Thank you for choosing to use the Taylor Vinters European Employment Law Handbook.

Inside you will find a useful overview of the key employment laws in various jurisdictions in Europe.

Although member states of the European Union ("EU"), and European countries that are party to EU trade agreements, are subject to the same EU labour laws, the way each member state interprets those laws can vary. This difference in interpretation, combined with each European country’s national laws, can result in approaches to regulate employees and labour matters that differ greatly across the various jurisdictions. We recognise that it can be time-consuming and often confusing to manage employees across Europe, and it is hoped that this handbook offers a helpful stating point when considering employment law issues in the region.
The Taylor Vinters team of dedicated employment lawyers is on-hand to assist you to resolve any employment law issues you may have. Although this handbook is a good starting point, it does not cover everything and does not account for experience based judgments and decisions which are equally, if not more, important. Whether your business is ambitious and growing, or is already a global enterprise, it is likely you will have to deal with employment and HR challenges along the way. The key question is how you view those challenges. We will help you to manage legal risk in line with your business priorities and, where appropriate, use our expertise to help you meet your commercial and business objectives and mandates.

Our own business is entrepreneurial and fast growing, with extensive global connections, so the advice of our employment and HR lawyers is informed by real-life commercial experience as well as a real depth and breadth of legal expertise.

Our team is supplemented by our relationships with hand-picked ‘local counsel’ from highly rated law firms, whom we instruct and manage to provide global legal advice to our clients. We thank our local counsel for their high-quality contributions to this handbook.

Please note that the information contained in this handbook is correct as at Spring 2017, though laws are subject to change and the information is not legal advice. We suggest you obtain formal legal advice before relying on any aspect of this handbook.

Taylor Vinters aims to make your life easier, and we hope the handbook assists you in understanding and managing employment law issues in the European region. We would be delighted to help should you require any further assistance.

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As an organisation operating in global markets, you almost certainly face the same challenges our clients tell us about, when trying to manage legal matters internationally.

Top of the list is the difficulty accessing, co-ordinating and ensuring consistent legal support across multiple jurisdictions and time zones. Operating internationally you need to be pragmatic, understand risk as well as local law and balance strict compliance with the need to operate in line with your own business processes and cultures. It’s about getting things done.

We’ve developed and refined our International Counsel service to meet these challenges and help you achieve your business objectives consistently and efficiently wherever you operate. Whether entering new markets, doing business internationally, meeting your compliance obligations or trying to manage a dispersed workforce, our model supports you internationally through a single point of contact: Taylor Vinters.

The key features of our International Counsel service are:

- We source the right counsel for you and the project in hand.
- Taylor Vinters is the primary advisor, from our UK and Asia hubs, managing local counsel directly with you, your head office and/or local businesses. A single point of contact.
- We manage local counsel to get the basic things right, wherever they are working – focusing on the right questions, understanding your objectives, being responsive, contactable, and providing answers, advice and guidance at short notice regardless of time zones.
- We negotiate with our trusted local partners to secure competitive rates for you based on our buying power and ensuring premium service levels.
- We help you manage local businesses as required.
- We can leverage our network where you need more than local lawyers.
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International legal matters needn’t mean cost, complication and inconsistencies. You can access our global legal resource from a single point, run from our UK and Singapore offices, and have the answers you need, in the way you want – every time.
Austria
AUSTRIA

SCOPE OF EMPLOYMENT REGULATION

1. Do the main laws that regulate the employment relationship apply to:
   - Foreign nationals working in your jurisdiction?
   - Nationals of your jurisdiction working abroad?

1.1. Laws applicable to foreign nationals

If no express choice of law is made in the relevant contract, Austrian employment law automatically applies to a foreign national who works in Austria on more than a temporary basis (for example, on a secondment) (Article 8(2), Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations) ("Rome I").

1.2. Legislation regulating the employment relationships include:

   - White-Collar Employees Act (Angestelltengesetz) ("AngG") 1921;
   - Labour Constitution Act (Arbeitsverfassungsgesetz) ("ArbVG") 1974;
   - Temporary Employment Act (Arbeitskräfteüberlassungsgesetz) ("AÜG") 1988;
   - Working Time Act (Arbeitszeitgesetz) ("AZG") 1969;
   - Rest Periods Act (Arbeitsruhegesetz) ("ARG") 1983;
   - Paid Holidays Act (Urlaubsgesetz) ("UrlG") 1976;
   - Act Governing the Employment of Foreign Nationals (Ausländerbeschäftigungsgesetz) ("AuslBG") 1975;
   - Act Governing the Employment of Disabled Persons (Behinderteneinstellungsgesetz) ("BEinstG") 1970;
   - Equal Treatment Act (Gleichbehandlungsgesetz) ("GIBG") 2004;
   - Maternity Protection Act (Mutterschutzgesetz) ("MSchG") 1979;
   - Paternity Leave Act (Väter-Karenzgesetz) ("VKG") 1989;
   - Employee Protection Act (Arbeitnehmerinnenschutzgesetz) ("ASchG") 1994;
   - Austrian Law Amending the Labour Contract Law (Arbeitsvertragsrechts Anpassungsgesetz) ("AVRAG") 1993;
   - Austrian Wage and Social Dumping Law (Lohn- und Sozialdumping-Bekämpfungs-Gesetz) ("LSD-BG"); and

Employees who are temporarily posted to Austria, or who work in Austria for an employer without a registered office there, are entitled to receive at least the remuneration due to Austrian employees of comparable status with comparable employers, as specified by law, government regulation or collective bargaining agreement ("CBA") (since LSD-BG).
Employees who are posted to Austria also have a mandatory right to paid holidays under Austrian law. The working time provisions set out in CBAs must also be respected. These provisions apply regardless of any choice of law in the employment contract.

The parties are free to agree for a particular state's law to apply, provided that the relevant regulations are as favourable (or are even more favourable) than the compulsory regulations which would apply under the rules of Article 8 (Rome I) in the absence of a choice of law.

1.3 **Laws applicable to nationals working abroad**

An employee who does not ordinarily work in only one country is subject to the law of the jurisdiction where the branch of the company that employs him is situated. If an employee works for a company branch in Austria, he is entitled to the mandatory statutory protection regardless of any choice of law clause in the contract, if the mandatory regulations are more favourable for the employee (see below).

Legislation (see above, *Laws applicable to foreign nationals*) provides significant mandatory protection that cannot be ruled out contractually to the detriment of employees. This includes:

- Restrictions on working hours and minimum annual holiday allowance;
- Salary protection (for example, sickness pay);
- Protection of pregnant or disabled employees;
- Employee representation and works council rights;
- Equal treatment of men and women in the workplace;
- Protection against dismissal;
- Automatic transfer of rights and obligations to a new employer under a transfer; and
- Protection of employees on the employer's insolvency.

**EMPLOYMENT STATUS**

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 **Categories of worker**

Generally, it is for the parties of the contract to define the category of employment for the position. Once the parties have agreed, they are required to comply with the applicable legal regulations.

Depending on the contract, the different categories of workers are as follows:

- Employer;
- Freelancer; or
- Contractor.
2.2 Employees

Employees are obliged to work personally within the confines of the company’s business hours, place of operations and instructions. They are economically dependent on the employer. This means that they use both the assets and the knowhow of the employer.

Employees are further divided into two different types of employee, white-collar employees and blue-collar workers. White-collar employees are employed to perform commercial business or office work. Blue-collar workers typically perform manual work or skilled labour. Despite the efforts to apply the same labour law standard to both white-collar employees and blue-collar workers, differences still exist.

2.3 Freelancers

Freelancers are hired to perform services but they are not dependent on the employer. Freelance workers are not typically protected by labour law or by CBAs. Differences between employees and freelancers regarding the social security system in Austria have been eliminated in the last few years.

2.4 Contractors

A contractor is not obliged to perform any specific tasks, rather that he must deliver a certain type of work. The contractor is completely independent and is not obliged to personally perform any services. The contractor is self-employed in terms of social security.

2.5 Entitlement to statutory employment rights

Only employees are fully protected by labour law regulations. White-collar employees enjoy additional privileges, particularly with regard to termination dates and periods, contained in the AngG.

Freelancers are protected by a few labour law regulations, for example, regulations regarding the termination of contract or the claim to an owed payment.

Contractors are considered to be completely independent and do not require the protection of Austrian labour law regulations.

2.6 Time periods

Consecutive employment contracts for a determined period existing between the same employer and employee must be justified. Otherwise such employment contracts will be considered as one contract for an indefinite period of time.

RECRUITMENT

3 Are any grants or incentives available for employing people? Does any information/paperwork need to be filed with the authorities when employing people?

3.1 Grants or incentives

There are different incentives available from the Austrian Public Employment Service (Arbeitsmarktservice) ("AMS"). For example, enterprises can obtain a subsidy for wage costs for the employment of long-term unemployed and elder workers. The amount of the subsidy is decided on the merits of each case. Another example is a subsidy for four months, for the employment of unemployed people to substitute employees on parental part-time work. Furthermore, the employment of people on reduced hours (short-time work) was strongly promoted by the AMS during the economic crisis.

Grants/incentives depend on the concrete support measure provided by law, varying between awarding a grant to the ancillary labour costs or a certain percentage of the base salary.
Filings

Filings can sometimes be required to receive a grant or incentive. In general, it is necessary to contact the AMS (employer and potential employee) before starting the incentive measure.

BACKGROUND CHECKS

Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

During a job interview, an employer is only entitled to ask questions to determine an applicant's suitability for the position.

Questions regarding an applicant's education, experience and former roles are permissible. Questions relating to pregnancy and family planning, political views, previous convictions, financial circumstances and medical conditions are not generally permissible.

It is common practice to use social media networks for insight into an applicant's background. Information that has been made public by an applicant can be used during the recruitment process. Sensitive or personal information that has not been made public by the applicant, cannot be used in the recruitment process.

PERMISSION TO WORK

What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

Visa

Holders of an EEA or a Swiss passport do not require a visa. Most other foreign nationals do require a visa. A Schengen visa (visa C) is required for all short-term business conferences and trips.

A national visa (visa D) is required for stays of more than 90 days, up to a maximum of six months (temporary residence permit). This visa allows its holder to engage in gainful employment during their stay.

Procedure for obtaining approval

Visas C and D can be issued by the Austrian Consulates in the foreign national's country of residence. Details of all Austrian Consulates (for example, addresses, telephone numbers, and so on) are available at the homepage of the Federal Ministry for European and International Affairs (Bundesministerium für europäische und internationale Angelegenheiten) ("BMeiA"): www.bmeia.gv.at/.

Cost

The consular fee for a visa C is EUR60, and for a visa D it is EUR100.

Time frame

The length of time to process applications for both a visa C and a visa D can vary according to seasonal and regional circumstances, but they are usually issued within two to three weeks.

Permits

There are several types of permits which can be required. Please note that only non-EEA nationals need specific permits to work or live in Austria. All EEA nationals (except nationals from Bulgaria,
Romania and Croatia; hence the term "non-EEA-nationals" which is used to also include nationals from these two countries) are free to work in Austria under Article 45 of the Treaty on the Functioning of the European Union (TFEU).

The process for obtaining permits is as follows:

- **Work permit**

  Only the employer can apply for a work permit, from the relevant agency’s regional office. Therefore, a non-EEA national who wants to work in Austria must find an Austrian employer first.

- **Rot-Weiß-Rot card**

  High-qualified workers (the AMS has defined the criteria for highly-qualified workers) can request a residence permit valid for six months to search for employment. Once employment is obtained, they can request the Rot-Weiß-Rot card, which is valid for 12 months and permits the holder to work for one employer.

- **Employment authorisation**

  Non-EEA nationals apply for this themselves, at the regional branch office of the AMS in the district in which they live.

- **Exemption certificate**

  Non-EEA nationals apply for this themselves at the regional branch office of the AMS in the district in which they live.

- **Residence permit**

  The procedures here differ between EEA and non-EEA nationals. Non-EEA nationals must apply for a residence permit at their Austrian embassy or consulate before entering Austria (except for the spouses and children of EEA citizens, who can file their application after arriving in Austria).

  When applying for a residence permit, the non-EEA national must submit a number of documents, including:

  - a valid passport;
  - a signed application form;
  - an original or notarised copy of the applicant’s birth certificate; and
  - proof of health insurance, sufficient financial means and accommodation in Austria.

  All foreign documents must be translated into German and, if the applicant is a minor, both parents or legal guardians must sign the application form.

  In contrast, EEA nationals and Swiss citizens do not need a permit to reside in Austria. They only have to inform the office of residence within four months from their entry if they plan to reside for more than three months in Austria. The office of residence will issue a registration certificate. Furthermore, the first establishment of any accommodation in Austria, or house moving within Austria, requires a registration with the local residence registration office within three days after moving, irrespective of the nationality of the person.

  In addition, almost all non-EEA citizens who apply for a residence permit and plan to stay in Austria for more than 24 months are obliged to fulfil the "integration agreement", which means they need to prove certain German language skills.
5.2.2 Cost
The costs are as follows:

- Work permit: about EUR20;
- Rot-Weiß-Rot card: about EUR100;
- Employment authorisation: about EUR127;
- Exemption certificate: about EUR127; and
- Residence permit: usually about EUR100.

Documents attached to the application can incur additional costs.

5.2.3 Time frame
The length of the process can vary greatly, and depends on various circumstances (for example, completeness of the applications, workload of the competent official, and so on).

Only work permits have a specific processing time, which is six weeks (usually the process lasts three to four weeks). To obtain a Rot-Weiß-Rot card, six to eight weeks must be allowed. For the other types of employment permit, a general deadline of six to 12 months applies (if the competent authority does not come to a decision within a six-month period, the applicant can request that the authority makes a decision within a further six months).

With reference to residence permits, there is a special processing time of six weeks for highly skilled employees. For persons who already have a residence permit in another EU member state, the deadline for the authorities to make a decision is four months. For other types of residence permit, the general deadline applicable to administrative procedures of six to 12 months applies.

5.3 Sanctions
If the necessary permits have not been obtained in time, possible sanctions will depend on the particular case. In particular, third-country nationals can face severe sanctions such as (immediate) expulsion from Austria, lasting up to 10 years. Employers of illegal foreign employees may be subject to severe fines and are liable to tax and social security consequences. In the case of repeat or severe offences, the employer could lose the necessary trade license.

RESTRICTIONS ON MANAGERS AND DIRECTORS

6 Are there any restrictions on who can be a manager or company director?

6.1 Age restrictions
There are no specific statutory age restrictions for managers, but the general rules concerning "capacity to act" do apply to managers. Therefore, company directors must be at least 18 years old. Employment contracts can be concluded (and also ended) by persons aged 15 years old or older. But their contracts can be prematurely terminated for cause by their legal representatives (even contrary to the minor's will).

6.2 Nationality restrictions
There are no statutory restrictions regarding nationality.
REGULATION OF THE EMPLOYMENT RELATIONSHIP

7 How is the employment relationship governed and regulated?

7.1 Written employment contract

An employer must give a written record (Dienstzettel) of the essential rights and obligations under the employment contract to the employee immediately after their employment begins. However, the employment contract is still binding if this written record is not provided. If there is no written record, the employment contract must mention the mandatory rights and obligations of employment.

The “written record” of the essential rights and obligations under the employment agreement (“Dienstzettel”) must specifically state the minimum wage (in accordance with the applicable CBA). Each time the minimum wage is increased (under the relevant CBA), the employee must be informed in writing.

7.2 Implied terms

Employment law mainly consists of mandatory rules, which cannot be excluded to the employees’ detriment (see Question 1).

7.3 Collective agreements

CBAs apply to the vast majority of employment relationships in Austria. They are made between the unions on behalf of employees, and usually the Chamber of Commerce on behalf of employers. Employers who do not join any representational institution such as the Chamber of Commerce are not subject to a CBA.

8 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

If an employer wants to unilaterally alter only parts of the terms and conditions of employment to the detriment of the employee, it can do so by means of a dismissal for variation of contract.

The purpose of a dismissal for variation of contract is mainly not to terminate the employment but to agree on different terms and conditions. It is considered as a notice of termination and an offer to change the content of the employment contract from a legal perspective. As a result the legal regulations in relation to the termination of employment apply. If the employee accepts the offer, the employment will continue with the altered terms and conditions. If not, the employment is terminated.

This means that an employee can also challenge the dismissal for variation of contract in court on the grounds that it is “socially unjustified”. This means that it substantially infringes on the interests of the employee and, in a balance-of-interest test, is not sufficiently justified by the employer.

Reasons for justification available to the employer:

- Termination is based upon personal characteristics of the employee that are detrimental to the interest of the company (for example, violations of the employment contract below the threshold where immediate termination is justified and long-term illness).

- Economic reasons preventing continuation of employment (for example, reduction of the workforce for business reasons).

MINIMUM WAGE

9 Is there a national (or regional) minimum wage?

There is no statutory minimum wage. However, CBAs can set minimum wages. The social partners (Austrian Chamber of Commerce and the Austrian Trade Union Federation) in June 2007
signed an agreement (Grundsatzvereinbarung zum Mindestlohn von 1,000 Euro) which stipulates that a minimum monthly wage of EUR1,000 must be implemented in all CBAs. The amount of minimum wage contained in a CBA typically depends on the:

- Classification of the work (there are different classification criteria set out in the collective agreement); and
- Length of employment.

For example, under relevant CBAs, the gross monthly minimum wage is:

- About EUR1,450 for trained retail trade employees until the third year of employment; and
- About EUR3,727 for experienced employees in the IT and data-processing sector.

Since 2016, "all-in clauses" (ie payment of any overtime included in the monthly salary) require that the monthly minimum wage for regular working hours (in accordance with the applicable CBA) should be specifically stated in the employment contract (see above, Written employment contract).

RESTRICTIONS ON WORKING TIME

10 Are there restrictions on working hours? Can an employee opt out on either an individual or collective basis?

10.1 Working hours

The maximum working day is eight hours (or 10 hours including overtime), and the maximum working week is 40 hours (or 50 hours including overtime) (section 3, Working Hours Act 1969). There are a number of exceptions (for example, flexible work time, other distribution of working hours implemented by a CBA or a works agreement (four-day-week, for example), and so on).

Some CBAs have decreased the standard weekly maximum to, for example, 38.5 hours.

10.2 Rest breaks

If the working time exceeds six hours, a minimum rest break of 30 minutes must be guaranteed. The period of rest is unpaid unless otherwise agreed.

10.3 Shift workers

In the case of shift work, the normal weekly working time within the shift cycle (or the period for averaging earnings) must not exceed an average of 40 hours (or the weekly maximum defined in the applicable CBA). The maximum normal daily working time is nine hours. CBAs can provide for more flexible arrangements, within specific limits.

HOLIDAY ENTITLEMENT

11 Is there a minimum paid holiday entitlement?

11.1 Minimum holiday entitlement

The minimum holiday entitlement is 25 working days paid holiday a year. After 25 years of service, the employee is entitled to 30 working days.

11.2 Public holidays

There are 13 paid public holidays, which have to be provided and are not included in the minimum holiday entitlement. If employees work on public holidays (which is only allowed in the cases permitted by law) they will receive salary for the working hours actually provided in addition to their
regular continued remuneration (for work on Sundays and public holidays). Many CBAs provide for extra pay for overtime on public holidays.

ILLNESS AND INJURY OF EMPLOYEES

12 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

12.1 Entitlement to time off

The employee and the employer can agree on unpaid time off. In this case, the employment relationship continues, but the duty to perform work and the payment of the salary are suspended.

12.2 Entitlement to paid time off

Employees who fall ill, or are injured unintentionally or without gross negligence, are entitled to paid sick leave for:

- A minimum of six weeks and a maximum of 12 weeks; and
- A further four weeks (after the 12-week period has elapsed) on half-pay.

However, these allowances can vary depending on:

- The employee's length of service; and
- Whether the employee was ill within the last six months of employment.

If an accident takes place at work, the paid sick leave entitlement is:

- Eight weeks for white-collar employees (non-manual employees); or
- 10 weeks for blue-collar employees (manual workers).

After the period of paid sick leave expires, employees can claim social security benefits from the state.

If the employer requests, the employee must provide written medical confirmation of the illness or injury (but not of the diagnosis).

Employees who are injured intentionally or with gross negligence are not entitled to paid sick leave; in cases of gross negligence or intentional injury employees may receive social security benefits from the state (depending on the circumstances).

12.3 Recovery of sick pay from the state

An employer cannot recover sick pay, that it has given to employees, from the state.

STATUTORY RIGHTS OF PARENTS AND CARERS

13 What are the statutory rights of employees who are:

- Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
- Carers (including those of disabled children and adult dependants)?
13.1 Maternity rights

Pregnant employees and mothers are protected from dismissal from the date of pregnancy until at least four months after giving birth. During this time, they can only be dismissed with judicial consent. If employees who have given birth, and are legally allowed to return to work, claim maternity leave or part-time employment, protection from dismissal usually ends four weeks after the maternity leave or part-time employment ends.

MSchG also regulates the:

- Termination of employment by mutual consent;
- Length of maternity leave (a maximum of two years from the date of birth and a minimum of two months from the date of the birth); and
- Right to be offered part-time employment.

Female employees are entitled to maternity pay (Wochengeld) for eight weeks before and eight weeks after giving birth (called the Schutzfrist, or protection period). This pay amounts to the employee’s average income earned during the 13 weeks before maternity leave begins. During that time, female employees must not work.

After receiving maternity pay for a total of 16 weeks, employees are entitled to parental pay (Kinderbetreuungsgeld).

Maternity pay and parental pay are borne by the social insurance carrier.

The mother or the father can claim parental pay, but not both at the same time. If both parents share the childcare arrangements, parental pay is available for up to 36 months. The following alternatives are possible:

- 30 and six months (taken by the respective parents): approximately EUR436 per month;
- 20 and four months (taken by the respective parents): approximately EUR624 per month;
- 15 and three months (taken by the respective parents): approximately EUR800 per month; or
- 12 and two months (taken by the respective parents): approximately EUR1,000 per month.

Parents can also opt for income-related parental pay, which effectively allows parents splitting parental leave by 12 and two months between them to claim 80% of their ordinary net salary of the last three calendar months before the protection period (providing a minimum of EUR1,000 and a maximum of EUR2,000 per month).

There are limits of permissible additional income (up to 60% of the last income, in any case EUR16,200 is the maximum threshold per year, or EUR6,100 in the case of income related parental pay) during parental leave which must not be exceeded (otherwise the parental pay must be paid back).

In certain cases involving single parents or hardship, the parental pay can be received for two further months.

13.2 Paternity rights

Fathers can claim up to two years’ paternity leave and part-time employment, or both, for childcare purposes, during which they enjoy special protection from dismissal. They cannot claim this if the mother has also claimed maternity leave (for the same period), but they can share parental leave. Fathers on paternity leave are entitled to parental pay in the same amount and for the same period as mothers on maternity leave (see above, Maternity rights).
13.3 Surrogacy

Surrogacy is illegal in Austria. However, the surrogate mother would be regarded as the mother under the Civil Code and enjoy protection under MSchG. Therefore, she will not be allowed to work for eight weeks before and after giving birth. The protection against dismissal and the right to maternity leave will last as long as the child remains with the mother. The parents under the surrogacy agreement (which would be void) would have to adopt the child (see below, Adoption rights). During the adoption process the parents who take care of the child and are going to adopt it have carers’ rights (see below, Carers’ rights).

13.4 Adoption rights

Maternity and paternity rights vary depending on the age of the child on adoption. If the adopted child is:

- Less than 18 months old, parents have full maternity and paternity leave (see above, Maternity rights and Paternity rights);
- 18 months to two years old, parents have maternity and paternity leave until up to six months past the second birthday of the child (assuming that the leave starts directly with the adoption of an 18 month-old child, a maximum of one year is possible); or
- Over the age of two and under the age of seven, parents have six months’ maternity and paternity leave.

The entitlement to parental part-time leave for adoptive parents is the same as for biological parents.

13.5 Parental rights

Parents who have worked for at least three years for a company with more than 20 employees are entitled to work part-time until their children reach seven years of age (but note that after the child's fourth birthday the special protection against dismissal is reduced to a protection against dismissal based on inadmissible reasons).

Parents also have the possibility to agree on part-time-work (which the employer essentially cannot refuse) in the event that they have worked less than three years for a company or if the workforce does not exceed 20 employees until their children reach four years of age.

13.6 Carers’ rights

Employees on compassionate leave (to care for critically ill family members or seriously ill children) are protected against dismissal. They can only be dismissed with the prior consent of the Labour and Social Security Court, which must consider the interests of both parties when making its decision.

CONTINUOUS PERIODS OF EMPLOYMENT

14 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

14.1 Statutory rights created

A period of continuous employment creates a right to a number of benefits, including:

- **Loyalty bonus.** Most CBAs allow bonuses for employees with a long period of service (typically 20 or 25 years). A loyalty bonus is a one-off payment equal to one month's income or more;
- **Holiday entitlement.** The minimum holiday entitlement (see Question 11) increases to 30 working days after 25 years of service;

- **Severance pay.** Employees are entitled to severance pay after a minimum of three years’ uninterrupted work. The amount varies depending on the length of service. Different rules apply to employment relationships that started on or after 1 January 2003 (see below, Severance payments);

- **Notice period for dismissal.** The statutory notice period for terminating employment increases according to the length of time worked (see below, Notice periods); and

- **Appeal against dismissal.** After a minimum of six months’ work, employees have an automatic right to appeal against a dismissal that has an adverse social effect on them.

Credit for work done with another employer can also be given by express agreement. CBAs often specify that additional compulsory credits must be included when determining the length of previous employment used to calculate the minimum wage (see Question 9). Earlier work for the same employer must also be considered.

14.2 **Consequences of a transfer of employee**

When an employee is transferred to a new entity, credit for earlier work is given in accordance with the contractual agreement, or if the law or a CBA provides for this. A period of continuous employment must always be maintained if a company or business is transferred (see Question 24).

**FIXED TERM, PART-TIME AND AGENCY WORKERS**

15 **To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?**

15.1 **Temporary workers**

There are no limits on the duration of temporary contracts. However, if temporary employment contracts repeatedly follow each other, an invalid chain contract may exist. This means that the agreed term of the employment contract is invalid and a permanent contract will exist. There is no general statutory regulation on how many fixed-term employment contracts may run together, though even a second contract may be unjustifiable and therefore invalid where its temporary nature cannot be objectively justified.

Fixed term contracts cannot be terminated before the agreed term, unless specific provisions for dismissal during the fixed term have been agreed.

It is not necessarily cheaper as such to terminate a fixed term contract, but it is easier insofar (and as a consequence therefore sometimes also cheaper) as the employee (or the works council) can not appeal against a dismissal, which is not provided for by law, in the case of an expiration of a limited period contract (as no dismissal exists in this case).

15.2 **Part-time workers**

Part-time workers are entitled to the same rights as full-time workers and must not be discriminated against. This means that part-time employees are entitled to a pro-rata salary, which must be equal to that of a full-time employee in the same or similar position.

15.3 **Agency workers**

The business which temporarily employs agency workers has a fiduciary duty towards them and must treat them equally to permanent staff.
As regards the contract with the work agency, agency workers are entitled to the same rights as other employees.

The salary for agency workers, while transferred to a company, must be geared to the minimum salaries contained in the relevant CBA. In addition, working hours must not differ greatly from those of permanent staff.

DATA PROTECTION

16 Are there any requirements protecting employee privacy or personal data? If so, what are an employer’s obligations?

16.1 Employees’ data protection rights

The Data Protection Act 2000 gives employees a comprehensive right to information about their personal data and how it is to be used. In addition, employees have the right for their personal data to be kept confidential, if it is worthy of protection (section 1, Data Protection Act 2000).

16.2 Employers’ data protection obligations

The relevant works council must approve (in the form of a works agreement) any introduction of systems for computer-supported acquisition, processing and transmission of employees’ personal data, if the data both:

- Relates to more than general information on the employees and their qualifications; and
- Is not used by the employer to meet its legal obligations.

DISCRIMINATION AND HARASSMENT

17 What protection do employees have from discrimination or harassment, and on what grounds?

17.1 Protection from discrimination

The Equal Treatment Act 1979 aimed to ensure that men and women were treated equally in their working lives. GIBG amended it to implement:

- Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; and
- Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

GIBG implements the principle of equal treatment of persons irrespective of sex, sexual orientation, racial or ethnic origin, age, religion or beliefs. Any direct or indirect form of discrimination in employment or occupation (and since 2011 also in connection with other legal relationships) is prohibited. The Act on Equal Treatment in Civil Service 1993 sets out similar restrictions for civil servants.

The anti-discrimination laws apply to all employees, in both the public and private sectors, in relation to:

- Conditions for access to employment or self-employment (including selection criteria, the recruitment process and, since 2011, the base salary under the relevant CBA and any potential disposition for overpayments must be mentioned in the advertisement for the position) and promotion, in all branches of activity and at all levels of the professional hierarchy;
• Access to all types and levels of vocational guidance and vocational training, including practical work experience;
• Employment and working conditions, including dismissals and pay; and
• Membership of, and involvement in, an organisation of employers or employees, or any organisation the members of which carry on a particular profession, including the benefits provided by that organisation.

In addition, the employer cannot discriminate against an employee because of their allegation of discrimination. For this discrimination to be proved, it must be associated, in fact and in timing, with the employee's allegation. There is no exact defined qualifying period for these types of claim.

17.2 Protection from harassment

Harassment is deemed to be a form of discrimination under GIBG (see above, Protection from discrimination).

WHISTLEBLOWERS

18 Do whistleblowers have any protection?

No special statutory protection is provided for whistleblowers.

TERMINATION OF EMPLOYMENT

19 What rights do employees have when their employment contract is terminated?

19.1 Notice periods

In the absence of any other agreement, all white-collar employees must give one month's notice by the end of the month, regardless of their length of service. Blue-collar employees and their employers must give 14 days' notice.

The notice period that the employer must give to white-collar employees depends on the white-collar employee's length of service:

• Less than or equal to two years' service requires six weeks' notice;
• More than two years' service requires two months' notice;
• More than five years' service requires three months' notice;
• More than 15 years' service requires four months' notice; and
• More than 25 years' service requires five months' notice.

CBAs and works council agreements can include provisions that are more favourable for the employee than the statutory provisions. If no agreement has been made stating otherwise, the only permissible termination dates for the employer are those at the end of a quarter (31 March, 30 June, 30 September and 31 December).

The statutory provisions regarding notice periods and termination dates apply to all employees. If provisions that are different from the statutory ones are made in CBAs or works council agreements, they are valid only for those employees who are included in the relevant agreement's area of application.
19.2 Severance payments

If the employment contract began before 1 January 2003, employees must receive the severance payment to which they have a claim when their employment ends. A severance payment is due only if one of the following applies:

- The employer gives ordinary notice to the employee;
- The employer dismisses the employee without good cause;
- The termination is by mutual agreement; or
- The termination is a favoured termination on the employee’s part. This applies when employees are entitled to severance payments even though they terminated the contract, for example, if they want to retire or end the employment relationship following a business transfer.

Severance payments depend on the length of continuous service, as follows:

- Three years' service requires twice the last monthly salary;
- Five years' service requires three times the last monthly salary;
- 10 years' service requires four times the last monthly salary;
- 15 years' service requires six times the last monthly salary;
- 20 years' service requires nine times the last monthly salary; and
- 25 years' service requires 12 times the last monthly salary.

All new employment relationships beginning on or after 1 January 2003 are subject to a new severance pay system. Under this new system, employers must pay contributions to a staff provision fund for all employees subject to the new system, at a rate of 1.53% of their gross monthly salary. On termination, the employees are given the option to either have the amounts paid out as severance pay (if they have a minimum of three years’ service and the employee did not give notice or was dismissed with cause) or left in the staff provision fund.

19.3 Procedural requirements for dismissal

Under Austrian law, the employer can give notice without stating a reason, and simply observing notice periods and dates. It is not necessary to demonstrate a redundancy situation or other reasons (however, such reasons may be important in the case of an appeal against the dismissal). In principle, written notice is only obligatory when contractually agreed, but should be observed for evidential purposes.

The employer must notify the works council before terminating an employment contract. The works council can then comment on the planned dismissal within one week. This stage is known as the preliminary procedure.

The works council can:

- Agree to the dismissal. This requires a two-thirds majority;
- Oppose the dismissal. This requires a simple majority; or
- Make no statement (abstain from comment). The decision not to make a statement of position must be based on a valid resolution, that is, at least half the works council members must participate. Resolutions not to make a statement require a simple majority.
The statement of position can be verbal or written but, to best serve as evidence, it should be in writing.

Dismissals that take place within this one-week period are invalid, unless the works council had already submitted a statement of position. The employer can give notice of dismissal after either receiving the works council's statement of position, or once the one-week period is over. The notice of dismissal must be reasonable within the legal and actual context of the preliminary procedure.

After the employer has given the employee notice, the employer must inform the works council again, but there is no specific deadline for this second notification. A representative of the employer must give the notice.

What protection do employees have against dismissal? Are there any specific categories of protected employees?

20.1 Protection against dismissal

Most of the employees (except, for example, board members or certain executives) have protection against dismissal under the ArbVG. Depending on the statement by the works council, the employee or the works council can claim that a dismissal is either unfair on social grounds or made for inadmissible reasons (provided that the employee has been employed for six months or more where they are claiming the dismissal is unfair on social grounds).

They must lodge a claim with the Labour and Social Court within two weeks of being informed about the notice of dismissal or the notice being delivered. There is no need for the employee or the works council to accept the dismissal, but only to receive notice of it.

A dismissal is considered as being made for inadmissible reasons if, for example, an employee is dismissed because of union activities. Alternatively, the dismissal of a 55-year-old employee with custody of a child and 25 years’ service, who has not done anything to interfere with the employer's operational interests, is likely to be considered unfair on social grounds.

If the dismissal is considered unfair on social grounds the Labour and Social Court must carefully weigh the interests of the employer and the employee, and the employer must prove that the circumstances concerning the employee as a person negatively affect the company's interests, or that operational requirements oppose a continuation of employment.

20.2 Protected employees

There are special provisions that provide a higher degree of protection for the following exhaustive list of nine employee groups:

- Employees with disabilities;
- Pregnant employees;
- Parents to whom MSchG or VKG applies;
- Members of the works council;
- Apprentices;
- Employees who agreed a particular type of leave or part-time working basis with their employer, determined in section 11-14, AVRAG (relating to further training or caring for seriously ill family members);
- Employees carrying out their compulsory military or alternative community service;
Concierges employed by the landlord of an apartment building, where the employment contract had been concluded before 30 June 2000; and

Public-sector employees.

REDUNDANCY/LAYOFF

21 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

21.1 Definition of redundancy/layoff

If a business reorganises and lays-off employees as a result of the reorganisation this is classified as a collective redundancy. However, Austrian law does differentiate between collective redundancies and other individual lay-offs based on business reasons.

21.2 Procedural requirements

Employers must notify the regional offices of the AMS in writing, within 30 days, if they intend to dismiss at least:

- Five employees, in companies with more than 20 and fewer than 100 employees;
- 5% of employees, in companies with 100 to 600 employees;
- 30 employees, in companies with more than 600 employees; or
- Five employees who are at least 50 years of age.

The employer must consult with the works council (if there is any) about the planned business reorganisation. The consultation documentation must be attached to the notice to the AMS. In addition to the notice to the AMS, the preliminary procedure with the works council must be respected for every single dismissal (see Question 19).

21.3 Redundancy/layoff pay

If an operational change causes substantial detriment to the employees’ interests, the works council can insist on a social compensation plan being made. This contains provisions that anticipate and remove a business reorganisation’s negative effects on employees. For example, it can provide for longer notice periods, voluntary payments in addition to severance pay, occupational retraining, reappointment clauses, and so on.

21.4 Collective redundancies

See above, Procedural requirements and Redundancy/layoff pay.

EMPLOYEE REPRESENTATION AND CONSULTATION

22 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

22.1 Management representation

Employees are entitled to management representation and have significant consultation rights. The company's works council, or the central works council (a joint council formed by the works councils of several enterprises of one company or joint companies) must appoint at least one out of every three members of a company's supervisory board.
For stock corporations (that is, joint-stock companies), and some private limited companies, a supervisory board is mandatory. Other types of company can opt to have a supervisory board, for example, limited liability companies.

22.2 Consultation

Through their works council, employees have wide-ranging information, consultation and, in some circumstances, intervention rights, for example:

- The works council is entitled to receive annual financial statements.
- The works council has substantial participation rights in operational changes, particularly if dismissals are planned (see Question 19 and Question 21). In particular, if an operational change creates material disadvantages for all (or significant groups of) employees, the works council can require a social compensation plan to be made;
- For businesses with more than 200 employees, the works council can appeal against an operational change if this is likely to be substantially detrimental to employees. Only an appeal against a planned factory shutdown can suspend an operational change (for a maximum of four weeks);
- If the works council is not consulted about an operational change, the employer can be liable to pay compensation and be subject to administrative fines of up to EUR2,180. However, the operational change is still effective in these circumstances; and
- The works council must be informed of a dismissal at least one week before it takes place (see above, Procedural requirements for dismissal), and can demand consultation with the company owner.

22.3 Major transactions

Employee consultation or consent is not required for share sales. On an asset sale, the works council must be informed and consulted about any operational changes. It can recommend how to prevent, eliminate, or reduce any detrimental effects on employees. In certain circumstances, the works council can compel the employer to make a social compensation plan.

23 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

23.1 Remedies

If the employer refuses to allow works council members to represent employees on the management board, the works council can bring an action for a declaratory judgment. If successful, the board's decisions become legally void.

Aside from this, generally the infringement of consultation duties has no legal consequences. In some cases an administrative penalty is due, and in other (rare) cases (for example, preliminary procedure when giving notice), the decision of the employer becomes void.

23.2 Employee action

The works council can appeal some employer decisions to the competent government agency. The agency must review the decision and either confirm or reject it. The decision is generally stayed until after the agency's confirmation or rejection, although sometimes a preliminary injunction can be issued instead.
CONSEQUENCES OF A BUSINESS TRANSFER

24 Is there any statutory protection of employees on a business transfer?

24.1 Automatic transfer of employees

The buyer of a company or business automatically takes over all rights and obligations under existing employment contracts. The employee can only object to a transfer if the buyer either does not:

- Grant the protection against dismissal as specified in the relevant CBA; or
- Grant company pension benefits in an individual employment contract.

24.2 Protection against dismissal

In general, dismissals six months before or after a transfer are legally invalid if they are exclusively or primarily due to the transfer. However, they are permitted, whether carried out by the seller or buyer, if they are due to economic, technical or organisational reasons.

24.3 Harmonisation of employment terms

Changes to the terms of individual employment contracts that are detrimental to employees are not permitted if they only take place because of the transfer, or are close in time to the transfer. However, changes that would have been allowed if there had not been a transfer are valid, for example, those that are made for business reasons or that relate to an individual employee.

The terms of a buyer's CBA generally apply to transferred employees. This can lead to less satisfactory employment conditions, but the employee's pay for regular work performance before the transfer cannot be reduced. If the buyer is not subject to a CBA, the terms of the seller's CBA continue to apply.

If there is a significant worsening of employment terms and conditions because of a CBA or works council agreement, employees can terminate the employment relationship with the same financial effects as if the employer had given notice (see Question 19).

EMPLOYER AND PARENT COMPANY LIABILITY

25 Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company's employees?

25.1 Employer liability

An employer is liable for any damage caused by its employees' negligent acts to a client or any third party with whom the employer has a contractual relationship.

If no contractual relationship exists between the employer and the third party claiming damages, the employer is only liable if they have either:

- Employed a person incapable of performing their duties, even if the employer did not know that the employee was incapable; or
- Knowingly employed a negligent employee.
25.2  Parent company liability

Parent companies are not generally liable for the acts of their subsidiaries' employees. However, in some exceptional circumstances, liability can extend to the parent company, for example, if the subsidiary company is undercapitalised.

EMPLOYER INSOLVENCY

26  What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

26.1  Employee rights on insolvency

Employment may be terminated in the case of bankruptcy or reorganisation proceedings with the debtor not being in possession, within one month after the start of the bankruptcy.

The employment may be terminated prematurely by the employee with immediate effect (this also applies to employees who have been laid off and are in their notice period). Bankruptcy proceedings serve as an important reason for a justified termination with immediate effect by the employee.

If the debtor is still in possession, employees are only entitled to terminate their employment with immediate effect, if they have been laid off before the employer.

26.2  State guarantee fund

The state insolvency fund (Insolvenz-Entgelt-Fonds) is financed by employer contributions that are payable for continuing employments. Employees are entitled to benefits from the insolvency fund in the following cases:

- Compensation claims, in particular for recurring remuneration (up to a maximum gross amount of EUR9,060 (2014) per month and for a maximum period of six months before the insolvency). This also includes pension claims against the employer and claims arising from the termination of employment;
- Certain damages, for example, termination pay;
- Other claims against the employer, for example, reimbursement claims; and
- Costs necessary for adequately enforcing such a claim.

Benefits from the insolvency fund must be applied for within a maximum period of six months after the start of insolvency proceedings. In addition, employees must file their claim in the insolvency proceedings at the competent commercial court.

HEALTH AND SAFETY OBLIGATIONS

27  What are an employer's obligations regarding the health and safety of its employees?

There are a number of laws that protect employees' health and safety. The employer must implement the required systems and processes (for example, setting up safety systems in the workplace based on risk assessments). Employers' duty of care includes protecting against loss of life, damage to health and harassment. This includes:

- Preventing work-related dangers;
- Providing information and training for employees; and
- Organising any necessary means of protection for employees' health.
Employers must keep themselves up to date about current technological and other developments that relate to the working environment. If a serious, immediate or non-avoidable danger arises, the employer must ensure that employees stop working and leave the workplace to reach safety. If employers are not often present in the workplace, they can delegate the task of implementing and controlling safety measures to others.

There are also special provisions regarding:

- Sanitary facilities;
- Breaks;
- Workplaces with computers;
- Protection for non-smokers;
- Night shifts; and
- The employment of certain groups of employees, such as minors, pregnant women and nursing mothers.

TAXATION OF EMPLOYMENT INCOME

28 What is the basis of taxation of employment income for:
- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

28.1 Foreign nationals

Nationality does not have an impact on income taxation. Under Austrian tax law, an individual is generally taxable in Austria if he has his residence or habitual place of abode in Austria. In principle, if the individual spends more than six months during a calendar year in Austria, he is subject to Austrian tax (unless bilateral tax treaties specify otherwise).

28.2 Nationals working abroad

Double taxation treaties must be used to decide the country in which tax should be paid if either:

- Austrian nationals have their domicile or ordinary residence not only in their country of employment, but also in Austria; or
- Some other tax connection to Austria exists (for example, the nationals have spent more than 183 days in Austria during a calendar year).

29 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

29.1 Rate of taxation on employment income

In Austria, the income tax is a progressive average rate. Depending on the amount of the annual income, the following rates apply:

- Income up to EUR11,000, the tax rate is 0%;
- Income of EUR11,001 to EUR25,000, the tax rate is 36.50%;
- Income of EUR25,001 to EUR60,000, the tax rate is 43.21%; and
• Income of more than EUR60,000, the tax rate is 50%.

29.2 Social security contributions

Social security contributions are due on all employees' earnings that are over a marginal level but not exceeding a maximum threshold. This level is defined each year and in 2014 is EUR395.31 per month, the maximum threshold amounts to EUR4,530 in 2014. Social security contributions are due at the following rates over employees' salaries (these figures are valid for white-collar employees; figures for blue-collar employees differ slightly):

• Retirement insurance: the employer pays 12.55% and the employee pays 10.25%;
• Health insurance: the employer pays 3.83% and the employee pays 3.82%;
• Accident insurance: the employer pays 1.43% and the employee pays nothing;
• Unemployment insurance: the employer and employee pay 3% each;
• Fee for housing subsidy: the employer and employee pay 0.5% each;
• Insolvency contribution: the employer pays 0.55% and the employee pays nothing;
• Workers' chamber contribution: the employee pays 0.5% and the employer pays nothing; and
• Staff provision fund contribution: the employer pays 1.53% and the employee pays nothing.

29.3 Ancillary labour costs

In addition, the employer must pay ancillary labour costs (municipal tax, employer's contribution to the Family Burdens Equalisation Fund) ("FLAG") of approximately 4.5% of the employee's gross salary.

BONUSES

30 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

There are no general guidelines on bonuses, such as profit shares, ad hoc awards and stock options. However, various kinds of bonus scheme are becoming increasingly popular, particularly at management level. Profit shares, profit bonuses and other premiums or bonuses often have favourable social security contribution treatment. Since 2011, profit shares, as well as bonuses and premiums, do not generally require a works agreement.

INTELLECTUAL PROPERTY (IP)

31 If employees create IP rights in the course of their employment, who owns the rights?

If the employee creates IP rights in the course of their employment, in general, they own the rights. However, the parties can agree in writing that IP rights created by the employee are owned and can be used by the employer.
RESTRAINT OF TRADE

32 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

32.1 Restriction of activities

Employees must not take part in activities that compete with their employer while they have a valid employment contract. It is a ground for dismissal if employees operate an independent commercial enterprise, or engage in trading activities, on their own or on someone else's behalf, in the employer's line of business.

32.2 Post-employment restrictive covenants

An employment contract can include a term stating that after leaving the company, the employee cannot engage in any activity that represents competition for the ex-employer. The maximum term for such a clause is one year. Any non-compete clause that strongly restricts the employee's career advancement is ineffective. Whether employees must observe such a clause depends on the nature of the termination of their employment. In some instances an employer must make a payment as consideration for restrictive covenants.

In addition, the following requirements should be noted (some of which only apply to agreements that were concluded since 2016):

- The minimum amount that an employee must earn for a non-compete clause to be permitted is currently €3,240.00 gross per month. This does not include any fringe benefits or bonus entitlements (contrary to previous practice);
- A penalty can be agreed between the parties (to be included in the employment contract), which is triggered in the event that the former employee breaches the restrictive covenants. Since 2016 the law is that the maximum penalty is 6 months’ net salary. The net salary is to be calculated without any fringe benefits or bonus entitlements;
- It is now clarified by law that any penalty can be subject to reduction by court ruling, which has been current practice; and
- Furthermore, it has been clarified that an employer may only claim either the penalty or omission (ie enforceability of the covenants).

This overview was co-written by Georg Schima and Birgit Vogt-Majarek, Kunz Schima Wallentin, and updated by Steven Roberts of Baier Partners

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Denmark
DENMARK

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

1.1 Foreign nationals

Danish statutory law on employment relationships applies in general to all persons working in Denmark, regardless of the employee's nationality and country of residence.

In Denmark, the labor market is, however, to a very large degree regulated by collective bargaining agreements and consequently, collective bargaining agreements will generally prevail over Danish statutes regulating employment relationships.

Parties to an employment contract may agree that the law of a specific country governs the employment relationship. However, in such case the Rome Convention includes rules on the applicability of mandatory law in, for example, the country where the employee usually carries out his/her work. In addition, the Danish Act on the Posting of Employees (implementing EU Directive 96/71/EF) includes certain laws which cannot be deviated from in the event employees are posted on a temporary basis to Denmark.

1.2 Nationals working abroad

Danish statutory law, which regulates employment relationships, does not in general apply to Danish nationals working abroad. However, according to the Rome Convention, an employee is generally subject to the mandatory law of the country in which the employee usually carries out his/her work, even if he/she is temporarily working in another country.

RESTRICTIONS ON MANAGERS AND DIRECTORS

2 Are there any restrictions on who can be a manager or company director?

2.1 Nationality and age restrictions

There are no general nationality or age restrictions in Denmark in terms of who can be appointed as a manager or company director.

However, public and private limited companies and foundations carrying out business activities in Denmark are required to register the manager with the Danish Business Authority. In order to be registered with the Danish Business Authority, the manager has to be legally competent (ie the manager must be 18 years old and may not be under guardianship or co-guardianship).

RECRUITMENT

3 Are any grants or incentives available for employing people? Do any filings need to be made when employing people?

3.1 Grants or incentives

In Denmark, there are several types of employment arrangements, which may entitle an employer to receive a public salary grant. The aim of these arrangements is to encourage employers to employ individuals, who are long-term unemployed or who are in another way prevented from being employed (eg due to being chronically ill or having a disability).

3.2 Filings

A foreign company that provides services in Denmark must be registered with the Register for Foreign Service Providers (RUT) and report certain information to the Danish Business Authority. The registration may be done online on the website of the Danish Business Authority.
Foreign companies expatriating employees to Denmark must also report certain information to the Danish Business Authority. The reporting on expatriation of employees must be completed before or at the same time as the activities commence.

Further, when employing employees for the first time in Denmark, the employer must register certain information with the Danish Central Business Register, including that the employer employs employees, withholds taxes, labour market contribution and contributes to the Danish Labour Market Supplementary Pension Scheme (ATP).

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country?

4.1 Visa

Third country nationals must apply for a visa to enter Denmark, unless they hold a residence card issued under the EU regulations on free movement, and their residence card is issued by an EU country that is also a Schengen country.

Nationals from the European Economic Area ("EEA") are visa exempt as are most third country nationals from the North and South American countries.

Finally, citizens from certain countries holding biometric passports are exempt from the visa requirement.

4.1.1 Procedure for obtaining approval

A visa application should be submitted at a Danish Mission, either an Embassy or a Consulate General. Employees must normally submit their application in their country of residence. It is possible to submit it in another country if the applicant has a legal residence there and there is a valid reason for not submitting the application in their country of residence.

The application cannot be submitted earlier than three months before the expected date of arrival in Denmark. However, if the employee already holds a multiple-entry visa valid for more than 180 days, they can apply earlier. The passport or any other form of valid travel document must be valid for three months past the visa expiration date.

4.1.2 Cost

The visa application procedure usually costs around DKK 450.

4.1.3 Time frame

Currently, nine out of 10 visa applications are expedited within 15 days by the Danish Missions around the world.

4.2 Permits

Foreign nationals (apart from EEA and Swiss nationals) are normally required to apply for both work and residence permits in order to work in Denmark.

4.2.1 Procedure for obtaining approval

As a rule, employees must obtain work and residence permits before entering Denmark. Employees must apply through a Danish Mission, though citizens from visa exempt countries can apply from inside Denmark. Also, third parties holding power of attorney (for instance, a Danish law firm) may apply on behalf of the employee.

Permits are granted if the requirements of the scheme under which the applicant has applied under are met. In some schemes, the job or profession is vital while other schemes require substantial occupational or labour-related conditions to warrant a permit. For most work schemes, salary and employment conditions must correspond to Danish standards.

There is a specific (fast track) ruleset for employees qualifying for either the Positive List scheme (various highly qualified employees) or the Pay Limit scheme (employees with a minimum annual salary of DKK 400,000).
4.2.2 Cost

The cost for a work and residence permit is between DKK 1,845 and DKK 6,000, depending on the scheme under which the permit is applied for. The cost is DKK 3,320 for a permit under the Positive List scheme and the Pay Limit scheme.

4.2.3 Time frame

The time for processing a work and residence permit is currently:

- One month for employees applying for a permit under either the Positive List scheme or the Pay Limit scheme as well as for Researchers and PhDs; and
- One to three months for other employees.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Employment contract

Under Danish law, the employer is obligated to make a written statement of all material employment terms and conditions if the employee works at least one month and the employee is working at least eight hours a week on average.

As a minimum, the employer is required to inform the employee of:

- The names and addresses of the employer and the employee;
- The location of the place of work or, if there is no fixed or principal place of work, the fact that the employee is employed at various addresses, including information on the registered office or the employer's address;
- A description of the work or a specification of the employee's title, ranking, position or job category;
- The date of commencement of the employment relationship;
- In the case of a fixed-term employment, the expected term of the employment;
- The employee's right to paid holiday, including whether salary is paid during holidays;
- The length of the employee's and employer's notice periods or information on the rules governing notice periods;
- The current or agreed pay the employee is entitled to at the beginning of the employment relationship, including information on any allowances and other pay elements not included in the pay (for example, pension contributions and any board and lodging). Furthermore, information must be provided on the dates of payment of salary;
- The length of the normal working day or week; and
- Information as to which collective or other agreements govern the employment. In the case of collective or other agreements concluded by parties outside the business, the names of these parties must also be stated.

The information must be provided to the employee within one month after commencement of the employment. Expatriate employees must receive the above information before departure. Further, expatriate employees must receive additional information with regard to the secondment.

If an employer does not fulfil the information requirement, the employee may be entitled to compensation.
5.2 **Implied terms**

Employment contracts are subject to Danish law, any applicable collective bargaining agreements, case law, and customs or practice. All of these sources may include implied terms and conditions for the employment relationship.

5.3 **Collective agreements**

The Danish labour market is to a very large degree regulated by collective bargaining agreements. An employer is covered by a collective bargaining agreement if the employer either is a member of an Employers' Association or has acceded to a collective bargaining agreement or concluded such on an independent basis.

Collective bargaining agreements are usually negotiated between the employers' and employees' organisations for the typical duration of a two- or four-year period, and usually cover pay levels, number of working hours and other material employment terms and conditions.

6 **What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?**

Under Danish law, a material change of the employment terms and conditions to the detriment of the employee is considered a termination of the employment and at the same time an offer of re-employment under the new terms and conditions. Accordingly, material changes must be made subject to the employee's individual notice period and will be effective from the expiry of the employee's individual notice period, unless otherwise specifically agreed with the employee.

The employee is not obliged to accept the offer of re-employment under the new terms and conditions and may therefore consider himself/herself dismissed by the employer if he/she does not wish to accept the offer of re-employment. In this case, the employee may be entitled to compensation for unfair dismissal if the change of the employment terms and conditions - and therefore the dismissal - is not justified by objective and fair reasons.

The employer may generally implement changes to the employment terms and conditions, which are not material and/or are not to the detriment of the employee, without or with limited notice. Changes to the employee's economic rights (such as salary, benefits, etc) will always be considered a material change.

**MINIMUM WAGE**

7 **Is there a national (or regional) minimum wage?**

There is no statutory minimum pay level in Denmark. However, collective bargaining agreements normally include a minimum pay level for the employees covered by those agreements.

**RESTRICTIONS ON WORKING TIME**

8 **Are there restrictions on working hours?**

8.1 **Working hours**

Pursuant to Danish law, the average working hours during a seven-day period in a reference period of four months must not exceed 48 hours, including overtime.

Nightly working hours must not on average exceed eight hours in a period of 24 hours, calculated over a period of four months.

If the employment relationship is covered by a collective bargaining agreement, the normal working hours are usually set out in this agreement. Usually, the working hours set out in a collective bargaining agreement are 37 hours a week.

If an employment relationship is not covered by a collective bargaining agreement, it is possible to agree that the weekly working hours will be, for example, 40 hours or more if this is acceptable to the employee. Furthermore, it is possible to agree that an employee is required to work overtime without additional pay.

8.2 **Rest breaks**

Under Danish law, employees are entitled to a daily rest period of 11 consecutive hours for every 24-hour period. Within a period of seven days, employees are entitled to 24 hours off work, which must be in immediate connection to a daily rest period.
The weekly rest day must as far as possible fall on a Sunday and fall at the same time for all employees working in the company. It is possible to reduce the rest period in certain circumstances.

8.3 **Shift workers**

Under certain circumstances, the daily rest period may be reduced to eight hours for certain groups of workers, including employees working in shifts.

**HOLIDAY ENTITLEMENT**

9

**Is there a minimum holiday entitlement?**

Under the Danish Holiday Act, employees are entitled to five weeks’ holiday (paid or unpaid) per holiday year. The Danish holiday year runs from 1 May to 30 April.

The entitlement to paid holiday is accrued during the calendar year (the "accrual year") preceding the holiday year. The employee accrues the right to 2.08 days' paid holiday for each month of employment.

A white-collar worker paid by the month is generally entitled to receive full salary during any holiday that he/she has accrued. In addition, the employer must pay to the employee a holiday supplement of 1% of the salary earned in the accrual year preceding the holiday year.

As a rule, a blue-collar worker is not entitled to receive his/her normal wage during holiday absence. Instead, he/she will receive a holiday allowance corresponding to 12.5% of the salary earned in the accrual year. The employer must pay the holiday allowance into the Danish Labour Market Holiday Fund ("FerieKonto") and the holiday allowance will be disbursed pro rata to the employee as the holiday is taken.

Collective bargaining agreements may include alternative or supplementary holiday regulations. Further, several collective bargaining agreements provide for a number of extra days off (typically an additional three to five days) in addition to those provided by the Danish Holiday Act. Outside the collective bargaining agreements, many employers also provide for up to five extra days off in addition to the holiday entitlement under the Danish Holiday Act.

The entitlement to five weeks’ holiday (paid or unpaid) in accordance with the Danish Holiday Act is in addition to public holidays. Denmark has nine public holidays and three days that many employers treat as public holidays (e.g., Constitution Day, 24 December and 31 December).

**ILLNESS AND INJURY OF EMPLOYEES**

10

**What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?**

10.1 **Entitlement to time off**

In Denmark, an employee's illness or injury is considered lawful absence. Generally, employees must, at the employer's request, provide proper documentation of the sickness and participate in sickness absence interviews, unless the nature of the sickness prevents the employee from participating.

10.2 **Entitlement to paid time off and recovery of sick pay from the state**

Pursuant to the Danish Salaried Employees Act, a white-collar worker is entitled to his/her normal salary (including benefits, bonus, etc) if he/she is absent owing to sickness, irrespective of the length of such absence. Certain collective bargaining agreements also provide similar rules on salary during illness.

After the first 30 days of sickness absence, the employer may be entitled to reimbursement of sick pay from the public authorities, which means that the employer will receive an amount of maximum DKK 4,245 (in 2017) per week for a full-time employee.

Employees who are not salaried employees, or who are not subject to a collective bargaining agreement that provides for salary during illness, are in certain circumstances entitled to statutory illness benefits of up to a maximum amount of DKK 4,245 per week (in 2017).

If the employee has been continuously employed by the employer for the last eight weeks before the sickness and worked at least 74 hours during this period, the employer must pay the statutory illness benefit for the first 30 days of the sickness. After the first 30 days of the sickness, the statutory illness benefit will be paid by the employee's local municipality.
What are the statutory rights of employees who are:

- Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
- Carers (including those of disabled children and adult dependants)?

### Maternity, paternity and parental rights

Under Danish law, a female employee is entitled to absence from work in connection with pregnancy examinations (but not in connection with fertilisation treatments and similar) when these will take place during working hours.

A female employee is entitled to pregnancy leave starting four weeks prior to the expected date of birth. After the actual birth, the female employee is entitled to up to 14 weeks of maternity leave.

A male employee and a co-mother are entitled to paternity leave for up to two consecutive weeks within the first 14 weeks after the birth or reception of the child in the home.

Each parent has an individual right to 32 weeks' parental leave after the 14th week after the birth or reception of the child in the home. However, male employees and co-mothers are entitled to commence parental leave within the first 14 weeks following the birth.

Employees may prolong the parental leave to up to 46 weeks. Further, an employee may postpone between eight and 13 weeks of the parental leave to be held at a later time, but prior to the child reaching nine years of age. Such postponed parental leave must be taken in one consecutive period.

As a starting point, an employee is only entitled to statutory benefits during the maternity, paternity and (some of) the parental leave. However, female white-collar workers are, under the Danish Salaried Employees Act, entitled to receive 50% of the salary from the employer for a period of up to four weeks immediately preceding the expected date of birth and for up to 14 weeks of the employee's maternity leave. Further, an employee may be entitled to salary during maternity/paternity/parental leave periods under a collective bargaining agreement, a company policy or the employment contract.

At the end of the maternity/paternity/parental leave employees have the right to return to the employment on unchanged terms and conditions, including the right to salary increase, etc.

### Refund

If an employee is entitled to receive his/her salary during maternity/paternity/parental leave, the employer may be entitled to a refund for up to 31 weeks. The maximum refund amount is DKK 170.29 per hour for up to 37 hours per week.

The refund cannot exceed the salary actually paid to the employee during the absence.

### Surrogacy

Surrogacy is illegal in Denmark.

### Adoption rights

Pursuant to Danish law, adopters who receive a child abroad are entitled to pre-adoption leave with statutory benefits for four weeks before receiving the child. Adopters, who receive a child in Denmark, are entitled to pre-adoption leave with statutory benefits for one week before receiving the child if, prior to the adoption, the adopters are staying with the child at the location from where the child was adopted. In both cases, the right to absence may be extended in certain circumstances.

The adoption authorities may decide that one or both of the adopters must be home for a period. If so, one of the adopter parents is entitled to initial adoption leave with statutory benefits for 14 weeks. During this period, the other parent is entitled to two continuous weeks of initial adoption leave with statutory benefits. Additionally, the adopters may be entitled to parental leave. In total, the adopters are entitled to leave for 80 weeks and statutory benefits for 48 weeks.

Collective bargaining agreements may set out rules which entitle the adopters to salary during the leave.
Carers’ rights

Under Danish law, employees are generally entitled to absence:

- In family matters, if the employee’s presence is urgent in the case of sickness or accident;
- If the employee is employed by local authorities to nurse a relative with significant and permanent physical or mental impaired functional capacity, or who has a chronic or longstanding disease; or
- If the employee receives allowance to care for a relative who wishes to die at home.

If an employer dismisses an employee on the grounds of exercising one of these rights, the employee may be entitled to compensation.

Further, most collective agreements include rules on the employees’ right to absence with ordinary pay on their child’s first (and/or second) day of sickness.

CONTINUOUS PERIODS OF EMPLOYMENT

Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

Benefits created

Under the Danish Salaried Employees Act, as well as pursuant to most collective bargaining agreements, the length of the notice of termination to be given by the employer depends on the length of the employee’s continuous employment.

Furthermore, employees who have been continuously employed for a certain number of years (at least 12 years for salaried employees) may be entitled to severance pay.

After one year (salaried employees) or generally nine months (employees subject to certain collective bargaining agreements), an employee may be entitled to a compensation if the employee is subject to unfair dismissal. Such compensation will generally be based on the specific circumstances surrounding the dismissal and, for example, the employee’s length of continuous employment.

Consequences of a transfer of an employee

In general, employees who change positions within the same company or group will retain their length of service unless they are transferred to a completely different position (eg from a position as a blue-collar worker to a position as a white-collar worker). However, in these situations special rules may be included in a collective bargaining agreement. It is customary to state in the employment contract whether the employee keeps his/her length of service.

If employees are transferred to another company by acquisition of assets, the transfer may be governed by the Danish Transfer of Undertakings Act. In this case, the transferred employees will retain their seniority. The Danish Transfer of Undertakings Act applies to acquisitions by way of merger, but not to acquisitions by way of share sale as there is no change of the identity of the employer.

TEMPORARY AND AGENCY WORKERS

To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

Temporary workers

Fixed-term employees must not be treated in a less favourable manner than permanently employed employees performing comparable work, unless such treatment can be justified by objective reasons.

This implies, among other things, that participation in an employer’s pension scheme, incentive programmes and other employment rights must not be conditional upon the employee holding permanent employment if the employer’s permanently employed employees perform work comparable with that of the fixed-term employee.
Agency workers

Under Danish law, a temp agency worker's terms and conditions of employment must be in compliance with all applicable law, applicable collective bargaining agreements, or other binding and general rules that would apply if the temp agency worker was a comparable permanent employee in the company. Terms and conditions of employment in this regard are limited to working time, rest periods, breaks, overtime work, night work, holiday, public holidays and remuneration.

DATA PROTECTION

What data protection rights do employees have?

The employer's processing of the employees' personal data is subject to the Danish Act on Processing of Personal Data (the "Act").

The employer's obligations

When processing HR-personal data (sensitive and non-sensitive), the employer must comply with fundamental requirements of the Act, including:

- Data must be processed in accordance with good practices for the processing of data;
- Data must be collected for specified, explicit and legitimate purposes;
- Data must be adequate, relevant and not excessive in relation to the purposes;
- Inaccurate or misleading data must be erased or rectified; and
- Data must not be retained for a longer period than necessary for the purposes.

In general, the employer can process non-sensitive personal data on the basis of an explicit consent from the employee, if it is necessary for the performance of the employment contract or if it is necessary to pursue a legitimate purpose, and the interests of the employer are not overridden by the employee's interests. Non-sensitive data is ordinary personal data (such as name, job position, bank account information etc).

However, processing of sensitive data as a starting point requires explicit consent of the employee. Further, sensitive personal data may be processed if:

- Processing is necessary to protect the vital interests of the employee or of another person where the person in question is incapable of giving his/her consent; or
- Processing relates to data which have been made public by the employee; or
- Processing is necessary for the establishment, exercise or defence of legal claims.

Sensitive personal data includes the following types of personal data:

- Racial or ethnic origin;
- Political opinions, religious or philosophical beliefs;
- Trade union membership;
- Health; and
- Sex life.

Processing of semi-sensitive data requires explicit consent unless the processing is necessary for pursuing legitimate interests which clearly override the interests of the employee. The same applies for disclosure of the data to third parties.

Semi-sensitive personal data includes the following types of personal data:

- Criminal records;
• Serious social problems; and
• Information on other purely private matters, such as personality tests or grounds for dismissal.

Prior to the commencement of processing sensitive or semi-sensitive data, the Danish Data Protection Agency must be notified and an approval from the agency must be obtained.

14.3 The employee’s rights

Where the personal data has been collected from the employee, the employer must provide the employee with the following information:

• The identity of the employer;
• The purposes of the processing of the data, and
• Any further information which is necessary, taking into account the specific circumstances of the collection of the data in order to enable the employee to safeguard his/hers interests. Such information may include:
  o The categories of recipients (information on the particular recipients is not necessary);
  o Whether the response to the questions is voluntary, including possible consequences of failure to reply; and/or
  o The rules on the right of access to and the right to rectify the data.
  o Where the data has not been obtained directly from the employee, the employer must provide the employee with the following information:
    • The identity of the employer and the representative;
    • The purposes of the processing of the data; and
    • Any further necessary information, such as
      o The categories of data;
      o The categories of recipients; and/or
      o The rules on the right of access to and the right to rectify the data.

This information must be provided upon collection/disclosure of data, which in practice means within 10 days after the data is obtained.

14.4 Security of processing

The transfer of personal data to a data processor (eg a third party that processes the data on behalf of the employer) must be based on a written contract with the processor. Such contract shall explicitly stipulate that the data processor will only be permitted to process personal data on behalf of and upon the instructions from the employer.

Moreover, such contract must stipulate an obligation of the employer to implement appropriate technical and organisational security measures to protect data against accidental or unlawful destruction, loss or alteration, and against unauthorised disclosure, abuse or other processing in violation of the provisions laid down in the Act. Furthermore, such contract shall stipulate that the provisions on security measures laid down by law in the EU member state in which the processor is established shall also be incumbent of the processor.

Transfer of data from the EU to third countries may only take place if the third country in question provides an adequate level of protection. This can be obtained, for example, by use of the EU Standard Contractual Clauses.
14.5 The EU General Data Protection Regulation

The EU General Data Protection Regulation (the "GDPR") will come into force in May 2018, and it will amend the data protection rules in force, including the Act. GDPR will extend the duty of disclosure and the rules on secure processing.

DISCRIMINATION AND HARASSMENT

15 What protection do employees have from discrimination or harassment, and on what grounds?

15.1 Protection from discrimination

Under Danish law, employees are protected against discrimination due to:

- Sex, maternity, family-related and marital status;
- Race, skin-color, national, social and ethnic origin;
- Religion or faith;
- Political opinion;
- Sexual orientation;
- Age;
- Disability; and
- Labour union affiliation.

It is unlawful for an employer to discriminate against employees and job applicants on the above-mentioned grounds with regard to employment, dismissal, transfer, promotion, or regarding salary and employment terms and conditions.

Under Danish law, both indirect and direct discrimination is considered unlawful. Direct discrimination occurs when a person is treated less favourably than another, or has been or would be treated in a comparable situation, on any of the grounds referred to above. Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put a person covered by one of the above grounds at a particular disadvantage compared with other persons unless such treatment is objectively justified.

Employees who have been discriminated against may claim compensation. An employee who is treated less favourably due to the employee demanding equal treatment may also claim compensation. In case law, the compensation generally amounts to at least six to 12 months’ salary depending on certain factors (e.g. the employee’s length of service). However, there is technically no upper monetary limit for such compensation.

15.2 Protection from harassment

Under Danish law, employees are protected against harassment. Employees who have been harassed will be able to make a claim for compensation.

Under Danish law, harassment is defined as unwanted behaviour in relation to a person’s protected characteristics (as listed above) with the aim of (or result of) infringing the person's dignity and creating a hostile, degrading or uncomfortable environment.

WHISTLEBLOWERS

16 Do whistleblowers have any protection?

It is a general principle under Danish law that employees who file a notification in good faith under a whistleblowing arrangement are protected against unfair dismissal. Furthermore, the employee must not suffer from detrimental consequences as a result of the notification, unless he/she files a notification only with a view to harm or harass colleagues.

As a general rule, financial undertakings in Denmark are subject to mandatory whistleblower schemes and mandatory protection of the employees submitting reports under the mandatory schemes. Thus, a financial
undertaking must ensure that the employees are not subject to unfavourable treatment or unfavourable consequences for reporting a violation or potential violation to the Danish FSA or to a scheme implemented by the employer. Employees whose rights are infringed by a breach of this obligation may be awarded compensation in accordance with the principles of the Danish Act on Equal Treatment of Men and Women. Such compensation must be assessed with due regard to the employee's length of service and the merits of the case in general. Accounting companies are subject to similar rules.

DISMISSAL OF EMPLOYEES

17 What rights do employees have when their employment contract is terminated?

17.1 Notice periods

Generally, employees are entitled to a notice period pursuant to statutory law, collective bargaining agreements or their individual employment contract. In general, the notice period depends on the employee's length of service. As an example, pursuant to the Danish Salaried Employees Act, white-collar workers are entitled to a notice period between one and six months depending on the employees' length of service. However, during a probationary period the notice period may be shortened to 14 days.

During the notice period, an employee is subject to the same employment terms and conditions as usual, unless otherwise agreed between the parties.

17.2 Severance payments

In Denmark, there are no general statutory rules on severance pay. However, white-collar workers, who have been continuously employed in the same company for 12 years, are entitled to a severance pay equivalent to one or three months' salary. For other employees, a right to severance pay may be set out in collective bargaining agreements or an individual employment contract.

17.3 Procedural requirements for dismissal

In Denmark, there are no general statutory procedural requirements for dismissals carried out by private employers, unless the dismissals are subject to the rules on collective dismissals.

On the other hand, collective bargaining agreements may set out procedural requirements. If such procedural requirements are not met the employer may be obligated to pay a penalty for breach of the collective bargaining agreement and the dismissal may not be effective.

18 What protection do employees have against dismissal? Are there any specific categories of protected employees?

18.1 Protection against dismissal

Employees are protected against discriminatory dismissals due to the above grounds. Accordingly, an agreement on termination of the employment without further notice when the employee reaches a certain age (for example, 70 years) is not enforceable in Denmark. An employee who has been dismissed due to one of the above illegal grounds may be entitled to a compensation of up to usually between six and 12 months' salary depending on certain factors (eg the type of breach and the employee's length of service).

Further, pregnant employees or employees on maternity, paternity or parental leave are protected by more rigorous rules on equal treatment, especially with regard to dismissal.

Moreover, white-collar workers subject to the Danish Salaried Employees Act, and employees subject to certain collective bargaining agreements, are protected against unfair dismissals after a certain period of continuous employment. A dismissal may be considered unfair if it is not justified by the conduct of the employee and/or the circumstances of the employer.

The consequence of an unfair dismissal is generally compensation payable to the employee in question. Under the Danish Salaried Employees Act, such compensation is based on the employee's length of continuous employment and an assessment of the circumstances of the case, and will normally amount up to one - six months' salary.

18.2 Protected employees

There are several categories of employees who are specially protected against dismissal, including eg;

- Shop stewards;
REDUNDANCY/LAYOFF

19 Are redundancies/layoffs defined, and what rules apply on redundancies/layoffs?

19.1 Definition of redundancy/layoff

There is no specific legal definition of redundancy under Danish law, and Danish law does not distinguish between redundancies and other dismissals. However, Denmark has passed legislation on collective dismissals, which will apply if the number of dismissals within a period of 30 days reaches or exceeds the following:

- 10 or more of the employees in companies employing 21-99;
- 10 per cent of the employees in companies employing 100-299; or
- 30 employees in companies employing at least 300 employees.

The number of employees concerned is calculated as the average number of employees normally employed during the previous four quarters, including all employees without considering the length of their working hours. However, employees employed for a limited period of time or to carry out a special job must not be included, unless their employment contract has not expired or been fulfilled.

Collective dismissals trigger the obligation to comply with certain formal procedural rules. Please note that stricter rules apply if the number of dismissals within a period of 30 days reaches or exceeds 50 percent of the employees in a company with at least 100 employees.

Further, collective bargaining agreements may include special rules regulating collective dismissals.

19.2 Procedural requirements

If the Danish law on collective dismissals applies, the employer must initiate negotiations with the employees, or with their representatives if such have been elected.

The negotiations carried out must be genuine; merely informing the employees is not sufficient. However, the employer is not obliged to let the negotiations have any influence on the decision regarding the contemplated dismissals. Thus, the employer will ultimately be entitled to carry out the dismissals unilaterally without any consent from the employee representatives.

The employer must keep records of the negotiations.

Before the negotiations can begin, the employer must provide the employees with all the relevant information, and as a minimum:

- The reasons for the contemplated dismissals;
- The number of employees contemplated to be dismissed;
- The categories of employees contemplated to be dismissed;
- The number of employees normally employed by the employer;
- The period during which the contemplated dismissals are expected to take place;
- The criteria proposed to be used for selection of employees to be dismissed; and
• Entitlement to severance payment.

The information must be sent by letter to the employees or their representatives and, at the same time, a copy must be sent to the Danish Regional Labour Board (first notice). The information letter must be sent to all employees in the affected entity. However, if employee representatives have been elected before initiating the procedure, the information letter may be sent to these representatives only.

The information provided may be considered confidential.

If the employer intends to carry through the dismissals after the negotiations with the employees, the employer must inform the Danish Regional Labour Board thereof in writing (second notice).

The information submitted to the Danish Regional Labour Board must include all necessary information, including information about the negotiations. The information provided must at least be the reasons for the dismissals, the number of employees normally employed by the employer, and the period during which the dismissals are expected to take place.

A copy of the information provided to the Danish Regional Labour Board must be submitted to the employees or their representatives.

The formal termination notice cannot be given to employees before the Danish Regional Labour Board has been informed.

As soon as possible and at the latest 10 days after the above information has been given, the employer must submit to the Danish Regional Labour Board (third notice) a list with names of the employees to be dismissed. The list must include information on full-time and part-time employment, and will normally contain information about the occupation of each individual employee, and their civil registration number containing their date of birth. The information is supplied in order to make it possible for the Danish Regional Labour Board to try, together with the state-run unemployment agency, to find new employment for the redundant employees.

The employees must be informed individually of the dismissals no later than at the same time as the list is provided to the Danish Regional Labour Board.

The dismissals will at the earliest be effective 30 days after the second notice is sent to the Danish Regional Labour Board (if the employees are entitled to 30 days' notice). Otherwise, the period of notice required to dismiss each individual employee will start to run when the notice is given.

19.3 Redundancy/layoff pay

If the procedural requirements are not met for collective dismissals, dismissed employees may be entitled to compensation corresponding to 30 days' pay from the date of the termination. However, if at least 50 percent of at least 100 employees are dismissed, the employee is entitled to a compensation corresponding to eight weeks' salary from the date of the termination.

In both cases, the compensation shall be reduced by the amount of salary the employee receives during the notice period.

In addition, the employer may be fined.

EMPLOYEE REPRESENTATION AND CONSULTATION

20 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

20.1 Management representation

Danish limited companies employing at least 35 employees over a three-year period are required to allow their employees to elect representatives to the company's supreme governing body, usually the board of directors. Employees are entitled to appoint a minimum of two members to the company's supreme governing body.

Similar rules apply to a Danish parent company if it, together with its Danish subsidiaries, meets the 35-employee requirement. However, in parent companies there must be at least three employee-elected members of the supreme governing body.

Employee representatives in a company's supreme governing body are subject to the same duties, obligations and remuneration as its other members and to the same liabilities as general management.
20.2 Consultation

A Danish employer employing at least 35 employees is required to inform and consult with the employees/employee representatives about all employer-related matters of significant importance to the employees.

This obligation flows from either

- a collective bargaining agreement, pursuant to which the employer has established a cooperation committee; or
- the Act on Informing and Consulting Employees (the "Informing and Consulting Act"), which covers any employer with at least 35 employees where the employer is not party to any collective bargaining agreement.

Pursuant to the Informing and Consulting Act, the employer is (as a minimum) required to provide the following information to the employee representatives:

- Information concerning the recent and probable development of the employer's activities and financial situation;
- Information and consultation about the situation, structure and probable development of employment with the employer and about any anticipatory measures envisaged, in particular where there is a threat to employment; and
- Information and consultation about decisions likely to lead to substantial changes in the work organisation or in contractual relations.

The information and consultation must take place at such time, in such manner and with such methods and contents as are appropriate to enable, in particular, the employee representatives to conduct an adequate study and, where necessary, prepare for consultation.

Further, consultation must take place at the relevant level of management and representation, depending on the subject under discussion. Finally, consultation must be carried out in such a way as to enable the employee representatives to meet with the employer and obtain a response, and the reasons for that response, to any opinion they might formulate with a view to reaching an agreement on decisions within the scope of the employer's powers.

20.3 Major transactions

If the transaction is subject to the Danish Transfer of Undertakings Act a transferor is obliged to inform the employees of the contemplated business transfer prior to the completion date, of:

- The date or suggested date of the transfer;
- The reasons for the transfer;
- The legal, economic and social consequences of the transfer for the employees; and
- Any measures to be taken in relation to the employees.

The information must be given to the employee representatives within reasonable time before the transfer of the business. There is no definitive case law on the meaning of "within reasonable time". In some situations, information can be given after the signing of the agreement, but before the actual transfer of the business, provided that the employees are given reasonable time to consider the consequences of the sale. If the transferor is afraid that the information given to the employee representatives will have an adverse impact on the transferor's ability to reach an agreement on the sale of the business, the transferor is entitled to impose a duty of confidentiality on the employee representatives.

If the transferor or transferee contemplates measures in relation to employees in connection with the business transfer, the employee representatives must be consulted on the contemplated measures.

The Danish Transfer of Undertakings Act does not contain any minimum requirements regarding the length of the information/consultation period. Normally, the duration of that period depends on the speed at which the parties achieve results in their negotiations.
Dismissals contemplated prior to or after the business transfer will not affect any of the obligations outlined above. The obligation to inform and consult the employee representatives exists regardless of whether the business transfer involves dismissals or not. However, other rules may delay the process if the business transfer involves dismissals of more than 10 employees (see Question 19).

21 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

21.1 Remedies

Under Danish law, the transferor and the transferee are entitled to complete an agreement on the sale of a business subject to the Danish Transfer of Undertakings Act, regardless of whether the employees have been informed or consulted. Thus, violation of the information and consultation requirements does not affect the validity of such an agreement. Non-compliance with the obligation to inform and consult may, however, be punishable with a fine.

If an employer fails to comply with its information and consultation duties under a collective bargaining agreement, the employer may be obligated to pay a penalty for breach of the collective bargaining agreement.

Further, non-compliance with the information and consultation duties under the Act on Informing and Consulting Employees may be sanctioned with a fine.

21.2 Employee action

In general, the employee representatives and the employees cannot prevent or stall the decision, introduction of the measures, business transfer, etc.

CONSEQUENCES OF A BUSINESS TRANSFER

22 Is there any statutory protection of employees on a business transfer?

If an undertaking or part of an undertaking is transferred to another company by acquisition of assets, the transfer may be subject to the Danish Transfer of Undertakings Act. The Transfer of Undertakings Act applies to acquisitions by way of merger, but not to acquisitions by way of share sale as there is no change to the identity of the employer.

If the Transfer of Undertakings Act applies, the transferee will immediately assume the rights and obligations of the transferor in relation to the employees on the date of the transfer. This will apply both in respect of the rights and obligations following from the individual employment contracts and in respect of the rights specified in collective bargaining agreements. In other words, all terms and conditions of employment, including salary, will continue without change. Correspondingly, the transferred employees will generally be under an obligation to continue their employments on the same terms and conditions.

Further, the transferee will, as a starting point, be liable for all claims no matter whether they pertain to the period before or after the transfer.

If the transferee does not want to adopt the transferor’s collective bargaining agreement applicable to the employees being transferred, the transferee must notify the relevant trade union within a certain time limit. If such notification is not given, the transferee will be deemed to have adopted the collective bargaining agreement. If the transferee decides not to adopt the collective bargaining agreement, the transferred employees will retain their individual rights under the collective bargaining agreement and such rights may not be terminated or amended by the transferee with effect earlier than the date of expiry of the collective bargaining agreement.

Neither the transferor nor the transferee are entitled to dismiss employees due to the transfer as such, but dismissals for economic, technical or organisational reasons are allowed.

EMPLOYER AND PARENT COMPANY LIABILITY

23 Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company's employees?
23.1 Employer liability

Under Danish law, an employer may be held liable for the acts of its employees if:

- The employee is under the employer's authority (i.e., employed by the employer);
- The employee has acted; and
- The employee's actions are in favour of the employer during working hours.

Under certain circumstances, the employer may apply for recourse.

Additionally, the Danish criminal code includes provisions that may impose employer liability for the employee's acts.

23.2 Parent company liability

Generally, no parent company may be held liable for the acts of a subsidiary company's employees.

However, it should be noted that Danish law includes special rules in the event a parent company issues warrants, stock options etc to employees in a subsidiary company.

HEALTH AND SAFETY OBLIGATIONS

24 What are an employer's obligations regarding the health and safety of its employees?

The Danish Working Environment Act covers all work performed in the course of employment. In addition, a number of executive orders and practice notes govern the employer's obligations regarding health and safety in the workplace. The overall aim of the Danish Working Environment Act is to establish a safe and healthy working environment.

Under the Danish Working Environment Act, employers with more than 10 employees must set up a safety committee with representation from both the employer and employees. The committee is to monitor the safety of working procedures and ensure that the employees receive proper instructions. The Danish Working Environment Service also carries out inspection visits in order to ensure that standards are met.

An employer is, by statute, required to take out industrial injury insurance that covers expenses for medical care, loss of earning capacity, permanent injury, transitional allowance upon death and loss of supporter. Furthermore, an employer is required to take out occupational disease insurance for employees.

TAXATION OF EMPLOYMENT INCOME

25 What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

25.1 Foreign nationals

A person is either not tax liable, fully tax liable or limited tax liable in Denmark. The requirements for tax liability in Denmark are strict and need to be carefully observed when placing employees in Denmark.

If a person is fully tax liable, all employment income is taxable in Denmark.

Full tax liability applies when a person:

- Has a residence and actually stays in Denmark - short stays in Denmark due to holiday are not included and, according to the tax authorities, a three month consecutive stay or stays of a combined 180 days in a 12 month period are not considered short stays; or
- Stays in Denmark longer than six months - short stays outside of Denmark due to holiday do not interrupt this period.
If a person is not fully tax liable in Denmark, certain employment income may still be taxable in Denmark (limited tax liability). One example is employment income received by a person for work performed in Denmark while employed by an employer with legal venue in Denmark or with a permanent establishment. This employment income is taxable in Denmark but only for the proportion relating to work actually performed in Denmark.

There are also limited tax liability rules on, for example, board remunerations paid by Danish companies and hiring-out of labour to a Danish company.

If the employment income is taxed by more than one jurisdiction, Denmark has an extensive network of tax treaties to reduce or eliminate double taxation.

25.2 Nationals working abroad

If a Danish national is fully tax liable in Denmark while working abroad, the Danish national’s employment income will be taxed in Denmark. However, in most cases this taxation will be reduced or eliminated by the applicable tax treaty.

26 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

26.1 Income tax

Employment income is calculated on a yearly basis (the tax year). In Denmark, taxation mainly distinguishes between personal income, capital income and equity income.

There is a progressive tax rate in Denmark. In 2017, the marginal tax rate on employment income is 56.4 %. Generally, employees' earnings above DKK 479,600 annually are taxed at the highest level.

The taxation for employment income may be divided into:

- Labour market tax at 8 %;
- Local tax at an average tax rate of 25.6 % (including the 0.69 % tax for members of Danish National Evangelical Lutheran Church);
- Health tax at 2 %;
- Base tax at 10.08 %; and
- Top-tier tax at 15 %.

The combined total of local tax, health tax, base tax and top-tier tax cannot exceed 51.95 %.

There is a basic tax-free allowance of DKK 45,000 and an employment allowance of maximum DKK 30,000.

Generally, employees have limited deduction options. However, there are important employee deductions for transportation, travelling expenses and pension contributions. Employees may also deduct negative capital income in the employment income up to a certain limit. Generally, capital income is interest income or expenses.

Capital income is added to the employment income if it exceeds DKK 42,800 (for single) or 85,600 (for married / cohabiting).

Dividend, capital gains etc from equity or other securities is taxed with 27 % or 42 %.

Denmark has a low-tax regime for foreign employees employed by a fully tax liable employer or a permanent establishment, if the employee is paid more than DKK 63,700 per month and has not been fully tax liable in Denmark during the last 10 years prior to working for the employer. It is not a requirement that the performance of the work takes place in Denmark. Instead of being subject to regular taxation, the employee is subject to a 31.92 % flat tax for up for five years of the employment income with no deductions allowed. After the five-year period, the employee is subject to regular taxation.
26.2 Social security contributions

The state social security system provides a comprehensive range of benefits such as retirement pensions, survivors' pensions, medical care, sickness and maternity benefits, disability benefits, family allowances and housing allowances.

Contributions to the social security system are generally levied through the tax system, except in respect of the Danish Labour Market Supplementary Pension Scheme (ATP), education and industrial injury.

Both employers and employees contribute to the ATP scheme. The employer contribution is DKK 2,272.2 (in 2017) per year, per full-time employee. Each full-time employee contributes DKK 1,135.8 (in 2017) annually. The employer's premium to the industrial injury scheme (AES) varies between the various branches of business, from approximately DKK 183 up to DKK 3,945 (in 2017) per year, per full-time employee.

Furthermore, the employer must pay contributions to certain other employee schemes, including FIB (unemployment financing), AUB (educational scheme) and Barsel.dk (maternity scheme), which amounts to DKK 4,120 (in 2017) per year, per full-time employee.

In addition to income tax, all employees and self-employed workers must pay a special labour market tax called "arbejdsmarkedsbidrag", which is currently 8% of the gross income.

PENSIONS

27 Do employers and/or employees make pension contributions to the government in your jurisdiction?

The Danish pension system is characterised by a number of public pension schemes and far-reaching mandatory occupational pension schemes primarily established by collective bargaining agreements between the labour market parties.

27.2 Contributions paid to the government

The primary first-pillar general state pension scheme called "Folkepension" is financed from tax revenues. In addition to the general state pension scheme is the ATP scheme (see above, Social security contributions).

27.3 Monthly amount of the government pension

The monthly amount of the general state pension scheme depends on various factors, for example, the employees' marital status. The amount of ATP pension depends on the contributions made through the employees' work life.

The retirement age for both the general state pension scheme and ATP pension is between 65 and 68 years (depending on the employees' birth year).

28 Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do these schemes provide pensions, the value of which:

- Is linked to the employee's salary?
- Is linked to employer and/or employee contributions and investment return on those contributions?

28.1 Linked to the employee's salary

The vast majority of the collective bargaining agreements concluded between the labour market parties include fully funded defined-contribution schemes. Contributions are often between 12 and 18% of the earnings, of which two thirds is paid by the employer and one third is paid by the employee.

Employers not covered by a collective bargaining agreement requiring participation in a pension scheme often offer their employees participation in a company pension scheme. Such company pension schemes are almost exclusively defined-contribution schemes. The value of voluntary occupational pension schemes are often linked to the employees' salary as the amount of the contribution is normally a certain percentage of the employees' salary split between the employer and the employee in a ratio of two thirds and one third.
28.2 Linked to employer and/or employee contributions

The pension obligations of the employer are normally taken over by a commercial pension provider, and the employer’s obligation is therefore limited to the payment of a defined contribution to the employees’ pension savings/pension insurance schemes with the pension provider.

29 Is there a regulatory body that oversees the operation of supplementary pension schemes?

29.1 Regulatory body

The Danish Financial Supervisory Authority and the Danish Business Authority oversee the company pension institutions.

29.2 Regulatory framework

The regulation of the Danish Financial Supervisory Authority and the Danish Business Authority's supervision of the pension institutions is stipulated in the Danish Financial Business Act and the Danish Act on the Supervision of Company Pension Funds.

The main aim of the authorities' supervision of the pension institutions is to ensure that they comply with statutory requirements. Furthermore, it is a central task for the Financial Supervisory Authority to ensure that the pension institutions have a sufficient capital base at any time.

If a pension institution violates any of the applicable rules, the Financial Supervisory Authority may issue a complaint, an order, or a fine. Ultimately, the pension institution may be reported to the police or have their license withdrawn.

30 Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)?

30.1 Tax relief on employer contributions

The employer's contribution to an employee's supplementary pension schemes is tax deductible.

Employer contributions are tax-exempt. However, this depends on the exact nature of the pension scheme, for example, the tax-exemption for a rate pension is limited to DKK 53,500 per year.

This contribution is deducted before tax but is still subject to labour tax. The pension institution automatically withholds the labour tax at the contribution.

30.2 Tax relief on employee contributions

Most employee contributions to a supplementary pension scheme will be tax deductible depending on the exact nature of the scheme.

31 Is there any legal protection of employees' pension rights on a business transfer?

If a business transfer is subject to the Danish Transfer of Undertakings Act, the transferee will immediately assume the rights and obligations of the transferor in relation to the employees on the date of the transfer, including the obligation to pay pension contributions as these are considered part of the salary.

If the specific pension provider will not accept contributions from the transferee because the transferee is, for example, not party to a certain Employers’ Association or collective bargaining agreement, the transferee must pay the pension contribution to a similar pension scheme provided by another pension provider.

32 Can the following participate in a pension scheme established by a parent company in your jurisdiction:

- Employees who are working abroad?
- Employees of a foreign subsidiary company?

In general, both employees who are working abroad and employees of a foreign subsidiary company may participate in a pension scheme established by a Danish parent company, unless stated otherwise in the specific pension scheme.
Is there any protection provided for pension scheme benefits where the sponsoring employer becomes insolvent? If so, who provides the protection, and how does this operate?

Private pension schemes - both mandatory and voluntary - are generally placed in, and operated by, pension institutions. In the event of an employer's insolvency, pension benefits will generally not be affected, as the pension institution is liable to pay the accrued benefits to the individual employees.

BONUSES

Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

In Denmark, it is common for an employer to reward its employees through bonuses. There are no general regulations, however, special rules apply with regard to white-collar workers and to certain types of companies.

Under the Danish Salaried Employees act, a white-collar worker, who is subject to a bonus scheme and who leaves the company during a financial year, is entitled to a pro rata share of the bonus which he/she would have been entitled to receive if he/she had still been employed with the company at the end of the financial year (or such other date as the bonus may be paid).

Further, a public limited company, with shares admitted to trading on a regulated market or a multilateral trading facility, must not enter into a specific agreement on incentive-based remuneration with a member of its management until the supreme management body of the limited liability company has laid down general guidelines for such incentive-based remuneration. The guidelines must have been considered and approved by a general meeting and published on the company's website. A specific incentive agreement must comply with the current approved guidelines.

Moreover, companies in the financial sector must have a written remuneration policy, which ensures sound and effective risk management. Accordingly, the Danish Financial Business Act sets out requirements of establishing a remuneration committee and publishing certain information of remuneration. The Danish Financial Business Act further includes restrictions in relation to variable remuneration of the board of directors, the board of management and other employees, whose activities significantly influence the company's risk profile. Generally, the variable remuneration (including bonuses) of these employees must not exceed 50 % of salary, as defined in the legislation.

INTELLECTUAL PROPERTY (IP)

If employees create IP rights in the course of their employment, who owns the rights?

Generally, the originator owns the IP rights of his or her creations and inventions. However, some exceptions apply in relation to IP rights created during employment.

According to case law and legal literature, any copyrights created by an employee in the course of his or her employment that are necessary for the employer's performance of business transfer to the employer. All other rights remain the property of the employee. The parties can derogate from this by individual contract.

Copyrights created in the development of computer programs transfer automatically to the employer as a rule of law.

The transfer of rights relating to patentable inventions is regulated by the Danish Act on Employees' Inventions. If the invention is made in the course of work as part of the employment, the employer is entitled to claim the rights of the invention for one or more countries. The employee is obliged by law to inform the employer of the invention without undue delay. After receiving this notice, the employer must inform the employee within four months if the employer wishes to acquire the rights to the invention. If so, the employee can claim reasonable compensation for the transfer of the rights.
Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

**Restriction of activities**

During employment, employees are bound by a general duty of loyalty. Therefore, employees must not take action that would create competition for the employer's business. If employees engage in any competitive activities, the employer will usually be able to terminate the employment.

**Post-employment restrictive covenants**

At the expiry of the notice period, employees are not restricted by the general duty of loyalty. Therefore, if the employer wishes to restrict employees' activities, it will require restrictive covenants, such as a non-compete clause or a non-solicitation of customers clause. A non-compete clause prohibits an employee from competing with the employer. A non-solicitation of customers clause prohibits the employee from having any business relationship with the employer’s customers or other business associates.

With effect from 1 January 2016, the Danish Act on Restrictive Covenants regulates non-compete clauses and non-solicitation of customers clauses with regard to white-collar workers and blue-collar workers.

With regard to white-collar workers, non-compete and non-solicitation of customers clauses were previously governed by the Danish Salaried Employees Act, which restricted the use of those clauses. These rules still apply to non-compete and non-solicitation of customers clauses entered into with white-collar workers before 1 January 2016.

Non-compete clauses and non-solicitation of customers clauses entered into on 1 January 2016 or later with white-collar workers and blue-collar workers are subject to the Danish Act on Restrictive Covenants. Such clauses are only enforceable if the following conditions are met:

- The restrictive covenant must be included in a written agreement;
- The employee must have completed at least six months continuous employment at the time of termination;
- The term of the restrictive covenant may be no more than 12 months (six months for a combined clause including both a non-competition clause and a non-solicitation of customers clause), commencing from the expiry of the notice period; and
- The employee is entitled to compensation during the entire term of the restrictive covenant:
  - If the term of the restrictive covenant is six months or less, the compensation must be at least 40% of the monthly salary;
  - If the term of the restrictive covenant is more than six months (up to 12 months), the compensation must be at least 60% of the monthly salary;
  - If the employee is subject to a combined clause, the compensation must be at least 60% of the monthly salary;
  - If the employee finds other suitable employment during the term of the restrictive covenant, the compensation is reduced during the term of such other suitable employment to at least 16% of the monthly salary (if the employee was originally entitled to a compensation of at least 40% of the monthly salary) or at least 24% of the monthly salary (if the employee was originally entitled to a compensation of at least 60% of the monthly salary);
  - In spite of the above, the employee is always entitled to the high level of compensation (40% or 60% of the monthly salary) during the first two months of the term of the restrictive covenant. The compensation for the first two months of the restrictive covenant must be paid as a lump sum at the expiry of the notice period;
A non-compete clause may only be imposed on an employee:

- Holding a particularly trusted position; or
- Who enters into an agreement with the employer on the right to use the employee's inventions. The employer must inform the employee in writing why a non-compete clause is required;

A non-compete clause cannot be enforced against an employee:

- Who has been dismissed by the employer without reasonable cause for such dismissal; or
- Who resigns from the employment and the employer’s omission to perform its obligations has given the employee reasonable cause for such resignation. The employee is, however, still entitled to receive the lump sum compensation for the first 2 months of the non-compete clause (see above);

A non-solicitation of customers clause may only be enforced in relation to customers with whom the employee has had business relations during the previous 12 months before the date of the employee's dismissal or resignation. In connection with the employee's dismissal or resignation, the employer must make a list of the customers covered by the non-solicitation clause.

Pursuant to the Danish Act on Restrictive Covenants, the use of non-solicitation of employees clauses has been prohibited under Danish law with effect from 1 January 2016. However, to a limited extent it is still possible to use such clauses in connection with a business transfer.

Further, non-solicitation of employees clauses entered into before 1 January 2016 may be enforced until 1 January 2021 and are subject to the rules in the Danish Act on Employer's use of Non-solicitation and No-hire clauses.

PROPOSALS FOR REFORM

Are there any proposals to reform employment law or pensions law in your jurisdiction?

A so-called “Holiday committee” has been composed to amend the Danish Holiday Act. The purpose of the Committee is to bring the Danish Holiday Act in line with international obligations, as well as to make the Danish Holiday Act easier to administer. The only information available on the work of the Committee at the time of writing is that they are looking into ways to amend and simplify the provisions on accruing and using paid holiday.

Further, the GDPR will come into force in May 2018. The GDPR will amend the data protection rules, including the Danish Act on Processing of Personal Data, and will extend the duty of disclosure and the rules on secure processing.

Otherwise, there are no other material proposals to reform employment or pension law in Denmark.
FRANCE

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

1.1 Laws applicable to foreign nationals

Foreign nationals working in France can choose the law applicable to their employment contract under Article 8(1) of Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”). However, where the applicable law would have otherwise been French law, the Labour Code’s mandatory laws apply. This usually applies where employees normally carry out their work in France (Article 8(2), Rome I). Mandatory laws have a much broader scope than public policy rules and are contained in almost all of the Labour Code provisions. They apply regardless of the contract's provisions, unless those provisions are more favourable to the employee (Article 8(1), Rome I).

In contrast, where the law would not have been French law, it is the law chosen by the parties that applies. However, certain French rules apply regardless of this choice.

Special rules apply to posted employees (employees that are sent to a host member state under the framework of a transnational provision of services). They are only subject to the public policy rules listed in Article L.1262-4 of the Labour Code, which apply regardless of the governing law and the employee's nationality. Public policy rules are limited, and mainly cover:

- Individual and collective employment rights, including the right to strike;
- The minimum wage (see Question 9);
- Illegal work;
- Working hours (see Question 10);
- Paid holiday (see Question 11);
- Discrimination (see Question 17);
- Working conditions; and
- Health and safety (see Question 27).

1.2 Laws applicable to nationals working abroad

Nationals working abroad can choose the applicable law (Article 8(1), Rome I). Public policy rules and mandatory laws do not apply unless French law is applicable to the contract. Generally, where the employer is French, French courts consider that French law is applicable.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

The main categories of workers are:

- Employees;
- Agency workers;
- Self-employed; and
- Independent contractors.

### 2.2 Entitlement to statutory employment rights

Employees who are employed under a contract of employment (whether it be a definite or indefinite term contract) are subject, and entitled, to all statutory provisions set out in the Labour Code and applicable collective agreements (such as the collective bargaining agreement applicable to the company and/or companywide collective agreements).

Agency workers are workers employed by agency work companies in order to work for client companies ("Using Companies") with a temporary need of workforce. Using Companies cannot use interim workforce to fill positions linked to their normal and permanent activity. The agency worker is not linked to the Using Company by a contract of employment (which is signed with the agency work company). Agency workers are entitled to the same rights and benefits as permanent employees (see Question 15).

The self-employed category consists of independent workers, with special skills and state-recognised diplomas, not working under a contract of employment. Self-employment is open to various areas of business which are not considered as commercial activities (for example, lawyers, notaries, bailiffs, accountants, medical doctors, architects, and so on). The self-employed have no entitlement to statutory employment rights but are instead subject to specific regulations (and sometimes professional rules) applicable to their activity. The self-employed usually perform their practice for more than one client/patient.

Independent contractors are companies or self-employed workers which are linked to another contractor by way of contract in order to perform a service or deliver goods but which are acting independently from their co-contractors. Independent contractors have no entitlement to statutory employment rights. Their activities are considered as commercial. Independent contractors usually work for more than one client/co-contractor (working for only one client can lead to the recognition of an employment relationship).

### 2.3 Time periods

Agency workers’ contracts have a maximum duration equal to temporary workers contracts (see Question 15). There is no maximum legal duration for contracts with the self-employed and independent contractors, although the self-employed or contractor may be deemed a permanent employee with an indefinite-term employment contract if a court finds that the self-employed or contractor actually works as a subordinate to the company (see Question 15).

### RECRUITMENT

#### 3 Are any grants or incentives available for employing people? Does any information/paperwork need to be filed with the authorities or given to new employees when employing people?

#### 3.1 Grants or incentives

The state provides various grants and incentives (such as financial aid, and exemptions and reductions in social security contributions). They are mainly aimed at encouraging employers to recruit individuals under a certain age (usually 26 years) or long-term jobseekers. This is so that they can acquire specific skills in return for a lower salary or get back to work after a long period of unemployment.

#### 3.2 Filings

A declaration (Déclaration préalable à l'embauche) must be made by the employer to the French administration prior to hiring. The declaration should be in the form of a single document under which the employer completes several registrations with the various competent administrations (such as the unemployment fund, social security, pension agency and so on) at one time.
3.3 Information

The employer shall inform the employee within the first two months of employment of the principal terms of the employment contract (in some cases, a written contract is mandatory, for example for fixed-term contracts). The employer shall also inform the employee at the beginning of the contract of the different collective bargaining agreements applicable within the company. It is also customary to give a copy of the internal rules applicable within the company at the start of the contract.

4 Background checks

4.1 Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

Under Article L.1221-6 of the Labour Code, information requested by an employer to a prospective employee is strictly limited to matters linked to the position and must aim at assessing his or her professional skills. Medical checks not linked to the considered position prior to the hiring are prohibited. The validity of the contract of employment was subject to medical fitness for the position (assessed by an occupational doctor). However, the Labour Law of 8 August 2016 (Loi travail) has removed the initial medical check for most employees.

Asking about an applicant's criminal record (Extrait N° 3 du Casier Judiciaire) is neither expressly authorised nor prohibited by the Labour Code. However, since all information requested must be linked to the position it will only be justified in very few positions, such as ones linked with the regular use of money (for example, banking activities).

PERMISSION TO WORK

5 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

5.1 VISA

5.1.1 Procedure for obtaining approval

Since 1984, work permits and visas have been granted within the same document and follow a unified process. A foreign national wishing to work in France therefore applies for a work permit (see below, Permits), which will, if granted, authorise them to enter and reside temporarily in France, as well as work in France.

Further, foreign nationals already living in France who have a permanent residence card (carte de résident) can also exercise any professional activity. The permanent resident card can be automatically granted (for example, to foreign children, or parents of a French national, or to foreign nationals having served in the French army) or it can be granted to foreign nationals having legally entered and stayed in France for at least three years.

Moreover, foreign nationals holding a temporary residence card granted on familial grounds (to parents and children of a foreign national legally staying in France) (carte de séjour temporaire "vie privée et familiale") can also exercise any professional activity. The procedure for obtaining the card, as well as the costs of obtaining it, is similar to those applicable to the permanent residence card.

Finally, a "carte de séjour "competences et talents" can be granted for three years to foreign nationals who intend to take part in the economic development of France or their home country.

5.1.2 Cost

The application must be made locally at the préfecture (which represents the government at local level) and costs up to EUR260, unless the applicant is otherwise exempted.

5.1.3 Time frame

Obtaining a permanent or temporary residence card is a lengthy process, which can take up to about six months. Visas such as the "Visa de long séjour valant titre de séjour" (allowing the beneficiary to work) are renewable. Application for renewal of this type of visa must be made at
least two months before it expires.

5.1.4 Sanctions

See below, Permits.

5.2 Permits

EU citizens do not need a work or residence permit if they hold a passport or other ID proving that they are EU citizens (Article 45, Treaty on the Functioning of the European Union (“TFEU”)).

All non-EU citizens must obtain a work permit to work in France. The relevant préfecture will consider the employment situation within its territory or department (département) when deciding whether to grant a work permit.

5.2.1 Procedure for obtaining approval

If the foreign national is living abroad, the employer must apply to the local French unemployment authority. The application is then forwarded to the employment authorities. If they decide that the foreign national can work in France, they issue a temporary, one-year work permit.

If non-EU citizens are already French residents and hold a residence permit, they apply to their local police department. If their application is accepted, they receive either a ten-year or temporary work permit.

5.2.2 Cost

The employer of a foreign national who holds a temporary or permanent residence permit must pay a fee (redevance) to the French Office of Immigration and Integration (L'Office français de l'immigration et de l'intégration). The amount depends on the employee's salary:

- For an indefinite-term employment contract, the employer must pay 55% of the employee's monthly salary, capped at two and a half times the minimum wage (see Question 9) (amounting to EUR3,700.67); and
- For a fixed-term contract (between three and 12 months):
  - if the employee's monthly salary is EUR1,480.27 or less, the employer must pay EUR74;
  - if the employee's monthly salary is between EUR1,480.27 and EUR2,220.40, the employer must pay EUR210; or
  - if the employee's monthly salary is more than EUR2,220.40, the employer must pay EUR300; and
- For a seasonal worker's short-term contract, the employer must pay EUR50 per month; and
- For a temporary contract entered into by a young professional hired under a bilateral agreement on exchange of young professionals, the employer must pay EUR72; and
- For a contract of or exceeding one year, the employer must pay 55% of the employee's monthly salary, capped at two and a half times the minimum wage amounting to EUR3,700.67.

The employee must pay the cost of the stamp duty necessary to create or renew the residence permit (the price varies between EUR19 and EUR260, unless the employee is exempted under certain circumstances).

5.2.3 Time Frame

There is no specific quota relating to the hiring of foreign nationals. However, before granting work permits, the French administration will consider the:

- Employment situation in France, in the concerned sector and the employment area (except for certain positions);
Specific features of the position; and
Research undertaken by the employer to hire a national jobseeker.

If the level of unemployment is too high for the concerned position in the concerned employment area, the French administration may refuse to grant the work permit (R.5221-20 et seq, Labour Code).

5.2.4 Sanctions

Failure to comply with immigration procedures is a criminal offence for the employer and employee.

The chief executive of the employer can be sentenced to up to five years' imprisonment and a EUR15,000 fine (the amount of the fine is multiplied by five when the company is convicted of the offence). The company can also be made responsible for the payment of a special contribution of EUR17,600.

RESTRICTIONS ON MANAGERS AND DIRECTORS

6 Are there any restrictions on who can be a manager or company director?

6.1 Age restrictions

Age restrictions depend on the type of company:

- Corporations. The maximum ages of a chairman of the board or a managing director are 65. No more than one-third of the board members can be older than 70 (unless the memorandum and articles of association specify otherwise);
- Public companies. Since 2014, at least 20% of the board of public companies must be of each gender; and
- Limited liability companies. There are no legal restrictions on age however, the memorandum and articles of association can impose an age restriction.

6.2 Nationality restrictions

There are no nationality restrictions on managers and company directors, though foreign company directors must hold a residence permit in France.

6.3 Other restrictions

Directors cannot hold a mandate and a contract of employment in the same company at the same time, unless the employment within the company corresponds to an effective position with technical functions different from the director's duties, with a separate remuneration, and performed as a subordinate to the company.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

7 How is the employment relationship governed and regulated?

7.1 Written employment contract

Employment can be on a full or part-time basis and for an indefinite period. Fixed-term contracts are only permitted in special cases (such as to replace a temporarily absent employee or to meet a temporary increase in the employer's activity).

Employment contracts are not generally required to be written, but certain forms of employment contract must be in writing (see below). The employer should provide the employee with a written statement of the essential terms governing the employment relationship.

A written contract is necessary where:
An applicable collective bargaining agreement ("CBA") requires it;

- It is a fixed-term contract;
- It is a part-time contract;
- It is a temporary contract;
- It is an apprenticeship employment contract; or
- It is a professionalisation employment contract.

Oral fixed-term contracts are irrevocably deemed to be indefinite-term contracts and oral part-time contracts are deemed full-time contracts.

### 7.2 Implied terms

In addition to the employment contract, various sources govern the employment relationship, including:

- EU law;
- The French Constitution;
- The Labour Code;
- Case law;
- CBAs;
- Company collective agreements;
- Internal rules and regulations; and
- Company practices.

The employment contract can only alter these implied provisions if this is to the employee's advantage.

### 7.3 Collective bargaining agreements

A CBA is a written agreement negotiated at a national or regional level and entered into between:

- One or more trade unions representing employees; or
- One or more trade unions representing employers in a specific sector (and sometimes a specific location).

The CBA usually governs:

- Individual and collective labour relations;
- Working conditions;
- Social guarantees; and
- Employee benefits.

Whether a CBA applies depends on the employer's main business activity. A CBA is usually mandatory if the main activity falls within its scope and it has been extended by the Ministry of Labour.
Company collective agreements

A Company collective agreement is a written agreement entered into between the employer and one or more trade unions representing employees that have reached a certain level of audience at the last employee representative elections (currently 10%). Company collective agreements can address a variety of topics, notably working time, remuneration or gender equality at work. In certain companies, the employer must negotiate on determined subjects every year (or every three years). A Company collective agreement can, in some cases, derogate from the provisions of the CBA or even the law.

The validity of a Company collective agreement is currently subject to the signature of one or more trade unions representing employees that have a cumulative audience at least equal to 30% of the votes cast during the last employee representative elections. Loi travail provides for the progressive increase to 50% of the cumulative audience of the trade unions necessary to validly sign a Company collective agreement. Specific rules apply in case there is no union representative (Délégué syndical) within the company.

What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Whether or not an employer can change the terms and conditions of employment depends on whether the change results in a modification to the employment contract or a change to the conditions of employment.

If the change affects one (or several) of the essential terms of the employment contract (for example, salary or the duration of work), it is subject to the employee’s express consent. The employee’s refusal to accept this type of change is not a ground for dismissal, and the employer must give the employee a reasonable period during which to reflect on the proposed change, so that he can properly consider it.

If the change is grounded on economic reasons, the employer must, in principle, inform and consult staff representatives before proposing the modification. In such a case, the employer must propose the modification by registered letter with acknowledgment of receipt to each concerned employee, and leave them a one-month period to consider the change. If the employee refuses to accept the modification, the employer is then entitled to make the employee redundant on the same economic reasons ground that created the need for the proposed change.

If the modification only consists of a minor change to the conditions of employment (for example, a small change to the workplace), the change anticipated by the employer can be directly applied to the employees. The employee’s refusal in this instance could constitute misconduct.

Is there a national (or regional) minimum wage?

As of 1 January 2017, the minimum gross monthly wage is EUR1,480.27 for a 35-hour working week.

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 for minimum wages (depending on job categories).

Are there restrictions on working hours? Can an employee opt out on either an individual or collective basis?

Working hours

Usually, employees work 35 hours per week. In addition, employees must not work more than:

- An average of 44 hours a week during any 12 consecutive weeks;
- 48 hours during any given week;
• 10 hours a day; and
• 220 hours of overtime a year (subject to applicable CBAs or collective agreements).

However, employers can agree a longer work week with their employees. In that case they must pay any time worked over 35 hours a week in the same way as overtime (although there is no entitlement to additional days off).

It is possible to negotiate a more flexible working schedule for all employees with trade unions at company level. Law No. 2008-789 reforming working time (Loi portant renouvellement de la démocratie sociale et réforme du temps de travail) ("Working Time Law") and Loi Travail, provides for working time to be reorganised at company level. Working time can notably be reorganised on a multiple-week basis: the employee works an average of 35 hours over four (or more) weeks, while their working time is different each week.

However, statutory restrictions on working time must be met (see above) and the employees duly informed of the working schedule.

Special rules apply to autonomous executives (that is, executives of a certain level who freely organise their working time) and to employees who can autonomously organise their working schedules. These executives can:

• Agree to a set number of days to be worked per year (this number cannot exceed 218 days, allowing, on average, nine additional days off a year); and
• Renounce some of their days off, depending on the applicable CBA. If there is no applicable CBA, they must not work more than 235 days a year.

However, recent case law has considerably increased the conditions in order to validly implement such type of working time arrangement (most notably, the employer must put in place a procedure designed to regularly check the workload of the concerned employee) and its use is becoming more difficult. Loi travail aims at securing this type of arrangement by setting out minimum rules for monitoring the workload of the employees concerned in case no sufficient provisions are provided for by a collective agreement.

Generally, all employees (including executives) must be granted both:

• A daily rest period of 11 consecutive hours; and
• A weekly rest period of 35 consecutive hours, including Sunday.

Most French law regarding working time does not apply to senior executives (cadres dirigeants).

The Act of 10 July 2015 (Loi Macron) allows up to 12 Sundays (instead of just five) to be worked upon authorisation from the Mayor, and allows shops located in an "international tourism area" to open up until midnight without the hours worked between 9pm and midnight qualifying as night work.

10.2 Rest breaks

When employees work more than six hours a day, they are entitled to a rest break of 20 minutes, unless more favourable provisions are made by any applicable CBA.

10.3 Shift workers

Shift working is only applicable in certain fields of activity, where it can be authorised by decree, convention or branch, venture or establishment agreement. Supplementary medical supervision is compulsory for shift workers and their maximum working time is strictly limited.

The working time of employees who permanently undertake shift work cannot exceed 35 hours per week (worked week) on average over the year (Article L. 3132-15, Labour Code).

In addition, many CBAs provide a minimum rest break for each shift.
HOLIDAY ENTITLEMENT

11 Is there a minimum paid holiday entitlement?

11.1 Minimum paid holiday entitlement

Employees are entitled to a minimum of five weeks' paid holiday a year, in addition to public holidays.

The law and CBAs grant additional paid leave for:

- Employees who have reached a specific length of service; and
- Family-related events.

Autonomous executives also benefit from additional days off (see Question 10).

11.2 Public holidays

France has the following public holidays which are not included in the minimum holiday entitlement:

- New Year’s Day (1 January);
- Easter Monday (March/April, this fluctuates each year);
- Labour Day (1 May);
- Victory in Europe Day: end of World War II (8 May);
- Ascension Day (May/June, this fluctuates each year);
- Whit Monday (May/June, this fluctuates each year);
- Bastille Day: National Day (14 July);
- Assumption of Mary (15 August);
- All Saints’ Day (1 November);
- Veterans Day/Remembrance Day: end of World War I (11 November); and
- Christmas Day (25 December).

ILLNESS AND INJURY OF EMPLOYEES

12 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

12.1 Entitlement to unpaid time off

Employees who are absent due to illness or injury must obtain a medical certificate covering the period of sick leave. During the period of illness or injury, the work contract is suspended. Unless it is necessary to replace the sick employee with another employee under an indefinite term contract, the former cannot be dismissed.

12.2 Entitlement to paid time off

Article L.1226-1 of the Labour Code provides that the employee’s remuneration must be maintained for a certain length of time (up to 90 days), depending on the employee’s seniority and provided that the employee:

- Has at least one year’s service with the employer;
• Provides a medical certificate within 48 hours of the absence;
• Is covered by social security; and
• Benefits from medical care either in France or in a member state.

In addition, CBAs often specify that the employer must supplement social security payments for a certain period of time, up to the level of all or part of an employee's salary if that employee has attained a specific length of service. This is a personal obligation for the employer and it cannot recover these payments from the social security system. However, most companies are insured to cover these obligations.

12.3 Recovery of sick pay from the state

Employees who are absent due to illness or injury receive daily indemnities from the social security system (for a maximum of three years).

STATUTORY RIGHTS OF PARENTS AND CARERS

13 What are the statutory rights of employees who are:

• Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
• Carers (including those of disabled children and adult dependants)?

13.1 Maternity rights

Employees are entitled to the following maternity leave:

• For a single birth bringing the mother's number of children to one or two: 16 weeks, consisting of:
  o six weeks before childbirth; and
  o 10 weeks after childbirth;
• For a single birth bringing the mother's number of children to three or more: 26 weeks, consisting of:
  o eight weeks before childbirth; and
  o 18 weeks after childbirth;
• For a multiple birth of twins: 34 weeks, consisting of:
  o 12 weeks before childbirth; and
  o 22 weeks after childbirth; or
• For a multiple birth of triplets or more: 46 weeks, consisting of:
  o 24 weeks before childbirth; and
  o 22 weeks after childbirth.

If the mother suffers an illness during pregnancy, she is entitled to two more weeks before the childbirth and four more weeks after the childbirth.

The relevant CBA can grant additional maternity leave. Employees can choose to increase the proportion of maternity leave taken after childbirth, decreasing the proportion taken before childbirth, if a physician authorises this.

Following maternity or adoption leave (see below, Adoption rights), employees have the right to return to their original position (or a similar position with the same remuneration). Additionally,
except in the case of serious misconduct or cases where it is impossible to maintain the contract, employees cannot be dismissed during:

- Pregnancy;
- Maternity leave after childbirth; or
- The 10 weeks after the end of maternity leave.

Employees with at least one year's service on the date of the birth or adoption can either:

- Take unpaid parental leave up until their child's third birthday (see below, Parental rights); or
- Return to work on a part-time basis.

Employees on maternity, paternity or adoption leave are entitled to a daily allowance from the social security authorities. The employer is not required to pay salary during this time. However, CBAs frequently state that the employee's salary must be paid in full if the employee has a certain length of continuous service (usually one year's service on the date of the child's birth or adoption).

13.2 Paternity rights

Male employees are granted three days' leave on the birth or adoption of a child. They are also entitled to 11 consecutive days' paternity leave (18 days if there are multiple births or adoptions), which must be taken within the four months following the birth or adoption. As with the mother, the father cannot be dismissed (except for the reasons described above) during the 10 weeks following the birth of the child.

Fathers are entitled to a daily allowance from the social security authorities (see above, Maternity rights), but the employer does not have to maintain the employee's remuneration during the leave (unless specifically provided for by any applicable CBA).

13.3 Surrogacy

Surrogacy is prohibited in France, and so there are no specific provisions covering this.

13.4 Adoption rights

The following rules apply to leave:

- Before adoption. Employees authorised to adopt by social services (Direction des Affaires Sanitaires et Sociales) can take unpaid leave of up to six weeks if they travel abroad to adopt a child; and

- After adoption. If the adoption leave is taken by only one parent: all employees authorised to adopt by social services have the following rights to leave:
  - for adoption of a single child bringing the parent's number of children to:
    - one or two: 10 weeks; or
    - three or more: 18 weeks; or
  - for multiple adoptions, adoption of twins, triplets or more: 22 weeks.

If the adoption leave is shared between both parents, the adoption leave is increased by 11 days (or by 18 days in case of adoption of twins, triplets or more).

The total amount of adoption leave taken cumulatively by the mother and the father must not exceed these limits (unless a CBA grants additional rights).

Adoptive parents are entitled to a daily allowance from the social security authorities (see above, Maternity rights).
Parental rights

Employees who have worked for at least one year before the date of their child's birth, or before welcoming a child no older than 16 years to their home with a view to adoption, can take parental leave or work part-time. This right lasts until the child's third birthday, unless the child was aged between three and 16 on arrival, in which case the adoptive parent can take one year's parental leave from the date of arrival.

If employees take parental leave, their employment contract is suspended and the employer does not have to pay compensation. However, the employees can receive certain indemnities from the social security system.

Parents can also benefit from additional leave when their child is sick, which usually amounts to between three and five days depending on the child's age and the parent's number of children. However, if the child suffers from a serious illness or disability, the parents can ask to work part-time or suspend their employment contract for a maximum of six months. They can also take a specific leave of 310 days over three years when the child suffers from a severe illness, disability or accident, which requires continuous parental presence or constraining care.

The Law of 9 May 2014 allows employees to renounce to some of their holiday entitlements (above the first 24 days of holiday) and give them to a colleague who needs resting days to take care of a seriously ill child. However, the employer is not obliged to accept this, and can refuse or partially accept it.

Carers' rights

Employees who have worked at least two years who are carers can take specific unpaid leave of three months, possibly renewable (up to a year).

CONTINUOUS PERIODS OF EMPLOYMENT

14 Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

14.1 Benefits created

Depending on the applicable CBA and company collective agreements, benefits linked to service mainly include rights to:

- Certain leaves of absence (for example, parental leave (see Question 13));
- Increased protection on dismissal (see Question 20);
- Maintain salary during illness or maternity leave (see Questions 12 and 13);
- Participate in the election of employee representatives and be a candidate;
- Benefit from profit-sharing plans
- Seniority measures; and
- Consequences of a transfer of employee.

The employees' period of continuous service is carried over on a transfer of undertakings under the Employee Transfer Rules (Article L.1224-1, Labour Code) (see Question 24).
To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

### 15.1 Temporary workers

Temporary and agency workers are entitled to the same rights and benefits as permanent employees regarding:

- Working hours;
- Night work;
- Weekly time-off and statutory holidays;
- Health and safety in the workplace; and
- Women, children and young workers’ work.

In addition, the remuneration of an agency worker cannot be less than that of a permanent employee with the same duties in the same company.

Temporary and agency workers cannot benefit from the company's mandatory and optional profit-sharing schemes, but are entitled to benefit from the mandatory and optional profit-sharing schemes of the agency with which they are under contract.

### 15.2 Agency workers

Fixed-term employees. For fixed-term employment contracts, temporary contracts generally contain a fixed term not exceeding 18 months (renewal included). Otherwise, the contract may be deemed to be a permanent contract with the temporary employment company (Article L.1251-40, Labour Code) from the beginning of the workers assignment. A breach of these provisions may be punished by a fine up to EUR3,750.

In general, if the employer fails to respect the provisions regarding fixed-term contracts, the employee is deemed to be a permanent employee. Notably, this is the case where there are multiple successive fixed-term contracts with the same employee. Furthermore, fixed-term contracts cannot, in principle, be terminated before the term fixed in the contract, unless “force majeure” is qualified.

However, there are some exceptions to the rule, for example, where a temporary contract for an unfixed-term (with a specified minimum duration) is used when the employer ignores the future duration of the contract at the time of its conclusion (Article L.1251-11 et seq, Labour Code). In these cases, the contract ends when the purpose for which it has been concluded ceases (such as when the fixed-term contract replaces an employee on sick leave).

Employees under a fixed term contract are entitled to a specific indemnity amounting to 10% of the total gross remuneration paid during the contract at the end of the term of their contract and provided that no indefinite-term contract of employment is agreed at the end of it.

### 15.3 Independent contractors

For independent contractors, if a court finds that the contractor actually works as a subordinate to the company he is contracted to work with, the contractor may be deemed a permanent employee with an indefinite-term employment contract. The company can be held liable for undeclared work and possibly illegal loan of workforce.

### 15.4 Part-time workers

Temporary and agency workers are entitled to the same rights and benefits as full-time employees, in particular regarding:

- Probationary period;
- Continuous employment; and
- Holiday entitlement.

The Act of 14 June 2013 (as modified by the order dated 29 January 2015) requires that, part-time workers' contracts must provide for a minimum of 24 hours per week working time (Article L.3123-14-1, Labour Code). The 24 hour minimum does not apply to fixed-term contracts of a duration of up to 7 days.

**DATA PROTECTION**

16

Are there any requirements protecting employee privacy or personal data? If so, what are an employer's obligations?

16.1 Employees' data protection rights

Specific provisions aim to protect employees' data in the context of medical records, computerised employment records and recruitment.

16.2 Employers' data protection obligations

Data protection is regulated by the Data Protection and Civil Liberties Act of 6 January 1978. Under this Act, individuals can access, modify, correct and delete any personal data concerning them (Articles 38-43). Without first obtaining the relevant party's prior written approval and the prior written approval of the Data Protection Authority (Commission Nationale de l'Informatique et des Libertés (CNIL)), it is prohibited to record or store personal data relating to (Article 8):

- racial or ethnic origins;
- political, religious or philosophical opinions;
- union membership;
- medical information; and
- sexual orientation.

However, this does not apply to databases processed by religious bodies, political parties or unions. Any breach of this rule is punishable by five years' imprisonment and a fine of up to EUR300,000 (Article 226-19, Criminal Code).

Data Protection is also regulated by:

- Labour Code (see above, Employees' data protection rights);
- Civil Code. Individuals are entitled to respect for their private life (Article 9); and
- Criminal Code. The following are punishable by five years' imprisonment and a fine of up to EUR300,000:
  - processing a database that contains personal data without following correct procedure (Article 226-16);
  - storing personal data beyond the time limit stated in the declaration without the prior written approval of the CNIL (Article 226-20);
  - processing personal data without taking all relevant steps to keep the information confidential, in particular, to prevent it from being disclosed to unauthorised third parties (Article 226-17);
  - collecting data by fraudulent, unfair or unlawful means, or processing information against a person's will (Article 226-18); and
  - diverting personal data from its proper purpose (at the time of its recording, classification, transmission or any other form of processing) as defined by the legislative provision or
regulation or decision of the CNIL authorising automated processing, or by the preliminary statement made before the implementation of that processing (Article 226-21).

In addition, the CNIL regularly issues recommendations, which must be used as guidelines.

DISCRIMINATION AND HARASSMENT

17 What protection do employees have from discrimination or harassment, and on what grounds?

17.1 Protection from discrimination

Discrimination is prohibited throughout the employment relationship. It is forbidden to punish or dismiss employees, or exclude potential employees from the recruitment process, on the basis of their (Article L.1132-1, Labour Code; Articles 225-1 et seq, Criminal Code):

- Origin;
- Gender;
- Sexual orientation;
- Morals;
- Age;
- Marital status;
- Pregnancy;
- Religious beliefs;
- Nationality;
- Ethnic or racial origin;
- Genetic characteristics;
- Political opinions;
- Trade union activities;
- Physical appearance;
- Family name;
- Medical condition; or
- Disability.

In addition, employees cannot be dismissed for going on strike in accordance with legal provisions. Discrimination is a criminal offence punishable by:

- For the employer's legal representative (generally the chief executive officer ("CEO")), a maximum of three years' imprisonment and a fine of EUR45,000 (Article 225-2, Criminal Code); and
- For the employer (as a company), a fine of up to EUR225,000 (Article 225-4, Criminal Code).

The qualifying period for claims concerning discrimination is five years as from the date of its revelation (Article L.1134-5, Labour Code).
17.2 **Protection from harassment**

Employees are protected from sexual and moral (that is, psychological) harassment (Articles L.1153-1 and L.1152-1, Labour Code). Harassment is a criminal offence punishable by up to two years' imprisonment and a maximum fine of EUR30,000 (Article 222-33-2 of the Criminal Code).

Any disadvantageous measure taken (such as a dismissal) resulting from discrimination, or an act of sexual or psychological harassment (or the reporting of such acts), is void. The employee must be reinstated or receive compensatory damages (Loi travail 2016 provides for a minimum of six months' pay where the employee does not ask to be reinstated, on top of payment of the employee’s remuneration for the period covered by the annulment. Additionally, the employer is liable for its employees' mental health and must take measures to ensure that they work in a safe environment.

The law dated 6 August 2012 has toughened sanctions against persons guilty of harassment. This law has introduced into the Labour Code a new offence of discrimination following harassment (Article 225-1-1, Criminal Code).

This law also imposes obligations on the employer (such as to display the text of the Criminal Code on harassment at the workplace) and gives a right of alert (droit d'alerte) to the staff representatives on the matter.

The qualifying period for claims concerning harassment is five years before the civil court and three years before the criminal courts.

WHISTLEBLOWERS

18 **Do whistleblowers have any protection?**

On 8 November 2016, the French Parliament passed a law reinforcing the status of whistleblowers.

The law defines a whistleblower as an individual who selflessly and in good faith reveals or reports: a crime or an offense; a clear and serious violation of an international agreement properly ratified or approved by France of an international organization's unilateral act taken on this basis, of law and regulations; or a threat or a serious harm caused to the public interest of which he or she has personal knowledge.

The whistleblower cannot be discriminated against or face unfavourable measures – particularly in terms of remuneration or career evolution – nor be excluded from a recruitment procedure, or be disciplinarily sanctioned (including dismissal).

TERMINATION OF EMPLOYMENT

19 **What rights do employees have when their employment contract is terminated?**

19.1 **Notice periods**

The parties must observe and cannot waive the required notice periods before an indefinite-term contract is terminated. There are exceptions to this rule (for example, dismissals for gross misconduct).

The notice period depends on the employee's length of service.

Employees who are dismissed or made redundant are entitled to pay in lieu of notice if they are not required to observe their notice period.

19.2 **Severance payments**

Severance pay is only awarded if:

- The employer terminates an indefinite-term contract; and
- The employee has the minimum length of service required by the Labour Code or an applicable CBA (usually one year).
Severance pay depends on the employee's length of service and the relevant CBA's provisions. It is generally calculated on the basis of an employee's average salary (often including bonuses as well as basic salary) during the last year of employment. Employees receive statutory severance pay (that is, one fifth of monthly salary for each year of service for the first 10 years of service and one third for each year above 10 years of service) if no CBA applies or the CBA rate is lower than the statutory amount.

Employment contracts can also provide for severance payments, as long as their rate is higher than that of the CBA or the statutory amount. However, severance payments in company directors' employment contracts must be approved by the company’s corporate governance body.

19.3 Procedural requirements for dismissal

In the case of an indefinite-term employment contract, there must be real and serious grounds for dismissal, either on personal or economic grounds (see Question 20).

Once an employer believes that there is a valid ground for dismissal (except for redundancies, which are dealt with at Question 21), it must hand deliver or send by registered mail against acknowledgement of receipt, a letter giving the employee five working days’ notice of a meeting. This letter must set out the (Articles L.1231-1 et seq, Labour Code):

- Time and place of the meeting; and
- The employee's right to be accompanied by a fellow employee or by somebody belonging to a list established by the Préfet (French local authority).

During the meeting, the employer must state why it intends to dismiss the employee and take note of the employee’s explanations. The employer must notify the employee of its decision (at the earliest, on the third working day following the meeting) and, as the case may be, specify the grounds for dismissal in a letter sent by registered mail against acknowledgement of receipt. The employee must acknowledge receipt and can dispute the dismissal's grounds before an employment tribunal.

If the contemplated dismissals are based on economic grounds, the employer must first select which employees to make redundant by considering some selection criteria, including:

- The number of the employees' dependants (especially for single parents);
- The employees' length of service;
- Potential difficulties that the employees may face in finding new employment (such as age or disability); and
- The employees' professional skills.

The employer must also make every effort, for employees facing redundancy, to find another position in the same company or group, worldwide. It must also help employees to adapt to the evolution of their job position by way of training programmes. Non-compliance with these rules makes the redundancy unfair, meaning that employees could claim damages.

Employees who are made redundant must be given priority during a one-year period if their previous, or a similar, position becomes vacant within their former employer.

If the dismissal procedure is not followed, the employee can claim an indemnity of up to a month's salary.

When terminating an employment contract the employer must also perform some incidental duties. The employer must:

- Give the employee a:
  - certificate of employment;
  - receipt acknowledging full settlement; and
Certificate for the State Unemployment Fund (Pôle Emploi) to enable the employee to apply for unemployment insurance benefits;

Send the State Unemployment Fund a copy of the certificate which enables the employee to gain the unemployment insurance benefits; and

Declare to the administration the:

- number of dismissals concerning employees over the age of 55 years;
- age of the employee when he is leaving the company; and
- amounts paid to the employee because of the dismissal (except some sums that are strictly the counterparts of the employment).

If the dismissal is made on economic grounds, the employer must inform the administration of the dismissal. If more than one dismissal is made on economic grounds, the employer must communicate to the administration the documentation provided to the staff representatives.

What protection do employees have against dismissal? Are there any specific categories of protected employees?

Protection against dismissal

In the case of an indefinite-term employment contract, there must be real and serious grounds for dismissal.

All employees are entitled to protection against dismissal regardless of their length of service. However, employees can be subject to a probationary period that enables the employer to assess employees' skills. This probationary period is not automatic and must be provided in the employment contract (Article L. 1221-23 et seq, Labour Code). Article L. 1221-19 of the Labour Code provides that the probationary period can be for two to four months (depending on the employee's position), unless provided for in a more favourable way in the employment contract, or in the applicable CBA if concluded after 27 June 2008. During this period, the employer or the employee can terminate the contract without having to justify their decision, and without the obligation to respect the schedules and formalities normally applicable to dismissals or resignations. However, case law tends to reduce this absolute right by punishing abusive terminations, such as terminations based on discrimination, causing harm, or not relating to the employee's skills.

In addition, termination of the employment contract during the probationary period is subject to a notice period.

There are two types of valid grounds of dismissal:

- **Personal grounds.** These can include:
  - poor performance or unsatisfactory professional skills;
  - inability to perform the assigned tasks; and
  - misconduct within the company.

  An employee's repeated absence or absence over a long period of time (which is not related to a work-related accident or illness) can also constitute, in certain circumstances, valid grounds for dismissal;

- **Economic grounds.** The Labour Code permits four economic grounds for dismissal:
  - economic difficulties facing the relevant business sector at group level (ie economic difficulties may be characterized either by the significant development of at least one economic indicator such as a drop in orders or turnover, operating losses or a deterioration in cash or surplus, or by any other factor capable of justifying such difficulties);
  - technological changes;
However, a fixed-term contract can only be terminated where any of the following occurs:

- Serious or gross misconduct;
- An act of God; or
- Mutual agreement.

In addition, an employee can terminate a fixed-term contract unilaterally if another employer offers them an indefinite-term employment contract.

Employees who are unfairly dismissed can challenge their dismissals before the Employment Tribunal. If the judges find the dismissals are unfair, they can grant compensation. An employee is entitled to a minimum of six months' pay as compensation if the dismissal is deemed unfair, if both:

- They have worked for more than two years for their employer; and
- The employer has at least 11 employees.

Compensation is usually financial, but in some cases employees have a right of reinstatement. This is where dismissals are not unfair but void, including:

- Discriminatory dismissals (see Question 17).
- Dismissal of employee representatives without the Labour Administration's prior authorisation (see below, Protected employees).
- Insufficient redundancy plan (see Question 21).
- Dismissals implemented in violation of Article L.1224-1 of the Labour Code (see Question 24).

20.2 Protected employees

Certain employees have varying levels of protection against dismissal, including:

- Pregnant women;
- Employees on sick leave as a result of a work-related illness or accident;
- Employee representatives; and
- Employee representatives can only be dismissed if the Labour Inspector authorises it.

REDUNDANCY/LAYOFF

21 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

21.1 Definition of redundancy/layoff

A redundancy is a dismissal for economic grounds, which the Labour Code defines as:

- Economic difficulties facing the relevant business sector at group level (ie economic difficulties may be characterized either by the significant development of at least one economic indicator such as a drop in orders or turnover, operating losses or a deterioration in cash or surplus, or by any other factor capable of justifying such difficulties).
- Technological changes;
- Safeguard of competitiveness; and
Business closure.

Loi travail has modified the legal definition of the economic grounds for dismissal in order to insert the last two grounds which were already recognised by case law at article L.1233-3 of the Labour Code. The new definition applies from 1 December 2016.

If the employees contest the redundancy as unfair dismissal before the courts, the employer must be able to provide evidence of the grounds for redundancy that appear in the dismissal letter.

For collective redundancies, the employer must send a detailed note to the staff representatives for the purpose of the information and consultation process which:

- Explains the grounds for the redundancy; and
- Provides some evidence of the existence of an economic motivation.

21.2 Procedural requirements

The redundancy procedure to be followed depends on a number of factors, including:

- The number of employees being made redundant;
- The size of the employer's workforce;
- Whether the employer has staff representation bodies;
- The time frame for the redundancies; and
- Whether or not the works council appoints a chartered accountant for assistance.

The following procedure applies to restructurings and redundancies of at least 10 employees over a 30-day period where the employer has both:

- At least 50 employees; and
- A works council.

The law on job security (loi de sécurisation du l’emploi) dated 14 June 2013 has significantly modified the procedure concerning collective redundancies (with a choice between a negotiated procedure with the representatives of the trade unions (leading to the signature of a collective agreement) or a unilateral process, a new timeline of procedure, and an increase in the role of the Labour administration).

The employer must start a two-stage works council information and consultation process, either concurrently or consecutively. The employer must take the works council's opinion into consideration, although it is not binding.

21.3 Restructuring

The employer must complete this procedure before reaching a final decision on the planned restructuring (Articles L.2323-15 et seq, Labour Code). Among other things, the employer must:

- Provide detailed information about the reasons for the restructuring;
- Allow the works council sufficient time to review these issues; and
- Answer all questions the works council raises.

Since 1 April 2014, companies with over 1,000 employees must, before closing a site, look for a potential buyer for the site concerned (Article L.1233-57-9 and L. 1233-57-10, Labour Code). The sanction for not complying with this obligation is the refusal of the administration approval required for the collective redundancy plan (see below, Collective redundancies). From 1 November 2014, companies with less than 250 employees must inform employees of any operation resulting in the sale of more than 50% of the equity of the company in order to allow them to present an offer to buy the equity.
21.4 Redundancy/layoff pay

In addition to the plan’s benefits (see below), employees who are made redundant are entitled to:

- Severance pay (see above, Severance payments);
- Pay in lieu of notice (see above, Notice periods); and
- Pay in lieu of holiday.

21.5 Collective redundancies

The employer must complete this procedure before reaching a final decision on the contemplated redundancies (Articles L.1233-21 et seq, Labour Code):

- Among other things, the employer must set up a collective redundancy plan and inform and consult the works council on this plan;
- The collective redundancy plan must either be in the form of a collective agreement signed with representatives of trade unions and validated by the administration, or a unilateral document drafted by the employer and approved (homologué) by the administration (Direccte). The control of the Direccte will be more important in the second scenario;
- The plan provides measures that encourage the redeployment (including in foreign locations, if the employee is willing) or retraining of employees facing redundancy. The works council or representative trade unions often negotiate an increase in severance pay;
- The works council (as well as trade union representatives, where a negotiation takes place) is entitled to be assisted by an expert or a chartered accountant paid for by the employer. In particular, the expert's mandate is to assist the works council with all financial and economic issues and help the works council analyse the economic rationale behind the contemplated collective redundancies. Experts can access the same documents as auditors and can request any document they consider useful within the employer and its group of companies. Depending on the number of redundancies considered, the works council has between two and four months to give its opinion (except as provided otherwise in the potential collective agreement signed with trade union representatives);
- The employer can inform employees of their redundancy in writing after the notification of the Direccte of its approval of the decision (decision d'homologation) in the case of the unilateral procedure or validation decision (decision de validation) in the case of the negotiated procedure with trade union representatives;
- The employer must offer each employee facing redundancy the option of taking advantage of a redeployment programme (which varies depending on the size of the employer's workforce); and
- If the attempts at redeployment fail, the employer must inform the administration of the notified redundancies.

EMPLOYEE REPRESENTATION AND CONSULTATION

22 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? What is required in a consultation process? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

22.1 Management representation

The works council is the main employee representative body for employers with at least 50 employees. It can appoint two of its members to attend board and shareholders’ meetings.

It is possible to regroup the different employee representative bodies or some of them into one. The procedure is different depending on the size of the company.
The law on job security has introduced the obligation for certain types of large companies (with at least 1,000 employees) to have employees' representatives on the board, with voting rights.

22.2 Consultation requirement

The consultation process requires the employer to communicate to the works council precise written information and oblige the employer to give motivated answers to its comments on the projects subject to consultation (Article L.2323-4, Labour Code).

22.3 Consultation

The works council has wide-ranging powers, and must be informed and consulted on almost all major company decisions, including:

- Matters relating to the employer's:
  - organisation;
  - management; and
  - general running;

- Decisions that are likely to affect:
  - the volume or structure of the workforce;
  - working hours and conditions; and
  - training;

- Restructuring operations and collective redundancies; and

- A change in the company's economic or legal structure, especially in the case of mergers or transfers of undertakings, or major changes in the production structure of the company, as well as of the takeover or sale of subsidiaries.

In the case of a public bid, the head of the company must inform the works council as soon as a takeover bid (offre publique d'achat) launched against a company or a public offer of exchange (offre publique d'échange) has been brought to their knowledge. In the case of a takeover bid, the target company must consult the works council before the board's decision on the bid. If the works council deems it necessary, it can invite the entity that launched the bid to a meeting to present its project to the works council (Article L.2323-35, Labour Code). However, this opinion is not binding on the employer.

Similarly, when a concentration is notified to the European Commission or the French national authorities for merger control and competition regulation, the head of any undertaking which is deemed a party to the concentration must inform the works council of the expected impact of the concentration on competition within three days of the publication of the submission notice (Article L.2323-34, Labour Code).

22.4 Major transactions

Employees are consulted through their elected representatives, not directly, on major transactions (see above, Consultation).

23 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

23.1 Remedies

If the chief executive, or a representative, breaches the consultation provisions, a criminal offence is committed, punishable by a maximum fine of EUR7,500 (EUR15,000 for repeated offences).

The company is also liable to pay a fine of EUR37,500.
23.2 Employee action

The works council and/or the unions are also entitled to obtain an injunction to suspend the implementation of the decision until they are properly informed and consulted.

CONSEQUENCES OF A BUSINESS TRANSFER

24 Is there any statutory protection of employees on a business transfer?

24.1 Automatic transfer of employees

Employees are automatically transferred if there has been a transfer of an autonomous economic entity (although the former employer can, with the relevant employees' approval, agree to retain certain employees) (Employee Transfer Rules (Article L.1224-1, Labour Code)). An autonomous economic entity is defined as an organised group of persons, with its own operating resources, clients and line of business.

The Employee Transfer Rules also apply to either:

- A transfer of part of the business; or
- A change in service providers, depending on the circumstances.

24.2 Protection against dismissal

Dismissals implemented by the transferor before the transfer, are prohibited and deemed void if they are to prevent the Employee Transfer Rules from applying (except for court-approved restructuring or insolvency proceedings or, under certain circumstances, for large companies with at least 1,000 employees). The relevant employees are entitled to reinstatement with the transferee or damages.

Dismissals implemented by the transferee after the transfer are subject to the usual rules on dismissals (see above, Dismissal of employees).

24.3 Harmonisation of employment terms

Employees' collective employment rights are not maintained except for a limited period of time (usually 15 months). Collective agreements are not transferred to the transferee.

The new employer must try to negotiate a new collective agreement (accord de transition ou d'adaptation) that defines the transferred employees' collective rights. According to Loi travail, if an agreement is not reached, the transferred employees continue nevertheless to benefit from their last annual remuneration (before Loi travail, employees would benefit from their individual acquired rights (avantages individuels acquis)).

Employees benefit from the existing collective agreements already applicable to their new employer.

Employment contracts are automatically transferred where the Employee Transfer Rules apply, without any modification whatsoever. The terms and conditions of the transferred employees should therefore not be modified after the transfer.

The courts do sometimes accept that the transferred employment contract can be modified following the transfer, but on the strict conditions that both:

- The employee expressly agrees to the modification (that is, they accept the modification in writing, while entering into an amendment to their initial employment contract); and
- The new employer does not actually commit fraud to the Employee Transfer Rules. Courts notably rule for fraud where the new employer has proposed a new employment contract to the transferred employees on the day of the transfer (Supreme Court, 9 March 2004, No. 02-42.140), or when the proposed modification actually meant that the employee was downgraded (Supreme Court, 14 January 2004, No. 01-45.126).
EMPLOYER AND PARENT COMPANY LIABILITY

25 Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company’s employees?

25.1 Employer liability

An employer can generally be held:

- Civilly liable for its employees’ acts; and
- Criminally liable for breaches of employment law that its representatives commit.

25.2 Parent company liability

In principle, a parent company cannot be held liable for the acts of a subsidiary company’s employees, unless it has acted as their employer (for example, by directly supervising them). However, in specific cases where a French subsidiary of a foreign group is closed down, courts can hold the foreign parent company liable for payment of severance indemnities, but this is becoming very uncommon.

EMPLOYER INSOLVENCY

26 What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

26.1 Employee rights on insolvency

Employees employed by a company subject to an insolvency procedure (whether it be reorganisation proceedings (redressement judiciaire) or a compulsory liquidation (liquidation judiciaire)) remain employed by the company until their potential dismissal for economic reason (redundancy). The redundancies are decided by the judge in charge of following up the procedure, except in the case of a judicial winding-up were the employees are made redundant by the liquidator following the judgment providing for the winding-up. Both require the drawing up of a collective redundancy plan if the conditions relating to the number of redundancies and employees within the company are met.

26.2 State guarantee fund

Employees have the status of preferred creditors. The preference is divided between privileged debts and over privileged debts (super privilège). Employees benefit from the protection of the Salary Guarantee Insurance scheme which is funded by a monthly contribution levied on salary. The guarantee applies to salary and various indemnities owed to the employee in the case of redundancy but is limited, depending on seniority, to a maximum of EUR77,232.

HEALTH AND SAFETY OBLIGATIONS

27 What are an employer’s obligations regarding the health and safety of its employees?

The head of the employer’s organisation (CEO) can be held criminally liable for breaches of health and safety rules (Labour Code).

Employers also have an absolute contractual duty to protect their employees' safety. For instance, the employer can be considered to have made an inexcusable error (faute inexcusable) in the event of a suicide on the workplace (Court of Appeal of Versailles, 19 May 2011, Renault SA).

27.2 Risk prevention

To avoid liability, the chief executive must ensure that legal provisions concerning safety in the workplace are strictly followed at all times. It is also necessary to evaluate the risks to employees’ health and safety when selecting:
- Manufacturing processes;
- Work equipment;
- Chemical substances to be used in the work process; and
- The workplace's layout or organisation.

Having made this assessment, the chief executive must adopt a risk prevention approach by, for example:
- Adapting work to the employee;
- Taking into account technological developments; and
- Replacing something dangerous with something less (or not) dangerous.

The risk assessment must be recorded in a written document (Document unique d' évaluation des risques), which should be accessible to:
- The Health, Safety and Working Conditions Committee (Comité d' Hygiène de Sécurité et des Conditions de Travail);
- Employee representatives or, in their absence, any person subject to a health or safety risk;
- The occupational doctor; and
- Control agents.

Failure to record in writing or update (at least each year) the risk assessment results is punishable by fines of:
- EUR1,500 for the chief executive; and
- EUR7,500 for the employer.

The employer is also bound to establish a record for each employee who is exposed to one or multiple professional risks, a dangerous working environment or to intensive working schedules. That record is to be transmitted to the occupational doctor.

Employees subject to difficult working conditions (nightshifts, noise, chemical agents) benefit from a "difficult working conditions account" (Compte personnel de prevention de la pénibilité) where they collect points that can be converted into training or be used to reduce their working time or retire early.

Additionally, non-compliance with Labour Code requirements regarding health and safety are punishable by a fine of EUR3,750.

27.3 Work-related accidents

Employees who suffer work-related accidents are compensated by a lump-sum indemnity paid by the social security system and the employer.

If the employer is guilty of gross negligence or wilful misconduct, the employer fully compensates the employee and can also be held liable for:
- The endangerment of the life of others (Article 223-1, Criminal Code); and
- In cases of death through breach of a duty of care or a safety regulation, involuntary manslaughter (Article 221-6, Criminal Code). This offence is punishable by both:
  - five years' imprisonment; and
  - a fine of EUR75,000.
When the employer is found guilty of such gross negligence, the employee receives a higher indemnity through the social security system, which is compensated by the employer paying higher social security contributions.

**TAXATION OF EMPLOYMENT INCOME**

28 What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

28.1 **Foreign nationals**

Foreign nationals who are French tax resident are taxed as French nationals on their gross salary, net of social security contributions. Tax residents are persons to whom one of the following applies:

- They live in France or have their main place of residence in France;
- They undertake their main professional activities in France; and
- The centre of their economic interests is in France.

There is a 10% professional expenses allowance deduction (limited to EUR12,170).

If a foreign national is not French tax resident and carries out a professional activity in France, a withholding tax at a progressive rate of 0%, 12% and 20% is imposed on salary payments (unless a double taxation treaty provides otherwise).

28.2 **Nationals working abroad**

If French nationals are French tax resident, they are taxed on their total income, regardless of its source (unless a double taxation treaty provides otherwise).

If they are not French tax resident, no tax is paid in France on income derived from work carried out abroad.

29 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

29.1 **Rate of taxation on employment income**

French employment income is taxed according to a progressive tax rate. The rates on income earned in 2013 are:

- 0% for income under EUR9,700;
- 14% for income from EUR9,700 to EUR26,791;
- 30% for income from EUR26,791 to EUR71,826;
- 41% for income from EUR71,826 to EUR152,108; and
- 45% for income over EUR152,108.

29.2 **Social security contributions**

The employer’s share of social security contributions amounts to about 43% of the gross salary, while the employee’s share amounts to about 22%. However, some contributions are capped for wages up to four, or eight times, the social security ceiling (the security ceiling was revaluated at EUR3269 per month and EUR39,228 per year for 2017).

The employer is liable to pay social security contributions and must withhold the employee’s share from the gross monthly salary. All employers paying more than EUR20,000 of social security
contributions per year have been obliged to declare and pay their social security contributions online.

**BONUSES**

30  **Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?**

It is common practice to reward employees through bonuses. Case law distinguishes between discretionary and contractual bonuses:

### 30.1 Discretionary bonuses

Bonuses are discretionary when the employer is completely free to choose whether or not to award them. If so, they are not considered an integral part of the remuneration package.

However, on 30 April 2009, the French Supreme Court ruled that:

- Discretionary bonuses must be justified on objective and appropriate grounds; and
- The employee must be informed of these grounds before entering into the employment contract.

It is therefore debatable whether discretionary bonuses can still be granted.

### 30.2 Contractual bonuses

Under case law, if a bonus is provided for in the employment contract, it is a contractual element of the remuneration package and can only be modified with the employee’s consent. If the bonus is contractual (Supreme Court, 2 July 2002, Saucier v Sté Fiduciaire Juridique et Fiscale de France (“Fidal”)):

- Its variation must be based on objective criteria, which are independent from the employer’s wishes;
- The employee must not share the employer’s risk; and
- The employee’s salary must not be less than either the:
  - Statutory minimum wage (see Question 9); or
  - Minimum salary set by a relevant CBA.

Some CBAs provide for bonuses, which are subject to the same rules as contractual bonuses.

Bonuses can also be paid as a result of company practice. If this practice is regular, fixed and applies to a set group of employees, the bonus forms part of the remuneration package that the employer must pay. An employer can end such a bonus by following a procedure set by case law, which involves:

- Individually informing the employees;
- Informing the staff representatives; and
- Observing a reasonable notice period (usually, at least three months).

**INTELLECTUAL PROPERTY (IP)**

31  **If employees create IP rights in the course of their employment, who owns the rights?**

31.1  **Patents**

Inventions made within the scope of employment relationships are divided into three categories (Article L.611-7, Intellectual Property Code):
- Employee inventions that automatically belong to the employer. These include inventions made:
  - in the course of employment consisting of an inventive assignment (when the employment contract requires studies and research that may result in an invention); or
  - when carrying out research or studies, which have been expressly assigned to the employee.

The employee is entitled to receive additional compensation for the invention (which can be included as part of the employee's salary);

- Employee inventions that the employer can claim. The employer can assign to itself the ownership of all or some of the rights in an employee's invention that is made in any of the following cases:
  - during the performance of the employee's duties;
  - in relation to the company's business;
  - using specific company knowledge;
  - using technologies or specific means of the employer; or
  - using data the employer has acquired.

The employee is entitled to obtain a fair price based on the invention's industrial and commercial use. In the event of a dispute, the employment tribunal sets the fair price; or

- Employee inventions that the employer cannot claim. All other employee inventions are considered to be non-attributable inventions and the employer has no rights over them.

### 31.2 Copyright

The author of an intellectual work owns, with effect from the date of creation, its exclusive IP rights, which are enforceable against all persons (Article L.111-1, Intellectual Property Code).

Ownership of the copyright can be assigned to the employer by written agreement (for example, in the employment contract). Employees always retain the moral rights to their work. They are not entitled to any additional compensation for a transfer of copyright ownership.

### 31.3 Other IP rights

Specific provisions exist for IP rights in software, designs and models.

### RESTRAINT OF TRADE

32

**Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?**

32.1

**Restriction of activities**

Employees are bound by a duty of loyalty towards their employer, which prevents them from engaging in any activity that could be against their employer's interest.

Employment contracts can also set out more specific non-compete provisions. During the course of employment, employees can be required to:

- Devote all of their attention to the company's business; and
- Not take part in any other professional activity, whether compensated or not (except for part-time employees).
Post-employment restrictive covenants

Non-compete clauses after termination are valid if they are included in the employment contract (or in an amendment to it). In addition, the non-compete clause must:

- Be essential to protect the company's legitimate interests;
- Apply over a specific period of time (two years is the limit generally upheld by the courts) and to a defined geographic area;
- Take into account whether the employee's position is specialised (that is, the clause must not prevent employees from continuing to work in their professional field); and
- Impose a duty on the employer to pay the employee financial compensation (this is usually at least 30% of the employee’s former salary throughout the period during which the clause applies).

Non-compete clauses that do not meet all four conditions are invalid.

CBAs can also provide for non-compete clauses.

Class Action

On 17 November 2016, France amended its laws on class actions. Such action may be brought by a representative union or a declared association. The union has to send a formal letter to the employee in order to ask him to put an end to the identified discrimination. The employer has a month to meet with the works councils and representative union within the Company.

They can request that the Company engage in discussion about measures needed to cease the discrimination in question. From then on, the parties have six months to reach a solution.

The law tries to solve the discrimination issue before going before the Tribunal. In cases where negotiations fail, the class action can be brought before the “Tribunal de Grande Instance”.

The Tribunal can issue a specific performance such as reinstatement, salary increase and allocate damages to the victims.

RATES OF TAX ON EMPLOYMENT INCOME

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>What is the rate of tax on employment income?</th>
<th>Are any social security contributions or similar taxes levied on employers and/or employees?</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>The rate of tax depends on the level of income (including various kinds of income, not only employment income) and on the number of family members. The general rate evolves as follows: 1 0% for income under EUR9,700. 2 14% for income from EUR9,700 to EUR26,791. 3 30% for income from EUR26,791 to EUR71,826. 4 41% for income from EUR71,826 to EUR152,108. 5 45% for income over EUR152,108.</td>
<td>Employees pay around 22% of the gross salary. Employers pay around 43% of the gross salary.</td>
</tr>
</tbody>
</table>
## DRUG/SUBSTANCE ABUSE TESTING

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Can employers carry out drug/substance abuse testing on employees in your jurisdiction?</th>
<th>If yes, can drug/substance abuse testing be carried out:</th>
<th>Please provide website address links to the governing legislation or &quot;best practice&quot; guidance notes for employers if drug/substance abuse testing can be carried out in your jurisdiction.</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>Yes, but only during employment and within the guidelines provided.</td>
<td>Drug/substance abuse testing cannot be carried out before any employment contract is signed. Drug/substance abuse testing is allowed during employment, provided:</td>
<td>Not applicable.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• It is provided for by the employer's internal rules and regulations.</td>
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<td></td>
<td></td>
<td>• It is restricted to employees for whom the influence of drugs is likely to cause a threat (drivers of vehicles, employees handling hazardous products, and so on).</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>• The employee is entitled to challenge the results of the test.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>The test must be performed by the occupational doctor, who will only inform the employer of the ability of the employee to perform his duties.</td>
<td></td>
</tr>
</tbody>
</table>

### PROPOSALS FOR REFORM

34 Are there any proposals to reform employment law in your jurisdiction?

The Finance minister announced on 3 August 2016 that the government intends to submit a bill to parliament to implement the collection of the income tax at source (ie by the employer).

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*This overview was written by Joël Grangé and Olivier Kress, Flichy Grangé Avocats.*

*March 2017*
Germany
GERMANY

SCOPE OF EMPLOYMENT REGULATION

1  Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

1.1  Laws applicable to foreign nationals

In general, when foreign nationals have their regular working place in Germany, German law applies in all aspects. In contrast, a foreign jurisdiction may continue to apply when a foreign national is only working in Germany for a limited period of time.

Under Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I Treaty), a choice of law clause can provide that the law of another jurisdiction applies to an employment relationship which, without that clause, would be subject to German law (for example, when the work is performed in Germany on a regular basis). However, a choice of law clause will not overrule:

- German mandatory regulations including, but not limited to:
  - maternity benefits;
  - sick pay;
  - parental leave;
  - special protection for pregnant employees, those on maternal or parental leave or severely disabled employees;
  - notification to the Labour Agency of a mass redundancy; and
  - insolvency law;

- German statutory regulations that cannot be varied by contractual agreement when those regulations are more favourable for the employee than the comparable regulation of the chosen jurisdiction, including, but not limited to:
  - general dismissal protection law; and
  - legal consequences of a transfer or undertaking; and

- German statutory regulations that may be categorised as public order law that, as a consequence, apply irrespective of the choice of law.

Comparable rules may apply under international or bilateral treaties for jurisdictions outside the EU.

1.2  Laws applicable to nationals working abroad

The aforementioned applies respectively for nationals working abroad.
EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

German law distinguishes between:

- Employees working under an employment contract; and

- Non-employees, including company’s statutory representatives (for example, managing directors of a limited liability company, members of the management board of a stock company), as well as independent contractors working under a service contract.

As independent contractors are generally not entitled to statutory employee (protection) rights, the assessment of whether a person is considered an employee or an independent contractor is crucial. However, in practice, it can be a difficult assessment to make. The assessment is based on an overall evaluation taking into account various factors, including whether:

- The individual is obliged to perform duties in person;
- The employer controls the individual as to performance, working hours and location;
- The individual is integrated into the employer’s working organisation; and
- The individual is financially dependent on the employer.

Contractual stipulations to the contrary will not negate the presence of an employment relationship where, in practice, an employment relationship exists.

False declarations of self-employment can have severe consequences for the employer and its representatives, including the obligation to pay arrears of tax and social security contributions as well as fines and criminal prosecution.

While traditionally German law distinguished between blue and white-collar employees, this distinction has been declared unlawful and is, therefore, no longer applied.

2.2 Entitlement to statutory employment rights

In general, statutory employment rights only apply to employees (including executive staff below the level of the company’s statutory representatives). However, company’s statutory representatives benefit from certain employment rights while contractual deviations are permissible to a broader extent.

Several subsets of employees exist (for example, workers, trainees and executive staff). While special statutory regulations may apply to these personnel, they are usually entitled to most employee rights and come within the related protective legislation.

Independent contractors fall almost completely outside the scope of employment protection legislation, and no social security contributions are required to be made for these workers.

2.3 Time periods

In general, there is no minimum or maximum length of an employment relationship. However, a fixed-term employment can only last for a maximum period of two years when the time limit cannot be justified by statutory defined grounds. Furthermore, agency workers can only be temporarily assigned to another employer for a period of up to 18 months as the maximum length of time permissible for the assignment.
RECRUITMENT

3 Are any grants or incentives available for employing people? Do any filings need to be made when employing people?

3.1 Grants or incentives

The employer can be entitled to governmental benefits when employing:

- Persons that have been unemployed for a certain period of time; or
- Persons with severe disability benefits amounting to up to 75% of the employee's salary (payable for up to 24 months).

3.2 Filings

The employer is responsible for deducting tax and social security contributions and for notifying the German authorities and the employers' indemnity insurance association (Berufsgenossenschaft) of the new employment. Further notifications may be needed (for example, concerning pregnant employees and trainees).

4 Background checks

4.1 Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

The employer's legitimate business interest in information is generally limited by the employee's personal right to protect personal information. Therefore, permissible research (including questions and background checks) must be directly relevant to the requirements of the envisaged role (for example, questions concerning physical requirements or criminal convictions listed in the central criminal register (eg concerning traffic offences for drivers or offences against property for roles with fiduciary responsibility)).

Any questions of a discriminatory nature that have no legitimate relation to the role being applied for are generally prohibited (for example, questions concerning pregnancy, or the status of a severe disability, or membership of a trade union). This prohibition still applies even where the potential candidate for the role would not be able to be assigned to the role (for example, where a pregnant candidate applies for the role of an x-ray assistant). Questions regarding family status are also prohibited, unless they relate to child day care requirements. As a result, comprehensive background checks are generally prohibited, and a candidate's express consent cannot make such a background checks legitimate. Furthermore, candidates are permitted to incorrectly answer prohibited questions without consequence (this is known as the "right to lie").

However, research using public sources and professional networks, as well as research with former employers, is permissible without employees' consent, even where it is conducted by third parties on the employer's behalf.

PERMISSION TO WORK

5 What prior approvals do foreign nationals require to work in your country?

EU/EEA citizens are free to enter and work in Germany. Non EU/EEA citizens generally need a visa to enter Germany as well as a residence and work permit to reside and work in Germany.

5.1 Visa

Citizens of certain states where there are bilateral agreements (among others, Argentina, Australia, Israel, Japan, Canada, South Korea, Malaysia, Mexico, Montenegro, New Zealand, Singapore, USA) are entitled to enter Germany for a private visit or business trip for up to 90 days within a period of 180 days without a visa. However, without a work permit they are not allowed to work in Germany.

All other persons require a visa to enter Germany.
5.1.1 Procedure for obtaining approval

A visa (or residence and work permit which includes a visa) must be obtained before entering Germany from the German embassy consulate at the current location of permanent residence.

5.1.2 Cost

The visa costs EUR60.

5.1.3 Time frame

Processing time can take up to 14 days.

5.1.4 Sanctions

Renewal is not possible. The visa holder can leave Germany and apply afresh when certain preconditions are met.

5.2 Permits

5.2.1 Procedure for obtaining approval

An application for a residence and work permit can be filed before entering Germany, or after entering (particularly when a visa for entering is not required).

Abroad, the application can be made to the German embassy consulate at the actual applicant's location of permanent residence. In Germany, local aliens departments (immigration offices) are competent authorities. Legal requirements vary depending on the purpose of employment in Germany (for example, a personnel exchange within international groups, an assignment within services performed by foreign companies in Germany or taking up employment with a German employer). The formal application procedure may also include a requirement for approval by the Labour Agency after conducting a labour market review.

The “EU Blue Card” is a new form of work permit for highly educated persons (university/college degree) and a minimum salary of EUR47,600 applies (or EUR37,128 in cases where there is a shortage of people with those qualifications).

5.2.2 Cost

The work permit can cost up to EUR 250.

5.2.3 Time frame

Processing time can take up to four months. Processing in the case of a personnel exchange or applying for an EU Blue Card may take up to six weeks.

5.2.4 Sanctions

The individual is required to leave Germany (though in certain circumstances the duration of the work permit can be extended).

5.3 Other

For certain jobs, an acknowledgement of the worker's qualifications can be required. In all cases, registration with the registration office at the location of residence in Germany is mandatory.

RESTRICTIONS ON MANAGERS AND DIRECTORS

6 Are there any restrictions on who can be a manager or company director?

6.1 Age restrictions

There are no age restrictions.
6.2 Nationality restrictions

There are no nationality restrictions.

6.3 Other

The Stock Cooperation Act and the Limited Liability Company Act provide for certain exclusions concerning persons who have:

- Been prohibited from engaging in an occupation or business; or
- Been convicted of a certain type of criminal act (for example, white collar crimes).

Since May 2015, the Equal Participation Act has implemented a quota for 30% of each management and supervisory board to consist of women.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

7 How is the employment relationship governed and regulated?

7.1 Written employment contract

In general, there is no requirement that an employment contract must be in writing. However, the employee must at least be provided with a "term sheet" detailing the most important aspects of the employment which is signed by the employer and includes:

- Start date;
- Place of work;
- Role;
- Remuneration;
- Holiday entitlement;
- Notice period; and
- Reference to applicable collective bargaining agreements.

Failure to provide this can lead to a claim for damages.

Furthermore, the law provides that certain matters must be in written form in order to be valid (for example, fixed-term employment or post contractual non-compete covenants).

While offer letters are sometimes issued, it is normal practice to provide a detailed employment contract in Germany.

There are no specific rules governing the language for employment contracts as long as the employee understands the respective language. Bilingual wording is recommended.

7.2 Implied terms

Certain terms are implied into an employment relationship under statutory law including:

- Minimum notice periods;
- Regulations on working hours and occupational health and safety;
- Paid holiday leave;
- Continued payments in the case of sickness; and
- Minimum wage.

Furthermore, statutory law prohibits certain matters rather than implying certain terms which can lead to indirect implications (for example, the provisions on general terms and conditions that form part of German employment and anti-discrimination law).

In addition, several "implied" duties of consideration and trust derive from the employment relationship itself (for example, confidentiality obligations and the obligation to orderly handle an employer's property).

**7.3 Collective agreements**

Collective agreements exist in the form of:

- Collective bargaining agreements ("CBA"), which are agreed between the employer or an employers' association and a trade union; and
- Works agreements, which are agreed between the employer and the Works Council.

CBAs are binding for the parties and their members within the (local and functional) scope of application, while membership is voluntary. However, the government can declare a CBA generally binding for all employers and employees of a certain industry (in 2014, 496 CBAs were declared generally binding). In addition, CBAs may be applicable to non-members via a reference clause in the employment contract.

Works Agreements are binding for the employer, the Works Council and the employees (except for executive staff) within their scope of application.

Both CBA and Works Agreements provide employees with direct rights and duties which overrule less favourable contractual provisions.

**8 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?**

When unable to reach agreement with an employee, the employer may issue a dismissal with the offer of modified working conditions in the case of a change of terms and conditions, provided that the change is justified by legitimate grounds for dismissal (for example, the change is made for operational reasons or reasons concerning the person or behaviour of the employee). The requirements for such a dismissal are usually rather high.

In a very limited number of situations, the employer can reserve the right to unilaterally revoke parts of the employees' working terms and conditions. This is a significant issue when dealing with benefit schemes that often allow the employer to unilaterally retain bonus payments or provides for claw back options. Under German law, determining whether such a provision is valid is complex. As a general rule, the unilateral right to revoke cannot exceed an amount equal to 25% of remuneration.

**MINIMUM WAGE**

**9 Is there a national (or regional) minimum wage?**

On 1 January 2015, the Minimum Wage Act was implemented, stipulating a national legal minimum wage. This is currently EUR8.84 an hour (since 1 January 2017). In general, the minimum wage applies to all employees. However, interns (mandatory internships for training purposes), apprentices, persons under the age of 18 who have not completed vocational training and long-term unemployed people are exempt from the scope. Exemptions may also apply where a collective bargaining agreement for a specific industry sector provides for a lower wage. Previous collective bargaining agreements will be applicable up until 31 December 2016 but from 1 January 2017, the national minimum wage will be generally observed.
The minimum wage must be paid not later than the last “banking day” of the month following the month in which the work was performed. It must be paid “unconditionally” and must also not be subject to any waiver agreement.

Additionally, an employer becomes liable for payment of the minimum wage, where subcontractors do not pay minimum wages to their employees.

**RESTRICTIONS ON WORKING TIME**

10. Are there restrictions on working hours? Can an employee opt out on either an individual or collective basis?

10.1 Working hours

Daily working hours must not exceed eight hours. However, this can be extended to up to 10 hours provided the employee is compensated with time off in such a way that the average working day (Monday to Saturday) is no more than eight hours over a period of 24 weeks. The employer must keep records of working days exceeding eight hours (which must be retained for two years). These limits on working hours are mandatory, though CBAs can provide for exemptions and there are special rules for certain groups of employees (for example, employees aged below 18 and pregnant employees).

Generally (albeit with certain exemptions,) working on Sundays and public holidays is prohibited.

10.2 Rest breaks

After work, employees must have an uninterrupted rest period of at least 11 hours. On working days of more than six hours, but less than nine hours, a break of 30 minutes is mandatory. On working days of more than nine hours, a break of 45 minutes is mandatory.

10.3 Shift workers

Shift work must be implemented in compliance with confirmed human health standards. CBAs and Works Agreements can provide detailed provisions.

**HOLIDAY ENTITLEMENT**

11. Is there a minimum paid holiday entitlement?

11.1 Minimum holiday entitlement

German law provides for a minimum holiday entitlement of 24 days for those who work six days a week. The amount of days for employees who work less is reduced by the appropriate proportion (eg five-day week: 20 days). However, it is common for employees working five-day weeks to receive 25 to 30 days’ leave in Germany.

11.2 Public holidays

There is a statutory right to paid time off on public holidays and these public holidays are not offset against the minimum holiday entitlement. There are nine public holidays that apply across Germany, though additional public holidays vary in the federal states (for example, in Berlin there are none, while in Bavaria there are four).

**ILLNESS AND INJURY OF EMPLOYEES**

12. What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

12.1 Entitlement to time off

Employees are free from their work obligations where they are unable to work due to physical or mental incapacity.
The employee must notify the employer of the incapacity and its estimated duration without undue delay. Where the incapacity lasts longer than three calendar days, the employee must submit a medical certificate by the following working day at the latest unless the employer has requested an earlier submission.

12.2 Entitlement to paid time off

Employees are entitled to sick pay equal to regular remuneration for up to six weeks once they have been employed for four weeks. Where an employee suffers from a different type of incapacity, a separate six-week period will commence. Where an employee has a recurrence of the same type of incapacity, the six-week period will restart after a certain period of time.

After expiry of the six-week period, employees are entitled to statutory/private insurance sick benefits.

Furthermore, the employee is entitled to paid time off for medical appointments when attending out of working hours is not possible (for example, because of the doctor's consultation hours or where medical care is urgently needed).

12.3 Recovery of sick pay from the state

Employers employing 30 or less employees may recover sick pay from an employers' cost sharing fund.

STATUTORY RIGHTS OF PARENTS AND CARERS

13 What are the statutory rights of employees who are:

- Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
- Carers (including those of disabled children and adult dependants)?

13.1 Maternity rights

Female employees must not work:

- For six weeks prior to delivery, unless they are willing to do so; and
- For eight weeks (or, in the case of premature or multiple births, 12 weeks) after delivery.

Where special conditions exist, work can be generally or individually prohibited (for example, in the case of hazardous occupations, or where there is a danger to the health of the mother or unborn child).

During these periods, employees are entitled to continued pay from the employer minus statutory benefits of EUR13 per day. The employer can recover its contributions from an employers' cost sharing fund.

Dismissal by the employer of an employee during pregnancy and up to four months after delivery is restricted and subject to the competent agency’s approval.

13.2 Paternity rights

Unless there are provisions providing for other arrangements in a CBA or in the company's internal policy, a male employee is entitled to one day off with continued pay for the birth of his child.

13.3 Surrogacy

Surrogate mothers have the same maternity rights as every mother (see above, Maternity rights).
13.4 Adoption rights

Adoptive parents have the same rights as regular parents (see below, Parental rights).

13.5 Parental rights

Both parents are entitled to parental leave until the child turns three. Parental leave can be claimed for each child separately even if the time periods overlap. A period of up to 12 months may be transferred to any other period until the child turns eight with the employer's consent. The same provisions apply to adopted or full-time foster children.

There is no right for continued pay during parental leave. However, for 12 months, mother or father are entitled to public benefits amounting to 67% of their most recent net salary (a minimum of EUR300, to a maximum of EUR1,800 per month). The period can be extended to 14 months when parental leave is split up between both parents. Maternity benefits are credited against these benefits. Further, parents are entitled to work up to 30 hours per week during parental leave when operationally feasible (while benefits are reduced accordingly).

Employer's ability to dismiss an employee during times of parental leave is restricted and subject to the competent agency's approval.

By the end of parental leave, employees are entitled to return to their former (or an equivalent) function.

13.6 Carers' rights

Employees are entitled to paid leave for a relatively short period of time where care is unexpectedly needed for dependants or close family members. This must not exceed 10 days. Generally, the employee must arrange care as soon as possible. Since this is not a mandatory employment right, contractual stipulations can provide for other arrangements.

In addition, employees can claim leave to care for a sick child provided either:

- The child is under the age of 12 or disabled; or
- A medical certificate confirms the need for care and the employee is the only person able to provide such care.

In such cases the employee is entitled to statutory sick benefit for up to 10 days (single parents are entitled to 20 days) per year, per child.

In addition to short periods of care, employees are entitled to unpaid long-term care for up to six months to take care of close relatives, or to reduce working hours and claim support from public benefits. Close relatives are, among others, children (foster, adopted, grand), parents, parents-in-law, spouses and partners in registered partnerships.

CONTINUOUS PERIODS OF EMPLOYMENT

14 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

14.1 Statutory rights created

Certain statutory rights only come into existence after a certain period of employment, for example:

- Protection against unfair dismissal under the Act on Protection against Unfair Dismissal (Kündigungsschutzgesetz) after six months' employment;
- Increases in statutory notice periods (which are staggered according to length of service);
- Full holiday entitlement after six months' employment;
• Continued pay in the case of incapacity after four weeks’ employment;

• Entitlement to part-time work after six months’ employment; and

• In accordance with collective agreements where stipulated (which is usual for severance payments, company pension, and so on).

14.2 Consequences of a transfer of employee

Where there is a transfer between two operational entities of the same company the employee retains their period of continuous employment (as they remain employed with the same employer). In the case of a voluntary transfer to another company (of the same group), former periods may be acknowledged, but, in general, they do not have to be acknowledged.

Where there is a statutory transfer of the employment relationship to a new owner following a transfer of undertaking under the German TUPE regulations (see also Directive 2001/23/EC on safeguarding employees’ rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive)), former periods of employment must be acknowledged by the purchaser. The same applies under the Transformation of Companies Act (Umwandlungsgesetz).

FIXED TERM, PART-TIME AND AGENCY WORKERS

15 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

15.1 Temporary workers

An employment relationship can be limited up to 24 months of employment without reason. Any shorter employment can be extended three times and up to 24 months in total. To be valid, a fixed-term agreement must be in writing and must be concluded before the start date.

Any limitation exceeding 24 months must be justified by statutorily defined reasons, (for example, substitution of a colleague during parental leave or sickness, limited need for extra staff due to exceptional work load or personal reasons of the employee). Without such a justification, or where there is no written document verifying the fixed-term employment, the employment relationship will be deemed by law to be indefinite.

Temporary workers benefit from equal treatment with indefinite employees, and they are protected against discrimination as a result of their status unless there are reasonable grounds for the different treatment (for example, loyalty bonuses).

Temporary workers can challenge their fixed-term status by filing respective proceedings with the Labour Court (though this challenge must be made no later than three weeks after the expiry of the fixed-term employment). Where the applicant is successful, the Labour Court will order reinstatement in an indefinite employment relationship.

15.2 Agency workers

In Germany, companies can lease a workforce either intragroup or using an external service provider (staff agency).

In general, a staff agency needs a specific licence to lease a workforce. In the absence of the necessary licence, the employment will automatically transfer to the lender by law. An intragroup workforce lease may be freed from this licence requirement (known as “intragroup privilege”). Furthermore, a lease of a specific employee to one specific employer is only permitted if it does not exceed 18 months.

Agency workers benefit from equal treatment with indefinite employees, including equal pay. In consequence, the external service provider is obliged to grant equal working conditions as the lender’s employees in comparable functions have A CBA may provide for other remuneration schemes but, at the latest, after 15 months the agency worker must receive “equal pay” with those employees of the employer where he is leased out to.
15.3 **Part-time workers**

Part-time workers benefit from equal treatment including (pro-rated) equal pay with indefinite employees, and are also protected against discrimination as a result of their part-time status.

Employees are entitled to part-time work either during parental leave or where certain prerequisites are met, unless there are serious operational reasons which render part-time work not feasible. An application to work part-time must be formally filed within a certain timeframe stipulated by law.

**DATA PROTECTION**

16 **Are there any requirements protecting employee privacy or personal data? If so, what are an employer’s obligations?**

16.1 **Employees’ data protection rights**

There were plans to implement specific and wide ranging data protection rules for employees, however, this project has now been postponed for an indefinite period.

As a result, apart from a few specific rules in German law regarding employee data protection, the general rules apply. Under the Federal Data Protection Act (*Bundesdatenschutzgesetz*), employees’ personal data must not be processed unless permitted:

- By law, which is the case when data processing is necessary for the employer’s decision to enter into or terminate an employment relationship, and for its own processes, including investigations when the employer suspects a criminal act has been committed in connection with the employment relationship;

- By CBA or Work Agreement that provides a legal basis for data processing; or

- By employees’ voluntary consent after comprehensive information has been provided to the employee. However, it is unclear to what extent such consent is deemed voluntary.

Certain further obligations apply to monitoring employees, including monitoring:

- Using surveillance cameras;

- Email or internet activity; and

- Location tracking.

16.2 **Employers’ data protection obligations**

Processing personal employee information requires:

- Appointing a Data Protection Officer when there are more than nine individuals processing personal data in an automated manner within the company (otherwise, the data protection authority must be notified);

- Implementing systems to review stored personal data regularly and to delete or dispose of information that is no longer needed;

- Implementing rules and systems to protect personal data (for example, as to confidential and secured storage and the training of employees); and

- Complying with employees’ requests for information concerning stored data, data processing and data deletion.

After the Safe Harbour Agreement was recently deemed invalid by the European Court of Justice, it is unclear which formal requirements must be met when forwarding personal employee data to locations outside of the EU (for example, to a parent company in the USA). Until a new practice is
found, data transfers can be based on EU Model Clauses or Binding Corporate Rules that are already in force, at least until 31 January 2016.

DISCRIMINATION AND HARASSMENT

17 What protection do employees have from discrimination or harassment, and on what grounds?

17.1 Protection from discrimination

The following characteristics are expressly protected by discrimination law, principally set out in the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz):

- Age;
- Disability;
- Racial and ethnic origin;
- Gender;
- Religion or beliefs; and
- Sexual identity or orientation.

Further unwritten characteristics are directly protected under the German constitution, including political opinion, trade union membership, marital status and pregnancy.

The law also provides protection for special groups of employees (for example, part-time employees).

German law prohibits both direct and indirect discrimination. However, individuals can be treated differently based on a protected characteristic when that different treatment:

- Can be justified by a reasonable ground;
- Has as its aim a legitimate purpose; and
- Uses the most moderate means to impose the different treatment.

Thus, special job requirements concerning gender, age or religion can be justified when they are essential for the role. The same applies for different treatment regarding age within a collective severance scheme, when taking into account chances on the job market, and so on.

The employer is required to make every reasonable attempt to stop discrimination at or in connection with the workplace, regardless of its source (colleagues, superiors or third persons), for example, by issuing a warning letter or transferring the discriminating person(s). Otherwise, employee victims can refuse work and can make a claim of discrimination and receive damages. Where a claim of discrimination is successful, the employer must compensate for any material damages (for example, differences in salary) and non-material damages. Where discrimination occurs in the course of a job application (for example, discriminatory job ads as to age or gender), non-material damages are limited to three times the envisaged monthly salary. However, there is no entitlement to be employed.

In general, claims for damages must be filed within two months of the discriminatory act coming to an end. The burden of proof shifts to the employer after the employee has stated facts that allow the presumption of discrimination having occurred (for example, such presumption is given in case of non-compliance with an employer’s statutory obligations regarding disabled individuals).

There are no statutory provisions concerning protection from victimisation and bullying (in Germany this is known as “mobbing”). However, the employer does have a general duty to take reasonable actions in this regard, and as a result, failure to do so may lead to a claim for damages.
17.2 Protection from harassment

See above, Protection from discrimination.

WHISTLEBLOWERS

18 Do whistleblowers have any protection?

Apart from specific law with respect to civil servants and corruption, German law neither contains any provisions permitting or forcing the disclosure of unlawful or non-compliant activity, nor provides for the protection of whistleblowers.

Whether an employee can be subject to sanctions after having disclosed such activity will be decided on a case-by-case basis depending on the circumstances, in particular, whether the applicant acted in good faith and tried to approach the employer before whistleblowing. However, German courts tend to stress the importance of employees’ duty of loyalty to the employer.

Employers are not required to put systems in place that allow for anonymous reporting. However, company’s directors must implement adequate measures to ensure compliance with the law.

TERMINATION OF EMPLOYMENT

19 What rights do employees have when their employment contract is terminated?

19.1 Notice periods

In the event of an "ordinary" dismissal, the employer must observe the statutory minimum notice period, which depends on the length of employment:

- During probationary period (maximum duration of six months): two weeks' notice;
- After or without probationary period: four weeks' notice, effective at the end of a month;
- After two years' service: one month's notice, effective at the end of a month;
- After five years' service: two months' notice, effective at the end of a month;
- After eight years' service: three months' notice, effective at the end of a month;
- After 10 years' service: four months' notice, effective at the end of a month;
- After 12 years' service: five months' notice, effective at the end of a month;
- After 15 years' service: six months' notice, effective at the end of a month; and
- After 20 years' service: seven months' notice, effective at the end of a month.

Employment contracts, Work Agreements and CBAs can provide for more favourable periods.

In general, these notice periods only apply to terminations issued by the employer. However, employment contracts often provide for the statutory notice period to apply on an employee’s resignation by analogy.

A termination for cause will (when justified) have immediate effect and terminate the employment relationship immediately.

During the notice period, the employer must continue to pay full salary as well as provide the opportunity to work. However, with reasonable cause, the employer can place the employee on garden leave (for example, in the case of criminal acts). Payment in lieu of notice is uncommon as this triggers disadvantages concerning unemployment benefits.
19.2 Severance payments

There is no statutory obligation to pay any severance in the case of individual dismissal, irrespective of whether the dismissal is valid or not (for collective dismissals and layoffs, see below, Collective redundancies, and for the consequences of an invalid dismissal, see below, Procedural requirements for dismissal).

However, in practice (and depending on the likelihood that the dismissal is invalid), parties may agree on a severance payment either outside of court (under a termination agreement) or during court proceedings (under a settlement agreement). Severances are usually calculated based on the formula of half a month's salary per year of employment. However, in practice, the calculation of the severance payment will again depend on the likelihood that the dismissal is invalid and the parties’ negotiations.

19.3 Procedural requirements for dismissal

A notice letter must be in writing. However, it is not necessary to state the reasons within the notice letter.

The notice letter must be signed by the statutory representative of the company (for example, the managing director), and the employee must be provided with an original copy of it.

Furthermore, where one exists, the Works Council must be informed at least one week before the letter is issued (though its approval is not required). Additional requirements apply in the case of collective layoffs (see below, Collective redundancies).

In addition, the prior approval of the competent agency is required where the employees concerned are either:

- Severely disabled;
- Pregnant; or
- On maternity/paternity leave.

To challenge a dismissal the employee must initiate proceedings for unfair dismissal in the Labour Court within three weeks of notification (otherwise, in general, the dismissal is deemed lawful). Where a dismissal is found to be invalid, that dismissal does not terminate the employment. In consequence, the employee is entitled to (retroactive) continued remuneration and reinstatement into the former position.

20 What protection do employees have against dismissal? Are there any specific categories of protected employees?

20.1 Protection against dismissal

"Ordinary" dismissals are subject to the Act on Protection against Unfair Dismissal (Kündigungsschutzgesetz). This Act applies:

- Once the employee has been employed for six months; and
- When there are more than 10 employees in the operational entity the employee works in (in former times: more than 5 employees, transition rules apply).

Even where the Act does not apply, an employee must still not be dismissed in an unreasonable, discriminatory or arbitrary manner.

Where the Act does apply, an "ordinary" dismissal must be "socially justified" in order to be lawful. A dismissal may be socially justified where:

- The reasons for the dismissal substantially relate to the personal attributes of the employee (for example, incapability, lacking experience, or long-term or recurring short-term illnesses);
The reasons for the dismissal relate to a substantial employee’s misconduct; or

There are operational reasons leading to the employee’s role ceasing to exist while a "social criteria test" is required to determine who of several comparable employees is to be dismissed (based on age, length of employment, maintenance obligations and severe disability).

However, in all cases, the employer must have, at first, exhausted all other reasonable means, including considering the possibility of a transfer, relocation, reassignment and further training, especially with regard to open roles.

Executives also benefit from dismissal protection to a certain extent. In contrast, company legal representatives do not benefit from protection from dismissal.

An employment relationship can be terminated for cause with immediate effect provided that it would not be reasonably possible to continue the employment until the expiry of the notice period (for example, in the case of a severe breach of duties, including severe (contractual or criminal) offences or disruptive behaviour). Notice of this type must be given within two weeks of learning of the cause for dismissal.

20.2 **Protected employees**

There are different groups of employees who are specially protected against dismissal:

- Pregnant employees;
- Employees on parental/maternal leave and carers;
- Severely disabled employees;
- Members of employees’ representative bodies;
- Elderly employees (from age 55) when explicitly covered (for example, in a CBA);
- Employees with official functions (for example, data protection officer); and
- Trainees.

The provisions regarding giving notice to these employees are restricted (the requirements vary).

**REDUNDANCY/LAYOFF**

21 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

21.1 **Definition of redundancy/layoff**

Redundancy occurs when, in accordance with a management decision, there is a reorganisation of the undertaking, motivated either externally or internally, which leads to the employee's role ceasing to exist. This encompasses, for example, a drop in orders which requires the employer to implement cutbacks, or a (partial) close down of the operational entity.

Redundancy can occur as an individual or collective event.

21.2 **Procedural requirements**

Dismissals in the case of redundancy must be justified by operational reasons.

For the procedural requirements concerning collective redundancies, see below, Collective redundancies.
21.3 Redundancy/layoff pay

There is no automatic entitlement to redundancy/layoff pay unless this is agreed upon in a Social Plan with the Works Council (see below, Collective redundancies). The formula for calculating severance payments to individual employees is at the core of the Social Plan and depends on the results of the negotiations between the parties during drafting. German law does not provide for any minimum or maximum amounts.

21.4 Collective redundancies

As with individual redundancy, the employer must show that there is an operational reason for the collective redundancies. In addition, the following procedural requirements may apply.

When there is a mass redundancy, the employer must notify the Labour Agency of the dismissals prior to giving notice. A mass redundancy takes place where one of the following circumstances exist:

- The employer has more than 20 but less than 60 employees, and is making more than five employees redundant;
- The employer has 60 or more employees, but less than 500 employees, and is making either more than 10% of the workforce, or more than 25 employees, redundant; or
- The employer has 500 or more employees and is making 30 or more employees redundant.

In addition, when collective redundancy goes along with an operational change of the operational entity, a collective consultation procedure with the Works Council, if one exists, must be performed. Such operational change may take place in the form of:

- Downsizing, closure or relocation of an operation or essential parts of it;
- Merger with, or split-up of, an operation;
- Essential changes within the organisation or working processes; or
- Personnel reductions within certain thresholds.

Within that procedure, the Works Council must be informed and consulted about the intended change (in due time) and involved in negotiating the Reconciliation of Interests (“ROI”) (Interessenausgleich) and Social Plan (“SP”) (Sozialplan). However, the collective consultation procedure is not required where there is no Works Council.

An ROI defines the way in which the redundancy is carried out (extent, timing and so on). When consent cannot be reached, both the Works Council and the employer can apply to an arbitration committee to try to reach agreement. Whilst the matter remains unsettled, the Works Council is not entitled to exercise any veto right. However, failure to properly negotiate on the employer’s part entitles the Works Council to apply for an interim injunction and employees can claim financial compensation (Nachteilsausgleich).

The purpose of an SP is to adequately compensate the employees for the financial disadvantages arising from the redundancy (for example, severance payments). If no agreement on an SP can be reached, both the Works Council and the employer can again apply to an arbitration committee whose ruling is then binding on both parties.
EMPLOYEE REPRESENTATION AND CONSULTATION

22 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

22.1 Management representation

For stock corporations and limited liability companies with more than 500 employees, the law provides for employee representation of one third of the employees on the company's supervisory board. Where more than 2,000 employees are employed, the law provides for the equal representation of employees on the supervisory board. In both cases, the establishment of a supervisory board is required by law. Herewith, employees take part in supervising management activities as well as the appointment and dismissal of managing directors.

22.2 Consultation

Without the existence of employees' representative bodies there is no obligation to consult with employees on collective issues.

Employees' representative bodies are:

- The Works Council in operational units of five or more employees. Its election can be initiated by three employees or the competent trade union;
- The Joint Works Council on a company level, Groups Works Council on a group level and European Works Council on an EU level;
- The representative committee of executive employees in operational units with 10 or more executive employees;
- The Economic Committees created by the Works Council in operational units with more than 100 employees; and
- The representative body for disabled employees.

The Works Council has the most active role in the day-to-day business of an organisation, with its rights including:

- Monitoring compliance with law and collective agreements;
- Co-determination rights in social matters, including:
  - rules of conduct;
  - procedural rules on daily working hours including breaks, holidays and overtime;
  - rules on the operation of technical devices being able to monitor employees' behaviour or performance; and
  - rules relating to remuneration systems.
- Co-determination rights with regard to human resources planning, including hiring and transfer of individual employees;
- Information rights as to individual dismissals; and
- Participation rights in cases of operational changes and collective redundancy.
22.3 **Major transactions**

The buying or selling of shares (a share deal) and assets (an asset deal) is subject to collective participation rights when that buying/selling goes along with an operational change of the operation (for example, with an operational merger with another entity or with a splitting up of an operation).

However, the Works Council and the Economic Committee (where they exist) generally need to be informed. Where they do not exist, there is no obligation to consult employees on major transactions.

23 **What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?**

23.1 **Remedies**

The Works Council can seek enforcement of its rights in the Labour Court (or in urgent matters, by applying for an interim injunction). In addition, the Labour Court can also impose fines on the employer (and in cases of a severe violation, this can also constitute a criminal offence).

23.2 **Employee action**

Employees can claim that an employer's measure is invalid (for example, the notice is invalid without the necessary prior information of the Works Council, or a relocation is not enforceable without the Works Council's prior approval). Furthermore, employees can refuse to follow instructions that are given without observing the Works Council's co-determination rights (for example, to perform overtime work).

**CONSEQUENCES OF A BUSINESS TRANSFER**

24 **Is there any statutory protection of employees on a business transfer?**

24.1 **Automatic transfer of employees**

German business transfer law is based on Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive) and applies to:

- The transfer of an undertaking or part of an undertaking; and
- Mergers and transformations which fall within the Transformation of Companies Act (Umwandlungsgesetz).

A transfer of undertaking takes place when an acquirer takes over the (material and immaterial) means to manage the business effectively and then continues its activities in a rather similar way. In Germany a transfer is not triggered by a mere succession in function without an accompanying transfer of assets or staff.

As a consequence of the transfer, the employment relationships assigned to the transferring entity will transfer by law to the acquirer unless the employee objects to the transfer (after having been provided with comprehensive information regarding the transfer). The acquirer must then take on all rights and obligations resulting from the employment relationships, including periods of continued employment, contractual obligations, CBAs and Works Agreements. Furthermore, the acquirer assumes all liabilities in relation to transferred employees, including outstanding claims (while the former employer remains jointly liable to a certain extent).

24.2 **Protection against dismissal**

Dismissal of an employee by either the acquirer or the former employer is deemed invalid if the transfer itself was the main reason for the dismissal. Dismissal for other reasons may be valid (for example, for operational reasons when the previous activity with the former employer is redundant as a result of the transfer to the acquirer).
Harmonisation of employment terms

The acquirer is not obliged to treat the transferred employees and its own employees on equal terms and is, therefore, not required to harmonise working conditions.

However, harmonisation with the acquirer applying less favourable conditions to the transferred employees is subject to complex statutory rules. Depending on the specific facts of the case, harmonisation with less favourable terms may be permissible either:

- With the agreement of the employees, after observing a one-year grace period where no changes are implemented;
- By dismissing employees as a result of the alterations; or
- By agreement with the Works Council or trade union.

EMPLOYER AND PARENT COMPANY LIABILITY

Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company's employees?

Employer liability

In general, the employer is liable in relation to third parties for all the acts of its employees which cause damage and are performed within the course of the employee's employment.

At the same time, the employee is entitled to be released by the employer from their liability in relation to third parties when the employee has acted with a minor degree of negligence (and this can also be the case, to a certain degree, when the employee has acted with a medium degree of negligence). In the case of gross negligence and wilful intent, the employee can be held entirely liable, and the employer may claw back costs paid out to compensate the damages of third parties.

Parent company liability

In general, there is no parent company liability. Exemptions may apply when the subsidiary's employees act within a certain range of duties, or when they act on behalf of the parent company.

EMPLOYER INSOLVENCY

What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

Employee rights on insolvency

After the opening of insolvency proceedings the employment relationship will continue with the insolvency estate. The administrator of the insolvency may be entitled to send the employees on garden leave or terminate the employment relationships while longer notice periods are reduced to three months. Claims for remuneration for services which were performed before the opening of insolvency proceedings are qualified as subordinate liabilities. Claims for remuneration for services performed after insolvency proceedings have opened are qualified as debts to the insolvency assets and will be satisfied with priority.

State guarantee fund

Where remuneration has not been received (or has only partially been received), employees are entitled to statutory insolvency pay. They can receive pay for the three preceding months before the start of the insolvency proceedings. In cases where the employment relationship ended before the start of insolvency proceedings, statutory insolvency pay can be paid for the last three months of the employment. Employees who are sent on garden leave may also be entitled to unemployment pay.
HEALTH AND SAFETY OBLIGATIONS

27 What are an employer's obligations regarding the health and safety of its employees?

An employer must adopt all measures necessary to ensure the health and safety of its employees as set out in the Labour Safety Act (Arbeitsschutzgesetz) and more specific statutory rulings, including:

- Implementing the required health and safety measures for the individual workplace;
- Regularly monitoring the effectiveness of its health and safety policy;
- Conducting risk management assessments; and
- Ensuring employees are provided with instructions on health and safety at work.

In organisations with more than 20 employees, the employer must also appoint a safety officer.

Where health and safety law is breached, fines may be imposed. If an employee is injured or dies in a work accident caused by the employer's non-compliance with health and safety regulations, claims for damages can also arise. In some instances, the employer can be held criminally responsible.

TAXATION OF EMPLOYMENT INCOME

28 What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

28.1 Foreign nationals

In general, employees resident in Germany are subject to German income tax irrespective of whether the income was earned inside or outside of Germany. A person is deemed resident in Germany when they have resided in Germany for at least 183 days within a tax year. Double taxation treaties may apply and may provide for deviations.

28.2 Nationals working abroad

In general, when nationals are not resident in Germany and income is earned abroad, German income tax is not due.

29 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

29.1 Rate of taxation on employment income

Every employee must pay income tax on remuneration (including any benefits in kind), as well as church taxes when belonging to an official church. In 2015, a single employee's tax free threshold is EUR8,354. Beyond that amount, taxation is based on progressive rates depending on the amount of taxable income, individual tax class (single, married, children) and allowances. The tax rates range from 14% to 42% (42% applies when there is a taxable income of EUR52,882 (married couples: EUR105,764)) or more, and the very top rate of 45% applies when there is a taxable income of EUR250,731 (married couples: EUR501,462) or more. Subject to additional personal information, an employee with a total income of EUR100,000 can expect to pay around 22.5% income tax and a 1% solidarity surcharge.

Tax deductions are made from gross salary (in Germany, parties usually agree on a gross salary). It is for the employer to calculate and deduct income tax from the employee's gross salary (withholding tax deduction procedure).
Social security contributions

Employees belong to a mandatory social security system comprising of old age pension insurance including reduction in capacity benefits, unemployment insurance, health (statutory or private) and nursing care insurance.

The contribution costs are shared between the employer and employee, with the total amount depending on the employee's gross income. The contribution will amount to around 40% of gross salary, but will be subject to different thresholds. In 2015 the yearly salary subject to contribution for pension and unemployment insurance is capped at €72,600 in the former West Germany and €62,400 in the former East Germany. Any salary exceeding these caps is not subject to social security contributions. In addition, employers are obliged to fund statutory accident insurance.

Subject to additional personal information, an employee with an income of EUR100,000 can expect to pay around 11.7% on social security contributions. The same amount of social security contributions must be paid by the employer.

Employers must document payment of withholding tax and payment of social security contributions.

BONUSES

Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is common in various industries to reward employees using bonuses.

Bonuses can be paid on a non-contractual or contractual basis or based on a Works Agreement or CBA. In general, when introducing a bonus scheme the employer is free to decide on the type and extent of the bonus, provided that the bonus is granted in a non-discriminatory manner (however, Works Council co-determination rights may apply).

In Germany, the usual types of bonuses comprise:

- Contractual or discretionary bonuses;
- Performance related bonuses based on individual, team, division, company or group results;
- Loyalty bonuses; and
- Profit sharing bonuses.

Bonus clauses need to be carefully drafted, especially as to discretionary bonuses, clawback rules and provisions requiring continuous employment. Furthermore, equal treatment principles, as well as restrictions within the banking and insurance sector and for stock companies, also apply.

INTELLECTUAL PROPERTY (IP)

If employees create IP rights in the course of their employment, who owns the rights?

In general, the employer is entitled to all the results of the employee’s work without being obliged to pay any additional compensation. However, the Employee Inventions Act (Arbeitnehmererfindungsgesetz) provides certain formal requirements concerning the exploitation rights for employees' inventions in cases where:

- The employer intends to use that invention without limitation;
- The employer intends to use that invention with limitation; or
- The employer does not intend to use the invention.
The Employee Inventions Act includes provisions concerning an employer's obligations to compensate the employee. Where the employer does not intend to use the invention, the employee is free to use the invention for his own purposes.

As a rule, employment contracts simply make reference to the Employee Inventions Act.

Other utilisation rights under copyright, trade mark law and/or any other intellectual property law are, as a rule, expressly or implicitly transferred to the employer, though the employer may have additional obligations to compensate the employee.

RESTRAINT OF TRADE

Is it possible to restrict an employee’s activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Restriction of activities

During the term of the employment relationship, even when being released from work duties, the employee is prohibited by law from:

- Performing services to any enterprise which is a direct or indirect competitor of the employer. Likewise, the employee is prohibited from establishing or acquiring such an enterprise or having a relevant direct or indirect participation in such an enterprise; and
- Disclosing business and trade secrets and other work-related confidential information to third parties;

Non-compliance can constitute a reason for dismissal and give rise to a claim for damages.

After expiry of the employment relationship, non-disclosure obligations continue by law. However, the employee is no longer restricted in his/her activities. In this regard, the employer can protect his interests by means of a post-contractual non-competition covenant. However, that covenant must be carefully drafted to meet statutory requirements, including:

- It must be reasonable in range as to the type of business and area;
- It must be in written form;
- It must provide for compensation of a minimum amount equal to 50% of the previous total remuneration (though deduction of ulterior earnings may apply); and
- It must not exceed duration of two years.

Further post-contractual restrictions can prohibit:

- Soliciting employees, customers or clients; and
- Doing business with customers, clients or suppliers of the former employer.

Additional restrictions on the employee may also apply under the Act Against Unfair Practices (Gesetz gegen unlauteren Wettbewerb).

PROPOSALS FOR REFORM

Are there any proposals to reform employment law in your jurisdiction?

After re-election in 2013, the German Federal Government announced its intention to discuss:

- More specific employee data protection rules.
• Modification of the prerequisites and permitted extent of workforce leases and equal pay rules (the current draft law will most likely be enforced in January 2017).

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ITALY

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

1.1 Laws applicable to foreign nationals

The parties can choose the law that governs the employment contract (Article 6, Rome Convention on the law applicable to contractual obligations (1980/934/EEC) and Article 8, Regulation (EC) No. 593/2008 on contractual obligations (Contractual Obligations Regulation)). However, most Italian employment legislation is mandatory, which means it applies independently of the choice of the parties.

1.2 Laws applicable to nationals working abroad

As a general rule, if the work is performed abroad, Italian law does not apply, unless the parties have chosen Italian law as the applicable law. In this case, foreign rules can also apply.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

Subordinate employees. Persons who, in consideration of a certain salary, bind themselves to perform their intellectual or manual work activity within the company, under the management and control of their employer (Article 2094, Italian Civil Code).

Self-employed workers. Workers who, in consideration of a certain remuneration, undertake and perform a piece of work or to provide a service, primarily by their own effort and without a relationship of subordination with respect to the principal (Article 2222, Italian Civil Code).

Commercial agents. These are self-employed workers paid to undertake to continuously promote the conclusion of a series of contracts in a certain area on behalf of the principal.

2.2 Entitlement to statutory employment rights

Generally, subordinate employees are entitled to all statutory employment rights (for example, holiday, sick leave, maternity leave, severance pay (trattamento di fine rapporto ("TFR")), and so on). Additionally, subordinate employees enjoy strong protection in the case of unfair dismissal, ranging from the payment of compensation to reinstatement (see Question 19).

Self-employed workers enjoy almost none of the rights granted to subordinate employees. However, with effect from 1 January 2016, the rules governing subordinate employment contracts will apply to self-employed workers who provide services that are performed in a manner that is exclusively personal and continuous, and which the method of execution is organised by the employer with regards to timing and place of work. However, certain self-employed contracts that are based on co-ordination and continuity will not be subject to the rules governing subordinate employment contracts in the following cases (among others):

- The worker is a practitioner registered on a professional register, such as a lawyer, accountant or architect (but only when carrying out professional activities);
- The worker is a member of the board of directors of a company (but only when carrying out this directorship);
- The worker works for an amateur sports association; and
In other cases provided for by any applicable national collective bargaining agreement ("CBA").

2.3 Time periods

The term of an employment contract must be set out in writing. The maximum duration of a fixed-term employment contract is 36 months (including temporary agency work contracts). If the initial term is less than three years, the fixed-term contract can be extended up to a maximum of five times, within the maximum period of 36 months, with the employee's consent, provided that the employee continues to carry out the same tasks.

RECRUITMENT

3 Are any grants or incentives available for employing people? Does any information/paperwork need to be filed with the authorities when employing people?

3.1 Grants or incentives

Companies that hired employees from 1 January 2015 until 31 December 2015, under an open-ended employment contract, were exempted from the obligation to pay social security contributions up to a maximum of EUR 8,060 per year, for a period of three years. For employees hired from 1 January 2016 until 31 December 2016 the exemption was equal to a maximum of EUR3,250 per year, for a period of two years. These exemptions only applied if the employee did not work under an open-ended employment contract in the six-month period before being hired. The law does not provide such an exemption for 2017.

There are other incentives (for example, reduced social security contributions or incentives), which are available to companies that employ certain categories of people, including:

- Young people, generally between 15 and 29 years of age, under specific types of contracts (such as apprenticeship contracts);
- Long-term unemployed persons over the age of 50 and unemployed women of any age who have been unemployed for a period of between six and 24 months, depending on whether they reside in certain disadvantaged regions; and
- Disadvantaged persons (that is, those subject to redundancy procedures or affected by disability).

3.2 Filings

Compulsory online filings, introduced by the Ministry of Labour, are required when hiring, terminating, transforming or extending the contracts of any category of workers for administrative purposes (and also for any purposes related to social security).

4 Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

Both during the recruitment procedure, for the purpose of hiring an applicant, and throughout the course of the employment relationship, the employer is prohibited from carrying out (directly or by using third parties) investigations concerning political, religious or union-related opinions or any other kind of opinion concerning circumstances that are not relevant for evaluating the professional aptitude of the employee to perform a specific job. Questions concerning employees' health are only permitted provided that they are deemed to be crucial for the job that is to be performed. Questions related to past criminal records are only permitted if a clear police certificate is deemed to be a requirement for the kind of job to be performed. Questions related to pending criminal proceedings are not allowed.
What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

## 5.1 Visa

### 5.1.1 Procedure for obtaining approval

As a general rule, most foreign nationals require a visa to enter and work in Italy, except for:

- European Economic Area ("EEA") citizens. They can enter and reside in Italy without a permit if their stay is less than three months. For longer stays, they must be enrolled on the public register of the town council where they reside; and
- Non-EEA citizens who already have a residence permit from another EEA country. They can enter and stay in Italy for eight days without a residence permit. After this period, they must obtain one.

For further details, a list of the nationalities that require a visa to enter Italy (on the basis of the duration of, and reasons for, the visit) is available on the website of the Ministry for Foreign Affairs, at: www.esteri.it.

### 5.1.2 Cost

Administrative costs for obtaining a visa range from EUR60 to EUR105.

### 5.1.3 Time frame

A visa can be granted within approximately 30 days.

## 5.2 Permits

### 5.2.1 Procedure for obtaining approval

Non-EEA citizens cannot work in Italy without an Italian work permit to stay, regardless of the length of their stay. The Italian Government fixes an annual ceiling (quota) on the number of permits to be issued. However, in exceptional cases, employees belonging to certain categories (for example, executives, highly skilled employees, university lecturers and translators) can access the Italian employment market outside the fixed quotas.

Italian employers must fill in and submit a pre-application form on the internet (further information is available at www.interno.it). This must include an offer to enter into a residence contract with the foreign national employee for work reasons. If this is accepted (subject to annual quotas and conditions), the prospective employer must attend a meeting at the relevant Immigration Office to sign the residence contract and produce all necessary documentation. In the case of a secondment, or other exceptional cases, the Italian company to which the foreign national employee is to be seconded must apply directly to the relevant Immigration Office for the permit to stay. The application must include:

- A duly completed application form; and
- A proposal to enter into a residence contract with the foreign national employee for work reasons.

The Italian company must also comply with the following:

- It must provide suitable accommodation for the non-EEA citizen and declare in the application that this will be made available;
- The employer must have regularly paid the social security and insurance contributions due for its workforce;
- Collective redundancies must not have taken place in the employer's company during the last year;
• An employee with the same professional skills as the non-EEA citizen, and who used to carry out the same job as the one intended for the non-EEA citizen, must not have been dismissed; and

• If a fixed-term contract is being offered, it must comply with legal requirements.

After the necessary checks have been made, the Immigration Office sends the authorisation to work to the Italian consulate or the embassy of the country where the foreign national is resident.

The consulate or embassy then issues a visa (see above, Visa), which allows the employee to enter Italy for work reasons. The foreign national, within eight days of entry into Italy, must go to the Immigration Office to sign the residence contract for employment and obtain a tax code (codice fiscale). The employee signs the residence contract at the same time as the pre-application form for a work permit. After the necessary checks, the work permit is issued by the provincial police office headquarters, which also informs the Immigration Office. The Immigration Office then calls the employee for delivery of his work permit.

5.2.2 Cost

Administrative costs for obtaining a work permit range from EUR80 to EUR200.

5.2.3 Time frame

There is no fixed time frame applicable to obtaining these permits, but it usually takes about three months. This process takes longer if the relevant quotas (see above) are reached.

5.2.4 Sanctions

Employers who hire foreign nationals who do not have the appropriate permit, or whose permit has expired or has been revoked, can be sentenced to prison for a period between three and five years, and be required to pay a criminal fine equal to one half as much as the original sanction when:

• More than three employees are involved;
• The employees are under 18 years of age; or
• The employees have been exploited.

RESTRICTIONS ON MANAGERS AND DIRECTORS

6 Are there any restrictions on who can be a manager or company director?

6.1 Age restrictions

There are no age restrictions on managers or company directors.

6.2 Nationality restrictions

There are no nationality restrictions on managers or company directors.

6.3 Other

A person cannot be appointed as a company director if he does not have legal capacity. Additionally, there are certain categories of individuals (such as members of Parliament, civil servants and so on) who cannot perform activities as company directors while they are in these positions.
7. How is the employment relationship governed and regulated?

7.1 Written employment contract

An oral employment contract is valid and effective. There is no specific requirement for a written employment contract nor obligation to draft the contract in Italian. However, to be valid, certain clauses must be in writing (for example, a probationary period, a fixed-term period and a non-competition clause). In addition, the employer must inform the employee in writing (within 30 days of starting employment) of the:

- Identity of the parties;
- Place of work;
- Date on which the contract begins;
- Duration of the contract, specifying whether it is fixed-term or permanent;
- Probationary period, if applicable;
- Job title or category;
- Salary;
- Duration of paid holidays;
- Working hours; and
- Length of the notice period when terminating the contract.

7.2 Implied terms

The Civil Code implies certain employee obligations into the employment contract, which apply even if no reference to them is made within the contract itself, including:

- Due diligence and care (paragraph 1, Article 2104, Civil Code);
- Obedience (paragraph 2, Article 2104, Civil Code);
- Non-competition during the employment and confidentiality (Article 2105, Civil Code); and
- There are also terms implied into the contract that limit the employer's management, disciplinary and monitoring powers.

7.3 Collective bargaining agreements

CBAs between trade unions and employers' associations are common in all sectors. National CBAs are only binding on a company if it is a member of the relevant employers' association. Generally, if a company is not a member, it does not have to apply the CBA. However, the agreement applies if reference is made to it in the employment contract or the employer decides to adopt its terms.

7.4 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Generally, an employer cannot unilaterally change the terms and conditions of employment. The employee's consent to these changes is always required.

However, there are two strictly regulated exceptions to this rule (as amended in June 2015) which permit an employer to unilaterally change the employee's duties and place of work if the employer wishes to do so.

With regard to changing an employee's duties, it is possible to assign the employee to a lower job, subject to the following limitations:
The employer can unilaterally assign an employee to different duties as long as such duties belong to the same job-classification level and statutory job category (that is, executives, middle-managers, white-collar employees and blue-collar employees) as his or her previous job-classification level, and the employee is entitled to the same salary;

The employer can unilaterally assign an employee to different duties of a lower job-classification level, but in the same statutory job category, only if there is an objective reason for doing so (for example, a change in the company’s organisational structure). More circumstances can be provided for under collective bargaining agreements (CBAs). To be valid, the change must be executed in writing and the employee must be entitled to the same salary; and

The employer can enter into individual agreements with its employees to change their duties (without limitation), job-classification levels, statutory job categories and salaries, on the condition that these agreements are signed before a conciliation committee (for example, at the local employment office, trade union offices, court or certification board offices) and that they are signed in the employee's interest so as to keep his/her job, to acquire a different skill or to improve his/her living conditions.

In addition, the employer can unilaterally change the place of work, provided that there are organisational, technical or production reasons to do so. Additional restrictions can be provided for under the applicable CBAs.

MINIMUM WAGE

8 Is there a national (or regional) minimum wage?

8.1 There is no minimum wage either at national or regional level. However, employees are entitled to receive a salary commensurate with the quality and quantity of their work and, in any case, one that is sufficient to guarantee a decent lifestyle for themselves and their family (Article 36, Italian Constitution). When deciding these minimum levels of pay, the court often considers the minimum amount of salary set out in the national collective bargaining agreements for the relevant sectors, even if the company does not apply them.

RESTRICTIONS ON WORKING TIME

9 Are there restrictions on working hours? Can an employee opt out on either an individual or collective basis?

9.1 Working hours

There is no cap on daily working hours as such. However, employees are entitled to a daily rest period of 11 consecutive hours every 24 hours. This effectively restricts how many hours a worker can work in a day.

The normal working week is 40 hours, and the maximum working week is an average of 48 hours every seven days, including overtime, calculated over a four-month reference period. CBAs can extend this reference period to six or 12 months provided that there are objective, technical or organisational reasons for doing so, and often provide for a shorter normal working week (for example, 37 or 39 hours). CBAs regulate overtime. Where no CBA applies, overtime must be agreed between the parties, although overtime cannot exceed 250 hours per year.

Even without prior written agreement, overtime can be requested for specific reasons set out in the law and CBAs, such as:

- Exceptional production requirements;
- Circumstances beyond the company’s control; or
- Particular events (for example, exhibitions or demonstrations).

Overtime must be compensated with increased salary, although a CBA can state that the worker must be allowed to take an equivalent period of compensatory rest.
There is a limit on the amount of night work an employee can perform. A night worker's normal hours of work must not exceed an average of eight hours in every 24 hours however, this limit can be adjusted by a CBA. Night work must be carried out between midnight and 5am. A night worker is a person who works at least three hours during this period.

There are different limits for young workers. In certain exceptional cases, where young people are permitted to work, different working hour limits apply. A worker under 16 years old must not work more than seven hours a day or 35 hours a week. A worker between 16 and 18 years old must not work more than eight hours a day or 40 hours a week.

The restrictions on working hours do not apply to employees whose duration of work cannot be measured, pre-determined or determined by the employees themselves, nor to:

- Executives, managers and employees who have any form of independent decision-making powers within the organisation's structure;
- Employees working from home; or
- Teleworkers (that is, employees not working on the employer's premises and using the employer's IT equipment such as a computer or other electronic devices).

9.2 **Rest breaks**

An employee whose working hours exceed six hours per day is entitled to a rest break during the working day. Normally CBAs regulate rest breaks, but where no CBA applies, a rest break cannot be less than ten minutes. Rest breaks can be allocated during the day to accommodate the technical requirements of the working processes.

Employees are entitled to a daily rest of at least 11 consecutive hours every 24 hours. In addition to the daily rest break, employees are entitled to a weekly rest period of at least 24 consecutive hours every seven days, usually coinciding with a Sunday.

Workers are entitled to "adequate" rest breaks where the worker's health and safety is at risk on account of the work pattern, for example:

- Repetitive work;
- Shift work; or
- Particular kinds of work (for example, in the transport sector).

9.3 **Shift workers**

Shift work is regulated by the relevant CBA.

**HOLIDAY ENTITLEMENT**

10 **Is there a minimum paid holiday entitlement?**

10.1 **Minimum holiday entitlement**

All employees are entitled to a minimum of four weeks' paid annual holiday. CBAs and individual contracts can provide for a longer period of holiday entitlement. Annual leave cannot be replaced by a payment in lieu, except where the employment contract is terminated.

There is no statutory unpaid holiday entitlement. However, a CBA can provide for unpaid leaves of absence.

According to a reform that entered into force on 24 September 2015, employees can transfer their accrued annual hourly leave or holiday entitlements for free to employees of the same company in order to allow them to look after their minor children who, due to their particular health conditions, need continuous treatments. The conditions and manner of transferring annual hourly leave and holiday entitlements will be set out in the applicable CBAs.
10.2 Public holidays

There are 12 public holidays, all of which are not included in the minimum holiday entitlement.

ILLNESS AND INJURY OF EMPLOYEES

11 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

11.1 Entitlement to paid time off

In the case of illness or injury, CBAs or individual contracts generally provide for a period of paid time off, during which the employee is entitled to keep his job and to receive their salary in the proportion and for the period set out in any applicable CBA or the individual employment contract. After this period, the employer can dismiss the employee by giving notice. This period is generally between six and 12 months, and applies in cases of both a single period of sick leave and multiple periods.

11.2 Recovery of sick pay from the state

The National Social Security Body (Istituto Nazionale Previdenza Sociale) pays part of the salary, depending on both:

- The employee's qualifications and length of service; and
- The employer's business sector.

The employer pays the other part (under the relevant CBA), so that employees generally receive their full (or almost full) remuneration. The employer is not entitled to recover sick pay paid from the state.

STATUTORY RIGHTS OF PARENTS AND CARERS

12 What are the statutory rights of employees who are:

- Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
- Carers (including those of disabled children and adult dependants)?

12.1 Maternity rights

Female employees must not work for two months before, and three months after, childbirth. This compulsory period of maternity leave can be changed to one month before and four months after childbirth, if a medical certificate is produced.

A female employee can request to go on early maternity leave in certain circumstances, for example, if her duties involve lifting or moving heavy objects. In this case, a medical certificate is required, together with an authorisation from the Employment Office. However, the employer's consent is not needed.

During the entire pregnancy, and for a period after childbirth, the employee must not be allocated tasks that may endanger her health.

During maternity leave, employees receive an allowance from the National Social Security Body equal to 80% of their salary.

In case of voluntary or therapeutic termination of pregnancy after 180 days from the beginning of the pregnancy, or in case of the death of the child at birth or during maternity leave, female employees can return to work at any time with at least ten days' notice to the employer (subject to specific medical approval).

After maternity leave, employees are entitled to return to the same job in which they were employed before taking leave. Employers cannot dismiss female employees during pregnancy and until the child is one year old, except in certain circumstances (see Question 19).
Additionally, the resignations and mutual termination agreements entered into with mothers during pregnancy or with parents of children under the age of three must always be validated and confirmed by such mothers or fathers through a special procedure. Failure to do so renders the resignation/mutual termination agreement ineffective.

12.2 Paternity rights

If the mother does not take maternity leave (due to death, infirmity or the father having exclusive custody), the father is entitled to the entire, or residual period, of maternity leave. This right does not apply in any other circumstances.

Employees on paternity leave are entitled to the same allowance, have the same rights to return to their job after paternity leave, and have the same protections against dismissal as employees on maternity leave (see above, Maternity rights).

Additionally, fathers must take two days, and possibly another two days, of paid paternity leave within five months of the child being born.

Italian law provides for a special procedure to validate and confirm resignations and mutual termination agreements made during the first three years of the child’s life (see above, Maternity rights).

12.3 Surrogacy rights

There are no regulations concerning surrogacy in Italy.

12.4 Adoption rights

Employees who have adopted children are entitled to take a five-month period of maternity or paternity leave during the first five months that the child is in the family.

They are entitled to the same financial benefits as parents of natural children (see above, Maternity rights). They can also take parental leave, for the first three years that the child is in the family, for the same periods and with the same financial benefits as parents of natural children (see below, Parental rights).

Additionally, the resignations and mutual termination agreements made by parents within the first three years of the child being adopted or taken on by the family must always be validated and confirmed by such mothers or fathers through a special procedure. Failure to follow the special procedure may render the resignation/mutual termination agreement ineffective (see above, Maternity rights).

12.5 Parental rights

After childbirth, in addition to the maternity and paternity rights above, male and female employees can take parental leave for up to six months each (with an overall limit of ten months together, or 11 months if the father takes a leave of not less than three months), until the child is 12 years old. Single parents are entitled to ten months’ leave. Employees receive an allowance amounting to 30% of their salary during parental leave, for an overall maximum of six months, until the child is six years old. The parental leave can be enjoyed on an hourly or daily basis.

The employee can request (only once) that his or her full-time contract be converted into a part-time contract in lieu of parental leave, reducing the working hours by up to 50%. The employer must convert the contract within 15 days of the request.

12.6 Carers’ rights

The law provides for several kinds of paid ordinary or extraordinary leave entitlements for subordinate employees who are:

- Parents or relatives of disabled children; or
- Married to, or have relatives who are, adult dependants, whose disability is of a serious nature and has been assessed by a state medical panel.
Ordinary leave entitlements include three days' paid leave per month, up to two hours paid leave per day and an extension of the optional six months' parental leave until the child is aged three. During this last period, employees receive an allowance amounting to 30% of their salary. Additionally, employees are entitled to request up to two years' extraordinary leave, during which the employee receives a monthly amount equal to the normal monthly salary, up to a fixed gross annual threshold set up each year by the Ministry of Labour (which was equal to EUR47,445.82 for 2016 and has not yet been fixed for 2017).

**CONTINUOUS PERIODS OF EMPLOYMENT**

13 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

13.1 Statutory rights created

Length of service can create a number of statutory benefits (for example, a right to increased severance pay (see Question 18). CBAs also give various benefits to employees, depending on their length of service, including:

- Automatic salary increases;
- Longer sick leave; and
- Longer notice periods.

13.2 Consequences of a transfer of employee

If individual employees are transferred to a new employer (either where a transfer of undertaking takes place or where contracts are transferred with the employees' consent), their employment contracts remain unaltered and they are deemed to retain their full period of continuous service.

**FIXED TERM, PART-TIME AND AGENCY WORKERS**

14 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

14.1 Temporary workers

Fixed-term and permanent workers must be treated equally.

Under a recent reform, a fixed-term employment contract can be entered into by the parties without any specific justification for the fixed-term duration, up until a maximum period of 36 months, including all possible extensions. This new rule also applies to temporary staff hired through agencies (see below, Agency workers).

In the absence of specific provisions in CBAs, the maximum number of employees on fixed-term contracts must not exceed 20% of the total number of permanent employees in force as of 1 January of the year of hiring. If the contract starts during the year, the percentage is calculated considering the number of permanent employees at the time of the hiring. There are some exceptions to this rule such as, for example, fixed-term contracts granted by an innovative start-up, for work relating or instrumental to its corporate purpose, run for a maximum period of four years from the start-up's formation.

CBAs can provide for different limits on the proportion of fixed-term contracts allowed with regard to the total number of permanent employees. If the maximum number of fixed-term contracts is not complied with, the contracts that violate the limit will not be converted into permanent contracts, but an administrative fine for each fixed-term employee employed in violation of the limit will be imposed, as follows:

- 20% of the remuneration, for each month or fraction of a month exceeding 15 days of the duration of employment, if the number of workers employed in violation of the percentage limit is not more than one.
• 50% of the remuneration, for each month or fraction of a month exceeding 15 days of the
duration of employment, if the number of workers employed in violation of the percentage
limit is more than one.

Fixed-term contracts are prohibited in the following cases:

• To replace employees on strike;

• Where, in the last six months, there was a collective dismissal affecting employees assigned
to the same tasks, unless:
  o the hiring takes place to temporarily replace an absent employee;
  o the employee to be hired is registered on the unemployment list; or
  o the initial term of the fixed-term contract does not exceed three months.

• In organisations where employment contracts have been suspended, or working time
reduced, with a right to redundancy pay for employees whose tasks are set out in the fixed-
term employment contract; and

• Where the employer fails to comply with health and safety regulations.

A fixed-term employment contract can last up to five years for an executive. However, the
executive can withdraw from it after the first three years, by giving proper notice. Executives are
expressly excluded from the application of the law concerning fixed-term contracts.

A fixed-term contract can only be terminated for just cause. If a just cause does not exist the
employee is entitled to damages. Damages are generally quantified by a judge according to the
loss of salary between the early termination date and the contractually agreed expiry date.

14.2

Agency workers

Agency work is permitted either for a fixed, or for an indefinite, period of time. In the absence of
specific provisions in CBAs, the maximum number of indefinite agency work employment contracts
must not exceed 20% of the total number of permanent employees in force as of 1 January of the
year in which the contract is entered into. If the contract starts during the year, the percentage is
calculated considering the number of permanent employees in force at the time of signing the
open-ended agency work employment contract. The maximum number of fixed-term agency work
employment contracts can be set by CBAs.

Agency work is prohibited in the following circumstances:

• To replace employees on strike;

• Where, in the previous six months, there has been a collective dismissal affecting employees
assigned to the same tasks provided for in the agency employment contract (unless the
agency workers are used to temporarily replace an absent employee or where the initial term
of the fixed-term agency contract does not exceed three months);

• In organisations where employment contracts have been suspended, or working times
reduced, with a right to redundancy pay for employees whose tasks are set out in the agency
employment contract; and

• Where the employment agency fails to comply with health and safety regulations.

The agency contract must be in writing and must contain certain information prescribed by law,
including:

• Details of the agency's authorisation granted by the Ministry of Employment;

• The reasons for entering into this type of contract; and

• The number of individuals to be supplied, their duties, position, place of work, working hours,
remuneration, and potential risks to which they could be exposed in carrying out the job.
An agency contract that is not in writing will be void, and the agency workers will be legally considered as permanent staff.

Under the CBA applicable to agencies, the initial term can be extended six times with the employee’s consent.

As agency workers are employees of the agency during their employment, they must be paid directly by the agency as their sole employer. However, the user company is jointly liable with the agency if the agency fails to pay them. Joint liability applies to the payment of social security and insurance charges, as well as to salary. Agency workers are subject to the directive and organisational power of the user organisation. However, any disciplinary procedure must be managed by the agency.

The agency is responsible for compliance with mandatory information obligations with regard to health and safety legislation in respect of agency workers, unless the agency contract provides that the user organisation is responsible.

If the supply of workers is unlawful, agency workers can file proceedings claiming the existence of an employment relationship directly with the user organisation from the start of the agency contract. This means that, in the case of a successful claim, an agency worker may become a permanent member of staff of the user organisation, with all the relevant rights and benefits. In these circumstances, administrative fines may also apply.

14.3

Part-time workers

A part-time employee is an employee who works for less than 40 hours per week, with pay and rights corresponding to the time worked. However, a part-time employee must not be discriminated against or receive less favourable treatment than an equivalent, full-time employee.

The part-time contract must specify the duration of the work and the distribution of working time.

In compliance with the provisions of the applicable CBA, an employer can ask a part-time employee to carry out additional work during the hours provided for by the parties in the employment contract, within the limits of normal working hours. If the applicable CBA does not regulate additional work, the employer can require the worker to carry out additional work up to a maximum cap of 25% of the agreed weekly working hours. In such a case, the employee can refuse the performance of additional work if his/her refusal is justified by proven work-related needs, or reasons relating to health, family or vocational training. Additional work is compensated by an additional 15% of the total hourly pay.

If the applicable CBA does not contain any provision, the employer and the employee can enter into an agreement (that must be certified by a special committee), providing for the employer's power to ask the employee to work different working hours or increase the working time in respect of the part-time hours provided for in the employment contract. To exercise this power, the employer must inform the employee by giving at least two working days’ notice, unless otherwise agreed between the parties. The employee has the right to an additional compensation for this change, as provided for under the applicable CBA. An employee's refusal to agree to different/increased working hours does not constitute a justified reason for dismissal.

A full-time employee’s refusal to agree to a part-time contract, or vice versa, does not constitute a justified reason for dismissal. However, the employer and the employee can agree in writing to convert a full-time contract into a part-time contract.

If a part-time employee is recruited, the employer must promptly notify full-time employees who work at the site and consider any request to convert full-time contracts to part-time contracts. The employer has no obligation to agree to a request for a part-time contract.

An employee whose employment contract is converted from full-time to part-time is entitled to be given priority with regard to the recruitment of workers with a full-time contract for the performance of the same tasks or duties, at the same job-classification level and category.
14.4 **Self-employed workers**

From 1 January 2016, employers that enter into a permanent employment contract with individuals who have a self-employment contract with that same employer, are entitled to the cancellation of the tax, social security contribution and administrative violations committed in relation to the misclassification of the working relationship, except for any violations that have been ascertained by a Ministry of Labour inspector before the hiring. This cancellation is only available if both:

- The employee signs (before a conciliation committee) a settlement agreement with waivers relating to the previous self-employment relationship; and
- In the 12 months following the hiring, the employer does not dismiss the employee (unless for just cause or for subjective justified reasons).

**DATA PROTECTION**

15 **Are there any requirements protecting employee privacy or personal data? If so, what are an employer's obligations?**

15.1 **Employees’ data protection rights**

The data protection rights enjoyed by employees can be found in the Personal Data Protection Code (Legislative Decree No. 196/2003) ("Data Protection Code"), which applies to all organisations and individuals.

The Data Protection Code brings together all the various laws, codes and regulations relating to data protection since 1996. There are three key principles behind the Data Protection Code, which are outlined in section 2:

- Simplification;
- Harmonisation; and
- Effectiveness.

The Data Protection Code is divided into three parts:

- Part one sets out the general data protection principles that apply to all organisations;
- Part two provides additional measures that must be undertaken by organisations in certain areas, for example, healthcare, telecommunications, banking and finance or human resources; and
- Part three contains provisions on sanctions and remedies.

Part two of the Data Protection Code has been further developed through the introduction of sectoral Codes of Practice.

15.2 **Employers’ data protection obligations**

The Data Protection Code ensures the fair and lawful processing of individuals' personal data, in line with principles of fair processing, by respecting data subjects' rights, fundamental freedoms and dignity, particularly relating to:

- Confidentiality;
- Personal identity; and
- The right to personal data protection.

The employer can only collect an employee's personal data if all of the following apply:

- The data is relevant in evaluating the employee's fitness for the position;
• Prior information on the purposes of the processing is given to the data subject;
• The data subject provides their consent to the processing; and
• In the case of sensitive data, the authorisation of the watchdog (Garante) is obtained prior to
the processing.

DISCRIMINATION AND HARASSMENT

16 What protection do employees have from discrimination or harassment, and on what
grounds?

16.1 Protection from discrimination

Employees are protected against direct and indirect discrimination, during the course of their
employment, on the grounds of:

• Sex;
• Race;
• Colour;
• Religion;
• Political opinion;
• Sexual orientation;
• National, social or ethnic origin;
• Membership of a trade union;
• Marital status;
• Pregnancy;
• Disability;
• Age;
• Personal opinion; or
• Being HIV positive.

Direct discrimination occurs when a person is, has been or would be treated less favourably than
another person in a comparable situation. Indirect discrimination occurs when an apparently
neutral requirement, criterion, act, pact or general rule places a person at a particular disadvantage
or in a less favourable position. However, indirect discrimination can be objectively justified if the
measure has a legitimate aim and appropriate methods are used.

The legislation applies to both the public and private sector, particularly in relation to:

• Access to the job market;
• Employment and working conditions;
• Access to any kind of professional association;
• The activities of employees’ and employers’ unions;
• Social security contributions;
• Health assistance;
• Social services;
• Education; and
• Access to services, including accommodation.

In addition, it is unlawful to refuse to employ individuals or to dismiss them on the grounds that they are or are not members of a trade union, or because of their marital or family status, or pregnancy. Employees are also protected against discrimination and victimisation on these grounds during the course of their employment.

If discrimination is found to exist, the Employment Tribunal can require the employer to develop a plan to remove discriminatory practices, and publish that decision in a national newspaper. It can also order the employer to pay damages. There is no specific ceiling for damages, but the court will consider, when setting their level, whether the discrimination consists of retaliation against the employee or an unfair reaction to a previous case.

There are specific procedures in relation to:

• Discriminatory collective economic treatment. The employees discriminated against (or their trade union) can request the court to order the employer to pay a sum into a special fund called the Pensions Adjustment Fund for a maximum of one year;

• Discriminatory collective treatment on the grounds of sex. On the request of the affected employees or their trade union, and after examining the facts and hearing the Equal Treatment Committee and the local trade union, the court can order the employer to draw up a plan to remove all kinds of discrimination and pay damages to the employees; and

• Anti-trade union behaviour. On the request of the affected trade union, the court can order the employer to immediately cease the anti-union practice. If an employer fails to obey, it can be liable to prosecution under the Criminal Code.

The qualifying period for claims depends on the type of claim and the statutory limitation period varies from five to ten years.

16.2 Protection from harassment

Harassment is defined as any unwanted conduct relating to any of the discriminatory grounds with the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment. Sexual harassment is specifically defined as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, with the purpose or effect of violating a person's dignity, in particular by creating an intimidating, hostile, degrading, humiliating or offensive environment.

A person's rejection of, or submission to, harassment or sexual harassment cannot be used as a basis for a decision affecting that person.

The court can impose the same orders and penalties as for discrimination (see above, Protection from discrimination).

WHISTLEBLOWERS

17 Do whistleblowers have any protection?

A piece of legislation has introduced specific protection for employees of the Public Administration who file a claim before a court, or report to their supervisor, any unlawful conduct that they have come to be aware of during the employment relationship. The law expressly provides that these employees cannot be sanctioned, dismissed or discriminated against by their employer for these complaints. The Discrimination Law provides protection against discrimination when someone (including an individual who has suffered direct or indirect discrimination, as well as any other person) is treated badly as a consequence of the action they took in order to achieve equal treatment (that is, victim protection).
TERMINATION OF EMPLOYMENT

18 What rights do employees have when their employment contract is terminated?

18.1 Notice periods

There are two ways in which the employer can terminate an employment contract:

- Dismissal without notice period for just cause, for example, where there is a serious breach of the employment contract (gross misconduct); or

- Ordinary dismissal with notice based on either a:
  - subjective reason (involving a breach of the employee's legal and contractual duties); or
  - objective reason (involving economic factors relating to production, the organisation of work, the proper functioning of the business and redundancy).

Specific rules apply to employees who are executives (dirigenti) (see Question 19).

The relevant notice period is set out in the applicable CBA, based on the employee's length of service, position, and level. The notice period required in the event of resignation is usually shorter than for dismissal. In the latter case, the employer can opt to make a payment in lieu of the notice period, on which social security contributions must be paid.

18.2 Severance payments

In all cases where an employment contract is terminated, even for just cause, the employer must pay the dismissed employee the following:

- Severance pay. The employer must pay severance pay (trattamento di fine rapporto (TFR)) in all cases, even if there is a resignation or just cause for dismissal. The amount payable is equal to the sum of each annual salary divided by 13.5. These amounts are index-linked annually;

- Pro rata supplementary monthly payments. The employer must pay these if it has done so during the employment contract. In these circumstances, the employer must pay the amount due up to the date on which the employment contract is terminated, including the pro rata sum accrued during the notice period; and

- Payment in lieu of holidays not taken. If dismissed employees have not used all their holiday allowance before the employment contract is terminated, they are entitled to a payment in lieu of unused holiday allowance.

18.3 Procedural requirements for dismissal

A dismissal must always be made in writing. If the dismissal is caused by an employee's failure to fulfil legal or contractual duties, a special procedure (disciplinary procedure) must be followed. Under this procedure, the employer must:

- Promptly send the employee a letter describing the facts that would constitute a breach of the contract;

- Wait for the employee's reply, which must be received within five days (or a longer period provided for in the applicable CBA); and

- Send the employee a letter of dismissal explaining why the employer cannot accept the employee's justifications.

In the letter of dismissal, the employer must mention the reasons for the dismissal. For individual dismissals for objective reasons (i.e. redundancy), there is a procedure that must be followed by employers that employ 61 or more employees in Italy, or 16 or more employees in a single work unit or town. In particular, this procedure provides that:
- The intention to dismiss must be communicated in advance to the employee and to the local Labour Office;
- The Labour Office has a seven-day period to call a meeting with the employer and employee in order to find an agreement for the planned dismissal;
- If the meeting is not called by the Labour Office within seven days, the dismissal can be served; and
- If the meeting is called, the parties will try to reach an agreement (for a maximum period of 20 days). In the event of failure to reach an agreement, the dismissal can be served.

The above procedure for dismissals based on objective reasons does not apply to the dismissal of:
- Executives; or
- Employees hired on or after 7 March 2015.

A specific procedure exists for collective redundancies (see Question 20).

19. What protection do employees have against dismissal? Are there any specific categories of protected employees?

19.1 Grounds for dismissal

There are three grounds for dismissal:
- Justified objective reason (that is, redundancy for economic, production, or organisational reasons);
- Justified subjective reason (that is, serious misconduct in breach of the employee's contractual obligations); or
- Just cause (that is, circumstances that prevent the continuation, even on a temporary basis, of the employment relationship).

Procedural requirements for dismissal are dealt with in Question 18.

19.2 Unfair dismissal.

Employees who have successfully passed the probationary period can apply to the Employment Tribunal if they consider that they have been unfairly dismissed. The judge can apply the following remedies, depending on the company's size and the date of hiring of the employees.

For employees hired before 7 March 2015, in the case of unfair dismissal within companies with 60 or fewer employees, and 15 or fewer employees in the single work unit (for example, an office or subsidiary) or the town in which the dismissal is served, the judge will order the employer to do one of the following (the choice rests with the employer):
- Reinstate the employee (the employee returns to work with a new contract); or
- Pay damages of between 2.5 and six months' salary. (Damages can increase to ten months' salary for employees with ten years' service and 14 months' salary for employees with 20 years' service, provided that the whole company has at least 15 employees.)

In the case of unfair dismissal within companies with 61 or more employees, or 16 or more employees in a single work unit or town, the judge can order the employer to do one of the following:
- Dismissal on discriminatory grounds. In the case of unlawful or void dismissals (for example, discriminatory dismissal, oral dismissal, dismissal during pregnancy or retaliatory dismissal), the remedy consists of the reinstatement of the employee with payment of compensation for the lost salary from the dismissal date until reinstatement (this applies to all employees,
including executives and employees working in smaller companies) with a minimum compensation of five months' salary;

- Dismissal without any written justification or served without following the legal procedure. If the dismissal is served without any written justification or without following the disciplinary procedure or the procedure prescribed by law for a dismissal for objective reasons (see Question 18), the judge can award the employee compensation for the damage suffered equal to between six and 12 months' salary, unless the reasons for the dismissal do not exist (in which case, the sanctions that follow will apply);

- Dismissal based on the employee's breach of contract (justified subjective reasons or just cause such as a gross misconduct). When a dismissal is served for subjective reasons (after completion of the compulsory disciplinary procedure described in Question 18) and is declared unfair at trial, the possible consequences are:
  - if the dismissal is unfair because the facts on which it was based did not happen, or are considered to be less serious breaches by the disciplinary codes applied to the employment relationship, the consequence is reinstatement with compensation capped at 12 months' salary (alternative income earned or potentially earned by the employee in the relevant time span is to be deducted from the amount awarded); or
  - in any other case of unfair dismissal declared at trial, the dismissal remains in place (and termination of the employment relationship is confirmed), but compensation is awarded to the claimant (between 12 to 24 months' salary); or

- Dismissal for economic or reorganisation reasons (objective reasons, such as the elimination of the job position). When dismissal is served for objective reasons (after completion of the procedure described in Question 18), and is declared unfair at trial, the possible consequences are:
  - if the dismissal is manifestly without merit or grounds (that is, the facts at its basis are not true), the judge has the discretion to award the claimant either reinstatement and compensation (capped at 12 months' salary), or just compensation (from 12 to 24 months' salary); or
  - in all other cases of unfair dismissal being declared at trial, the dismissal remains in place (and termination of the employment relationship is confirmed), but compensation is awarded to the claimant (between 12 to 24 months' salary).

For employees hired on or after 7 March 2015, in the case of unfair dismissal within companies with 60 or fewer employees, and 15 or fewer employees in the single work unit (for example, an office or subsidiary) or the town in which the dismissal is served, the judge will award the unfairly dismissed employee compensation equal to one month's salary (not subject to social security contributions) for each year of service, with a minimum of two months', and a maximum of six months', salary.

In the case of unfair dismissal in companies with 61 or more employees, or 16 or more employees in a single work unit or town, the judge will order the employer to do one of the following:

- Dismissal on discriminatory grounds. In the case of unlawful or void dismissals (for example, discriminatory dismissal, oral dismissal or dismissal during pregnancy), the remedy consists in reinstatement with the payment of compensation for the lost salary from the dismissal date until reinstatement (this applies to all employees, including executives and employees working in smaller companies) with a minimum of five months' salary;

- Dismissal based on justified subjective reasons or just cause. When the dismissal is found to be unfair due to the inexistence of the grounds, the remedies are reinstatement and damages equal to the full salary and social security contributions due from the date of dismissal to the date of reinstatement (capped at 12 months' salary);

- Dismissal on redundancy grounds, disciplinary grounds or just cause. The court will declare the employment contract terminated at the date of dismissal and order the employer to pay compensation, not subject to social security contributions, equal to two months' salary for each year of service, with a minimum of four months' and maximum of 24 months' salary; or
• Unfair dismissal due to a procedural error or issued without an explanation of its grounds. The court will declare the contract terminated at the date of dismissal and order the employer to pay compensation, not subject to social security contributions, equal to one month's salary for each year of service, with a minimum of two months’ salary and a cap of 12 months’ salary.

19.3 Executives

Executives can be dismissed:

• For just cause without notice. There must be a serious cause that cannot allow the contract to continue even on a provisional basis; or

• For no given reason, with notice. However, if a CBA applies to the employment contract with the executive, the employer must have reasons for the dismissal, which can be subjective (involving a breach of the employee's legal and contractual obligations) or objective (involving economic factors relating to production, the organisation of work, the proper running of the business, and redundancy). If the reason is not fair or true, or there is a dismissal without any reason, the executive can be awarded a penalty, which must be paid in addition to the notice period. For example, the CBA for the manufacturing sector provides for a range between two and 18 to 24 months’ salary depending on the length of service.

19.4 Discriminatory dismissal

Discriminatory dismissals are unlawful, regardless of the company's current size or the employee’s category (see above, Dismissal on discriminatory grounds).

19.5 Qualifying period regarding claims for unfair dismissal

Claims against dismissal must be filed within 180 days of the date on which the employee first challenges the dismissal. The challenge to the dismissal must be made in writing within 60 days of the notification of the dismissal itself.

If this deadline is missed, the right to file a claim before the Employment Tribunal will be forfeited.

19.6 Protected employees

The following categories of employees have special protection against dismissal:

• Disabled employees. The dismissal of disabled employees for economic reasons or as part of a collective redundancy is not valid if the number of disabled employees in the workplace is lower than the law requires. If a disabled employee's contract is terminated, the employer must inform the Employment Office within ten days to substitute the dismissed employee with another disabled employee;

• Employees entitled to maternity or paternity rights. Employers cannot dismiss female employees during pregnancy and until the child is one year old, unless the dismissal is due to:
  - a just cause;
  - the employer's business closing down;
  - the expiry of a fixed-term contract; or
  - an unsatisfactory probationary period.

The same rule applies to a father who takes paternity leave instead of the mother;

• Employees who have been married for one year or less. Employers cannot dismiss employees from the date of the request for publication of the marriage until one year after the date of the marriage. Any dismissal in this period is null and void unless the employer demonstrates that the reason for the dismissal is due to:
  - a just cause;
the employer's business closing down; or

- the expiry of a fixed-term contract.

Recent case-law has extended this protection to male employees; and

- Representatives of the works council. The dismissal of a representative of a works council on union grounds is unlawful.

**REDUNDANCY/LAYOFF**

20.1 **Definition of redundancy/layoff**

Dismissal for objective reasons (individual redundancy) is determined by reasons related to the business activity, the organisation of work, and to the business’ regular functioning. A genuine redundancy must derive from a real need for the employer to make a certain position redundant in order to deal with economic, organisational and production reasons. Individual redundancies are subject to the rules outlined in Question 18 and Question 19.

20.2 **Redundancy/layoff pay**

The individual and collective redundancy pay is equal to severance pay on dismissal (see above, *Severance payments*). In addition, starting from 1 January 2013, a new unemployment benefit (Nuova Assicurazione sociale per l’impiego ("NASPI")), has been provided, under certain circumstances, to people who have been dismissed. The benefit is approximately equal to a maximum of EUR1,300 per month, paid for a number of weeks equal to half of the contribution weeks of the previous four years. The employers will contribute to its funding.

In the case of a collective redundancy that occurs before 2017, employers in certain activity sectors must also contribute to the National Social Security Body (Istituto Nazionale Previdenza Sociale (INPS)) in order to fund a special unemployment indemnity (indennità di mobilità), which is payable to the employee in lieu of NASPI.

20.3 **Collective redundancies**

A collective redundancy occurs when a company employing more than 15 persons, as a result of a business reorganisation, intends to make at least five dismissals (including executives) within 120 days, in either:

- Each work unit; or

- A number of work units within the same province.

If an employer intends to carry out collective redundancies, it must inform the employees’ representatives in writing (either the company’s works council or any related trade unions) and provide the following information:

- The reasons for making the redundancies;

- The technical, organisational or economic reasons why it is impossible to avoid, wholly or in part, making the redundancies;

- The numbers and job descriptions of the redundant employees;

- The timetable for redundancies;

- Any measures taken regarding the redundant employees; and

- The proposed method of calculating any redundancy payments, other than those conferred by law or CBAs.
The redundancy procedure is then divided into two phases:

- **Phase I.** Negotiations with the employee representatives must begin within seven days of receiving the written information (if requested by the employees' representatives). This consultation phase must be completed within 45 days (23 days if the number of employees involved is fewer than ten). The company must provide the Regional and Provincial Employment Offices with written notice of the results of the negotiations, giving reasons if there is a negative outcome; and

- **Phase II.** If the parties do not reach an agreement, the Employment Office must summon them for final negotiations, lasting up to 30 days (15 days if the number of employees is fewer than ten).

This information and consultation procedure also applies in the case of dismissal of executives (who were previously excluded from the application of the procedure).

If the time limit for final negotiations has expired and an agreement has still not been reached, the company can make the redundancies. Redundancies must comply with the employees' notice period, which vary depending on their job position and length of service. Within seven days of the dismissals, the Employment Office must be given a written list of employees who are made redundant. The list must contain the following information:

- The employees' names and addresses;
- The employees' job descriptions and positions in the company;
- The employees' ages and family situations; and
- A detailed description of the selection criteria applied.

Different sanctions apply depending on the hiring date of the affected employees, as follows:

- **Employees hired before 7 March 2015.** The following sanctions apply:

  - if the employer fails to comply with the information and/or consultation requirements, the dismissal will be declared unfair and, as a result, the employer will have to pay each affected employee a compensation payment equal to between 12 and 24 months' salary; or
  - if the employer fails to comply with the selection criteria, the judge can order the employee to be reinstated in his/her job and be paid compensation of up to 12 months' salary; or

- **Employees hired on or after 7 March 2015.** The following sanctions apply:

  - if the employer fails to comply with the information and consultation requirements, or with the set selection criteria, the dismissal will be declared unfair and, as a result, the employer will have to pay each affected employee compensation (not subject to social security contributions) equal to two months' salary for each year of service, with a minimum of four and a maximum of 24 months' salary; or
  - if the dismissed employees were not notified of the collective dismissal in writing, the court can order their reinstatement, as well as payment of compensation equal to the salary that would have been earned by the employees between the dismissal date and the date of reinstatement, with a minimum of five months' salary.

Regarding executives, if the employer fails to comply with the information and consultation requirements or with the set selection criteria, executives will be awarded compensation of between 12 and 24 months' salary, depending on the nature and seriousness of the breach. CBAs can provide for different amounts than those provided by law.
REPRESENTATION AND CONSULTATION

21 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

21.1 Management representation

Employees are not entitled to management representation.

21.2 Consultation

Legislative Decree No. 25 of 6 February 2007, which implemented Directive 2002/14/EC on informing and consulting employees, has introduced a general framework for this issue. This provides that CBAs must define the scope, time frame, affected parties and conditions regarding the information and consultation process. The information and consultation obligations concern:

- The company’s general situation;
- The business it is engaged in;
- The employees; and
- The decisions that may affect how work is organised.

These rules apply to companies with at least 50 employees.

21.3 Major transactions

If the company carries out collective redundancies or transfers of undertakings, employees are entitled to be consulted through their representatives. Consultation is not required for transfers by share takeover. CBAs usually provide further specific provisions.

22 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

22.1 Remedies

If an employer fails to comply with its consultation duties for collective redundancies, or transfers of undertakings or other consultation obligations provided in CBAs, the union can bring legal action for anti-union behaviour. If the court finds that the employer did not comply (for example, if changes to the company’s organisation are adopted without consultation), it can order the employer to stop its unlawful behaviour and consult with the unions.

22.2 Employee action

Individual employees cannot take action to prevent proposals going ahead. The employees’ representatives can apply to the court for an order to stop the unlawful behaviour and consult with the unions (see above, Remedies).

CONSEQUENCES OF A BUSINESS TRANSFER

23 Is there any statutory protection of employees on a business transfer?

23.1 Automatic transfer of employees

If a transfer of an undertaking is carried out, employees are automatically transferred with the business. CBAs can allow executives to resign within six months of the date on which they receive formal notice of the transfer, receiving an extra payment equal to the payment in lieu of notice.

Additionally, if, after a transfer of an undertaking, the terms and conditions of an employment contract have been substantially modified, within three months following the transfer of the undertaking the employee can resign and obtain the payment of the indemnity in lieu of notice.
23.2 Protection against dismissal

Dismissals made as a direct result of transfers of undertakings are invalid.

23.3 Harmonisation of employment terms

The terms of the individual employment contract can be altered, but only with the consent of every employee who has been transferred. In addition, the new employer must apply all terms and conditions of any CBAs applicable to the transferred employee until their expiry date, unless they are replaced by either:

- The new employer's CBA, if applicable; or
- A specific company CBA that deals with the changeover of agreements.

EMPLOYER AND PARENT COMPANY LIABILITY

24 Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company's employees?

25 Employer liability

An employer is vicariously liable for the acts of employees in the course of their employment and for any damage caused to a third party.

25.1 Parent company liability

A parent company is not generally liable for the acts of its subsidiary company's employees.

EMPLOYER INSOLVENCY

26 What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

26.1 Employee rights on insolvency

Employees' rights related to severance payments, as well as damages for the failure of the employer to pay social security contributions and compensation awarded in the case of unfair dismissal, are considered employees' privileged credits. The same applies to the remuneration of self-employed workers.

26.2 State guarantee fund

There are state funds managed by the National Social Security Institute (namely, Fondo di Tesoreria and Fondo di Garanzia) providing a guarantee mainly for the mandatory severance pay (see Question 18) and the additional private pension contributions that insolvent employers failed to pay.

HEALTH AND SAFETY OBLIGATIONS

27 What are an employer's obligations regarding the health and safety of its employees?

The employer's main obligations are to:

- Evaluate health and safety risks in the workplace;
- Identify the steps that must be taken to comply with safety requirements; and
- Eliminate or reduce the risks to a minimum.

The employer must put in place various measures, including measures relating to first aid training,
evacuation of employees, and safety devices. Particular focus should be placed on safety devices, which must be used and maintained in compliance with the manufacturer's instructions.

The employer's premises must be regularly maintained, including its plant machinery and systems.

Employees or their representatives must be involved in the training and consultation regarding health and safety issues in the workplace. The employer must appoint one or more competent persons to assist it in implementing preventative and protective safety measures. In addition, the employer has a duty to ensure that its employees are provided with appropriate health cover. Breach of the employer's health and safety duties carries both criminal and civil penalties. Specific health and security obligations came into force regarding contracts for services, including the duty to:

- Check the suitability of the contractors in relation to the work to be performed; and
- Implement preventative and protective measures regarding the related risks of the job to be performed under the contract.

TAXATION OF EMPLOYMENT INCOME

28 What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

28.1 Foreign nationals

Resident individuals are liable to pay income tax on income produced or earned during the tax period anywhere in the world (worldwide taxation principle). Non-resident individuals are only taxed on the income produced or earned in Italy. The Italian tax year is the calendar year. Individuals are deemed to be resident in Italy if, for more than 183 days in the tax year, they either:

- Are enrolled at the public residency register of the town council where they reside;
- Have their economic and personal interests in Italy; or
- Have their habitual abode in Italy.

28.2 Nationals working abroad

The same principles apply as for foreign nationals (see above, Foreign nationals).

29 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

29.1 Rate of taxation on employment income

The rate of taxation on personal income is currently:

- 23% for income up to EUR15,000;
- 27% for income over EUR15,000 and up to EUR28,000;
- 38% for income over EUR28,000 and up to EUR55,000;
- 41% for income over EUR55,000 and up to EUR75,000; and
- 43% for income over EUR75,000.

29.2 Social security contributions

Both employers and employees must pay social security contributions. Contributions are paid on a
monthly basis and the rate depends on the type of business that the company carries out and the employees' positions within the company (that is, whether they are blue-collar employees, white-collar employees, managers or executives).

29.3 Social security contributions are payable on employees' gross annual earnings. The basic rate for employers' contributions is currently 26.60%, while the current rate for employees is 9.19%, with a ceiling of EUR100,324 for 2017 for any employees who started work after 31 December 1995.

BONUSES

30 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

Employees are commonly rewarded through contractual or discretionary bonuses. If bonuses are contractual, they are subject to the specific conditions contained in the rules governing the bonus scheme.

INTELLECTUAL PROPERTY (IP)

31 If employees create IP rights in the course of their employment, who owns the rights?

IP rights can be split into three categories, depending on the kind of invention:

- Service invention. This is an invention, made by employees in the course of their employment, where the activity that led to the invention was part of the scope of the employment contract and the employees were paid for performing that activity. In this case, the rights arising from the economic exploitation of the invention automatically belong to the employer. Employees are not entitled to specific remuneration for the invention, as their salary already covers this;

- Company invention. This is an invention, made by employees in the course of their employment, where the employee was not paid for performing the activity that led to the invention. In this case, the rights arising from the economic exploitation of the invention belong to the employer, but the employee has the right to be recognised as the actual author of the invention. The employee also has the right to receive proper remuneration for the invention (fair reward). The amount of remuneration is decided according to the importance of the invention; or

- Occasional invention. This is an invention, made by employees in the course of employment using their own resources, but within the business sector in which the company operates. In this case, the economic as well as the creative rights belong to the employee. However, the employer may have a right of pre-emption for either the exclusive or non-exclusive use of the invention, or for the acquisition of the patent.

The above rules only apply to inventions that can be the subject of a copyright. No particular rules apply to other IP rights.

RESTRAINT OF TRADE

32 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

32.1 Restriction of activities

Employees have a duty of loyalty to their employer during the course of employment. During employment they cannot engage in business that competes with the employer, either on their own account or on behalf of third parties. In addition, employees must not divulge information relating to their employer's business or use it in a manner that is detrimental to the employer's activities. Failure to observe these duties can result in disciplinary penalties, including dismissal, depending on the seriousness of the breach involved.
Post-employment restrictive covenants

Any agreement purporting to restrict employees' activities in competition with the previous employer after their contract has been terminated is valid only if the following conditions are met:

- It is in writing;
- It sets out a fair remuneration for the employee;
- It is confined to a specific geographical area;
- It is confined to a specific activity; and
- It does not exceed a term of five years for executives or three years in other cases.

If a longer term is agreed, it is reduced to the above time limit. The remuneration must be calculated by taking into account the duration of the covenant, the area covered and the type of business that is prohibited.

PROPOSALS FOR REFORM

Are there any proposals to reform employment law in your jurisdiction?

There is a draft law concerning some measures for the protection of self-employed workers and for the promotion of flexible working time and location for subordinate employees.

This overview was written by Franco Toffoletto, Emanuela Nespoli and Ornella Patané, Toffoletto De Luca Tamajo e Soci.

March 2017
NETHERLANDS

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:
   • Foreign nationals working in your jurisdiction?
   • Nationals of your jurisdiction working abroad?

1.1 Laws applicable to foreign nationals

Whether Netherlands laws apply to the employment relationship depends on whether the parties
have made a choice of law. If no choice is made, the applicable law is determined by Regulation
(EC) 593/2008 on the law applicable to contractual obligations ("Rome I") or the applicable
international private law. Even if a choice of law is made, certain mandatory provisions of law may
still apply.

For example, the following always apply to foreign nationals, even if they are otherwise subject to
foreign law:

   • The Act on Cross-border Employment Working Conditions 2 December 1999 (Wet
     arbeidsvoorwaarden grensoverschrijdende arbeid) ("Waga");
   • Minimum Wage and Minimum Holiday Allowance Act 23 February 1969 (Wet minimumloon
     en minimumvakantiebijslag);
   • Working Hours Act 1 January 1996 (Arbeidstijdenwet) ("ATW");
   • Equal Treatment Act (Algemene wet gelijke behandeling) ("Awgb");
   • A number of Articles in the Civil Code; and
   • Laws applicable to nationals working abroad

If Dutch law is chosen to govern the employment relationship, it applies in principle to Dutch
nationals working abroad. If the law of another country is chosen, Dutch nationals can still invoke
mandatory provisions of Dutch law that would apply without a choice of law under Rome I. Further,
Waga applies to Dutch nationals working abroad, irrespective of which law applies to the
employment relationship.

RESTRICTIONS ON MANAGERS AND DIRECTORS

2 Are there any restrictions on who can be a manager or company director?

2.1 Age restrictions

There are no age restrictions on managers or company directors. Under equal treatment
legislation, these types of restrictions are in principle prohibited.

2.2 Nationality restrictions

There are no nationality restrictions on managers or company directors. Under equal treatment
legislation, these types of restrictions are in principle prohibited.

2.3 Other

Dutch law does not provide for any other restrictions limiting who can be appointed as a manager
or director.
**RECRUITMENT**

3 Are any grants or incentives available for employing people? Do any filings need to be made when employing people?

3.1 Grants or incentives

There are incentives available for employing disabled and older people. This is partly regulated in the Participatiwet (Participation act).

3.2 Filings

If you are employing personnel for the first time, you must register as an employer with the Dutch Tax and Customs Administration. You will then receive the necessary forms to meet your payroll tax obligations.

**PERMISSION TO WORK**

4 What prior approvals do foreign nationals require to work in your country?

- Schengen/short stay visa.

4.1 Procedure for obtaining approval

All foreign nationals are subject to the visa requirement except those from visa waiver countries (visa waiver countries include EU countries and the US), if they are to stay in The Netherlands for 90 days or less every 180 days. The visa can be obtained from the Dutch embassy or Dutch consulate in the foreign national's country.

There are two ways of using a Schengen visa. Either way, after the 180 days, the visa can be renewed if either:

- The foreign national stays in The Netherlands for 90 days and physically leaves the country for a subsequent 90 days on expiry; or

- The foreign national divides the 90 days over a 180 day period and re-enters The Netherlands multiple times. In this, the foreign national must request a multiple entry visa.

A short stay visa provides residence privileges only (that is, no work privileges, which generally, although not always, require a work permit (see below, Permits)).

4.1.1 Cost

The charge for a visa is EUR 60.

4.1.2 Time frame

Acquiring a visa can take, at a minimum, a number of days, and at a maximum, up to two months.

4.2 Entry visa

4.2.1 Procedure for obtaining approval.

Foreign nationals subject to the visa requirement that is, all foreign nationals except those from visa waiver countries (see above), who will stay in The Netherlands for more than 90 days, require an entry visa (and a residence permit). The visa can be obtained from the Dutch embassy or Dutch consulate in the foreign national's country, or the sponsoring company in the Netherlands can start the procedure at the Dutch Immigration and Naturalisation Service.

The entry visa can be used by non-visa waiver foreign nationals to enter Dutch territory and apply for a residence permit. The duration of the visa is 180 days (as from the date of issue). Consequently, the foreign national has six months to travel to The Netherlands.
4.2.2 Cost

The charge for an entry visa depends on the reasons for requested entry. For a regular work for pay, the charge is EUR897. The cost for renewal is EUR396.

The costs can be found in English here: https://ind.nl/en/Pages/Costs.aspx

4.2.3 Time frame

This can take approximately three to six months, depending on the purpose of the stay. However, for employment purposes, and if the Dutch employer applies by means of an expedited procedure, the entry visa can be granted within two to three weeks.

Guidance on this can be found in English here: https://ind.nl/EN/individuals/residence-wizard/procedure/Pages/default.aspx

4.3 Permits

The following documents are required to work in The Netherlands (there is a general exception for highly skilled migrants and there are additional exceptions for short duration activities, such as incidental business visits):

4.3.1 Work permit

This is required for non-EU/EEA nationals (unless they qualify as highly skilled migrants (see below, *Highly skilled migrants*), or they receive the following note on their residence permit, "work activities free, no work permit required").

To obtain a work permit, the employer must file a request with the Employee Insurance Agency (Uitvoeringsinstituut Werknemersverzekeringen) ("UWV"). To grant a work permit, the employer must comply with the following requirements:

- the employer must first try to recruit employees in The Netherlands and Europe (during a period of three months);
- the employer must report the vacancy to the UWV (during a period of five weeks);
- the employer must offer the foreign employee terms and conditions of employment in accordance with the terms and conditions of employment and working conditions provided for under Dutch law, or which are customary in that business sector;
- the employee must have a valid residence permit (or the procedure for obtaining the permit must have been started); and
- other requirements, for example, the foreign employee must reside within a reasonable distance from the place of work and must be older than 18 and younger than 45 years old.

4.3.2 Residence permit

This is required for non-EU/EEA nationals if the foreign national will stay in The Netherlands for longer than three months. The permit is obtained from the Immigration and Naturalisation Service.

4.3.3 Statement of identification with the local police (a sticker on the passport)

This is required for foreign nationals who will stay in The Netherlands for less than three months. The permit is obtained at the local police office (within three days of arrival in The Netherlands) unless they stay in a hotel or at an official camping site (in that case the hotel and/or camping personnel will take care of registration).

4.3.4 Cost

The costs are as follows:

- Work permit - Free of charge;
• **Residence permit** - The charge depends on the reasons for requested residence. In case of regular work for pay, the charge is EUR300 (if the foreign national also applied for and received an entry visa) or EUR 897 (if the foreign national is a visa waiver national and did not apply for an entry visa). The cost of renewal is EUR 396; and

• **Statement of identification** - Free of charge.

The costs can be found in English here: [https://ind.nl/en/Pages/Costs.aspx](https://ind.nl/en/Pages/Costs.aspx)

4.4 **Time frame**

The time frame for obtaining these approvals is as follows:

• **Work permit** - A work permit takes five to six months (including the three months of active search and the five week vacancy registration with the UWV (see above, Procedure for obtaining approval));

• **Residence permit** - A residence permit takes between three and six months after arrival in The Netherlands. During this period, the foreign national cannot start work activities, unless he has a valid entry visa; and

• **Statement of identification** - This can be requested, if needed, at the local police station immediately after scheduling an appointment.

4.5 **Highly skilled migrants**

4.5.1 **Procedure for obtaining approval**

Foreign nationals who meet specific financial thresholds (that is, the remuneration levels set out below) can qualify as highly skilled migrants. They do not need a work permit and instead only have to apply for a residence permit with the annotation "work as highly skilled migrant". This gives them residence and work privileges.

The highly skilled migrant scheme is for foreign nationals who will reside in The Netherlands for longer than three months. For skilled migrants who stay up to three months in the Netherlands, the work permit application procedure has been simplified. Under the scheme, the employer must be admitted to the highly skilled migrant scheme. The main conditions for acceptance include:

• The employer is a Dutch legal entity or has a branch office in The Netherlands;

• The employer has good employment practices, which can be demonstrated by submitting the following documents:

  - proof of registration in the Commercial Register not older than 30 days, issued by the Chamber of Commerce (if applicable) or proof demonstrating that registration is not required;

  - proof that a subsidised or approved educational institution or research institute, directly or indirectly, fully or partially paid or subsidised by the government is involved (if applicable); and

  - a payment history statement issued by the tax authorities.

Other conditions apply for start-up companies.

Once the employer is registered, a special residence permit can be obtained from the Immigration and Naturalisation Service provided that the following financial thresholds (2017, indexed per calendar year) on the employee's salary are met:

• Migrants under the age of 30: EUR38,040 gross per year;

• Migrants aged 30 and over: EUR60,536 gross per year; and

• Migrants graduated in The Netherlands: EUR27,264 gross per year.
If the employer is established in, and the Highly Skilled Migrant will reside in, a city with its own Expat Center (for example, Amsterdam, Rotterdam or The Hague), parties can make use of the Expat Center to obtain a residence permit. One of the advantages of this is that the application for a residence permit can be filed before the highly skilled migrant arrives in The Netherlands. Consequently the waiting period in The Netherlands can be kept to a minimum. http://www.iamsterdam.com/en/expatcenter/employers/the-expatcenter-procedure

4.5.2 Cost

A residence permit for a highly skilled migrant is EUR926. The cost of renewal is EUR396.

5 Time frame

An application for a residence permit for a highly skilled migrant is processed significantly faster than regular applications and takes approximately two to four weeks, provided that the employer has been admitted to the Highly Skilled migrant scheme.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

6 How is the employment relationship governed and regulated?

6.1 Written employment contract

The employer must confirm the following to the employee electronically or in writing (Article 7:655, Civil Code):

- Name and residence of the parties;
- Place where the work will be carried out;
- Position and a description of it;
- Hiring date;
- If the employment contract is for a definite period, the time period;
- Holiday rights;
- The duration of the notice period;
- Salary and payment intervals and, if the remuneration depends on the results of the work to be performed, the amount of work to be rendered per day or per week, the price per item, and the reasonable time required to perform the work;
- Customary number of working hours per day or per week;
- Employee's pension rights (if applicable);
- If the employee will work outside The Netherlands for a term exceeding one month, the:
  - duration of the employee’s work;
  - details of their accommodation;
  - application of Dutch social security legislation, or the bodies enforcing the legislation;
  - currency in which payments will be made;
  - allowances to which the employee is entitled; and
  - arrangements for his return, on condition that all this is done before the employee leaves;
The application of a collective bargaining agreement ("CBA") (if any); and

Whether the employment contract is a temporary employment contract, within the meaning of Article 7:690 of the Civil Code.

The employer must give these particulars within one month of the start of the employment, or earlier if the employment contract terminates earlier. An employer who fails to provide this or includes incorrect particulars is liable to the employee for any damage caused. The employer must sign the written particulars.

If a person performs work for three consecutive months, either weekly or at least for 20 hours per month for payment, the person is deemed to be performing the work on the basis of an employment contract (Article 7:610a, Civil Code).

6.2 Implied terms

The Dutch Civil Code and other acts contain numerous terms which are implied by law into employment contracts as described in Question 1.

6.3 Collective agreements

For companies operating in The Netherlands there are generally:

- A company CBA; or
- CBAs for specific industries, for instance, the metal or cleaning industry.

Not all employers are bound by a CBA. Some industry-wide CBAs are declared generally binding by the Ministry of Social Affairs and Employment. In this case, if the activities of an employer fall under the scope of this CBA, the employer must still apply that CBA, even if it is not party to it.

7 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

The basic principle is that an employer cannot unilaterally amend employment conditions. In principle, the amendment of a condition of employment requires the employee's prior consent. An employee is generally not obliged to accept an amendment to an employment condition or (company) regulation. However, the employer should consult the employee to gauge their willingness to accept the intended amendment.

Employees must be informed, in a timely and clear manner, of intended changes and the consequences of those changes. Employees must also be informed of the reasonable grounds for the decision. The employer should apply a transitional or phasing-out arrangement. By offering the amended employment conditions and allowing the employee time to review the intended amendment, the employer acts in accordance with good employment standards. Similar standards apply to employees for being good employees (goed werknemerschap).

7.1 Unilateral amendment clause (section 7:613, Civil Code)

If the employment contract includes a unilateral amendment clause, the employer can amend the employment conditions without the employee's prior consent. An employer can invoke a unilateral amendment clause only if it has such a substantial interest in the amendment, and this outweighs the interest of the employee in maintaining the status quo in accordance with the standards of reasonableness and fairness.

A substantial interest is not readily accepted and can only be demonstrated where there are compelling commercial or organisational circumstances, for example, a necessary reorganisation or the company's financial difficulty. The employer must provide substantive proof that the application of the current employment conditions is unacceptable in accordance with the standards of reasonableness and fairness in the given circumstances. Prevailing case law illustrates that Dutch courts exercise restraint in allowing the unilateral amendment of employment conditions.
7.2  The principle of reasonableness and fairness (sections 7:611 and 6:248, Civil Code)

A leading decision of the Supreme Court set out three criteria relevant to determining whether it is reasonable to expect an employee to accept a unilateral change:

- Is a change in circumstances involved and, if so, what is the nature of that change of circumstances?
- Is the employer's proposal reasonable? In this respect, all the circumstances of the case should be taken into consideration, including:
  - the nature of the changed circumstances and the nature and significance of the proposal;
  - the interest of the employer and the business it conducts; and
  - the employee's position and their interest in not changing the employment conditions; and
- Can the employee reasonably be required to accept the reasonable proposal in view of the circumstances?

7.3  Unforeseen circumstances (section 6:258, Civil Code)

A final (and not commonly used) option is that the court may, at request of one of the parties, amend an employment contract (in full or in part). The circumstances must be of such a nature that the employee or employer, in all reasonableness and fairness, could not expect the contract to remain unchanged. However, the court will not allow a contract to be amended or terminated just to bring the contract in line with generally accepted practice. Both the legislature and the Supreme Court have indicated that the court should act with great reluctance in these matters.

MINIMUM WAGE

8  Is there a national (or regional) minimum wage?

8.1 There is a minimum wage, which is dependent on age and applies from 1 January 2017:

- For employees aged 23 years and older: EUR1,551.60 gross per month; and
- For employees aged 15 to 22 years: from EUR465.50 gross to EUR1,318.85 gross per month.

RESTRICTIONS ON WORKING TIME

9  Are there restrictions on working hours?

9.1  Working hours

Employers must comply with the Working Hours Act of 23 November 1995. In brief, it stipulates that for an employee of 18 years and over the:

- maximum length of a shift is 12 hours;
- maximum length of a working week is 60 hours;
- average working week must be 48 hours in every period of 16 consecutive weeks; and
- most they can work is for 55 hours on average per week, in every period of four consecutive weeks.

It is possible to agree, through a CBA, that the employee will work longer.

After a working day, an employee of 18 years and over must have 11 consecutive hours of non-work time. This rest period can be shortened to eight hours once every seven-day period if the nature of the work or the business circumstances require this.
In the event of a five-day work week, an employee must have 36 consecutive hours of non-work time after the end of the work week.

A longer work week is also possible, provided the employee has at least 72 consecutive hours of non-work time in a period of 14 days. This period can be split into two periods of at least 32 hours each.

9.2 Rest breaks

The following rules apply to rest breaks:

- If an employee works for more than five-and-a-half hours, they are entitled to at least 30 minutes of break time. This can be split into two 15-minute breaks; and
- If an employee works for more than 10 hours, they must have at least 45 minutes of break time. This can be split into several breaks, each of which must be at least 15 minutes.

A CBA can include agreements allowing for fewer breaks. But if the employee works for more than five-and-a-half hours, they must have at least 15 minutes of break time.

9.3 Shift workers

The following provisions apply to shift workers:

- The maximum length of a shift is 12 hours;
- The maximum length of a working week is 60 hours;
- The average working week must be 48 hours in every period of 16 consecutive weeks;
- The maximum length of a night shift in a three-shift schedule is 10 hours;
- The maximum length of a working week with over 16 night shifts in a period of 16 weeks in a three-shift schedule is 40 hours;
- The maximum number of night shifts in a period of 16 weeks is 36; and
- The maximum length of a night shift can be extended by two hours, for five times in a period of 14 times 24 hours, or 22 times in a period of 52 weeks.

HOLIDAY ENTITLEMENT

10 Is there a minimum holiday entitlement?

10.1 Minimum holiday entitlement

The main rule is that an employee, for each year in which they are entitled to remuneration in the agreed work period, is entitled to holiday of at least either:

- Four times the weekly work period; or
- If the work period is expressed in hours per year, a corresponding period.

For example, if the employee has agreed to a 40 hour working week (five days), they are entitled to at least four weeks holiday (20 days).

If the employee is employed for only part of the year, they acquire a proportionate amount of holiday. In the case of full or partial incapacity to work, employees still accumulate holiday in full.

Parties are free to negotiate more days' holiday per year.

As from 1 January 2012, employees must take accrued but untaken statutory vacation days (which have accrued as from 1 January 2012) within six months of the end of the calendar year in which
they have accrued, otherwise they will lapse. For example, statutory holidays accrued in 2012 will, in principle, lapse, if untaken by 1 July 2013. This six month limitation period will not apply if an employee has not had a reasonable opportunity to take the statutory vacation days accrued in the previous calendar year within the first six months of the next calendar year. The six month statute of limitation only applies to statutory vacation days and not to additional vacation days. The limitation period for these additional vacation days remains unchanged at five years after the calendar year in which they have accrued.

10.2 Public holidays

Public holidays are not included in the minimum holiday entitlement. In The Netherlands, there are eight public holidays:

- 1 January, New Year’s Day;
- Good Friday and Easter Monday;
- 27 April, King’s Day;
- Ascension Day;
- Whit Monday;
- 25 December, Christmas Day; and
- 26 December, Boxing Day.

ILLNESS AND INJURY OF EMPLOYEES

11 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

11.1 Entitlement to time off

By law, during an employee’s illness and to the extent that the salary does not exceed the maximum daily wage (as of 1 July 2017, EUR206.54 gross per day), the employer must pay at least 70% of the employee's most recent gross base salary, for up to two years in a row. The purpose of holiday is to let employees recover from work. If an employee is ill, they cannot work, and, therefore, in theory, they do not take holiday and/or cannot actually enjoy their holiday during this time. However, the following exceptions relate to holiday exceeding the statutory minimum:

An employer and employee can, where appropriate, agree that periods in which the employee cannot perform work due to illness are deemed holiday, to the extent it is holiday exceeding the statutory minimum (four times the agreed work period). It is not common to treat holiday as used during garden leave and to do so would require the agreement of the employee.

Parties can also agree (in advance) that days during which the employee cannot work due to illness are deemed holiday. There are no set forms for such an agreement, except that it must be in writing or by CBA. This is only possible for days’ holiday exceeding the statutory minimum.

The employee’s consent is required to consider days during which the employee cannot perform work due to an illness as holiday. However, case law shows that the position is different if the employee is actually able to enjoy their holiday, for instance, where the illness is the result of a conflict at work. In that case, the reason the employee reported ill would not stop them from actually enjoying holiday. Where it is reasonable and fair to do so, these days can be counted as holiday. However, the fact the time is taken as holiday must not interfere with the employee’s recovery process.

11.2 Entitlement to paid time off

See above, Entitlement to time off.
11.3 Recovery of sick pay from the state

An employer cannot recover sick pay made to employees from the government.

STATUTORY RIGHTS OF PARENTS AND CARERS

12 What are the statutory rights of employees who are:

- Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
- Carers (including those of disabled children and adult dependants)?

12.1 Maternity rights

A female employee is entitled to at least 16 weeks of pregnancy and maternity leave. She is entitled to continued payment of 100% of her salary, up to the maximum daily wage (as of 1 July 2017, EUR206.54 gross per day), for at least 16 weeks. In practice, employers usually, where appropriate, continue paying 100% of the salary of the female employee.

12.2 Paternity rights

After the birth, partners are entitled to two working days of paid paternity leave and 3 days unpaid. The two days' paid leave must be taken within four weeks after the date of birth. Different provisions can be agreed by CBA, a works council or a staff representative body resolution.

12.3 Surrogacy

Dutch law does not provide for specific rules and regulations in respect of surrogacy.

12.4 Adoption rights

Each adoptive parent is entitled to up to four consecutive weeks of paid leave. The employee can issue a request (three weeks before the start date of the leave) through their employer to the UWV, for payment of benefits of up to 100% of salary, up to the maximum daily wage (as of 1 July 2017, EUR206.54 gross per day), for a maximum of four weeks. Adoption leave can start from four weeks before the adoption date. It must be taken within 22 weeks after the child is taken into the family. Adoption leave also applies to the adoption of a foster child, if the foster child is permanently taken into the family. Different provisions can be agreed by CBA, a works council or staff representative body resolution.

12.5 Parental rights

An employee is entitled to unpaid parental leave of up to 26 times his working hours (that is, 26 times the average number of weekly hours worked by the employee). An employee is not entitled to parental leave once the child reaches the age of eight. This leave is taken by the week for consecutive periods up to one year. These provisions also apply to foster parents who live at the same address as the child and are permanently responsible for the child's upbringing and care. Different provisions can be agreed by CBA, a works council or staff representative body resolution.

12.6 Carers' rights

12.6.1 Short-term care leave

An employee is entitled to leave to render necessary care to an ill person, including:

- The employee's spouse, registered partner or the person with whom they cohabit;
- A child living as part of the employee's household with whom the employee has a family-law relationship;
- A child of the employee's spouse or registered partner or the person with whom they cohabit who lives as part of the employee's household;
12.6.2 Long-term care leave

An employee is entitled to unpaid leave to give necessary care to a person with a life-threatening illness, including:

- The employee’s spouse, registered partner or the person with whom the employee cohabits;
- A child living as part of the employee’s household with whom the employee has a family law relationship;
- A child of the employee’s spouse or registered partner or the person with whom the employee cohabits who lives as part of the employee’s household;
- A foster child living at the same address as the employee for whom the employee is permanently responsible for upbringing and care; and
- A first or second degree blood relative.

The maximum duration is six times the weekly working hours in a period of 12 months. Such leave is taken by the week for consecutive periods up to a maximum of 12 weeks.

Different provisions can be agreed by CBA, a works council or a staff representative body resolution.

CONTINUOUS PERIODS OF EMPLOYMENT

13 Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

13.1 Benefits created

A period of continuous employment creates certain benefits for employees if individual employees are transferred to a new entity (by operation of law), which is classified as a transfer of undertaking within the meaning of Article 7:662 of the Civil Code (see Question 22), for example, longer notice periods and severance pay (see Question 18).

13.2 Consequences of transferring an employee

If individual employees are transferred to a new entity (by operation of law), and this is a transfer of undertaking within the meaning of Article 7:662 of the Civil Code, they retain their period of continuous employment (see Question 22). Case law has also established that where an entrepreneur transfers the responsibility for the operation of a service provided to the company (an economic entity) to another company, that transfer of operations can be regarded as a transfer of an undertaking.

TEMPORARY AND AGENCY WORKERS

14 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

Temporary and agency workers are often subject to different terms and conditions of employment under an applicable CBA for temporary workers. If not, temporary and agency workers must, in principle, be treated equally with permanent employees. The employer also has more flexibility in terminating the employment contracts of temporary and agency workers, compared to permanent
employees.

Depending on the applicable CBA, after a certain period or number of contracts, a worker may be deemed to be a permanent worker of the temporary employment agency.

An employee who is misclassified as a temporary worker may in fact be entitled to receive full dismissal protection.

**DATA PROTECTION**

15 What data protection rights do employees have?

The Personal Data Protection Act of 6 July 2000 ("PDP Act") prescribes rules on the processing of personal data. The PDP Act specifies the rights of data subjects (for example, employees) whose personal data is being processed:

- **Right to access** - A data subject has the right to request access to their personal data;
- **Right to correction** - The data subject can request that the data controller correct, supplement, erase or block their personal data; and
- **Right to object** - The data subject has the right to object to certain uses made of their personal data by a data controller.

The data controller has statutory obligations concerning the processing of employee personal data, which can give rights to the employer as well.

**DISCRIMINATION AND HARASSMENT**

16 What protection do employees have from discrimination or harassment, and on what grounds?

16.1 Protection from discrimination

Employers must have in place a policy to prevent employees from experiencing any psychosocial burden, and implement measures to prevent causing any psychosocial burden (Working Conditions Act 1998 (Arbeidsomstandighedenwet)). Employers must also have in place a policy to prevent discrimination and (sexual) harassment.

The General Equal Treatment Act 1994 (Algemene wet gelijke behandeling) ("AWGB") prohibits making a (direct or indirect) distinction on the basis of:

- Religion;
- Political views;
- Race;
- Gender;
- Nationality;
- Sexual orientation; and
- Civil status.

If an employer does not comply with the Working Conditions Act 1998, the employer can be fined. Furthermore, the employer can risk a compensation claim from the employee, who may state that the employer has violated their duty of due care and the employee as a consequence has incurred damage.

The Civil Code provides for two statutory time limits to bring claims:
- A short time limit of five years; and
- A longer time limit of 20 years, or for toxic substances the time limit is 30 years.

### 16.2 Protection from harassment

See above, *Protection from discrimination*.

### WHISTLEBLOWERS

**Do whistleblowers have any protection?**

The law has been amended since 1 July 2016. Where an enterprise employs 50 or more people, the employer must set up a whistleblowers scheme.

A civil servant who reports a suspected malpractice in good faith in accordance with such a procedure may not suffer disadvantage as a result of reporting his suspicions, either during the course of the procedure or afterwards.

Disadvantage can take a variety of forms, for example dismissal, refusing to transform a temporary contract into a contract of continuous employment, transferring or relocating, taking a disciplinary measure, withholding salary, withholding opportunities for promotion and refusing holiday leave.

### DISMISSAL OF EMPLOYEES

**What rights do employees have when their employment contract is terminated?**

#### 18.1 Notice periods

The notice period is either the contractually agreed notice period or the statutory notice period. For the following lengths of service, the statutory notice periods are as follows:

- Less than five years: one month;
- From five years up to 10 years: two months;
- From 10 years up to 15 years: three months; and
- 15 years or longer: four months.

The employee must give a notice period of one month.

Deviation from these notice periods is possible in writing, on condition that both:

- The notice period that the employee must give is no longer than six months; and
- The notice period that the employer must give is no shorter than double the notice period given by the employee.

Deviation is possible by CBA, on condition that the notice period given to the employee is at least equal to any extended notice period to be given by the employee.

#### 18.2 Severance payments

Severance pay is payable to employees on termination, as long as the employee:

- is aged 18 or over;
- worked more than 12 hours a week;
- is not retiring due to reaching state pension age; and
is not being dismissed for a serious reason.

The statutory severance pay is calculated as follows up to a maximum of EUR77,000 gross (as of 1 January 2017) or 12 months of gross salary:

- For the first 10 years of service: multiply every six months of service by 1/6 of the monthly gross salary; and
- For the following years of service: multiply every six months of service by 1/4 of the monthly gross salary.

There are temporary exceptions to this calculation regarding elderly people and small companies.

18.3 Procedural requirements for dismissal

By law, an employment agreement entered into for an indefinite period can be terminated:

- By consent of the employee;
- By giving notice with the prior consent of the UWV (based on grounds a and b);
- By dissolution by the competent court (based on grounds c through to h, or an appeal against a UWV denial of consent;
- For urgent cause (instant dismissal); or
- By mutual consent.

The law prescribes 8 grounds for termination:

- Economic reasons;
- Long-term illness (more than 2 years);
- Repeated illness with unacceptable consequences for the business of the employer (unless caused by fault or negligence of the employer);
- Inability of the employee to correctly perform his duties caused by other than sickness;
- Reproachable behaviour by the employee;
- Refusal by employee to carry out the agreed duties on account of conscience;
- Distorted work relations; or
- Other grounds on account of which the employer cannot be expected to have the employment relation continue.

19 What protection do employees have against dismissal? Are there any specific categories of protected employees?

19.1 Protection against dismissal

Dismissal is not possible if one of the statutory bans on termination applies, for example dismissals related to:

- Illness (at the time the consent is requested);
- Pregnancy;
- Marriage;
- Parental leave;
- Membership of a trade union;
- Membership of a works council; and
- Transfer of an undertaking.

In the case of dissolution by a court, the court will ascertain whether one of the statutory bans on termination applies. If so, the court will determine whether the request for dissolution relates to the ban on termination. If so, the court will refuse to terminate the employment contract, and the employee remains employed by the employer. There is an absolute protection on dismissal on economic grounds during illness.

In a number of cases, the bans on dismissal do not apply, in particular if:
- An employee agrees to the dismissal in writing; or
- The employment contract is terminated for urgent cause or during the probation period.

19.2 Protected employees

Categories of protected employees include:
- Employees subject to illness (at the time the termination is initiated);
- Pregnant employees;
- Married employees;
- Employees on parental leave;
- Members of a trade union;
- Members of a works council or employee participation body;
- Employees on leave based on the Work and Care Act 2001 (Wet Arbeid en Zorg);
- Employees subject to a transfer of undertaking; and
- Employees who do not consent to work on Sundays.

REDUNDANCY/LAYOFF

20 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs?

20.1 Definition of redundancy/layoff

Redundancy can be defined as dismissal, both individual and collective, as a result of a position, or positions, becoming redundant (for example, as a result of a reorganisation).

20.2 Procedural requirements

20.2.1 Individual

If a position becomes redundant due to reorganisation, a company must take the following steps before it can terminate an employment contract:

- **The company must clarify the reasons behind the reorganisation**
  These reasons can simply be cost reduction or profit maximisation. It is the company’s prerogative to implement the reorganisation. However, the explanation for the need to
reorganise influences the level of severance paid to the employee whose position will be made redundant;

- **Making positions redundant must be seen as an ultimate remedy**
  The company should first show that it took, or at least considered, alternative measures. It should show that it either took these measures but they did not have the desired effect, or that alternative measures were not possible;

- **The company must determine which positions will become redundant**
  It is the company's prerogative to determine in which department positions will become redundant, but it must be able to substantiate its decision; and

- **Selection of employees**
  After the company has decided where redundancies will be made in the company, the actual positions to be terminated must be selected using legal principles. The first principle is the reflection principle. Under this principle, the employer must first categorise all interchangeable positions. The employees within a category must then be divided into the following age groups:
  
  - 15 to 25 years;
  - 25 to 35 years;
  - 35 to 45 years;
  - 45 to 55 years; and
  - 55 years and older.

  Subsequently, the employer must apply the last-in-first-out principle to every age group, thus the overall number of staff in each age group remains equal (in so far as possible). The employee who entered into the service of the employer last should be dismissed first. This does not apply when a unique position is made redundant or when an entire category of interchangeable positions is to disappear.

  Once the position that must be made redundant is determined, the company must explain what will happen to the current responsibilities of this employee.

  The company must then look within the organisation for an alternative suitable position for the employee. This should be a vacant position or a position that will become vacant within a reasonable time. Positions that are filled by temporary agency workers are generally regarded as vacant. Whether a position is suitable depends on the:

  - Content and level of the position;
  - Employment conditions; and
  - Whether the position is based in The Netherlands.

  In principle, the company should also offer the employee a position abroad.

  If the employee does not accept this position, or there is no suitable alternative position, the company can move towards terminating the employment contract.

20.2.2 **Collective**

If a company will terminate the employment contracts of at least 20 employees within three months in one UWV area, the redundancy qualifies as a collective dismissal. Additional legal requirements to terminate the employment contracts will, therefore, apply.

In summary, a collective dismissal procedure involves the following:

- The works council or personnel representative committee ("PVT") and the trade unions must be consulted on the restructuring plans at the earliest opportunity (see Question 20); and
The company must formally request the advice of the works council/PVT, in writing, on the proposed restructuring (and for that matter, on any significant restructuring leading to a termination of at least a quarter of the personnel). Advice must be requested in accordance with legal requirements. The company must submit the intended decision to the works council/PVT in writing. Advice must be requested at a time appropriate for the decision to be made. When a request for advice is submitted to the works council/PVT, it must be provided with at least a statement of:

- the grounds for the decision;
- the alternative measures it has taken and considered;
- how the employer selected the employees to be dismissed;
- the anticipated social consequences for those being dismissed and those who will remain with the employer; and
- the projected measures to be taken in that respect.

If a decision is taken after the works council/PVT has given its advice, the employer must inform the works council/PVT of that decision in writing as soon as possible. If the advice of the works council/PVT has not, or has not wholly, been followed, the works council/PVT must also be informed why its advice has not, or has not wholly, been followed.

The company must formally notify the UWV of its intention to lay off the employees. Explanation should be provided as to why there is sufficient cause for dismissal, together with explanatory documents (for example, general information on the business, balance sheets, profit and loss statements and organisational charts). On receipt of notification, a one-month waiting period applies, which allows the company to negotiate a social plan and formally ask the works council/PVT for advice. This period does not apply, however, if the trade unions have declared that there is sufficient cause for dismissal.

The social plan contains the severance package negotiated with the trade unions. The package can also consist of arrangements relating to, for example, supplementing social security benefits or work-to-work agreements or outplacement. On expiration of the one-month waiting period (or earlier, if no waiting period has to be observed), the company must ask the UWV for permission to terminate the employment contracts. The UWV, among others, will assess whether there is sufficient cause for dismissal. If no permission is granted, the employment contracts cannot be terminated.

If UWV approval is obtained, each employee should be notified that their employment contract will be terminated with due observance of the applicable notice period. This notice period commences per the commencement of the termination procedure (request for consent from UWV or termination request in court, provided that the minimum remaining period is one month).

A settlement is often reached between the employer and the employees. If so, the route with the UWV does not have to be followed or completed.

20.3 Redundancy/layoff pay

See above, Severance payments.

EMPLOYEE REPRESENTATION AND CONSULTATION

21 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

21.1 Management representation

Employees are not entitled to management representation.
21.2 Consultation

Where an enterprise employs 50 or more people, the employer must set up a works council. If an employer with 50 or more employees considers transferring all or part of an undertaking, it must, before its decision on the matter, request the advice of the works council. If the employer disregards the works council's advice where that advice is negative for the employer, the works council can file a complaint against the employer's decision to proceed with the transfer. This complaint is made to the Enterprise Chamber of the Amsterdam Court of Appeal (Ondernemingskamer), which can order the company to reverse its decision.

An enterprise with at least 10 but fewer than 50 employees which does not have a works council can set up a PVT. A PVT has consent and advisory powers, and the right to receive general information. Its consent powers apply to:

- Working hours;
- Working environment; and
- Policy on illness.

Its advisory powers apply to proposed decisions that could result in the loss of jobs or in major changes in the work or a change of employment conditions affecting at least a quarter of the active employees. However, if a subject is already covered by an applicable CBA, the advisory powers of the PVT no longer apply. The PVT does represent the employees' interests but cannot impose its (positive or negative) advice or consent on these employees. Individual employees can still agree or object to the intended company decision. In relation to the advisory powers of the PVT, the PVT does not have the right to appeal to the Enterprise Section of the Amsterdam Court of Appeal. If the PVT has given negative advice, the company can still implement the proposed decision without the PVT being able to appeal against it. However, if the company does not adhere to the advisory and consent rights of the PVT at all, the PVT has the right to appeal to the competent court.

21.3 Major transactions

The employer must seek the prior advice of the works council for proposed decisions concerning a number of important subjects. These subjects include (Article 25, Works Council Act 1971):

- Termination of, or a major change in, the activities of the enterprise;
- Major investments;
- Important reorganisations;
- Mergers;
- Takeovers;
- Change of location; and
- Major redundancies.

The advice of the works council must be sought at the appropriate time, so that it can influence the proposed decision. If the advice is positive, the employer can go ahead. For proposed major decisions subject to Article 25, the same applies on a share sale as well as an asset sale.

22 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

22.1 Remedies

The employer must observe proper procedures, particularly those in the Works Council Act 1971.
Employee action

If the advice (see above, Consultation) is negative but the employer takes the proposed decision anyway, the employer must observe a waiting period of one month before it can implement its decision. During that one-month waiting period, the works council can petition the Enterprise Chamber of the Amsterdam Court of Appeal, and claim that the decision could not have been reasonably arrived at in view of the interests concerned.

The Court can order the employer to revoke its decision and/or reverse any act of implementation (either permanently or temporarily). However, the Court rarely rules in favour of the works council if the objections of the works council are only based on the merits of the case. The employer has considerable freedom in determining company policy. The Court is far stricter when the petition is based on procedural matters.

CONSEQUENCES OF A BUSINESS TRANSFER

23 Is there any statutory protection of employees on a business transfer?

23.1 Automatic transfer of employees

In a transfer of undertaking, all employees employed for those activities transfer to the acquirer by operation of law under their current terms and conditions of employment (Articles 7:662 to 666, Civil Code). Separate arrangements apply to pensions (see Question 31).

23.2 Protection against dismissal

An employee is protected against dismissal on a business transfer (Article 7:670(8), Civil Code). Only economic, technical or organisational reasons (“ETO” reasons) can justify a dismissal as part of a transfer of undertaking.

23.3 Harmonisation of employment terms

In principle, a transfer of undertaking in itself cannot be a reason to amend the employment conditions. If the amendment is based solely on the transfer of undertaking, the arrangements or amendments are void.

An employee who agrees to other terms and conditions of employment (even if comparable to his current ones) before or during the transfer can, even afterwards, successfully claim that the amendment is invalid, and claim their former terms and conditions as of the transfer date, or a one-off payment for the differences between the packages. Further, the employee can request a court to terminate the employment contract. Where this occurs, the court holds the employer liable for the termination if the new terms and conditions are substantially detrimental to the employee, and will order the employer to grant the employee severance payments (see above, Severance payments).

EMPLOYER AND PARENT COMPANY LIABILITY

24 Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company's employees?

24.1 Employer liability

An employer is liable for the acts of its employees if the employee is liable to a third party because the employee has caused damage while performing their work, unless the damage is the direct result of the employee’s intent or wilful recklessness (Article 7:661, Civil Code and Article 6:170(1), Civil Code).

24.2 Parent company liability

In principle, a parent company cannot be liable for the acts of a subsidiary company's employees.
HEALTH AND SAFETY OBLIGATIONS

What are an employer’s obligations regarding the health and safety of its employees?

An employer must take those measures relating to the safety of the workplace, and provide instructions, as are reasonably necessary to prevent employees from incurring any damage (duty of due care) (zorgplicht) (Article 7:658(1), Civil Code). The duty of due care extends to the:

- Layout of the workplace;
- Maintenance of rooms; and
- Raw materials, tools and equipment used by employees in performing their duties/work.

An employer must draw up a risk assessment and evaluation (risico inventarisatie en evaluatie) (RI&E) (Working Conditions Act 1999). In this respect, an employer must investigate the specific dangers connected to the company’s activities. Following determination of the risks, the employer must take and enforce those measures which may reasonably be required, taking into account all circumstances, to establish an optimum safety level. In doing so, the employer must take into account the:

- Nature of the activities;
- Foreseeability of the danger;
- Risk of danger;
- Gravity of possible consequences; and
- Burden of taking these measures.

The employer must take into account in advance that employees may be forgetful, and that the everyday routine may result in a slackening of attention to their own safety and the safety rules. It is not sufficient to provide the employees with instructions on only one occasion. The employer must regularly point out the risks to employees and check whether they comply with the safety rules. If an employee violates the safety rules repeatedly, the employer should sanction the employee.

The employer has a duty of care based on the Working Conditions Act 1999 and the Working Conditions Decree 1999 (Arbeidsonderhedenbesluit). The employer is in principle liable for damage incurred by an employee in an accident caused by the employer's violation of this statutory duty.

TAXATION OF EMPLOYMENT INCOME

What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

Foreign nationals

In general, if an individual is living and working in The Netherlands, this person is taxable on his worldwide income (including employment income). This is irrespective of whether the individual is a foreign or Dutch national.

However, foreign nationals can qualify for what is known as the "30% tax ruling". Under this tax ruling, 30% of the salary can be paid out as tax-free compensation for costs, and the employee can benefit from treatment as a non-resident for tax purposes. Consequently, the employee is not taxed on passive income but only on Dutch-source income (that is, employment income related to employment activities performed in The Netherlands). If an individual only works in The Netherlands (and does not live there), the individual is taxable only on Dutch-source income. All income (including income in kind) related to employment activities in The Netherlands is taxable at
progressive tax rates, unless a certain exemption applies (for example, specific business costs).

26.2 Nationals working abroad

If Dutch nationals are living and working abroad, they are not taxed in The Netherlands on employment income. An exemption can apply in relation to a directorship fee for a Dutch company. This is determined by the applicable tax treaty (if any). If a Dutch national is living in The Netherlands but working abroad, the applicable tax treaty is the basis for determining which country has the right to tax the employment income earned abroad. In most tax treaties, it is generally determined that the working country has the right to levy taxes. However, if the employee is present in that working country for fewer than 183 days a year or any 12-month period (depending on the applicable tax treaty), and the salary costs are carried by a Dutch employer, the employment income is taxable in The Netherlands.

27 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

27.1 Rate of taxation on employment income

Tax rates on employment income are progressive. There is a distinction between national insurance (NI) premiums and employee insurance (EI) premiums. NI premiums are included in income tax and are due, for example, for the state old-age pension.

For 2015, the income tax and NI premiums are:

- EUR0 to EUR19,981: 36.55% (8.9% tax and 27.65% NI);
- EUR19,982 to EUR33,790: 40.8% (13.15% tax and 27.65% NI);
- EUR33,791 to EUR67,071: 40.8% (tax only); and
- EUR67,072 and above: 52% (tax only).

27.2 Social security contributions

Premiums are paid by the employer and are due, for example, for unemployment and disability. The amount of these premiums depends on the individual circumstances of the employee and the employer. In 2017 employers premiums for unemployment insurance are approximately 2 to 3% and for disability insurance approx. 6.65%. Apart from this, premiums differ per industry sector and per individual employer based on disability history.

PENSIONS

28 Do employers and/or employees make pension contributions to the government in your jurisdiction?

28.1 Contributions paid to the government

Each individual subject to the social security system (usually resident employees) must pay a contribution to the state old age pension ("AOW") until the state old age pension date has been reached. This age was 65 in 2013 and is gradually increasing to 67 in 2021. The yearly contribution amounts to 17.9% of taxable income from employment and home ownership (with the contribution ceiling set at EUR 33,791 for 2017).

28.2 Taxation of contributions

AOW contributions are levied in the same way as tax on employment income (see Question 26), and are withheld as part of NI premiums from gross salary. As wage tax and contributions to the state old age pension are an advance levy on income tax and NI premiums, the contributions made by payroll are deducted from the final personal income tax assessment.
Monthly amount of the government pension

The monthly amounts of state old age pension are established twice a year. On 1 January 2017, the monthly state old age pension per person is:

- Married couples: EUR 794.59 (plus EUR 51.15 monthly holiday allowance); or
- Single persons: EUR 1,153.35 (plus EUR 71.61 monthly holiday allowance).

There are also varying different rates for singles persons with a child below the age of 18. Different amounts also apply if the state old age pension was provided before 1 February 1994.

Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do these schemes provide pensions, the value of which:

- Is linked to the employee’s salary?
- Is linked to employer and/or employee contributions and investment return on those contributions?

Linked to the employee’s salary

Supplementary pension plans can exist in addition to the state old-age pension. These plans are financed by contributions paid by the employer and/or employee and managed by industry or company pension funds or by insurance companies.

Employee contributions are withheld from the employee’s salary and paid by the employer to the pension provider. The employee cannot, in principle, directly make contributions to the pension provider himself.

The employer should be the policyholder of the pension plan. Exceptions exist for employees who already had an individual pension plan (c-policy) before 1 January 2007, and have not switched employer since.

An employer is not obliged to provide supplementary pension plans unless it has promised the employee a pension plan, or a CBA or government initiative requires it. There are several ways in which supplementary pension benefits can be arranged and financed:

- Defined benefit system (such as years of life, final pay or average pay plan). In a defined benefit system, the pension benefit as of the pensionable date is in principle linked to the employee’s salary and years of participation in the pension plan.
- Defined contribution system (see below, Linked to employer and/or employee contributions).

Linked to employer and/or employee contributions

In a defined contribution system, the pension benefit is linked to the:

- Contribution paid;
- Return on investment; and
- Applicable interest rates as at the pensionable date.

Is there a regulatory body that oversees the operation of supplementary pension schemes?

Regulatory body

The Dutch National Bank (“DNB”) supervises compliance of pension funds and pension insurers with pension regulations. This supervision focuses on the financial solidity of pension funds (whether they are solvent) and the financial stability of the pension funds sector. The Authority for the Financial Markets (“AFM”) is responsible for supervising the communications of pension
Regulatory framework

Once a pension fund is set up or an insurer is administering pension plans, supervision involves gathering and assessing information. The DNB has the following sources of information for ongoing supervision:

- Articles of association of the pension fund, pension rules and regulations, and administration agreements between the pension fund and the employer(s);
- Actuarial and technical business reports ("ABTN");
- Reports and financial statements;
- Quarterly reports;
- Continuity analysis; and
- Reports requested on an ad hoc basis.

The Financial Assessment Framework ("FTK"), which is part of the Pension Act and is currently under revision, sets out the statutory financial requirements for pension funds. Based on the FTK, a pension fund must have sufficient own funds to ensure, with a confidence level of 97.5%, that the value of the fund’s investments will not be less than the level of the technical provisions within a period of one year (minimum required capital).

If the pension fund will face a funding shortfall or reserve deficit, it must submit a short or long-term recovery plan to the DNB. This recovery plan must outline how the pension fund will eliminate the shortfall or deficit within three (temporarily extended to five) years (in case of a funding shortfall) or 15 years (in case of a deficit shortfall).

To exercise effective supervision, the DNB can penalise breaches of the Pension Act (such as the FTK), including:

- Administrative fines;
- Orders (possibly subject to periodic penalty payment);
- Public warning; and
- Appointment of an administrator or curator.

Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)?

Tax relief on employer contributions

As long as the pension contribution is within the tax limits established by law, a deferred taxation system applies. This means the pension benefit that will be received from the pensionable date is subject to tax, but the pension contributions paid, either by the employee or the employer, are not subject to tax.

Tax relief on employee contributions

See above, Tax relief on employer contributions.

Is there any legal protection of employees’ pension rights on a business transfer?

Automatic transfer of pension rights

In an asset transfer, all rights and obligations of the employer under employment contracts with employees at the time of the transfer pass to the acquirer of the company by operation of law. In
relation to pensions, specific rules and situations apply:

- If the seller does not provide a pension plan and the acquirer does:
  The transferred employees are entitled to the pension plan of the acquirer as of the transaction date (for the accrued years of service with the acquirer only); and

- If the seller provides a pension plan and the acquirer does not:
  The transferred employees are entitled to the same pension plan as before the transaction date and the acquirer must continue this pension plan (acknowledging all accrued years of service with the seller); and

- If both the seller and acquirer provide pension plans that differ:
  The acquirer can choose between offering the transferred employees:
  o the acquirer's pension plan as of the transaction date (for the accrued years of service with the acquirer only); or
  o a continuation of the seller's pension plan (acknowledging all accrued years of service with the seller) after the transaction date.

This acquirer's choice must be made before the transaction date and must be effectively communicated to the transferred employees by the seller and the acquirer. If the seller and/or acquirer are contractually or legally obliged to join an industry-wide pension fund, or a CBA includes pension requirements, very detailed exceptions may apply.

A new pension plan or pension provider does not automatically imply a transfer of the accrued pension entitlements.

### 32.2 Other protection for pension rights

The Pension Act also contains a prohibition against commuting (that is, cashing-in) pensions (afkoopverbod). An exception is made for small pension entitlements up to the amount of EUR467.89 (in 2017).

### 33 Can the following participate in a pension scheme established by a parent company in your jurisdiction:

- Employees who are working abroad?

- Employees of a foreign subsidiary company?

If an employer offers its employees a pension promise, the employer must administer this pension promise with a pension provider (pension fund or insurance company). To facilitate this, a pension execution agreement should be agreed on between employer and pension provider. An employer can only offer a pension promise to its own employees. If a Dutch subsidiary participates in pension plan of its parent company, the Dutch subsidiary must agree on a pension execution agreement with the pension administrator of the parent company. If the pension provider of the parent company is based outside The Netherlands, the pension provider must obtain a licence from the foreign regulatory authority before accepting any pension contributions from the Dutch subsidiary. Detailed conditions apply where the pension provider of the parent company is based in The Netherlands while the subsidiaries are based abroad.

### 33.1 Employees working abroad

No additional approval or authorisation requirements from the local regulator apply.

Whether an employee can continue its Dutch pension plan while working abroad depends on whether the employee's employment remuneration is taxable in The Netherlands. If the employment remuneration is taxed locally, the question of whether an employee can continue its Dutch pension plan depends on local legislation. During a secondment, deviating conditions may apply.
33.2 **Employees of a foreign subsidiary company**

If the employee of the foreign subsidiary is not employed by the Dutch employer (assuming that a secondment, if any, does not qualify as an employment relationship), the employee is not entitled to the tax reliefs referred to in Question 30.

Exceptions can apply if the employee falls within the scope of a generally declared binding CBA or mandatory industry-wide pension fund.

Subject to certain taxation-related conditions, it may be possible to continue the foreign national's 'home' state pension, subject to the laws of the foreign national's home jurisdiction. Confirmation from the Dutch tax authorities is required to continue the home state pension.

**Is there any protection provided for pension scheme benefits where the sponsoring employer becomes insolvent? If so, who provides the protection, and how does this operate?**

An employer's pension promise must be administrated by external pension providers in order to protect employees against a loss of accrued pensions due to insolvency of the employer. Consequently, employees will still have a pension claim for accrued entitlements against the pension provider, as the insolvency of the employer does not release the pension provider from its contractual obligation to make pension payments in accordance with the plan's rules.

In the case of an employer’s insolvency, the Institute for Employee Insurance Agency (UWV WERKbedrijf) takes over some of the employer's financial obligations towards the employees, including any pension contributions that have remained unpaid over a maximum of one year before the termination of employment.

**BONUSES**

35 **Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?**

There are no mandatory requirements relating to bonus/commission payments. An employer is not, for example, obliged to pay bonuses. This differs if the employer and the employee have agreed a certain bonus scheme/plan. Whether bonuses are usual depends on the industry, level and kind of position of the employee.

If an employer chooses to grant bonus payments, all employees must be treated equally for the employer to avoid any discrimination claims (see Question 15). An employee is, for instance, in principle entitled to receive bonus payment equal to that commonly paid to an employee of the opposite sex performing work of an equivalent value. Dutch law specifically provides for the equal treatment of men and women. Further, discrimination relating to entitlement to a bonus on the grounds of race, gender, handicap or chronic illness is not allowed. For these reasons, it is not advisable to make a distinction relating to bonus entitlement between employees who work part time and those who work full time (most part-time workers are women).

The conditions and criteria under which the employee is entitled to a bonus payment must be objective.

A bonus entitlement based on the performance of the employee and/or the company is permissible.

There are restrictions for bonuses in the banking sector; since 1 February 2015 these bonuses may not exceed 20% of the fixed remuneration. There are similar restrictions in the insurance sector and there is a restriction on all bonuses for companies that are aided by the government.

**INTELLECTUAL PROPERTY (IP)**

36 **If employees create IP rights in the course of their employment, who owns the rights?**

36.1 **Copyright**

The employer is considered to be the maker and rights-holder of the copyright protected work if all the following apply (Copyright Act 1912):
The creation of the work falls within the scope of the activities of the employee (that is, the creation of the work must fit the job description);

- The employment relationship is of such nature that the employer has control over the creating process; and

- The employer and employee have not agreed otherwise.

The employer is also considered the copyright owner if the work does not fit the job description but results from a firm assignment of the employer that has been accepted by the employee.

36.2 Patents

An employee who makes an invention in the course of their employment has, in principle, a claim to the patent (Patent Act 1995). However, the claim to a patent accrues to the employer if the nature of employment requires the employee to make inventions of the same kind to which the patent application relates. Parties can deviate from this in writing.

A person who has the right to a patent (the employer) must pay the inventor (the employee) a reasonable fee for relinquishing their rights to the patent. This reasonable fee must be paid where it is considered that the employee has not received adequate payment in the form of wages, allowance or other payment made (Patent Act). Any clause that deviates from this provision is null and void.

RESTRAINT OF TRADE

37 Is it possible to restrict an employee’s activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

37.1 Restriction of activities

It is possible to agree in the employment contract to a prohibition on other work during the course of employment.

Post-employment restrictive covenants are possible, however:

- they must be agreed in writing (which means that the employment contract must bear the signature of the employee); and

- they are in principle disallowed in a fixed term contract, unless the contract specifies why in that individual case a restrictive covenant is necessary on grounds of the substantial interest of the company.

An employer is not obliged to pay its former employees if they are subject to post-employment restrictive covenants, for example, a non-competition clause. However, an employee can claim compensation for the duration of the non-competition clause if the clause prevents them, to a large extent, from taking up employment with another employer (Article 7:653(5), Civil Code).

PROPOSALS FOR REFORM

38 Are there any proposals to reform employment law or pensions law in your jurisdiction?

38.1 The Coalition Agreement

Dutch employment law has been amended substantially since 1 July 2015. Government has indicated that the new law – the Act on Employment and Security – is to be evaluated after three years. There is call for a much sooner evaluation and it is not unlikely that parts of the law will be amended in the coming period.

38.2 Dismissal system

In the Act on Employment and Security, the dismissal system has been overhauled rather drastically. It is one of the aspects on which future changes are probable, although at the time of
publication there is no proposed new legislation nor any concrete plans.

38.3 **Severance payments and remuneration**

Again, this subject is part of the Act on Employment and Security. The system has changed from entirely free (no statutory severance but a policy by which the courts can award whatever compensation it saw fit) to a very rigid fixed standard.

There is no standard yet on the “equitable compensation” due in case of gross misconduct by an employer; the high courts will probably formulate guidelines in due course.

38.4 **Pensions**

The increase of the state pension age was originally planned for a longer period, until 2024. That period has since been shortened and it is not unthinkable that legislation concerning pensions will alter again in the near future; however, there are currently no concrete plans.

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Norway
SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

1.1 Laws applicable to foreign nationals

The main laws governing the employment relationship apply to all work performed in Norway, regardless of the employee's nationality. However, Norwegian law is not applicable if the employment relationship is more closely connected to another country, for example, if the employee usually performs his work in that other country.

There are several laws applicable to foreign nationals, but the two main laws governing employment relationships are the Working Environment Act (the "WEA") of 17 June 2005, No. 62 and the Holidays Act of 29 April 1988, No. 21 (the "Holidays Act"). The WEA is mandatory, unless explicitly excluded by the Act in section 1-2(1), for example, certain industries, such as shipping, hunting and fishing, are exempt. The Holidays Act is also mandatory, and applies to all employment relationships in Norway.

Norway has implemented Directive 96/71/EC concerning the posting of workers (the "Posted Workers Directive"). For employees temporarily posted to Norway parts of the main laws apply, in accordance with the Posted Workers Directive.

1.2 Laws applicable to nationals working abroad

Whether Norwegian law applies when Norwegians are working abroad, or the foreign country's law will apply, is based on the general principles of choice of law. The main rule is that the laws of the country where the work is performed are decisive, unless the employment relationship as a whole is more closely connected to another country.

Workers posted from Norway for more than one month are entitled to a special employment agreement regulating the posting. This employment contract will regulate:

- The duration of the work to be performed abroad;
- The currency in which remuneration is to be paid;
- Any cash benefits or benefits in kind that are associated with the work abroad; and
- Any conditions relating to the employee's return journey.

RESTRICTIONS ON MANAGERS AND DIRECTORS

2 Are there any restrictions on who can be a manager or company director?

2.1 Age restrictions

Only persons over the age of 18 and of full legal capacity can be board members.

2.2 Nationality restrictions

The general manager and at least half the members of the board of directors must reside in Norway unless the government grants an exemption.
RECRUITMENT

3 Are any grants or incentives available for employing people? Do any filings need to be made when employing people?

3.1 Grants or incentives
Norwegian legislation does not prohibit agreements that provide grants or incentives to employ people. It is not uncommon that employers provide a grant to their employees for recruiting other employees.

3.2 Filings
The employer is obligated to file the employment relationship within the NAV State Register of Employers and Employees (the "EE-register"); a register that records the relationship between employers and employees.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country?

4.1 Visa
Foreign nationals from countries under the Schengen area do not need a visa to visit Norway. Other specific countries, mainly associated with industrialised countries, also do not require a visa to visit Norway.

Persons that are exempt from the visa requirement can stay inside the Schengen area for up to 90 days during any six-month period.

All other foreign nationals will require a visa.

4.2 Procedure for obtaining approval
The visa application can be made online. Alternatively, an appointment can be made to deliver the relevant documents to the appropriate Norwegian embassy/consulate. The documentation requirements vary from country to country and they may change over time.

4.3 Cost
The cost is currently EUR60.

4.4 Time frame
According to the immigration authorities, most visa applications are currently decided within 15 days.

4.5 Permits
A work permit is required for the majority of foreign nationals who intend to work in Norway. The Directorate of Immigration presumes that a work permit is required regardless of the nationality of the employer, provided the place of work is in Norway.

EU citizens and foreign nationals from the Nordic countries are exempt from the requirement to obtain a work permit.

4.6 Procedure for obtaining approval
A foreign national is prohibited from commencing work before a required work permit is granted. As a rule, a work permit must be granted prior to arrival in Norway.

Employees defined as "specialists" can apply for a work permit after arrival, and the employee can apply for a temporary work permit if they are entitled to apply after arrival.
Generally, the employee must apply from their home country through a foreign service office. However, the employer can apply on the employee's behalf provided the employee has executed a written proxy. A formal job offer, from the company to the employee, must also be executed.

4.7 Cost

The cost is currently NOK 3,700.

4.8 Time frame

According to the Directorate of Immigration, the current processing time is estimated at four - five weeks, but this can be longer for certain categories of workers.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract

All employee relationships must be subject to a written employment contract, which should be entered into "as early as possible"; and, at the latest, within one month following the commencement of employment.

The minimum requirements regarding the content of the employment contract are:

- The identity of the parties;
- The place of work;
- A description of the work or the employee's title;
- The date of commencement;
- Provisions regarding the trial period, if applicable;
- If the employment is temporary, the expected duration;
- The right to holiday and holiday pay, and the provisions concerning the fixing of dates for holiday;
- The notice period;
- The pay and other remuneration at commencement;
- The daily and weekly working hours and lengths of breaks;
- Any agreement regarding special working-hour arrangements (if applicable); and
- Information regarding collective agreements relevant to the employment (if applicable).

5.2 Implied terms

The terms of the WEA and Holidays Act are both mandatory unless explicitly excluded by these Acts.

5.3 Collective agreements

It is quite common that the employment relationship is governed by collective agreements. The major collective organisations are the Confederation of Norwegian Enterprise and the Norwegian Confederation of Trade Unions. There are a variety of unions and employer organisations that are entitled to enter into collective agreements.
What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

The employer is entitled, within the framework of legislation, collective agreements and individual employment agreements, to change the terms and conditions of employment. The Employer will only be able to change terms under an employment contract if the contract specifically allows the employer to do so.

Employers must consult with the union representatives and the employees in question prior to deciding to change the terms.

MINIMUM WAGE

Is there a national (or regional) minimum wage?

There is no regulation on minimum wage in Norway. However, collective agreements may contain clauses setting a minimum wage.

In addition, some collective agreements are made generally applicable, notwithstanding membership of trade unions. The industries where collective agreements are made generally applicable concern workers employed:

- On construction sites;
- In the maritime and shipbuilding industry; or
- In the agriculture and gardening industry.

RESTRICTIONS ON WORKING TIME

Are there restrictions on working hours?

Working hours

Normal working hours must not exceed nine hours per 24 hours and 40 hours per seven days. Working time means the time when the employee is at the disposal of the employer. The WEA calculates these provisions using average normal working hours.

Rest breaks

Lunch break

An employee must have at least one break if the daily working hours exceed five hours and 30 minutes.

Daily and weekly off-duty time

The WEA also contains provisions regarding daily and weekly off-duty time. An employee must have at least 11 hours’ continuous off-duty time per 24 hours.

Shift workers

Normal working hours must not exceed nine hours per 24 hours and 38 hours per seven days for:

- Semi-continuous shift work and comparable rota work;
- Work on two shifts which are regularly carried out on Sundays and public holidays, and comparable rota work regularly carried out on Sundays and public holidays;
- Work which necessitates that individual employees work at least every third Sunday; and
- Work principally performed at night.
Shift work is usually regulated in detail in collective agreements.

The same regulations apply for shift workers as for ordinary employees when it comes to breaks.

**HOLIDAY ENTITLEMENT**

8 Is there a minimum holiday entitlement?

8.1 Minimum holiday entitlement

Under the Holidays Act, employees are entitled to a minimum annual holiday of 25 "workdays". Saturdays are considered workdays, and so the minimum annual holiday is four weeks and one day. Holiday pay must be 10.2% of the annual remuneration if the employee is entitled to 25 workdays' annual holiday.

Although 25 workdays are the requirement under the Holidays Act, a majority of Norwegian enterprises provide five weeks of vacation either based on collective agreements, individual employment contracts or as an employer policy. The holiday pay should in these situations be 12% of the annual remuneration.

The holiday pay system in Norway is complex. Under the Holidays Act, salary is deducted when the employee is absent due to holiday. As a substitute, the employees are entitled to holiday pay, based on last year's remuneration as described above. Under the Holidays Act, holiday pay must be paid out immediately before the holiday. However, the parties can agree otherwise. To simplify the holiday pay procedure, most enterprises instead deduct the monthly payment in June (plus 4/26 of the July remuneration if the employee is entitled to 30 workdays of holiday) and replace the June remuneration with last year's holiday pay irrespective of when the employee in fact is absent due to holiday.

8.2 Public holidays

There are the following public holidays:

- New Year's Day;
- Maundy Thursday;
- Good Friday;
- Easter Monday;
- Labour Day (1 May);
- Constitution Day (17 May);
- Ascension;
- Whit Monday;
- Christmas Day (25 December); and
- Boxing Day (26 December).
ILLNESS AND INJURY OF EMPLOYEES

9 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

9.1 Entitlement to time off

The employee is entitled to time off during the entire period he is sick. Where the sick leave is no more than three days, it is, as a rule, sufficient that the employee hands in a self-certification note to his employer. If sick leave goes beyond three days, the employee must hand in a medical certificate from a physician.

9.2 Entitlement to paid time off

The employee is entitled to sick pay when he is unable to work due to his own illness or injury. The employer is obliged to pay the employee sick pay for the first 17 days of sickness (the "Employer's Period"). The sick pay is by law limited to six times the basic amount of the National Insurance, but many employers chose to pay full salary. The basic amount is currently NOK 92 576.

9.3 Recovery of sick pay from the state

After the Employer's Period expires, the National Insurance Scheme is responsible for paying sick pay. Sick pay is given by the state for up to one year. The employer cannot recover sick pay made during the Employer's Period.

STATUTORY RIGHTS OF PARENTS AND CARERS

10 What are the statutory rights of employees who are:

- Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
- Carers (including those of disabled children and adult dependants)?

10.1 Maternity rights

A pregnant employee is entitled to a leave of absence with pay in connection with prenatal examinations if those examinations cannot reasonably take place outside working hours.

The mother is entitled to a leave of absence for three weeks prior to giving birth. After giving birth, the mother must take a leave of absence for the first six weeks unless she produces a medical certificate stating that it is better for her to resume work.

A nursing mother with at least a seven hour working day is entitled to one hour's leave of absence each day without wage deduction, until the child is 12 months old.

10.2 Paternity rights

In connection with childbirth, the father is entitled to two weeks' leave of absence in order to assist the mother. If the parents do not live together, this right to leave can be exercised by another person who assists the mother. This leave is unpaid and the father is not entitled to financial support.

10.3 Surrogacy

If the parents using the surrogate's services are approved as adoptive parents, the same rules for surrogate parents as for adoptive parents apply (see below, Adoption rights).
10.4 Adoption rights

Adoptive parents and foster parents are entitled to two weeks' leave of absence prior to taking over responsibility for the care of a child. The adoptive/foster parents are not entitled to financial support under the National Insurance Act.

Further, the adoptive parents and foster parents are entitled to the same leave of absence as biological parents when taking over responsibility for the care of a child.

An adoptive parent may, on the same grounds as biological parents, be entitled to parental benefits under the National Insurance Act.

10.5 Parental rights

Both parents are entitled to a leave of absence when a child is born with benefits from the national insurance. The parents must choose between 100 percent or 80 percent degree of coverage. The total period for parental benefit is 49 weeks at 100 percent coverage, and 59 weeks at 80 percent coverage, including the maternity leave (see above, Maternity rights). The parents must choose the same degree of coverage. The maternal and paternal quotas of the total period of parental benefit are 10 weeks each, and the parents are free to decide the leave for the remaining 26 or 36 weeks. This leave of absence must be taken before the child's third birthday.

In addition to this, each parent is entitled to a leave of absence for up to 12 months for each child without pay.

10.6 Carers' rights

10.6.1 Children

If the child is sick, the employee is entitled to a maximum of 10 days' leave of absence per calendar year, and 15 days' leave if the employee is caring for two or more children. Employees who have sole care are entitled to double this period of leave.

If the child has a chronic or long-term illness or disability, the employee is entitled to a maximum of 20 days' leave of absence per calendar year. Employees who have sole care are entitled to double this period of leave.

10.6.2 Close relatives

An employee who takes care of a close relative with a terminal illness is entitled to 60 days' leave of absence to take care of the patient.

10.6.3 Parents, spouse, cohabitant or registered partner

An employee is entitled to a leave of absence for up to 10 days each calendar year to provide necessary care to a parent, spouse, cohabitant or registered partner.

CONTINUOUS PERIODS OF EMPLOYMENT

11 Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

11.1 Benefits created

There are provisions on prolonged notice periods for employees who have been employed for five years or more. In addition, seniority is a relevant factor to consider where the employer wishes to implement workforce reductions (i.e. redundancies).

11.2 Consequences of a transfer of employee

Norway has implemented Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (the "Transfer of Undertakings Directive"). Employees covered by the Transfer of Undertakings Directive are entitled to maintain periods of
TEMPORARY AND AGENCY WORKERS

12 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

As a rule, the WEA applies to all employment relationships, both permanent and temporary. However, there are some differences between the rights of temporary and permanent employees.

12.1 Temporary workers

An employer has limited possibilities to employ temporarily, and illegal temporary employment will in general be considered as permanent.

When the duration of a legal temporary employment contract ends, the employment also ends. Similarly, when a temporary employee receives a termination notice from their employer, his employment ends. Temporary employees still have the right to contest the legality of the notice, but the temporary employee is usually not allowed to remain in the position pending the court's decision. When a permanent employee receives notice of termination from their employer, he has the right to remain in his position until the case has been heard by the court and a legally binding verdict has been given.

If an employee is hired on a temporary basis for more than four consecutive years, the provisions of Norwegian employment law concerning termination of employment relationships will apply to him.

When an employee has been employed on a temporary basis for four years or less, whether the provisions concerning termination of employment relationships apply will be considered on a case-by-case basis.

12.2 Agency workers

Agency workers are protected by Directive 2008/104/EC on temporary agency work.

DATA PROTECTION

13 What data protection rights do employees have?

The monitoring of employees' e-mails, computer files, and all types of control measures aimed at monitoring employees are regulated by Chapter 9 of the WEA and the Data Protection Act (the "DPA") of 14 April 2000, No. 31.

13.1 Chapter 9, WEA

Control/surveillance measures must be objectively justified by circumstances relating to the undertaking, and must not place undue strain on employees.

In principle, the WEA states that all control measures will be evaluated on the employer's purpose and need for the measures, in comparison to the employees' need for privacy.

13.2 The Data Protection Act

The DPA outlines the general principles and regulates the processing of personal data at workplaces. The Act restricts the employer's right to monitor activities in the company's computer systems, facsimile systems, voicemail systems, and so on.

13.3 E-mails

The employers' access to employee e-mails is regulated by the Regulations on the Processing of Personal Data of 15 December 2000, No. 1265.
DISCRIMINATION AND HARASSMENT

14 What protection do employees have from discrimination or harassment, and on what grounds?

14.1 Protection from discrimination

Discrimination on any of the following grounds is unlawful:

- Sex/gender;
- Race (including ethnicity, national origin, descent, skin colour, language, religion and philosophy);
- Political views;
- Membership of a trade union;
- Sexual orientation;
- Disability;
- Age; and
- Employees that work on a temporary or part-time basis.

Both direct and indirect discrimination are prohibited if it cannot be objectively justified.

Since 1 January 2006, there has been a new Equality and Anti-Discrimination Ombudsman and an Equality and Anti-Discrimination Tribunal (the “Tribunal”) in Norway. The main purpose of the ombudsman is to supervise and assist with implementing the Norwegian regulations on anti-discrimination.

To claim compensation for discrimination, or to claim that a decision is invalid, a claimant can apply to the ordinary courts. A claimant can also address the ordinary courts to rehear a decision from the tribunal.

There is no qualifying period for claims, with the exception of the general rules regarding limitation periods.

14.2 Protection from harassment

Claims can also be raised for harassment. Harassment due to any of the protected grounds mentioned above is prohibited.

Harassment is unwanted behaviour which takes place with the intent, or the effect, that it offends a person's dignity. Harassment is prohibited in the working environment.

If the employee is unlawfully harassed, they can demand compensation. There is no qualifying period for claims, with the exception of the general rules regarding limitation periods.

WHISTLEBLOWERS

15 Do whistleblowers have any protection?

An employee has the right to notify both the authorities and the employer of censurable conditions in the undertaking (e.g. suspicion of corruption or other illegal actions, sexual harassment, or a breach of the undertaking’s policies).

Retaliation against an employee who notifies the authorities or the employer about censurable conditions is prohibited. The provision is mandatory and all employers must respect this prohibition.
The employer must develop procedures to permit internal notification, or implement other measures that facilitate the internal notification, of censurable conditions in the undertaking.

DISMISSAL OF EMPLOYEES

16

What rights do employees have when their employment contract is terminated?

16.1

Notice periods

Unless otherwise agreed in writing or laid down in a collective pay agreement, a period of one month's notice applies to either party. However, the most common notice period in Norwegian employment contracts is three months.

The minimum notice period is two months for continuous employment of more than five years. The minimum notice period is three months for continuous employment of more than 10 years. If an employee is dismissed after more than 10 years of continuous employment, the notice period shall be at least four months when given to an employee who is 50 years of age or older, at least five months after the age of 55 years and at least six months after the age of 60 years.

In the case of written contracts of employment under which the employee is engaged for a given probationary period, generally, 14 days' notice is given.

16.2

Severance payments

There is no mandatory legislation on severance pay in Norway. However, there can be provisions on severance pay contained in collective bargaining agreements. It is also common to negotiate agreements on severance pay when reductions in the workforce are implemented.

16.3

Procedural requirements for dismissal

Before making a decision regarding dismissal with notice, the employer must, to the extent that it is practically possible, discuss the matter with the employee and the employee's elected representatives, unless the employee does not want this to happen. The purpose of the meeting is for the employer to present the reasons why dismissal is being considered and to allow the employee to present any arguments before a final decision on summary dismissal or dismissal is made. Therefore, it is important that the employer refers to the fact that the company is considering a dismissal or summary dismissal, and that the employer wants to hear the employee's arguments before the final decision is made. The same procedure applies if the employee is dismissed because of his poor performance or misconduct.

There is no legal obligation for a written warning to dismiss an employee because of his poor performance. However, prior to the decision on dismissal, it is recommended that the employee is given the opportunity to correct his performance in accordance with the employer's demands.

The termination notice must be given in writing. Notice given by an employer must be delivered to the employee in person or be forwarded by registered mail to the address given by the employee.

The notice must contain information on:

- The employee's right to demand negotiations and to institute legal proceedings;
- The employee's right to remain in his post under the provisions of sections 17-3, 17-4 and 15-11 of the WEA;
- The time limits applicable for requesting negotiations, instituting legal proceedings and remaining in a post; and
- The name of the employer and the appropriate defendant in the event of legal proceedings.
What protection do employees have against dismissal? Are there any specific categories of protected employees?

**Protection against dismissal**

Employees cannot be dismissed unless this is objectively justified on the basis of circumstances relating to the company, the employer, or the employee.

**Notice due to circumstances relating to the undertaking**

Notice can be given for redundancies that are due to closing of the business or restructuring. Such a decision, and the selection of employees to be made redundant, must be made on an objective basis.

In practical terms, the dispute often concerns the selection of workers, rather than the actual need to reduce the workforce.

A notice of dismissal that is given to at least 10 employees within a period of 30 days without being warranted by reasons related to the individual constitutes a collective redundancy. This triggers a requirement for a special consultation.

**Notice due to circumstances relating to the employee**

Breach of contract, breach of duty, and other circumstances related to the employees' actions or behaviour can be grounds for termination.

If the dismissal is unfair, compensation must be fixed at the amount the court deems reasonable, considering:

- The financial loss;
- The circumstances relating to the employer and the employee; and
- Other facts surrounding the case.

**Protected employees**

Special regulations apply for certain employees, including:

- Protection against dismissal in the event of sickness;
- Protection against dismissal during pregnancy or following the birth or adoption of a child; and
- Protection against dismissal in connection with military service.

**REDUNDANCY/LAYOFF**

How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs?

**Definition of redundancy/layoff**

Redundancies are generally defined as the dismissal of staff where the situation in the undertaking makes it necessary to reduce staffing levels. Layoffs are defined as temporary layoffs, meaning that the employees are suspended from work temporarily with 14 days' notice. In the consultation, the employer must present the grounds for the redundancy or layoff.

**Procedural requirements**

An employer contemplating redundancies must, at the earliest opportunity, enter into consultations with the employees' elected representatives with a view to reaching an agreement to avoid collective redundancies or to reduce the number of persons to be made redundant.
Where the employee is dismissed owing to circumstances relating to the employer (i.e. redundancy), the notice must also contain information concerning preferential rights under section 14-2, WEA, which states that an employee who has been dismissed owing to circumstances relating to the employer must have a preferential right to a new appointment with the same employer unless the vacant post is one for which the employee is not qualified.

Procedural requirements also apply for layoffs but may differ for employers covered by a collective agreement. In general, employers are obliged to consult with employee representatives before deciding layoffs.

18.3 Redundancy/layoff pay

Redundant employees are entitled to pay during the notice period. Laid off employees are entitled to pay for a 14-day notice period. After that period, the employer is obliged to pay their salary for 10 days. Currently an employee may be laid off for up to 49 weeks. After the first 30 weeks the employer is responsible for payment for five working days, before the layoff can continue for an additional 19 weeks.

Laid off employees and redundant employees may be entitled to payment from the national insurance following the notice periods paid by the employer.

EMPLOYEE REPRESENTATION AND CONSULTATION

19 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

19.1 Management representation

The employees of a limited liability company or public limited liability company have a right to be represented on the board of directors and/or in a corporate assembly (which is responsible for electing members of the board of directors) if there are more than 30 employees in the company. The number of employee board members to be elected depends on the following:

- How many other board members there are;
- How many employees there are in the company;
- Whether there are any special group arrangements; and
- Whether there is a corporate assembly.

19.2 Consultation

In companies employing at least 50 employees, the employer must provide information on important issues concerning the employees' working conditions and discuss those issues with the employees' elected representatives and the company's working environment committee. Similar requirements are laid down in collective bargaining agreements and are applicable regardless of the number of employees in the company.

There are certain special requirements regarding informing and consulting with the employee representatives in relation to collective redundancies (where at least 10 employees are dismissed within a period of 30 days).

19.3 Major transactions

In the event of a transfer of undertaking (typically asset sales), certain consultation requirements exist, however, there are no requirements for consent. The employer must, at the earliest opportunity, provide information concerning the transfer to, and discuss it with, the employee representatives.

Share sales do not normally trigger consultation obligations for the target company. The employer is still the same legal entity and normally there is no change to the target company and its internal
relationships and benefits. However, for companies bound by collective bargaining agreements, there is normally an obligation to inform and consult with the employee representatives in relation to share sales.

20 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

20.1 Remedies

Under the consultation procedures, there are no direct remedies. However, if dismissals are part of the actions taken by the employer, failing to inform and consult with the employee representatives can affect the validity of the dismissals. Failing to inform and consult in relation to collective redundancies can also result in the employees' notice period being prolonged.

Employers that are bound by collective bargaining agreements may be liable to pay a fine to the union for failing to inform and consult.

20.2 Employee action

Generally, employees cannot take actions to prevent proposals going ahead, unless the criteria for obtaining a temporary injunction are fulfilled.

CONSEQUENCES OF A BUSINESS TRANSFER

21 Is there any statutory protection of employees on a business transfer?

21.1 Automatic transfer of employees

Norway has implemented the Transfer of Undertakings Directive and statutory protection is in line with that Directive. When a business is transferred in a way covered by the Directive, the employees are automatically transferred to the new employer.

21.2 Protection against dismissal

A business transfer cannot by itself justify a dismissal, but that does not prevent dismissals on a business transfer where they are necessary for organisational or technical reasons.

21.3 Harmonisation of employment terms

The transferor is generally responsible for the employees' accrued benefits. As a main rule, the transferee automatically assumes the transferor's rights and obligations to the employees, including:

- Salary;
- Holiday allowance; and
- Other terms and conditions of employment.

There can be exemptions to this main rule, for instance with respect to pension benefits.

EMPLOYER AND PARENT COMPANY LIABILITY

Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company's employees?
21.4 **Employer liability**

An employer can be liable for the acts of its employees in certain situations, for example if the employee has inflicted economic loss on a third party either deliberately or by gross negligence.

21.5 **Parent company liability**

Under the general legal principles, a parent company will not be liable for the acts of a subsidiary company's employees. However, in special circumstances, there can be liability for the acts of the subsidiary company, in particular, if there is an agreement that liability should apply.

**HEALTH AND SAFETY OBLIGATIONS**

22 **What are an employer’s obligations regarding the health and safety of its employees?**

The general principle is that the working environment must be fully satisfactory, particularly where there are factors within the workplace that can affect the employees’ physical health, mental health and welfare. Each of these factors is judged both separately and collectively. Some of the particular obligations of the employer are to:

- Provide occupational health services where there are risk factors in the workplace that require this;
- Provide occupational injury insurance for all employees;
- Undergo training in health, environment and safety at work;
- Arrange for the election of safety representatives; and
- Establish a working environment committee on which the employer, the employees and the safety and health personnel are represented (only for undertakings which regularly employ at least 50 employees).

**TAXATION OF EMPLOYMENT INCOME**

23 **What is the basis of taxation of employment income for:**

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

23.1 **Foreign nationals**

Foreign citizenship in itself has no direct relevance for the tax basis or level of tax assessed in Norway. Generally, salary is taxable for employees who are tax resident in Norway. Further, employees who live or are domiciled abroad can be taxed in Norway for work performed in Norway if the salary is paid by a Norwegian company and the applicable double taxation treaty does not prevent that taxation.

Foreign nationals can be treated as tax residents of Norway typically if they have a permanent home and have lived with their family in Norway for some time. More exact methods for calculating tax residency are contained in tax treaties. Employees who are tax residents of Norway will always be taxed in Norway for work performed there.

23.2 **Nationals working abroad**

Residents of Norway are taxable in Norway on their global income. For salaries earned abroad this can be limited by an applicable double taxation treaty. In the case of foreign employment with a duration of more than 12 months, a resident of Norway can claim a reduction in Norwegian tax whether there is an applicable double taxation treaty or not.
More permanent stays abroad can result in the person no longer being a Norwegian tax resident. This can be the case where the stay lasts for more than three years, or for shorter periods under an applicable double taxation treaty.

What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

**Rate of taxation on employment income**

The tax rate consists of three elements:

- Ordinary income tax;
- Social security contributions; and
- Top tax.

The ordinary income tax rate which applies to all kinds of income is currently 28%. This is based on net income.

**Social security contributions**

The social security contribution is 8.2% and the top tax is up to 12%. Social security contribution and top tax is based on gross income.

Unlike the social security contribution, the top tax is not linked to earning rights in the social security system. As the top tax is assessed on gross income, one important aspect is that it limits the effect of interest deductions for Norwegian households. The 2016 top tax rate is 9% on income exceeding NOK550 550 and 12% on income exceeding NOK885 600. The total marginal tax rate is 48.2%, derived as 28% ordinary income tax on net income, 12% top tax and 8.2% social security contribution.

**PENSIONS**

Do employers and/or employees make pension contributions to the government in your jurisdiction?

**Contributions paid to the government**

All employers pay statutory social security contributions to the national insurance scheme consisting of charges for retirement pension, disability pension and other social benefits, including unemployment benefits and sick leave benefits. The contributions are calculated on the basis of gross pay and allowances. The rate is 14.1% (although this is lower in some more rural districts).

**Taxation of contributions**

The employer's contribution is not taxable income for the employee.

**Monthly amount of the government pension**

The monthly amount depends on the level of salary and other allowances, age and length of membership in the national insurance scheme.

Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do these schemes provide pensions, the value of which:

- Is linked to the employee’s salary?
- Is linked to employer and/or employee contributions and investment return on those contributions?
It is compulsory for all employers that are taxed in Norway and who have a minimum of one employee to provide for a supplementary pension scheme. There are two main pension schemes:

- The defined contribution scheme; and
- The defined benefits scheme.

Under the defined contribution scheme, the company pays an annual premium equivalent to a percentage of each employee’s wage. The premium must at least be a contribution of 2% of the employee’s gross income between 1 base amount (B) to 12B (1B is presently NOK92,576). The maximum contribution is 7% of the gross income between 1B and 7.1B, and 18.1% between 7.1B and 12B. No contributions are paid for income which exceeds 12B.

The defined benefits scheme ensures that, at the age of retirement, the employee receives a defined benefit (for example, 60% of the employee’s salary) after the deduction of national insurance. This means that the company’s future annual premium payment is difficult to predict. The return from the pension contribution remains in the pension fund.

Pension schemes are regulated by the Pension Acts:

- The Occupational Pension Act of 21 December 2005, No. 124;
- The Defined Contribution Pension Act of 24 November 2000, No. 81; and

Pension schemes involving payments other than those regulated by the Pension Acts are usually paid as operating expenses.

27
Is there a regulatory body that oversees the operation of supplementary pension schemes?

27.1 Regulatory body

The Financial Supervisory Authority is the public authority that oversees pension funds and insurance companies.

27.2 Regulatory framework

The operation of supplementary pension schemes is principally regulated by the Act on Insurance Activity of 10 June 2005, No. 44 and accompanying regulations, as well as the Defined Contribution Pension Act and the Company Pension Act. Insurance companies have an obligation to report to the Financial Supervisory Authority. A special licence is required to operate pension enterprises.

28
Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)?

28.1 Tax relief on employer contributions

Contributions paid within the limits of the Defined Contribution Pension Act and the Company Pension Act are tax deductible for the employer. Extra payments to build a contribution fund are also deductible within certain limits, for up to 50% of the average payments made through the present and the two previous years.

Contributions paid by the employer are not taxable income or capital for the employee. The employer must pay social security payments on the basis of the pension contributions. Payments received by the employee from the pension scheme are taxable in the hand of the employee.

28.2 Tax relief on employee contributions

Payments made by the employee are tax deductible within the limits of the Defined Contribution Pension Act or the Company Pension Act.
Is there any legal protection of employees’ pension rights on a business transfer?

29.1 Automatic transfer of pension rights

The employees’ right to earn further entitlement to a retirement pension, survivor’s pension and disability pension in accordance with a collective service pension scheme is transferred to the new employer where there is a transfer of the business. The new employer can, as a main rule, choose to make existing pension schemes applicable to the transferred employees.

Any individual pension schemes also usually transfer automatically to the new employer.

29.2 Other protection for pension rights

The pension benefits accrued by the employees when they were employed by the transferring employer are usually issued as a paid-up policy in connection with the transfer.

Can the following participate in a pension scheme established by a parent company in your jurisdiction:

- Employees who are working abroad?
- Employees of a foreign subsidiary company?

30.1 Employees working abroad

Generally, only employees who are statutory members of the Norwegian national insurance can participate in a pension scheme established by a parent company in Norway. The continued membership in a defined contribution plan is possible for previous members of the government insurance scheme in the case of temporary work abroad for up to 10 years.

Tax relief for the Norwegian employer is still available unless the cost should be allocated to a non-Norwegian company or branch which is not taxed in Norway. Tax reliefs for the employee will depend on which country the employee is liable to pay taxes in. The requirements for approval of the scheme in Norway are the same as for all pension schemes.

30.2 Employees of a foreign subsidiary company

Generally, the employees of a foreign subsidiary company cannot participate in a pension scheme established by a parent company in Norway.

Is there any protection provided for pension scheme benefits where the sponsoring employer becomes insolvent? If so, who provides the protection, and how does this operate?

The accrued pension benefits are the property of the employee and do not form part of the bankrupt estate if the employer becomes bankrupt.

BONUSES

32 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is quite common to reward key employees/management employees through bonus payments in addition to a fixed salary, especially within certain business sectors, for example, consultancy and sales.

Bonuses are usually based on individual agreements, but can also be the result of regular practice at the company or collective agreements. A bonus may benefit the employee with money, but share options, funds or arrangements for co-ownership can also be used. The bonus system must not be designed or implemented in a manner that is in breach of the discrimination legislation.

Special regulations and restrictions apply to bonus schemes within the financial sector.
INTELLECTUAL PROPERTY (IP)

If employees create IP rights in the course of their employment, who owns the rights?

Where an invention results from a specified task assigned to an employee as part of their employment, the employer is entitled to have all or part of the rights to the invention transferred to it if the exploitation of the invention comes within the sphere of the company's activity.

The employee has the right to be compensated for patentable inventions that are transferred to the employer.

RESTRAINT OF TRADE

Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Restriction of activities

The employment relationship imposes an implied duty of loyalty on the employees in relation to the employer; employees are prevented from acting in a way that could damage the employer. The duty of loyalty applies during the employment, and means that employees cannot engage in competing activities, disclose confidential information, or act in any other way that would be in conflict with the employer's interests.

Post-employment restrictive covenants

Post-employment, non-competition clauses for up to 12 months are legal in certain circumstances. A non-competition clause can not be more extensive than necessary to protect the employer against competition.

Non-competition clauses cannot be invoked in a situation where the employee has been dismissed on the basis of either a re-organisation or a workforce reduction, or if the employee has had reason to terminate the employment because of the employer's breach of contract.

The employer must compensate the employee during the restriction period. The employee is entitled to monthly compensation equal to 100% of the employee's monthly salary, subject to a cap of up to eight times the National Basic Amount ("B"), currently NOK 92,576. Monthly salary is calculated on the basis of the employee's salary during the immediately preceding 12 months period, without any variable increments.

If the employee receives any payment for work during the period the employer pays compensation, the employer is entitled to make a reduction in the agreed compensation equal to 50% of the payment that the employee receives for such work.

In addition, post-employment obligations to protect the employer’s customers are legal for a period of 12 months after termination. This applies to any customers the employee has been in contact with or been responsible for during the last 12 months. There is no requirement for compensation for such clauses, and they may therefore be more practical for many companies than non-competition clauses.

If an employee contemplates performing work which may be in breach of restrictive covenants, he/she shall inform the employer in writing and ask whether the employer has any objections against it. The employer shall within 4 weeks from the receipt of such information inform the employee in writing whether they will invoke the restrictive covenants, and state its reasons for the decision. The reasoning given shall be binding for the employer for three months. If the employee terminates the employment, and a binding reasoning does not already exist, the termination shall have the same effect as a written request. If the employer dismisses or summarily dismisses the employee, and a binding reasoning does not already exist, reasoning shall be given in connection with the dismissal or within one week after the summarily dismissal. Otherwise, the employer will lose its right to invoke the restrictive covenants.
PROPOSALS FOR REFORM

Are there any proposals to reform employment law or pensions law in your jurisdiction?

Currently there are no significant proposals to reform employment law or pension law in Norway.

This overview was co-written by Ingeborg Moen Borgerud, Tron Dalheim, Marianne Willet Jansen and Cecilie Wille Søvik, Arntzen de Besche, and updated by Sunniva Nising Sandvold, Kluge Advokatfirma AS.

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Poland
POLAND

SCOPE OF EMPLOYMENT REGULATION

1  Do the main laws that regulate the employment relationship apply to:
   •  Foreign nationals working in your jurisdiction?
   •  Nationals of your jurisdiction working abroad?

1.1  Laws applicable to foreign nationals

The law applicable to foreign nationals working in Poland depends upon the law governing the employment relationship. However, even if the employment relationship is governed by a foreign law, the terms and conditions of employment cannot be less favourable than those provided under Polish labour law in any of the following circumstances:

•  In connection with the fulfilment of an agreement between the employer and a Polish entity;
•  In a Polish branch or undertaking owned by the group to which the employer belongs; or
•  As an employee of a foreign temporary employment agency.

This particularly applies to regulations on:

•  Working time;
•  Rest periods;
•  Holiday;
•  Overtime pay;
•  Minimum wage;
•  Occupational health and safety;
•  Parental rights;
•  Minor employees’ rights;
•  Non-discrimination; and
•  Temporary workers’ rights.

1.2  Laws applicable to nationals working abroad

The parties to an employment relationship are usually allowed to choose which law governs the relationship. Therefore, Polish labour law only applies if it is chosen.

RECRUITMENT INCENTIVES

2  Are any grants or incentives available for employing people?

In general, there are no recruitment grants or incentives available. However, some means of financial support is provided under the Act of 11 October 2013 on special solutions for protecting employment.

Furthermore, certain financial benefits are available for employers who employ disabled, older, or unemployed persons. For example, employers that employ at least 25 employees are obliged to contribute to the State Fund for Disabled Workers. However, if its workforce constitutes at least 6%
of disabled employees, it is released from this obligation.

In addition, employers do not pay contributions to the Labour Fund and the Employee's Guaranteed Benefits Fund for female employees over the age of 55 and male employees over the age of 60.

PERMISSION TO WORK

3 What prior approvals do foreign nationals require to work in your country?

3.1 Visa

A visa is required for nationals of all countries except

Citizens of Schengen zone countries; and in particular:

Citizens of Albania (only for holders of biometric passports), Andorra, Antigua Barbuda, Argentina, Australia, Bahamas, Barbados, Bosnia and Herzegovina (only for holders of biometric passports), Brazil, Brunei, Bulgaria, Canada, Chile, Columbia, Costa Rica, Croatia, Cyprus, Dominica, Guatemala, Honduras, Hong Kong, Iceland, Ireland, Israel, Japan, Liechtenstein, Macau, Macedonia (only for holders of biometric passports), Malaysia, Malta, Mexico, Moldova (only for holders of biometric passports), Monaco, Montenegro (only for holders of biometric passports), Nicaragua, New Zealand, Panama, Paraguay, Peru, Rumania, Salvador, San Marino, Seychelles, Singapore, South Korea, Taiwan (for holders of passports which include an identity card number), Tonga, Trinidad and Tobago, United Arab Emirates, Uruguay, USA, Vatican, Venezuela and the United Kingdom.

Citizens of the above countries enjoy visa-free movement in Poland if their stay in Poland does not exceed three months in any six month period.

3.1.1 Procedure for obtaining approval

The authority responsible for issuing visas is the consul representing the foreign national's country of residence. The procedure to obtain a visa depends on the type of visa requested. Consuls often have specific requirements, so it is advisable to check what documents are required to obtain a visa with the competent consulate before filing the application.

3.1.2 Cost

The fee for a visa is up to EUR60, or its equivalent in local currency.

3.1.3 Time frame

There are no statutory time limits for granting visas. Therefore, the time it takes to obtain a visa depends entirely on the relevant consul. In practice, it often takes around two weeks to complete the visa process.

3.2 Permits

To work in Poland, foreign nationals generally require a work permit. The following categories of foreign nationals are exempt from the obligation to obtain a work permit:

- Citizens of the EU, European Economic Area ("EEA") and Switzerland, and members of their families;
- Foreign nationals with a settlement permit;
- Foreign nationals who have long-term EU resident status in Poland;
- Refugees, people granted temporary protection and people granted "tolerated stay" status; and
• Other foreign nationals released from the obligation to obtain a work permit under specific regulations.

3.2.1 Procedure for obtaining approval

Subject to the exceptions above, before a foreign national can take up employment in Poland the prospective employer must obtain a work permit. Work permits are issued by the province governor (‘voivode’ or ‘wojewoda’) competent for the employer's registered office.

The province governor issues a work permit for a fixed term of no more than three years. In the case of management board members in entities which employ at least 25 employees, a work permit can be issued for up to five years.

A work permit can be issued by the province governor if both:

• The foreign national's remuneration is not lower than the remuneration paid to a Polish employee in a similar position; and

• The district governor (‘starosta’) confirms that the vacancy cannot be filled by a Polish national registered as unemployed or seeking employment.

Several exceptions to these requirements are provided for in specific regulations.

The employment contract must also strictly reflect the conditions in the work permit relating to employment duration, place of work and the employee's position.

3.2.2 Cost

The fee for a work permit is:

• PLN 50 if the employment lasts less than three months;

• PLN 100 if the employment lasts longer than three months; or

• PLN 200 if the foreign national is seconded to Poland to perform export services.

Extending a permit costs up to PLN 100.

3.2.3 Time frame

It usually takes one to two months to obtain a work permit.

RESTRICTIONS ON MANAGERS AND DIRECTORS

4 Are there any restrictions on who can be a manager or company director?

4.1 Age restrictions

There are no statutory age restrictions for managers and company directors. However, the law prohibits the employment of minors under the age of 16 and provides specific requirements when persons between the age of 16 and 18 can be employed.

4.2 Nationality restrictions

There are no nationality restrictions for managers and company directors under Polish law. Foreign nationals who are board members do not need work permits as long as they do not stay in Poland for more than six months in any consecutive 12 month period.
REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract

An employment contract should be concluded in writing. Under the Polish Labour Code (the “Labour Code”) the contract must specify:

- Parties to the employment contract;
- Employment contract execution date;
- Type of employment contract;
- Work commencement date;
- Type of work;
- Place of work;
- Remuneration for work corresponding to its type, and a list of the remuneration components; and
- Working hours (full- or part-time).

Since 22 February 2016, fixed term contracts concluded for a period longer than 33 months and fixed term contracts issued for a fourth time must specify the reasons why the statutory limitation on the length of employment (33 months) or number of employment contracts (3 contracts) does not apply.

In addition, the employer must also inform the employee in writing of the following within seven days of the employment contract being executed:

- Daily and weekly working-time hours;
- How often remuneration is paid;
- Holiday entitlement; and
- The notice period.

If the employer has not adopted work rules, the following information must also be provided to the employee in writing:

- Night time hours;
- Place, date and time of remuneration payment; and
- The procedures for confirming arrival and presence at work and justifying absence from work.

5.2 Implied terms

There are no specific terms implied by law in the employment contract. However, assuming that the employment relationship is governed by Polish law, the Labour Code and other provisions of Polish labour law will apply.

5.3 Collective agreements

According to information from the Ministry of Labour and Social Policy and the State Labour Inspectorate (where collective agreements are registered), approx. 20% of employees
in Poland are covered by collective agreements.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

If the employer wants to unilaterally change employment terms and conditions (including salary and/or position), special formalities and procedures apply. Unilateral changes must be introduced by a notice of termination of work and pay terms and conditions.

An employee who is given notice of termination of work and pay terms and conditions (which requires good reasons if the employee is employed under a permanent employment contract) can, during the first half of the notice period, refuse to accept the termination. The employee’s refusal will lead to the termination of their employment at the end of the notice period. If an employee accepts the new employment terms and conditions, they become effective at the end of the notice period.

MINIMUM WAGE

7 Is there a national (or regional) minimum wage?

The minimum wage in Poland is set annually for the entire country irrespective of region. In 2017, the monthly minimum wage is PLN 2,000. Minimum wage applies to all full-time employees.

In relation to part-time employment, the minimum wage is calculated proportionally to the part-time employee’s working time.

RESTRICTIONS ON WORKING TIME

8 Are there restrictions on working hours?

8.1 Working hours

An employee’s working hours cannot exceed eight hours per day and an average of 40 hours per week (in an average five day working week over a four month reference period). Under certain conditions, daily working hours can be extended and balanced by shorter daily working time on other days, or by days off in lieu. Furthermore, the adopted reference period can be extended by up to 12 months if such extension is justified by objective or technical reasons or work organisation, subject to the general rules regarding the protection of the health and safety of workers.

Overtime must not exceed 150 hours per employee in any calendar year. However, a collective work agreement, work rules or, in the absence of these, an employment contract, can provide for a higher overtime limit. In this case, employees’ weekly working hours, including overtime, cannot exceed an average of 48 hours a week over the four month reference period.

8.2 Rest breaks

Employees are entitled to at least 11 hours of undisturbed rest per day, and at least 35 hours of undisturbed rest per week. The following individuals are not entitled to the daily rest quota and their weekly rest can be limited to 24 undisturbed hours:

- Management board members; and
- Persons working during emergency operations required to protect human life, health, property or to deal with a breakdown.

8.3 Shift workers

In certain circumstances, shift workers’ weekly undisturbed rest time can be reduced, but cannot fall below 24 hours per week.
**HOLIDAY ENTITLEMENT**

9 **Is there a minimum holiday entitlement?**

9.1 **Minimum holiday entitlement**

The statutory minimum holiday entitlement is either 20 or 26 days in a calendar year, depending on the duration of the employee's employment. Employees who have worked for less than 10 years are entitled to 20 days, and employees who have worked for at least 10 years are entitled to 26 days. The period during which holiday entitlement is calculated includes education (for example, graduation from university is treated as eight years' employment).

An employee taking up their first employment acquires 1/12 of the statutory holiday entitlement after each month of work. The holiday entitlement of part-time employees is calculated in proportion to their working time.

9.2 **Public holidays**


**ILLNESS AND INJURY OF EMPLOYEES**

10 **What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?**

10.1 **Entitlement to time off**

Employees who are unable to work due to illness or injury are entitled to time off if they can justify their absence from work by providing the employer with a medical certificate.

10.2 **Entitlement to paid time off**

During the first 33 days of incapacity to work due to illness in a calendar year (or, in the case of employees who have reached the age of 50, 14 days), the employer must pay the employee a minimum of 80% of their remuneration. The employer's internal policies can provide for a higher amount. In any case, employees are entitled to 100% of their remuneration if incapacity to work is caused by any of the following:

- An accident at work;
- Illness during pregnancy; or
- Medical tests carried out on candidates for cell, organ or tissue donors.

10.3 **Recovery of sick pay from the state**

From day 34 (or 15, in the case of employees aged 50 or over) of any illness, employees are entitled to sickness benefits from the state. Sickness benefit is paid by any employer employing over 20 persons. The amount of sickness benefit paid by the employer is then deducted from the social security contributions due from that employer.

**STATUTORY RIGHTS OF PARENTS AND CARERS**

11 **What are the statutory rights of employees who are:**

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**
11.1 Maternity rights

In Poland, (paid) maternity leave is 20 weeks if one child is born, 31 weeks for twins, 33 weeks for triplets, 35 weeks for quadruplets and 37 weeks for quintuplets or more. Up to six weeks' maternity leave can be taken before the expected delivery date.

If an employee gives birth to a stillborn baby, or if the baby dies during the first eight weeks of life, the employee is entitled to maternity leave of eight weeks and not less than seven days starting from the child's death. If an employee gives birth to more than one child during one delivery and one of the children dies, she is entitled to the maternity leave to which she is entitled for the number of surviving children. If the child dies after eight weeks of life, the employee has an entitlement to seven days maternity leave from the date of the child's death.

During maternity leave, an employee has the right to receive maternity benefit of 100% of her remuneration, paid by the state.

After maternity leave, the employer must re-employ the employee in her previous position, or, if this is impossible, in an equivalent position or a position corresponding to the employee's qualifications. The employee is entitled to her standard remuneration during maternity leave.

11.2 Parental leave

Having taken maternity leave an employee is entitled to parental leave up to 32 or 34 weeks depending on the number of children born at any one time. Both parents of a child may take parental leave simultaneously. In those circumstances, the total length of parental leave may not be longer than 32 or 34 weeks. Parental leave must be used up to the end of the calendar year in which the child reaches the age of six years. In the event an employee decides to combine parental leave with part-time employment, the amount of parental leave will be proportionally extended (up to 64 or 68 weeks depending on the number of children born at one time).

11.3 Paternity rights

The mother may decide to reduce her maternity leave after the first 14 weeks. If this is the case, the father may take the remaining part of the maternity leave upon written request.

If the mother has taken eight weeks of her maternity leave and is hospitalised, which prevents her taking care of the child, the father is entitled to use part of the mother's maternity leave for the time she is in hospital. The total length of both parents' leave cannot exceed the statutory maternity leave entitlement.

A father bringing up a child is entitled to two week's optional paternity leave, which can be used up to the end of the calendar year in which the child reaches the age of 2 years. Additionally, under certain circumstances, a father bringing up a child is entitled to additional leave on the same conditions as maternity leave.

During paternity leave, the employee receives remuneration equal to his standard remuneration.

11.4 Surrogacy

There are no regulations in Polish law relating to surrogacy. However, under Polish labour law a mother who decides not to raise her child and gives the child up for adoption or sends the child to an adoption nursery is not entitled to maternity leave after that point in time. However, maternity leave after the birth cannot be less than eight weeks, during which the employee receives standard maternity benefit (see above, Maternity rights).

11.5 Adoption rights

An adopting parent is entitled to leave on the same conditions as maternity leave (see above, Maternity rights).

The leave entitlement expires when the child reaches the age of seven years. If the child has a suspended school obligation, the employee is entitled to the leave set out above, but only until the child reaches the age of 10 years.
In the case of adoption, employees are also entitled to parental leave (see above, *Parental leave*).

### 11.6 Other parental rights

Employees who have worked for at least six months are entitled to childcare leave. Childcare leave can be granted for a maximum period of three years up to the end of the calendar year in which the child reaches the age of six years.

In general, employees are not entitled to remuneration during childcare leave, although those in a difficult financial situation may be granted a family allowance.

During childcare leave, an employee can work for the current employer, another employer or attend education or training if it does not interfere with caring for the child. At the end of the leave, the employee is entitled to be re-employed in his/her former, or an equivalent, position. An employee can return to work from childcare leave at any time with the employer's consent, or by notifying the employer at least 30 days in advance.

The employee's position during childcare leave is protected. Employment can only be terminated:

- In the event of the employer's bankruptcy or liquidation; or
- Without notice due to fault on the employee's part.

An employee entitled to childcare leave can apply for a reduction in their working hours (not more than half their full-time hours). In this case, they are protected against termination of employment for a maximum of 12 months.

### 11.7 Carers’ rights

Employees taking care of a sick child under the age of 14 years are entitled to 60 days' leave. The leave for taking care of another sick family member amounts to 14 days. During this leave, employees are entitled to an allowance of 80% of their regular remuneration. As long as the employees receive the allowance they are protected against termination of their employment.

Furthermore, an employee taking care of a child up to the age of four years may not carry out overtime work, night-time work, nor be delegated work outside of the usual workplace without the employee’s consent.

Employees bringing up at least one child under the age of 14 years are entitled to take 16 hours or two days off work per calendar year while retaining the right to remuneration.

### CONTINUOUS PERIODS OF EMPLOYMENT

**12** Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

**12.1 Benefits created**

A period of continuous employment creates certain benefits (and other rights) for employees relating to:

- Length of notice period;
- Period for which, during an employee’s absence from work due to illness, their employment is protected against termination;
- Childcare leave entitlement;
- Amount of severance pay due to employees dismissed for reasons attributable to the employer; and
- Amount of death benefit paid to the employee's family.
Other employee benefits relating to continuous employment may derive from the employer's internal regulations, for example, a jubilee award (that is, a monetary benefit).

12.2 Consequences of a transfer of employee

In a transfer of an undertaking (or part of it) the employees are transferred to the new employer automatically. As a rule, they retain all the employment rights gained during the employment with their previous employer, including those connected with continuous employment.

TEMPORARY AND AGENCY WORKERS

13 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

As a rule, temporary workers are entitled to the same rights and benefits as permanent employees. Exceptions are provided under the Act on the Employment of Temporary Workers. For example, temporary workers cannot be employed under permanent employment contracts, and render particularly dangerous work.

DATA PROTECTION

14 What data protection rights do employees have?

In general, employers can process the personal data of employees and potential recruitments, provided that it is done in accordance with personal data protection regulations. In particular, the processing of personal data requires adopting internal regulations (i.e. the implementation of a security policy and instructions on the management of the IT system used for personal data processing) and procedures to secure such data.

The Labour Code provides that the employer can only ask employees (potential or current) for the following information:

- First name, surname and parents’ names;
- Date of birth;
- Address; and
- Details of education and previous employment.

An employee, at the employer’s request, must also give the first names and surname(s) of his/her children, their dates of birth and PESEL (Polish ID number).

DISCRIMINATION AND HARASSMENT

15 What protection do employees have from discrimination or harassment, and on what grounds?

15.1 Protection from discrimination

Employees are protected under the Labour Code against direct and indirect discrimination on the grounds of:

- Sex;
- Age;
- Disability;
- Race;
- Religion or belief;
• Nationality;
• Political views;
• Trade union membership;
• Ethnic origin;
• Religious convictions;
• Sexual orientation; and
• Employment for a fixed or non-fixed term, full- or part-time.

Specific areas in which employees must be treated equally are:

• Taking up and terminating employment;
• Employment terms and conditions (such as remuneration or other work-related benefits);
• Promotion; and
• Access to training to improve professional qualifications.

In the event of breach of non-discrimination regulations, an employee can claim compensation. It is for the employer to prove that there was no discrimination.

15.2 Protection from harassment

In the event of harassment, employees enjoy similar protection and rights as discriminated employees. Sexual harassment may also result in criminal liability and lead to a fine or imprisonment.

WHISTLEBLOWERS

16 Do whistleblowers have any protection?

There are no specific protections for whistleblowers in Poland.

DISMISSAL OF EMPLOYEES

17 What rights do employees have when their employment contract is terminated?

17.1 Notice periods

If an employment contract is concluded for an indefinite term or fixed term and is terminated with notice, the termination is effective on the last day of the notice period. The minimum length of this period depends on the employee’s length of service, as follows:

• Two weeks, if the employee has worked for less than six months;
• One month, if the employee has worked for at least six months but less than three years; or
• Three months, if the employee has worked for three years or more.

Minimum notice periods for probation periods are as follows:

• Three days, if the trial period is up to two weeks;
• One week, if the trial period is more than two weeks but less than three months; or
Two weeks, if the trial period is three months.

Notice periods can only be shortened in special circumstances provided for in specific regulations (e.g., in the event of the employer's liquidation, bankruptcy or the termination of the employment contract for reasons attributable to the employer).

17.2 Severance payments

Severance payments may only be paid in the event of collective redundancies which meet the requirements of the Act of 13 March 2003 on special rules for terminating employment for reasons not attributable to employees (the "Redundancies Act") (see below, Redundancy/Layoff).

17.3 Procedural requirements for dismissal

An employer who terminates an employment contract is subject to the following rules:

- The termination notice must be given in writing;
- The termination notice must contain information on the employee's right to appeal to the labour court;
- Termination is effective at the end of a calendar month if the notice period is specified in months, or on a Saturday if in weeks; and
- Selected employee categories are protected against employment termination with notice (see below, Protected employees).

If an employer terminates a contract for an indefinite term:

- The termination notice must give reasons for the termination which must be true, specific and justified; and
- The intention to terminate the contract must be discussed with any trade union operating at the employer's establishment if the employee to be dismissed is a trade union member or the employee's interests are protected by the trade union.

18 What protection do employees have against dismissal? Are there any specific categories of protected employees?

18.1 Protection against dismissal

Employees who consider that they have been dismissed unfairly or unlawfully can file an appeal with the labour court and request to be reinstated or awarded compensation of up to three months' pay.

18.2 Protected employees

Under Polish law, certain employee categories are protected against their employment being terminated with notice, including the following:

- Pregnant employees;
- Employees on maternity and similar leave;
- Employees on (unpaid) childcare leave;
- Employees who will reach retirement age in less than four years, if the employment period gives them the right to a retirement pension on reaching that age;
- Employees on justified absence from work;
- Members of works councils;
• Trade unionists indicated by trade union authorities;
• Members of state enterprise working councils;
• Members of supervisory boards in companies established as a result of commercialisation of state enterprises;
• Social labour inspectors; and
• Members of special negotiating bodies or European works councils.

REDUNDANCY/LAYOFF

19 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs?

19.1 Definition of redundancy/layoff

Redundancy is defined as the termination of the employment relationship by the employer, who employs at least 20 employees, for reasons not attributable to the employee (eg reorganisation and restructuring). Redundancies are governed by the Redundancies Act.

Employees dismissed by reason of redundancy are entitled to severance pay irrespective of the nature of the redundancy (ie collective or individual).

Redundancies are collective if during a period of 30 days they cover:

• At least 10 employees, if the employer has fewer than 100 employees;
• 10% of employees, if the employer has between 100 and 299 employees; or
• 30 employees, if the employer has 300 employees or more.

These limits include employees whose employment contracts are terminated by mutual agreement at the employer's initiative (ie voluntary redundancies), if termination in such a manner applies to at least five employees.

19.2 Procedural requirements

The Redundancies Act imposes the following obligations (in addition to the general rules on terminating employment provided for under the Labour Code) on an employer carrying out collective redundancies:

• Notifying a trade union or, if there is no trade union, other employee representatives of the planned redundancies;
• Consulting with the trade union/other employee representatives;
• Notifying the local labour office;
• Concluding an agreement with the trade union within 20 days of the notification or, if an agreement cannot be reached or there is no trade union, adopting redundancy rules;
• Notifying the local labour office of the outcome of the consultations with the trade union/employees’ representatives (including information about any agreement or rules adopted); and
• Delivering a copy of the labour office notification to the trade union/employees’ representatives.

19.3 Redundancy/layoff pay

The amount of the layoff (severance) pay depends on the employee's length of service, as follows:
- One month's salary, if the employee has worked for less than two years;
- Two months' salary, if the employee has worked for at least two but not more than eight years; or
- Three months' salary, if the employment record exceeds eight years.

The amount of severance pay cannot exceed 15 times the minimum wage.

**TAXATION OF EMPLOYMENT INCOME**

20 What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

20.1 Foreign nationals

The rules of taxation on individuals' income are the same in Poland for foreign nationals and for Polish nationals.

Foreign nationals domiciled in Poland that have a centre of economic or personal interest in Poland, or stay in Poland for more than 183 days in any one tax year, pay tax on their worldwide income in Poland.

Foreign nationals who are not domiciled in Poland are subject to limited tax (i.e., they are only taxed on income received from performing duties in Poland or from Polish sources) unless a double tax treaty to which Poland is a party provides otherwise.

20.2 Nationals working abroad

The rules specified above also apply to Polish nationals working abroad (see above, Foreign nationals).

21 What is the rate of taxation on employment income? Are any other taxes or social security contributions levied on employers and/or employees?

21.1 Income tax

Personal income tax rates are progressive and in 2016 are as follows:

<table>
<thead>
<tr>
<th>Taxable base in PLN</th>
<th>Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 85,528</td>
<td>18% minus tax-reducing amount of PLN 556.02</td>
</tr>
<tr>
<td>More than 85,528</td>
<td>PLN 14,839.02, plus 32% of the surplus over PLN 85,528</td>
</tr>
</tbody>
</table>

Polish employers must deduct tax from their employees' taxable salary and pay it to the tax office by the 20th day of the following month in which the tax becomes payable. Annual returns must generally be filed by employees (and tax paid) by 30 April, stating all sources of income and showing any additional tax due for the previous year.
21.2 **Social security contributions**

In Poland, social security contributions consist of pension, disability, accident and sickness insurance. Social security contributions are obligatory and payable by employers. They are financed by both employers and employees. Employers must deduct the appropriate amounts from the employees' salaries and pay the contributions monthly to the social security office by the 15th day of the following month in which they become payable. The amounts of contributions are:

- **Pension**: 19.52% (employer 9.76% and employee 9.76%);
- **Disability**: 8% (employer 6% and employee 2%);
- **Accident**: 0.40% to 3.60% (paid by the employer); and
- **Sickness**: 2.45% (paid by the employee).

Employers must also pay a contribution of 2.45% to the Labour Fund and 0.1% to the Employees’ Guaranteed Benefits Fund.

There is also an obligatory contribution of 9% to health insurance, although health insurance contributions are deductible from the employees’ tax up to 7.75%.

**EMPLOYER AND PARENT COMPANY LIABILITY**

22 **Are there any circumstances in which:**

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company’s employees?

22.1 **Employer liability**

An employer is liable for any damage caused by its employee to a third party, if the damage was caused by the employee during the performance of their duties. The employer can claim reimbursement of part of the compensation from the employee under the Labour Code.

22.2 **Parent company liability**

A parent company bears no liability for the acts of a subsidiary company’s employees as only the direct employer is liable for damage caused by its employees.

**HEALTH AND SAFETY OBLIGATIONS**

23 **What are an employer’s obligations regarding the health and safety of its employees?**

The main occupational health and safety obligations of an employer are:

- Organising work in a manner to ensure safe and hygienic working conditions;
- Ensuring observance of health and safety regulations by giving instructions to remove any breaches of them, and by supervising implementation of the instructions in the employing establishment;
- Responding to the need to adjust the measures for the health and safety of workers;
- Developing a coherent overall policy to prevent accidents at work and occupational illnesses;
- Ensuring protection of the health of minor employees, pregnant or breastfeeding employees, and disabled employees when developing health and safety monitoring;
- Ensuring that orders, requests, decisions and regulations of bodies supervising working conditions are executed; and
• Ensuring that the recommendations of the social labour inspector are followed.

Employers must also take measures for first aid, fire prevention and evacuation of employees, which are adapted to the nature and size of the business, and appoint employees responsible for these matters.

In addition, the employer must:

• Organise occupational health and safety training;
• Provide (free of charge) protective clothing, personal protective equipment, other protective appliances and any health and safety equipment required, including personal hygiene facilities;
• Ensure that its employees undergo medical examinations; and
• Fulfil obligations relating to accidents at work and occupational illnesses (e.g. keep a record of accidents at work for a period of 10 years, and investigate and eliminate causes of accidents at work or occupational illnesses suffered).

EMPLOYEE REPRESENTATION AND CONSULTATION

24 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

24.1 Management representation

In private undertakings employees can be represented by trade unions, works councils or employees elected by them to represent their interests.

24.2 Consultation

A number of consultation rights are governed by the Act on Informing and Consulting Employees (the "Consultation Act"). These rights are vested in works councils established according to the rules set out in the Consultation Act. Among other things, works councils must be consulted over the following matters:

• Changes in the level and structure of employment;
• Actions aimed at keeping the employment level unchanged; and
• Actions which may lead to significant changes in work organisation or employment basis.

Trade unions are also entitled to be informed or consulted in relation to the following matters:

• Terminating the employment of employees who are trade union members;
• Collective redundancies; and
• The transfer of an undertaking (or part of it).

24.3 Major transactions

Certain consequences of asset sales that result in the automatic transfer of the work establishment (or part of it) require consultation with trade unions. In share sales, consultation is generally not obligatory.
What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

**25.1 Remedies**

An employer's failure to comply with consultation duties to trade unions in the event of a transfer of an undertaking (or part of it) exposes the employer to the risk of a fine or imprisonment.

The Consultation Act stipulates penalties for any employer failing to fulfil its consultation duties to a works council.

**25.2 Employee action**

There are no remedies available to prevent the employer's plans or proposals going ahead.

**CONSEQUENCES OF A BUSINESS TRANSFER**

Is there any statutory protection of employees on a business transfer?

**26.1 Automatic transfer of employees**

The transfer of a work establishment (or part of it) to another entity will result in the employees assigned to the transferring business being automatically transferred to the new employer. Only in the event of a transfer of part of a work establishment both the former and new employer will be jointly and severally liable for any breach of the obligations arising from employment relationships created before the transfer date.

**26.2 Protection against dismissal**

The transfer of an undertaking (or part of it) cannot be the only or main reason for an employer terminating employment with notice.

**26.3 Harmonisation of employment terms**

If the transferred employees were covered by a collective labour agreement, the conditions of their employment contracts resulting from the collective labour agreement can be modified after a period of one year.

Transferred employees are generally entitled to the same working terms and conditions after the transfer as they had before. Any changes, particularly those that are disadvantageous to the transferred employees, can only be made in accordance with the procedures under the Labour Code. The transfer of the undertaking should not be the only (or main) reason for the changes.

**PENSIONS**

Do employers and/or employees make pension contributions to the government in your jurisdiction?

**27.1 Contributions paid to the government**

Pension contributions at a rate of 19.52% are withheld from the employee's salary and paid to the Social Security Office by employers, but they are financed by both the employer and employee (see above, Social security contributions).

**27.2 Taxation of contributions**

Pension contributions financed by the employer constitute the employer's tax costs (that is, they are deducted from the taxable base). As a result, no corporate income tax is levied on these amounts. The part of the contribution paid by the employee is deducted from their taxable income.

**27.3 Monthly amount of the government pension**

The monthly amount of the pension depends, among other things, on the:
• Sum of valorised pension premiums gathered on an individual account;

• Valorised initial capital settled on 1 January 1999; and

• The Employee’s retirement date.

Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do these schemes provide pensions, the value of which:

• Is linked to the employee's salary?

• Is linked to employer and/or employee contributions and investment return on those contributions?

Since 1997, Polish law has provided supplementary pension schemes for employees. These are not obligatory and employers can create them voluntarily, which means they are considered an extra benefit for employees.

Supplementary pension schemes are still uncommon in Poland and, according to information published by the Financial Supervision Authority in June 2016, only 1,053 supplementary pension schemes have been registered.

Linked to the employee's salary

The amount of additional pension resulting from participation in a supplementary pension scheme cannot be determined at the start of the arrangement, as it is determined not only by the fixed amount of contributions, but also by the investments made by the financial institution managing the scheme.

Is there a regulatory body that oversees the operation of supplementary pension schemes?

Supplementary pension schemes are supervised by and registered with the Financial Supervision Authority.

The Financial Supervision Authority supervises the compliance of the pension schemes with the law, particularly by checking whether all the required conditions have been met by the employer, and whether the scheme can be registered. Employers must also provide the Financial Supervision Authority with information and updates on their pension schemes annually.

Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)?

In general, contributions to the supplementary pension schemes are not tax exempt. As a rule, tax reliefs are only available in relation to:

• Payments from pension schemes to another pension scheme or to the beneficiaries; and

• Income connected with participation in such schemes.

Is there any legal protection of employees’ pension rights on a business transfer?

The consequences of the automatic transfer of employees with regard to supplementary pension rights depend on whether the former and the new employer run a supplementary pension scheme. The following scenarios are possible with regard to employees’ supplementary pension rights in the event of the transfer of an undertaking (or part of it):

• The entire undertaking is transferred from employer A to the employer B. B runs a supplementary pension scheme, but A did not. In general, the transferred employees are entitled to participation in the pension scheme run by the new employer;

• The entire undertaking is transferred from A to B. B does not run a supplementary pension scheme, but A did. B becomes a party to the employee supplementary pension agreement
between A and the financial institution and continues the scheme. Moreover, current employees of B are entitled to participate in the pension scheme as well;

- The entire undertaking is transferred from A to B. Both A and B run a supplementary pension scheme. The transferred employees have the right to participate in B's scheme. However it is also possible that B, for a period not longer than three years, runs both schemes (should the employee's elect to stay on A's scheme);

- Part of the undertaking is transferred from A to B. B does not run a supplementary pension scheme, but A did. B does not become a party to the employee pension agreement between the former employer and the financial institution and cannot continue the scheme; or

- Part of the undertaking is transferred from A to B. Both A and B run a supplementary pension scheme. In general, the transferred employees are entitled to accede to B's scheme. The funds accrued in A's scheme can be transferred to B's scheme.

Can the following participate in a pension scheme established by a parent company in your jurisdiction:

- Employees who are working abroad?
- Employees of a foreign subsidiary company?

Employees working abroad

In general, all employees (including those working abroad) are entitled to participate in pension schemes, provided that they have worked for the employer setting up the scheme for at least three months (unless the pension agreement between the employer and employees' representatives provides otherwise).

Employees of a foreign subsidiary company

Employees of foreign subsidiaries cannot participate in pension schemes established by a Polish employer.

Is there any protection provided for pension scheme benefits where the sponsoring employer becomes insolvent? If so, who provides the protection, and how does this operate?

If the insolvency of the employer leads to liquidation of the pension scheme, the employer's liquidator must notify the scheme participants of the date from which contributions to the scheme are not calculated, deducted or paid.

The liquidator must also request scheme participants to indicate the account to which the transferred payment (that is, a transfer of the participant's funds to another pension scheme or to an individual pension account) should be made. If an employee does not indicate an account by the deadline specified in the agreement between the employer and the employees' representatives (or the terms and conditions of the pension scheme), part of the funds (60% to 70%) on the participant's account are returned to the participant.

BONUSES

Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is quite common for bonuses to be awarded to employees. Although the law does not regulate bonuses, generally they are divided into awards of a discretionary or mandatory nature.

Bonuses are awarded to employees on the fulfilment of objective criteria, as set out in the employment contract, the employer's internal policies or other documents.
INTELLECTUAL PROPERTY (IP)

If employees create IP rights in the course of their employment, who owns the rights?

Any piece of work covered by IP rights (author's rights, trade marks, and inventions) made by an employee in the course of their employment, within the scope of their duties, and which relates to the business of the employer, belongs to the employer. This does not apply to moral rights, which always remain with the author/inventor.

If an employee creates an invention (not a trade mark or work) outside the scope of their duties but with the help of the employer, the employer is allowed to use it in the limited scope provided for by law.

RESTRAINT OF TRADE

Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

36.1 Restriction of activities

The parties to an employment contract can execute a non-competition agreement, under which the employee undertakes not to perform competitive activities during employment or for an agreed period after termination.

36.2 Post-employment restrictive covenants

Non-competition agreements can be concluded after an employment relationship terminates if the employee had access to particularly important information which, if disclosed, could cause damage to the employer.

The Labour Code provides the minimum amount of compensation due to an employee for refraining from competitive activities after termination of employment; the compensation cannot be lower than 25% of the monthly remuneration paid to the employee during the employment relationship, paid monthly for the term of the non-competition ban. If the compensation is not specified in the agreement, the employee is entitled to the statutory minimum amount.

The period for which the agreement is to be concluded must be defined, otherwise it may be declared invalid.

The term of the agreement is not limited. Therefore, as long as the employer pays the compensation and the period of the agreement is reasonable, the obligations on the parties to the agreement remain enforceable.

PROPOSALS FOR REFORM

Are there any proposals to reform employment law or pensions law in your jurisdiction?

The government has indicated its intention to amend the Act on Employment of Temporary Agency Workers and to limit the period of assignment of a temporary employee to a specific user-undertaking. According to the draft amendment, a specific user-undertaking can use the work of a given temporary employee for a maximum period of 18 months within 36 consecutive months. Under current legislation, the assignment time limit is addressed only to the work agency. Therefore, it is common practice that the same temporary employee works for a given user-undertaking much longer than the permitted 18 months. It is permissible because the temporary
employee is assigned to the same user-undertaking by several affiliated work agencies every time for the permitted 18 months. In order to prevent this law circumvention, the time limit will be addressed not only to the work agency but also to the user-undertaking. The draft amendment stipulates that a breach of the time limit will be punished with a fine of up to PLN 30,000.

This overview was co-written by Katarzyna Dobkowska and Bogusław Kapłon, Domański Zakrzewski Palinka sp. k. and updated by Agnieszka Nowak-Błaszczak, Wolf Theiss

February 2017
Spain
SPAIN

SCOPE OF EMPLOYMENT REGULATION

1. Do the main laws that regulate the employment relationship apply to:
   - Foreign nationals working in your jurisdiction?
   - Nationals of your jurisdiction working abroad?

1.1. Laws applicable to foreign nationals

Parties can choose which law regulates the employment contract, although there are certain mandatory provisions that apply regardless of the choice of law. In particular, if a European Economic Area ("EEA") national, or a non-EEA national working for an EEA-based company, has been posted to work in Spain, Directive 96/71/EC (and Directive 2014/67) concerning the posting of workers (the "Posted Workers Directive") applies. This provides that employees posted to work in another member state are protected by that member state's mandatory employment legislation. In Spain, this includes:

- Maximum work periods, minimum rest periods and paid annual holidays (see below, Questions 10 and 11);
- Minimum rates of pay, including overtime rates (see below, Question 9);
- Equal treatment and non-discrimination (see below, Question 17);
- Conditions and restrictions on work by minors;
- Prevention of risks at work (see below, Question 25);
- Freedom to join a trade union and the right to strike; and
- The right to privacy and dignity at the workplace.

The mandatory employment legislation that applies in the absence of a choice of law also applies to non-EEA nationals and nationals working for non-EEA-based companies (Section 6, Rome Convention on the law applicable to contractual obligations (1980/934/EEC) (the "Rome Convention").

1.2. Laws applicable to nationals working abroad

Unless the parties have agreed on a choice of law, the general rules apply. This means that the employment contract is governed by the law of the country in which the employee habitually carries out his work in performance of that contract, even if the employee is temporarily employed in another country (Section 6, Rome Convention).

EMPLOYMENT STATUS

2. Does the law distinguish between different categories of worker? If so, what are the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1. Categories of worker

The rendering of services to employers can be carried out under employment relationships (with employees) or civil/mercantile relationships (with self-employed workers and/or independent contractors).

Under Spanish law, the employment contract is an agreement under which employees voluntarily offer their physical or intellectual services for payment to an employer.
For civil/mercantile relationships, the contract for the provision of services (also called a commercial contract for services) is an exchange of obligations and contributions, which are rewarded with a payment for the services provided.

Therefore, an employment contract will only exist where there are generic elements of employment in the relationship (ie the employee is managed by the employer, is dependent on the employer, engages in no risk-sharing with the employer, and receives a guaranteed payment for services rendered).

In addition, Spanish law separately regulates the "economically dependent autonomous employee", who is a natural person, who:

- Performs a professional activity for profit on a regular basis;
- Carries out that activity personally, directly and principally for one natural or legal person (called a client); and
- Depends on this client to receive at least 75% of their income.

Economically dependent autonomous employees are a particular category of the self-employed, and are regulated under a specific legal framework.

2.2 Entitlement to statutory employment rights

Only people who are employees under an employment contract are entitled to statutory employment rights.

2.3 Time periods

Only fixed-term employment contracts have a maximum duration under the law.

RECRUITMENT

Are any grants or incentives available for employing people? Do any filings need to be made when employing people?

3.1 Grants or incentives

The government issues an employment plan every year that sets out specific incentives available for employing certain categories of people. The most common incentives are:

- Reducing social security contributions for employing people over the age of 45 years;
- Reducing social security contributions for employers converting temporary employment contracts into permanent contracts, to promote employment stability;
- Reducing social security contributions for employers converting contracts of replacement or contracts for training into permanent contracts, to promote employment stability; and
- Awarding bonuses to employers, such as direct payments from social security, for employing women and unemployed persons for more than one year.

In addition to the government's discretionary incentives, there are specific measures and incentives for employing the following people:

- Unemployed persons registered at the Employment Office;
- Disabled persons;
- Female victims of domestic violence;
- Employees suffering from social exclusion; and
• Unemployed persons with family responsibilities.

The last mayor labour reform adopted specific measures and incentives for employing people with certain characteristics, and which must be examined on a case by case basis.

3.2 Filings

All signed employment contracts must be presented to the National Employment Public Service within 10 days of signing the employment contract.

BACKGROUND CHECKS

4 Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

There is no clear indication in Spanish law as to what information employers are allowed to ask employees to provide during the hiring process.

However, all questions must comply with data protection law and must respect the candidates' right to privacy. For example, employers must not ask questions about a job applicant's health before making a job offer.

However, there are certain circumstances where medical checks may be made before recruitment. These circumstances apply where employers are recruiting for jobs with a risk of occupational diseases. In such cases, the employer must arrange a medical examination of the employee before the hiring process begins. The medical examination is free for the candidate. The employer will be told whether the candidate is fit to do the job but will not have access to the details of the medical examination.

PERMISSION TO WORK

5 What prior approvals do foreign nationals require to work in your country?

5.1 Visa

5.1.1 Procedure for obtaining approval

Any foreign national who is not from the EEA and wants to work in Spain must obtain, prior to commencing their work activity, a work permit and its corresponding work visa (once the work permit has been approved).

5.1.2 Cost

The administrative costs for a working visa vary depending on the nationality of the non-EEA applicant.

5.1.3 Time frame

The work visa takes between seven and 15 days to be issued.

5.1.4 Sanctions

See below, Permits: Sanctions.

5.2 Permits

5.2.1 Procedure for obtaining approval

EEA nationals are free to work in Spain without permits.

Non-EEA nationals must usually obtain a work permit. Different permits are required, depending on the length of employment and the employee's geographical location. If a job does not require
specific qualifications, a permit is only granted if there are no Spanish people available to take up the position.

The work permit is subject to the labour market test, except for the cases indicated in section 40 of the Immigration Law, and for Peruvian and Chilean citizens, who are exempted.

A company wishing to hire a non-EEA national must obtain a permit from the labour authorities. The work permit application can be filed in one of the following organisations, depending on the characteristics of the Spanish sponsoring company and the professional skills of the assignee:

- The General Immigration Directorate: the process takes around 30 days to resolve the application; or
- The local immigration office: the process takes a minimum of three months.

Once the work permit is approved and notified, the assignee has to apply for the corresponding work visa, within one month, from the Spanish consulate that has jurisdiction over the applicant's place of residence.

5.2.2 Cost

The charges for a work permit can vary from approximately EUR192 to EUR380 depending on the salary the applicant will receive.

5.2.3 Time frame

The process can take from 30 days to three months, depending on which organisation the work permit application is filed with.

5.2.4 Sanctions

Employing a foreign national who does not have the necessary permission to work is a very serious breach of law, penalised with a fine ranging from EUR10,000 to EUR100,000 (plus any social security charges due).

5.3 Investors and qualified professionals

Act 14/2013 of September 27 (the "Act"), supporting entrepreneurs and their internationalization, sets out several provisions affecting international mobility with the intention of attracting investment and talent by eliminating administrative bureaucracy.

The Act regulates the following foreigners' entry into and presence in Spain:

- Investors;
- Entrepreneurs;
- Highly qualified professionals;
- Researchers; and
- Workers subject to intra-corporate transfers within the same undertaking or group of undertakings.

5.3.1 Investors

This feature is aimed at non-resident foreigners carrying out capital investments in Spain.

The visitors' visa for investors is granted for one year and is sufficient authorisation to reside in Spain.

To obtain the visa, one of the following types of investment in Spain must be proven:
• EUR 2 million in Spanish public debt, or EUR 1 million in shares or equity interests in Spanish companies, or in bank deposits in Spanish financial institutions;

• Acquisition of one or more properties with a joint value of at least EUR 500,000 per applicant; or

• Investment in a general interest business project, provided it helps create jobs, has a socio-economic impact on its geographic sphere of influence or makes a relevant contribution to scientific and/or technological innovation (upheld with a report from the consulate trade office).

5.3.2 Entrepreneurs and business activity

For this purpose, business and entrepreneurial activities must be innovative, of particular economic interest to Spain, and must have been given a favourable report from the General State Administration’s relevant body. The creation of jobs in Spain is particularly valued. The contracting party’s professional profile will also be considered, along with the business plan, its financing, added value for Spain’s economy, innovation and investment opportunities.

A one-year visa can be applied for to carry out the preliminary procedures for starting a business activity. When proof of the start-up of the business activity has been provided, applicants will qualify for a residence permit for entrepreneurs, requiring no prior minimum stay.

RESTRICTIONS ON MANAGERS AND DIRECTORS

6 Are there any restrictions on who can be a manager or company director? Do any filings need to be made when employing people?

6.1 Age restrictions

The usual retirement age for all employees is 65; there is no compulsory retirement age.

There are no specific age restrictions on managers or company directors. However, major Spanish companies are increasingly imposing age limits on company directors in accordance with good corporate governance rules. This practice has not been affected by Spain’s implementation of European provisions on age discrimination.

6.2 Nationality restrictions

There are no specific nationality restrictions on managers or company directors.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

7 How is the employment relationship governed and regulated?

7.1 Written employment contract

There is no general requirement for an employment contract to be in writing, except for temporary contracts lasting more than four weeks.

Employees must be provided with certain written particulars of employment, including details identifying the following matters (Royal Decree 1659/1998 of the 24 July and section 8.5 of the Workers’ Statute), if not set forth in the written employment contract, and when the employment relationship is longer than four weeks:

• Name of the company;

• Date on which employment begins;

• Remuneration;

• Place of work;

• Hours of work;
Holiday and holiday pay entitlement;
Collective agreements applicable to the employment relationship; and
Professional group to which the employee belongs.

7.2 Implied terms

Statute and case law imply certain terms into employment contracts. Common implied terms are the:

- Mutual duty of trust and confidence;
- Employee's duty to obey the employer's instructions; and
- Employee's duty to comply with the company's internal rules.

7.3 Collective agreements

Collective agreements between unions and employers are quite common; almost every company in Spain is subject to a collective agreement. The provisions in collective agreements apply regardless of the terms in the employment contract.

8 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Employers can unilaterally modify the terms and conditions of employment under employment contracts and collective agreements (different from a collective bargaining agreement). To this effect, employers must fulfil the requirements established by section 41 of the Workers’ Statute. Under section 41, where demonstrated economic, technical, organisational or production justifications exist, the company’s management can resolve to make a substantial modification to the following terms and conditions of employment:

- Hours of work;
- Working timetable and distribution of working time;
- Working patterns for shift work;
- Salary system and salary amount;
- Procedures for measuring employees’ work and performance; and
- Employees’ functions, where these exceed the limits set by section 39 of the Workers’ Statute for functional mobility.

The justifications contained in section 41 needs to be linked with:

- Competitiveness;
- Productivity; or
- Technical or labour organisation.

Different procedures for modification must be followed depending on whether the modification is of an individual or collective nature.

An individual modification will take place when a modification based on the above justifications takes place, and the thresholds stated for collective substantial modification to working conditions are not met.
A collective substantial modification to working conditions will take place when the modification affects, within a 90 day period, at least:

- 10 employees in those companies employing less than 100 employees;
- 10% of the employees in those companies employing between 100 and 300 employees; or
- 30 employees in those companies employing more than 300 employees.

MINIMUM WAGE

9  Is there a national (or regional) minimum wage?

The minimum wage for 2016 is EUR 707.60 per month. It applies to all employees.

RESTRICTIONS ON WORKING TIME

10  Are there restrictions on working hours? Can an employee opt out on either an individual or collective basis?

10.1  Working hours

The Spanish Workers' Statute state that employees must:

- Not work (on an annual average) more than 40 hours a week;
- Not work more than nine hours a day; and
- Be given at least 12 hours' rest before starting the next day's work.

There are exceptions for certain industries (eg agricultural work), management executives and other specified employment relationships.

10.2  Rest breaks

Whenever the duration of the continuous working day exceeds six hours, a rest period of not less than 15 minutes must be given. This rest period is considered as working time where this is established by either a collective bargaining agreement or the employment contract. Workers under the age of 18 years are entitled to a rest period of a minimum of 30 minutes whenever the duration of the continuous working day exceeds four and a half hours.

Workers have the right to an uninterrupted minimum weekly break of one and a half days, which can be accumulated in periods of up to 14 days. This break period, as a general rule, should include either Saturday afternoon or Monday morning, together with the whole of Sunday. Persons under the age of 18 years must have a weekly break of two days without interruption (it is irrelevant which days of the week this weekly break takes place).

10.3  Shift workers

The following provisions are set out in both the Workers' Statute and in Royal Decree 1561/1995 of 21 September, which regulate that the following special working hours for shift workers must be observed:

- Employees will be entitled to minimum weekly time off, which can be accumulated for a period of up to 14 days, equal to one and a half interrupted days which, as a general rule, should include Saturday afternoon, or Monday morning and all day Sunday. However, in cases where shift workers are required to work by the organisation, the weekly half day of rest can be accumulated by periods of up to four weeks, or can be separated into full days;
- When the shift worker is unable to enjoy the minimum time off between working days (the legal minimum is 12 hours) this may be reduced to a minimum of seven hours. The additional five hours of time off must be compensated to the employee over the course of the immediately following days;
• Reductions in time off between working days and working weeks (as set out above) must be compensated by alternative rest periods, which must be no shorter than the reduction in question; and
• The enjoyment of the time off in lieu (referred to above) cannot be replaced with financial compensation, except in the case of termination of employment for causes other than those arising under the terms of the contract.

HOLIDAY ENTITLEMENT

11 Is there a minimum paid holiday entitlement?

11.1 Minimum holiday entitlement

Once employees have been continuously employed for one year, they are entitled to 30 calendar days’ paid holiday every year. Holiday entitlement cannot be replaced by payment in lieu.

11.2 Public holidays

There are 14 public holidays which are in addition to the minimum holiday entitlement.

ILLNESS AND INJURY OF EMPLOYEES

12 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

12.1 Entitlement to time off

Employees are entitled to a maximum of 18 months’ sick leave in cases of illness or injury. Once the 18-month period has expired, employees can be designated as permanently ill and claim a social security pension.

12.2 Entitlement to paid time off

Employees receive social security payments during the sick leave period (up to a maximum of 18 months). The amount of social security payment varies depending on the employees' salary and their position in the employer's organisation. Some employers, on their own initiative or under the provisions of a collective agreement, supplement the social security payment to match the employee's current salary.

12.3 Recovery of sick pay from the state

Employers are compensated for payment made in favour of employees from the day after the accident (or after the 16th day in the case of a common contingency) by discounting the amount of the delegated payments made from their periodic settlements of social security contributions.

The delegated payments by employers end after 365 days. If there is an extension after this date, that payment is made directly by the National Social Security Institute.

STATUTORY RIGHTS OF PARENTS AND CARERS

13 What are the statutory rights of employees who are:

• Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
• Carers (including those of disabled children and adult dependants)?

13.1 Maternity rights

Maternity leave is 16 weeks’ long. Six of these weeks must be taken by the mother immediately after the birth. Maternity leave is increased where there are:
• Multiple births (by two weeks for each additional child, to be counted from the second child); or
• Medical complications.

Maternity leave can also be increased where the child is disabled. If the mother dies whilst taking maternity leave, the remaining leave is transferred to the other parent (see below, Paternity rights).

Pregnant employees and those who have recently given birth are entitled to time off for, among other things, attending antenatal clinics and breastfeeding, in addition to the 16 weeks’ maternity leave.

Social security benefits are paid to employees on maternity leave. Employees must generally satisfy a qualifying period of paid employment to receive benefits, depending on their age:

• Employees under 21 years old: no qualifying period applies;
• Employees aged between 21 and 26 years old: a qualifying period of 90 days’ paid employment within the previous seven years. However, benefits will be received if the employee has had 180 days’ paid employment during her lifetime; and
• Employees aged over 26 years old: a qualifying period of 180 days’ paid employment within the last previous seven years. However, benefits will be received if the employee has had 360 days’ paid employment during her lifetime.

The monthly benefit is equal to 100% of the mother's base of contribution to social security.

13.2 Paternity rights

The other parent of a newly born child can take up to two working days’ paid absence immediately after the birth.

Fathers are also entitled to 20 additional days’ paternity leave. Paternity leave can be increased for multiple births (by two days for each additional child). Social security benefits are paid to employees on paternity leave, provided that the father has had 180 days’ paid employment within the previous seven years. The monthly benefit is equal to 100% of the father's base of contribution to social security.

The other parent can also share his partner’s maternity or adoptive leave if either (notwithstanding the six immediate weeks after the birth):

• There is a mutual agreement between the parents;
• The mother dies whilst on maternity leave (see above, Maternity rights).

The parents of the child do not have to be married for this right to apply. If maternity leave is shared, the father can take a maximum of 10 weeks out of the full 16 weeks allowed (in addition to the paternity leave period). The mother must take a minimum of six weeks' leave immediately following the birth.

13.3 Surrogacy

In December 2016, the Supreme Court granted Social Security benefits to surrogate parents.

13.4 Adoption rights

Maternity and paternity rights apply in cases of adoption.

13.5 Parental rights

Employees have the right to a leave of absence of up to three years to attend to the care of each child, whether natural, adopted or fostered permanently. The leave is to be counted from the date of birth or, where applicable, from any relevant legal or administrative resolution. This leave can be applicable to both males and females and can be apportioned between couples. Nonetheless, if
two or more employees from the same company exercise this right on account of the same person, the employer can limit its simultaneous exercise for justified reasons concerning the company's operation.

Female workers have the right to one hour of absence from work each day for lactation in relation to an infant of less than nine months. This can be divided into two half-hour periods. The duration of this leave will be increased proportionately in cases of multiple births. Women can choose to substitute this right for a reduction of their working day by half an hour for the same purpose. Alternatively, they can let this accumulate into complete days under the terms provided for by the collective bargaining agreement or by the agreement arrived at with the employer.

In the case of the birth of premature infants or children who, for any reason, have to remain hospitalised after childbirth, the mother or the father have the right to be absent from work for one hour. Likewise, they have the right to reduce their working day by up to a maximum of two hours, with a proportional reduction in salary.

A person legally charged with the direct care of a child of less than 12 years of age, or a person with a physical, psychic or sensory handicap who does not perform any paid activity, will have the right to a reduction in the working day. There will be a proportional decrease in salary of between 1/8 and 1/2 of the salary. If two or more employees from the same company exercise this right on account of the same person, the employer can limit its simultaneous exercise for justified reasons concerning the company's operation.

13.5.1 Carers' rights

Dependent people can receive financial assistance for the hiring of a personal assistant. Carers do not have any applicable rights in Spain.

CONTINUOUS PERIODS OF EMPLOYMENT

14 Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

14.1 Benefits created

None of the statutory employment protection rights are dependent on a minimum period of continuous employment. However, some social security benefits, for example, unemployment benefits, do depend on the length of employment.

14.2 Consequences of a transfer of employee

When individuals are transferred to a new entity, they retain their continuous period of employment if the new entity is an associated employer. Employers are associated if either:

- One controls the other (directly or indirectly); or
- A third party controls both of them (directly or indirectly).

Employees also retain their continuous period of employment if they are transferred to a new entity and the business transfer falls within the definition of a "change of ownership" or transfer of an undertaking. A change of ownership includes any legal transaction that alters the employer's legal identity (such as a merger, spin-off, sale or assignment, and split or asset purchase). The ownership change can take place in:

- The company;
- A specific workplace (or several specific workplaces); or
- An autonomous productive unit.

However, under section 44 of the Workers’ Statute, a transaction must be carried out as an asset acquisition to qualify as a transfer of an undertaking. Transfers of shares do not alter the employer's legal identity and, therefore, do not qualify as a change of ownership.
TEMPORARY AND AGENCY WORKERS

15 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

15.1 Temporary workers

Temporary and agency workers are entitled to the same rights and benefits as permanent employees.

Fixed-term contracts can only take place in certain cases expressly stated by law, including:

- When the employee is hired for a determined work/service project, which is autonomous within the activity of the company and which, even though is of a limited period, in principle has an uncertain duration;
- When the circumstances of the market, accumulation of tasks, or excess of orders requires it when considering the normal activity of the company; or
- When replacing employees entitled to maintain their work position. In this instance, the contract must specify the name of the employee replaced and the reason for their replacement.

The Workers’ Statute states specific maximum terms for fixed-term contracts.

At the termination date, the employee will be entitled to a severance payment of 12 days of salary per year of work.

15.2 Agency workers

Agency workers are entitled to the following rights and benefits:

- The same essential conditions as if they were directly hired by the employer. Essential conditions include the following:
  - Salary;
  - Working hours;
  - Overtime;
  - Holidays;
  - Night time work; and
  - Days off;
- They are entitled to the same rights regarding health and safety measures;
- They are entitled to the same rights regarding pregnancy, breastfeeding and non-discrimination; and
- Should the agency employment contract be a fixed term, the employee will be entitled to a severance payment of 12 days salary per year of service.

15.3 Part-time workers

Part-time workers will have the same rights as full-time workers. These rights must be acknowledged proportionally in the legal and regulatory provisions and in the Collective Bargaining Agreements, depending on the time worked.
DATA PROTECTION

16 Are there any requirements to protect employee privacy or personal data? If so, what are an employer's obligations?

16.1 Employees' data protection rights

Employees are entitled to receive information from their employer concerning the processing of ordinary and sensitive personal data about them. They also have a right of access to processed personal data, and can prevent the processing of data that is likely to cause substantial damage or distress.

16.2 Employers' data protection obligations

Under the Spanish Data Protection Act 1999, any information concerning an identified or identifiable natural person is protected. The law sets out the following list of rules or principles aimed at providing the necessary protection for personal data:

- Personal data can be processed only where relevant and must not be used excessively in relation to the purposes for which the information was collected;
- Personal data cannot be used for purposes incompatible with those for which the information was collected;
- Personal data must be accurate and kept updated;
- Personal data, if proved to be inaccurate, must be deleted and replaced, where relevant;
- Personal data must be deleted when no longer necessary or relevant;
- Personal data must be stored in a way that allows the right of access to be exercised.

The data controller or processor is required to take all measures necessary to prevent alteration, loss and unauthorised processing of, or access to, personal data.

Likewise, an organisation is responsible for files containing personal data about its employees. Accordingly, the organisation must comply with all the obligations imposed by the Data Protection Act. For example, there is an obligation to notify the Spanish Data Protection Agency so that files can be registered with that Agency. The organisation must adopt all adequate and necessary measures to guarantee the security of personal data. There are three different security levels depending on the type of data, each with different security procedures.

DISCRIMINATION AND HARASSMENT

17 What protection do employees have from discrimination or harassment, and on what grounds?

17.1 Protection from discrimination

Under the Spanish Constitution, Spanish people are equal before the law and cannot be discriminated against on account of:

- Birth;
- Race;
- Sex;
- Religion; or
- Opinion or any other personal or social condition or circumstance.
Under employment law, employees have the right to not be directly or indirectly discriminated against in employment by reason of:

- Sex;
- Civil status;
- Age;
- Racial or ethnic origin;
- Social status;
- Religion or convictions;
- Political ideas;
- Sexual orientation;
- Membership or non-membership in a union; or
- Language within Spain.

Any action taken by an employer that is viewed as illegal harassment or discrimination is invalid. In these circumstances, the labour authority can also impose fines of between EUR6,251 and EUR187,515.

Employees can terminate their employment contract and receive the severance payment stipulated by law for unfair dismissal together with moral damages compensation if they are discriminated against.

Employees who have been treated less favourably by employers because they have made an allegation of discrimination or harassment can file a claim to stop the employer's less favourable treatment and receive compensation.

17.2 Protection from harassment
See above, Protection from discrimination.

WHISTLEBLOWERS

18 Do whistleblowers have any protection?
Whistleblowers are protected and any action against these employees based on the fact that they have "blown the whistle" may render that action (particularly their dismissal) invalid.

TERMINATION OF EMPLOYMENT

19 What rights do employees have when their employment contract is terminated?

19.1 Notice periods
Where employees are dismissed on disciplinary grounds, there is no duty to give them notice of dismissal.

19.2 Severance payments
If a dismissal is made on disciplinary grounds and a judge subsequently rules that the dismissal is unfair, the employer will have the following options:

- Reinstatement of the employee in their role, and payment of the accrued salaries up to the date of notification of the court's decision; or
• Payment of a severance payment equivalent to:
  
  o 45 days of salary per year for services for the period of time worked up to 12 February 2012 with a cap of 42 months’ salary; and
  
  o 33 days of salary per year for services for the period of time worked after 12 February 2012, with a cap of 720 days’ salary.

The severance payment for employment contracts entered into after 12 February 2012 will be equivalent to 33 days of salary for each year worked, with a cap of 24 months’ salary.

19.3 Procedural requirements for dismissal

If the dismissal is based on disciplinary grounds, a specific procedure must be followed (section 55, Workers’ Statute). Under this procedure, the employer must communicate their decision to the dismissed employee in writing, specifying the facts giving rise to the dismissal and the date on which the dismissal will take effect. In addition, if any employee representative is being dismissed, proceedings must be held in which both parties are entitled to be heard and receive proper notice (this requirement must be met by the employer where the affected employee is a trade union member and the employers have knowledge of that affiliation).

Some Collective Agreements establish further requirements.

20 What protection do employees have against dismissal? Are there any specific categories of protected employees?

20.1 Protection against dismissal

Disciplinary dismissals constitute unfair dismissals if:

• employers cannot prove, before the court, the disciplinary grounds stipulated in the written notice to the employee;

• if the employer did not observe the requirements contained in section 55.1 of the Workers’ Statute; or

• the grounds for the disciplinary action are not sufficiently serious to justify the dismissal.

All employees are protected from unfair dismissal. If subject to an award of unfair dismissal against it, the employer can choose between either:

• Paying severance pay (see above, Severance payments); or

• Reinstating the employee.

20.2 Protected employees

Protected employees include the following:

• A union representative;

• A staff delegate (that is an employee representative); or

• A member of the works council.

The protected employee (rather than the employer) can choose between severance payment and reinstatement if he is unfairly dismissed.

Pregnant employees, those on maternity/paternity leave, those on leave of absence, or those enjoying any maternity/paternity permits are also protected. The termination of their employment contract without cause shall render the termination null and void, and not unfair.
REDUNDANCY/LAYOFF

How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

Definition of redundancy/layoff

Spanish law allows for redundancies and layoffs when there are objective reasons that justify the termination of employment. In such cases, special procedures apply.

Grounds for redundancies/layoffs

Dismissals must be grounded on economic, technical, organisational, or productive reasons ("ETOP Reasons").

Procedural requirements

The following procedural requirements must be met by the employer (section 53, Workers’ Statute):

- Simultaneously with the delivery of the written dismissal letter detailing the corresponding legal reason for the dismissal, the minimum legal severance payment (see below, Redundancy/layoff pay) must be made available to the employee; and
- A 15-day notice period following the delivery of the letter must be granted before the dismissal takes effect (subject to a payment of salary in lieu of notice). During the notice period the employee will have to continue providing their services, although they will be entitled to spend six hours per week looking for new employment.

Redundancy/layoff pay

Employees affected by this type of dismissal will be entitled to receive a legal severance payment equivalent to 20 days’ salary for each year of service in the company (up to a maximum of 12 months’ salary).

Definition of collective redundancy/layoff

Collective redundancies involve the termination of work contracts based on economic, technical, organisational or production reasons where the terminations affect, within a period of 90 days, at least:

- 10 workers in companies/work centres that employ less than 100 workers;
- 10% of the workers in companies/work centres employing between 100 and 300 workers; or
- 30 workers in companies/work centres employing more than 300 workers.

Likewise, the termination of all employment contracts in a whole company payroll is a collective layoff, provided that more than five employees are affected, and grounded on an ETOP Reason.

Grounds for collective redundancies/layoffs

Collective layoffs must be grounded on an ETOP Reason.

Procedural requirements

A consultation period with the workers' legal representatives must be conducted before the collective layoff takes place (section 51, Workers’ Statute), preceded by 7 days' prior notice. The consultation period must last for no more than 30 calendar days (or 15 calendar days in the case of companies employing fewer than 50 employees). During the consultation period, parties must negotiate in good faith with a view to achieving agreement. However, there is no obligation to reach an agreement.
Once the consultation period finishes, its result must be communicated by the employer to the Administrative Labour Authority. If an agreement is reached the employer will deliver a copy of that agreement to the Administrative Labour Authority. However, if parties have not reached an agreement during the consultation period, the employer will communicate to the workers' legal representatives and the Administrative Labour Authority its adopted final decision concerning the redundancy dismissals, as well as its conditions and terms.

Once the agreement is reached or the final decision is notified to the workers' legal representatives, the employer must notify the affected employees within 15 calendar days in writing of the individual dismissals following a specific procedure similar to the redundancy/layoff procedure, but with the specific obligation that at least 30 days should exist between the notification date to the Administrative Labour Authority about the opening of the consultation period and the dismissal date.

21.8 Collective redundancy/layoff pay

Employees affected by this type of dismissal will be entitled to receive a legal severance payment equivalent to 20 days' salary per year of service in the company (with a maximum payment of 12 months' salary), or the amount agreed to in the consultation period.

EMPLOYEE REPRESENTATION AND CONSULTATION

22 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

22.1 Management representation

Employees are not entitled to management representation.

22.2 Consultation

Employers must consult workers' legal representatives when they propose any of the following:

- Collective redundancy (see above, Question 21);
- Business transfers when labour measures will be adopted by the old or new employer;
- Substantial modifications to working conditions; or
- A decision that could cause any relevant modification in the employment organisation or to employment contracts.

Employers must also consult employees on health and safety matters.

22.3 Major transactions

Employee consent is not required for most major transactions. If a business transfer constitutes a change of ownership (see above, Question 14), both the old and new employers must inform the workers' legal representatives about it (specific information must be provided) and the consultation obligation must be observed if the new or old employer plan to adopt labour measures with regards to the affected employees.

In addition, workers' legal representatives must be issued with a report, prior to enforcement by the employer of decisions on the following matters:

- Workforce restructuring as well as total or partial, permanent or temporary cessations of the workforce;
- Reductions in the working day;
- Total or partial relocation of the workplace;
A merger, absorption or modification of the company's legal status which may have an effect on the volume of employment;

Professional training plans of the company;

The creation or revision of organisational and work control systems; and

Time studies, the establishment of bonus or incentive systems and job post evaluations.

What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

23.1 Remedies

If employers do not comply with their consultation duties, they may be subject to administrative fines and the measures already taken could be declared invalid.

23.2 Employee action

If employers fail to consult workers' legal representatives when appropriate, employees can file a claim in an employment court for violation of information rights.

CONSEQUENCES OF A BUSINESS TRANSFER

24 Is there any statutory protection of employees on a business transfer?

24.1 Automatic transfer of employees

Employment contracts are automatically transferred with the business to the new employer. All the old employer's rights, powers, duties and liabilities under, or in connection with, the contract are also transferred.

24.2 Protection against dismissal

A dismissal is automatically unfair if it is solely or principally due to the transfer, or a reason connected with it. However, a dismissal is fair if it can be shown that it was for an ETOP Reason that required changes in the workforce, provided that the employer acted reasonably.

24.3 Harmonisation of employment terms

It is only possible to harmonise the employment conditions of all employees through negotiations with the workers' legal representatives or, if these do not exist, by agreement with employees individually or collectively.

EMPLOYER AND PARENT COMPANY LIABILITY

25 Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company's employees?

25.1 Employer liability

An employer is vicariously liable, under common law and statute, for the acts of its employees carried out in the course of their employment.

25.2 Parent company liability

A parent company cannot be held liable for the acts of a subsidiary company's employees if the two companies are separate legal entities.
EMPLOYER INSOLVENCY

26 What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

26.1 Employee rights on insolvency

Under section 32 of the Workers’ Statute:

- Salary credits for the last 30 days of work (capped at twice the minimum wage) will enjoy preference over any other credit, although this may be backed by pledge or mortgage; and

- The timeline for the exercise of the rights of preference on salary credit is one year, counted from the moment on which the salary should have been received. Such rights are extinguished once this term elapses.

- The above bullet points apply to all cases in which the employer has not declared itself in receivership. In the event of bankruptcy, the provisions of the Bankruptcy Law regarding the classification of credit, will apply.

26.2 State guarantee fund

The Salary Guarantee Fund, an agency of the Employment Ministry, will pay the workers the amount of salary and legal severances due as a result of the employer’s insolvency or bankruptcy. Such payments will be made by the Salary Guarantee Fund under specific terms and conditions.

HEALTH AND SAFETY OBLIGATIONS

27 What are an employer’s obligations regarding the health and safety of its employees?

Employees have a legal right to work in a safe environment. As a result, employers must comply with the following general duties:

- Protecting employees from safety hazards in the workplace and avoiding these hazards as far as possible;

- Evaluating any inevitable safety risks;

- Prioritising group safety measures over individual safety measures; and

- Keeping employees informed about health and safety matters at all times.

There is also a specific duty on employers to draw up a risk prevention plan, which must set out the organisational structure, procedures and resources necessary to prevent safety risks in the workplace.

28 What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?

- Nationals of your jurisdiction working abroad?

28.1 Foreign nationals

According to Spanish Personal Income Tax (PIT) regulations, an individual will be a Spanish tax resident for a calendar year if he satisfies either:

- The presence test: he spends more than 183 days in Spain during the calendar year (for these purposes, any days in the calendar year falling within a “sporadic absence” from Spain are treated as days spent in Spain, unless, the individual can prove that he is resident in another country); or
- The economic center test: his center of economic activities or interests is in Spain (this test looks at economic activities and interests only).

In addition, if an individual's spouse (from whom he is not legally separated) and dependent underage children are tax residents in Spain, the individual shall be considered a tax resident in Spain unless proved otherwise.

Tax residents in Spain are subject to PIT on income obtained worldwide. As a general rule, employment income includes all compensations or benefits, in cash or in kind, resulting directly or indirectly from personal work, or an employment or statutory relationship (i.e., salaries, remunerations in kind, contributions made to pension plans by employers on behalf of employees, travel and meal allowances over certain exempt amounts, etc.). Additionally, remunerations earned by resident individuals as members of boards of directors or other management bodies are also considered employment income for PIT purposes.

Deductible expenses are mainly social security contributions and an allowance of EUR 2,000 (certain increased amounts are available if requirements are met).

Finally, a 30% reduction may apply to employment income generated over a period of more than two years if certain requirements are met (the base of this reduction cannot exceed EUR 300,000).

Spanish non-resident individuals that move to Spain and become Spanish tax residents can opt for the Spanish inbound expatriates’ regime during the first year in which they are considered Spanish tax residents, and the following five years, provided certain requirements are met.

In general terms, this regime allows taxpayers to be taxed as if they were non-resident taxpayers instead of under the ordinary tax regime for resident taxpayers.

Therefore, qualifying individuals would be taxed on Spanish-source income only, as opposed to being taxed on worldwide income.

There is a relevant exception to this rule; employment income derived by qualifying individuals is deemed to have been obtained in Spain regardless of the source country, and therefore, would be taxed on a worldwide basis.

This new unlimited tax liability on work-related income would not extend to activities performed before the individual moved to Spain, nor to those who appropriately communicate their departure from Spanish territory. In those cases, the income would be deemed to have been obtained in Spain under the general rules for non-resident taxpayers.

28.2 Nationals of your jurisdiction working abroad

Spanish nationals working in, or seconded to, other countries are taxed depending whether they are deemed to be Spanish residents or not.

If they are considered tax residents in Spain, they will be taxed following the general rules mentioned above.

If they are considered non-residents, they will be taxed only on Spanish-source income. Some exit tax provisions have been enacted in 2015 (mainly related to interest in entities). Furthermore, Spanish nationals who demonstrate their new tax residency in a tax haven will be liable for PIT, in the taxable period in which they change their residence and in the four following tax periods.

29 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

29.1 Income tax

General tax rates applicable for 2016 year and onwards to employment income

Tax rates applicable at national level to employment income are as follows:
Tax rates at the regional level must be added to form the gross tax due. All autonomous regions have currently their own tax rates so the regional applicable tax rates must be analysed(*). In the absence of specific regional tax rates, the following tax rates apply:

<table>
<thead>
<tr>
<th>Net tax base up to (€)</th>
<th>Gross tax due (€)</th>
<th>Remainder of the net tax base (€)</th>
<th>Applicable tax rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0,00</td>
<td>0</td>
<td>12.450,00</td>
<td>9,50</td>
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<tr>
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<td>2.112,75</td>
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<td>15,00</td>
</tr>
<tr>
<td>35.200,00</td>
<td>4.362,75</td>
<td>24.800,00</td>
<td>18,50</td>
</tr>
<tr>
<td>60.000,00</td>
<td>8.950,75</td>
<td>onwards</td>
<td>22,50</td>
</tr>
</tbody>
</table>

Considering the above tax rates, the following aggregate tax scale shall apply:

<table>
<thead>
<tr>
<th>Net tax base up to (€)</th>
<th>Gross tax due (€)</th>
<th>Remainder of the net tax base (€)</th>
<th>Applicable tax rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
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<td>0.00</td>
<td>12.450.00</td>
<td>19.00</td>
</tr>
<tr>
<td>12.450.00</td>
<td>2.365.50</td>
<td>7.750.00</td>
<td>24.00</td>
</tr>
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<td>20.200.00</td>
<td>4.225.50</td>
<td>15.000.00</td>
<td>30.00</td>
</tr>
<tr>
<td>35.200.00</td>
<td>8.725.50</td>
<td>24.800.00</td>
<td>37.00</td>
</tr>
<tr>
<td>60.000.00</td>
<td>17,901.50</td>
<td>En adelante</td>
<td>45.00</td>
</tr>
</tbody>
</table>

(*) Tax rates applicable in autonomous regions are not shown.

29.2 **Social security contributions**

Social security contributions are paid at various rates, depending on the different contingencies covered under the system. Generally speaking, the employer pays 29.9% of the employee’s net taxable income and the employee pays 6.35% (this is deducted from the employee’s salary). There is a minimum and a maximum contribution for all employees depending on its category within a range from EUR 1,152.90 to EUR 3,751.20.
BONUSES

30 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

Bonuses are common and are regulated either by a collective agreement or the employee’s individual employment contract. There are no specific guidelines on how bonuses must be awarded. An employer has discretion to decide on the rules and policies that govern this type of benefit.

INTELLECTUAL PROPERTY (IP)

31 If employees create IP rights in the course of their employment, who owns the rights?

IP rights created by employees in the course of their employment usually belong to the employer.

IP rights created by an independent contractor belong to the contractor rather than the employer. Therefore, an employer should include an appropriate assignment of rights in an independent contractor’s contract.

RESTRAINT OF TRADE

32 Is it possible to restrict an employee’s activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

32.1 Restriction of activities

A non-compete duty is implied during employment. In addition, the employer and employee can agree an exclusivity clause in the employment contract. This restricts employees from carrying out any work-related activities or jobs for any other employer or on their own account. The employees must be specifically and adequately compensated during the term of employment for agreeing to the exclusivity clause.

32.2 Post-employment restrictive covenants

Employers and employees can agree a non-compete clause for a maximum of two years after the employee’s employment is terminated. There must be a real and effective interest for the employer to restrict the employee from competing with the business, and the employee must be specifically and adequately compensated for agreeing to the non-compete clause. An adequate compensation can range from 30% to 60% of the employee’s salary.

PROPOSALS FOR REFORM

33 Are there any proposals to reform employment law in your jurisdiction?

Following the general election that took place in June 2016, changes to Spanish employment law are expected.

This overview was written by Iñigo Sagardoy de Simón, Sagardoy Abogados and updated by Juan Bonilla, Ana Campos and Deogracias Izquierdo, of Cuatrecasas, Gonçalves Pereira

March 2017
Sweden
Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

### 1.1 Laws applicable to foreign nationals

A distinction is made between posted workers and foreign workers that permanently work in Sweden. A posted worker is a worker who, for a limited period, carries out his work in the territory of an EU member state other than the state in which he normally works. Directive 96/71/EC concerning the posting of workers (the "Posted Workers Directive") lays down standards for posted workers and covers a wide range of issues such as:

- Maximum work periods;
- Minimum paid annual leave;
- Equal treatment; and
- Safety at work.

This applies to all posted employees. Posted workers are guaranteed a minimum level of protection under the Foreign Posting of Employees Act and most of the laws applicable to employees that work in Sweden permanently apply to posted employees.

Swedish employment rules and regulations are applicable in their entirety if the worker is not a posted employee but is considered to work in Sweden permanently. The main laws in this area are the:

- Employment Protection Act;
- Work Environment Act;
- Employment (Co-Determination in the Workplace) Act;
- Annual Leave Act;
- Parental Leave Act;
- Discrimination Act; and
- Working Hours Act.

### 1.2 Laws applicable to nationals working abroad

The Posted Workers Directive applies to Swedish nationals working abroad within the EU. In addition, Swedish employment law applies to Swedish nationals working abroad if they are employed by a Swedish legal entity.
EMPLOYMENT STATUS

2. Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1. Categories of worker

Swedish law does not categorise workers. However, agreements to perform work fall into two major categories:

- Employment work agreements; and
- Contract work agreements (eg independent contractors).

Swedish law offers no definition of the categories and the labelling of the contract is irrelevant (but recommended). The categories are distinguished by the degree of independence of the party performing work, with employees being heavily dependent, whereas contract workers are much more independent.

Independent contractors are generally individuals who sell their labour to private and public employers, while a worker is anyone who performs remunerated work personally in accordance with the continuous instructions of the employer.

2.2. Entitlement to statutory employment rights

Labour laws apply only to employment work agreements.

2.3. Time periods

An employee cannot be employed on a temporary basis for more than two years during a five-year period, after which the temporary employment automatically converts to permanent employment under the Employment Protection Act. Other restrictions also apply, in order to prevent employers from offering employees repeat fixed term employment.

RECRUITMENT

3. Are any grants or incentives available for employing people? Does any information/paperwork need to be filed with the authorities when employing people?

3.1. Grants or incentives

There are currently several employment incentive programmes. These are limited in time depending on the type of programme and age of the employee. The area is subject to constant change depending on the ruling political party. At the date of print, these programmes include, but are not limited to, financial support for:

- Employers that employ people with disabilities impairing their ability to work;
- Employers that employ persons who have been unemployed for over a year (six months for people under 27), persons that have been in prison, newly arrived immigrants, or persons that participate in a certain work programmes;
- Employing people under the age of 25 who, for example, have been unemployed or have worked fewer hours than the available capacity of the employee for at least three months; and
- Employing persons part time for a trainee period (up to 12 months) under certain circumstances, and if the person is enrolled in an education program. The employee's wages during this period are mainly paid by the State.
3.2 Filings

Information must be filed at the Swedish Unemployment Authorities for an employer to benefit from the above programmes.

4 Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

An employer's ability to ask questions is limited by the Discrimination Act. A third party acting on behalf of the employer, such as when using a recruitment firm, is limited to the same extent.

Employers are generally not entitled to an applicant's criminal record. There are some exceptions, such as for child-related work and insurance intermediaries.

PERMISSION TO WORK

5 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

5.1 Visa

5.1.1 Procedure for obtaining approval

Citizens of the EU/EEA, citizens of the Nordic countries and citizens of countries on the specific list of visa-free states, do not need visas to enter Sweden.

People outside these countries must obtain a visa before entering Sweden if they wish to enter to work. Applications for a visa are filed with a Swedish embassy or consulate abroad.

5.1.2 Cost

The fee for entry visa applications is EUR60.

5.1.3 Time frame

The time frame for obtaining a visa has been complicated by the recent migration crisis. Accordingly, the process could take up to six to eight months. In some cases, the processing time can be longer.

5.1.4 Sanctions

According to the Swedish Aliens Act, an employer can be liable to pay a fine and/or a special fee if the employer employs people who lack a statutory visa or working permit. In addition, in serious circumstances, the employer may face imprisonment, irrespective of whether the omission is an intentional act or an act of negligence.

5.2 Permits

5.2.1 Procedure for obtaining approval

EU/EEA citizens can work in Sweden without a work or residence permit. EU citizens may start working immediately and do not need a residence permit or register their right of residence with the Migration Agency. Close relatives of EU citizens, who are citizens of a non-EU country, are also allowed to work without a work permit but should apply for a residence card if they intend to stay in Sweden for more than three months.

Citizens of countries outside the EU/EEA must obtain a work permit before entering the country, but in certain circumstances an application can be submitted after the person has entered Sweden. Specific rules apply to permits for certain occupations and for citizens of certain countries. The requirements for obtaining a work permit are:

- A valid passport;
The terms of the employment (including salary) are offered on par with those set by Swedish collective agreements or which are customary within the occupation or industry;

An offer of a monthly gross salary amounting to at least SEK 13,000, in order to satisfy the support requirements; and

The employer intends to provide insurance covering health, life, employment and pension when the employee commences work.

Applications for both work and residence permits are filed with the Swedish Migration Board. This can be done electronically. Residence permits can also be applied for at a Swedish embassy or consulate. A working permit extension can be applied for before the current permit expires. The employee can keep working while waiting for a decision.

A residence permit is required for an employee that works in Sweden for more than three months. An individual obtaining a working permit for more than three months will also receive a residence permit. If an EU/EEA citizen remains in Sweden for more than three months, they must register with the Swedish Migration Board.

5.2.2 Cost

The fee for a work permit is SEK2,000. There is no cost for a residence permit, when applied for at the same time as a work permit.

5.2.3 Time frame

The time frame for obtaining a work permit and/or residence permit is approx. 1 - 4 months. However, 55% of all work permits applications are handled within one month. A work permit renewal normally takes two to six months to be processed.

5.2.4 Sanctions

See above, Visa.

RESTRICTIONS ON MANAGERS AND DIRECTORS

6 Are there any restrictions on who can be a manager or company director?

6.1 Age restrictions

Managing directors or board members must be at least 18 years old.

6.2 Nationality restrictions

The following persons linked to a company must reside within the EU/EEA:

- The founders;
- The managing director;
- At least half of the board members;
- At least half of the deputy board members; and
- At least one of the persons that holds special signatory power.

However, it is possible to file for an exemption from these restrictions at the Swedish Companies Registration Office.

6.3 Other

Managing directors and board members must not:
• Be declared bankrupt;
• Be banned from trade activity; or
• Have a legal custodian.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

7 How is the employment relationship governed and regulated?

7.1 Written employment contract

There are no formal requirements for employment contracts and an employment contract can be entered into both orally and in writing.

If the employment lasts for more than three weeks, the employer must provide the employee with written information on the terms of employment within one month of the start date. The information must contain the:

• Names and addresses of both the employer and employee;
• Starting date of the employment;
• Duties of the employee;
• Information about the type of employment, including notice periods, termination and so on;
• Salary and other benefits;
• Working hours;
• Paid annual leave; and
• Where applicable, details regarding relevant collective agreements.

7.2 Implied terms

A provision in an agreement is invalid if it excludes or limits employees’ rights under mandatory labour law.

7.3 Collective agreements

Collective agreements are common in all industries with most Swedish workplaces being bound by collective agreements.

8 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

It is not possible for an employer to unilaterally change the essential terms and conditions of employment. The employer can unilaterally change non-essential terms of employment based on the employer's right to direct work.

The employer can terminate employment and then re-employ the employee on new terms and conditions if it wishes to push through a unilateral change. However, an employer must have objective grounds for termination of employment (see below, Question 20).
MINIMUM WAGE

9  Is there a national (or regional) minimum wage?

There is no statutory minimum wage in Sweden. Instead, minimum wages are often set by collective agreements.

RESTRICTIONS ON WORKING TIME

10  Are there restrictions on working hours? Can an employee opt out on either an individual or collective basis?

10.1  Working hours

The Working Hours Act regulates working hours. Normal working hours cannot exceed 40 hours per week. For a period of four weeks, the maximum overtime is 48 hours, or for a calendar month, 50 hours overtime. The maximum amount of overtime work in one year is 200 hours. However, extra overtime of 150 hours is permitted if there are special reasons and the situation cannot be solved in any other reasonable manner.

The Working Hours Act can be modified through collective agreements. Special rules apply for employees under the age of 18.

10.2  Rest breaks

The Working Hours Act entitles an employee to rest breaks after five hours of work. In addition, an employee must have at least 11 hours of break in every period of 24 hours and this must include the hours between 12.00am and 5.00am. An employee is entitled to 36 hours of consecutive rest during every seven-day period.

10.3  Shift workers

The Working Hours Act contains special regulations for night work. However, the Act can be modified through collective agreements and certain categories of employment involving shift work have regulations on working hours in collective agreements.

HOLIDAY ENTITLEMENT

11  Is there a minimum paid holiday entitlement?

11.1  Minimum holiday entitlement

The Annual Leave Act regulates minimum holiday entitlement and holiday pay, and applies to all employees.

In general, employees are entitled to 25 days of paid vacation per year. The Act can be replaced by rules in collective agreements.

There are some exceptions applicable to posted workers. For example, it is possible to agree to forfeit the right to paid vacation for posted workers that work in Sweden for less than three months. In that case, the employees retain a right to compensation in lieu of annual leave.

11.2  Public holidays

There are normally 11 public holidays in Sweden and employees are generally entitled to have paid time off. These days are not included in the minimum holiday entitlement. Many employees are entitled to half-days the day before a public holiday. However, it is common for the employer to have a policy for public holidays or for a collective agreement to regulate this.
ILLNESS AND INJURY OF EMPLOYEES

12 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

12.1 Entitlement to time off

Employees who are prevented from performing their work due to illness or injury are entitled to time off. An employee who is unable to perform work for a period longer than seven days must present a doctor's certificate. An employee is also entitled to time off for rehabilitation and dental appointments.

12.2 Entitlement to paid time off

Generally, no wages or sick pay is paid for the first day of absence due to illness (qualification period). The employee is entitled to sick pay from the employer from day two to day 14 of each period of absence. Employees must notify the employer immediately of their condition to receive sick pay.

12.3 Recovery of sick pay from the state

Sickness benefit is paid by the state to the employee after 14 days. Sickness benefits amount to approximately 80% of the employee's annual income as long as the annual income does not exceed approximately SEK330,000. Higher income does not entitle the employee to higher sickness benefits. Collective agreements may include other terms for sick leave and individual employment agreements may include more beneficial terms.

The employer may receive compensation from the state for annual sick pay costs that exceed a certain level.

STATUTORY RIGHTS OF PARENTS AND CARERS

13 What are the statutory rights of employees who are:

- Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
- Carers (including those of disabled children and adult dependants)?

13.1 Maternity rights

The Parental Leave Act stipulates parents’ right to leave. Both parents have an equal right to leave. The right to leave includes:

- The right to full leave in connection with childbirth for female employees. This includes at least seven weeks before the calculated date of delivery and seven weeks after the delivery. A female employee is also entitled to leave for breast-feeding;
- Full time off for a parent until the child is 18 months or, provided that the parent then has full parental benefits, for the time thereafter. It is possible to receive parental benefit up to and including the day the child turns 12 years old or when the child finishes form/grade 5 in compulsory school. However, after the child has turned four years old, it is only possible to save 96 days (parental benefit is paid out for 480 days in total, of which 90 days are allotted to each parent and may not be substituted);
- Parents have the right to shorten their working hours by up to 25% until the child reaches the age of eight; and
- Leave for temporary care of children.

The statute does not provide for pay during time off but social security legislation entitles parents to compensation for lost income in many situations, including parental leave, amounting to
approximately 80% of wages. Parental benefit is paid for 480 days for each child. For the first 390 days the compensation is based on the employee's income. For the following 90 days the compensation amounts to SEK180 per day (days on the lowest level). If the child is born in 2013 or later, the calculations may vary.

13.2 Paternity rights

Under the Social Insurance Code the father has a right to leave for 10 working days in connection with childbirth (eg for antenatal appointments). This right extends to 60 days from the date of the child's birth.

13.3 Surrogacy rights

Surrogacy is illegal in Sweden.

13.4 Adoption rights

The same right to leave is applicable to parents of adopted children. This right is also given to:

- Legal custodians and others that have a child and/or are responsible for permanent care or fosterage; and

- Someone who lives together with a parent of a child, and:
  - Has or has had other children with the parent;
  - Is or has been married to the parent; or
  - Is or has been a registered partner of the parent.

13.5 Carers’ rights

The Care for Related Persons Act provides a right to leave for employees in connection with seriously ill relatives. Carers are entitled to leave for as long as they are eligible for compensation from the social insurance system. A carer is compensated for up to 100 full working days in relation to each person that is cared for, under the Social Insurance Code. The 100 days are tied to the person being cared for and if more than one relative is caring for them the days must be shared. The employee can choose either leave for fulltime care, or can choose a reduction of normal working hours by 25% or 50%.

CONTINUOUS PERIODS OF EMPLOYMENT

14 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

14.1 Statutory rights created

The notice period for termination is tied to the length of service, and the length of service gives the employee advantage in redundancy stations. Ranking is based on the length of service (last-in, first-out).

14.2 Consequences of a transfer of an employee

The Employment Protection Act allows an employee who is transferred to a new employer to take account of the foregoing period of employment if, at the time of the transfer, both employers belong to the same group of companies.

The employee can also be credited with the time from former employment if a transfer of an undertaking takes place (ie an acquisition of a business, including employees). This also applies to transfers of employment in connection with bankruptcy.
FIXED TERM, PART-TIME AND AGENCY WORKERS

15 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

15.1 Temporary workers
The Act against Discrimination of Part-time Employees and Employees on Fixed-term Employment prevents employers from disfavouring part-time employees or employees on fixed term employment contracts. The Act covers both direct and indirect discrimination. However, the Act does not prohibit less favourable terms and conditions when these are justified on reasonable grounds.

15.2 Agency workers
Agency workers have their employment contract with their agency and are paid by their agency. Agency workers are not considered employees with the company for which they are providing services. However, the courts may find an agency worker to be a de facto employee of the company in certain circumstances.

15.3 Part-time workers
The Act against Discrimination of Part-time Employees and Employees on Fixed-term Employment also applies to part-time workers (see above, Temporary workers).

DATA PROTECTION

16 Are there any requirements protecting employee privacy or personal data? If so, what are an employer's obligations?

16.1 Employees’ data protection rights
The Personal Data Act, based on Directive 95/46/EC on data protection, stipulates how personal data can be processed. In many situations, the employer must inform the employee of the retention of information and the employee must provide his/her consent to this. The Data Inspection Board supervises compliance with the Act. Amendments to the Personal Data Act are expected on the basis of the new Regulation 2016/679 with regard to the processing of personal data.

16.2 Employers’ data protection obligations
The employers’ obligations mainly arise when an employee is dismissed or quits. However, different rules apply to different types of information. For example, factual information on why an employment was terminated can be saved. However, value judgments concerning a previous employee can generally only be saved with the employee’s consent.

An exception applies to service certificates that the employee has received. The employer may keep such information for as long as there is a risk of a legal dispute with the former employee.

Employees’ email accounts and information about them on the company’s website should normally be deleted within a month.

Application materials concerning unsuccessful candidates must be destroyed as soon as the application process is finished and consent is required if the employer wishes to keep the information for future recruitment.

The Swedish Personal Data Act prohibits bodies other than authorities from processing personal data concerning:

- Violations of laws involving crimes;
• Judgments in criminal cases;
• Penal procedural coercive measures; and
• Administrative deprivations of liberty

DISCRIMINATION AND HARASSMENT

17 What protection do employees have from discrimination or harassment, and on what grounds?

17.1 Protection from discrimination

Under the Discrimination Act, nobody may be treated unfairly on the basis of:

• Gender;
• Transgender identity or expression;
• Ethnic origin;
• Religion or other system of belief;
• Disability;
• Sexual orientation; or
• Age.

An employer is prohibited from engaging in discriminatory conduct against:

• Employees;
• Job applicants;
• Trainees; and
• Persons who are on standby to carry out work as hired or borrowed manpower.

Positive discrimination is permitted if it is suitable and necessary in order to achieve certain public policy goals, for example in order to achieve equality between women and men. However, positive discrimination cannot be implemented in connection with conditions of salaries or employment.

The Equality Ombudsman is responsible for compliance with the Discrimination Act. Damages may apply, which aim to operate as both deterrence and as compensation. Damages normally range between SEK10,000 to SEK150,000.

17.2 Protection from harassment

In addition to the Discrimination Act, the Work Environment Act establishes an employer's obligations in relation to the working environment. This includes a responsibility to prevent all kinds of harassment.

WHISTLEBLOWERS

18 Do whistleblowers have any protection?

There is no specific protection for whistleblowers. Whistleblowers are protected under the Constitution and the Freedom of the Press Act which stipulates a right to provide information to the media without the risk of repercussions.
Employees in the public sector have a more extensive right to provide information to the media, which includes a right to anonymity and a prohibition on authorities and other public agencies investigating who has provided information. Those same rules of anonymity do not apply in the private sector.

Many employers in Sweden have report systems for whistleblowing. It is possible for employers to process personal data in these systems without having to apply for a special permission from the Data Inspection Board. However, the employer must comply with the requirements in the Personal Data Act, meaning that the employer must have a legal ground for the processing and provide sufficient information to the data subjects.

TERMINATION OF EMPLOYMENT

19. What rights do employees have when their employment contract is terminated?

19.1 Notice periods

The statutory notice periods vary in accordance with the length of service and ranges from one to six months, as follows:

- Employed for less than two years: one month’s notice period;
- Employed for at least two years but less than four years: two months’ notice period;
- Employed for at least four years but less than six years: three months’ notice period;
- Employed for at least six years but less than eight years: four months’ notice period;
- Employed for at least eight years but less than 10 years: five months’ notice period; and
- Employed for at least 10 years: six months’ notice period.

The individual employment agreement or collective agreements may provide for longer notice periods, for example for workers over the age of 55 with at least 10 years of service.

In general, employees adhere to notice periods of one to three months, but this must be regulated in an individual employment agreement or a collective agreement.

19.2 Severance payments

There are no statutory rights to severance payments. The employee is entitled to normal wages and benefits during the notice period. Collective agreements may provide for severance payments. Severance pay is provided by an insurance system collectively financed by the employer community. Individual agreements may also stipulate a right to severance payment.

19.3 Procedural requirements for dismissal

A notice of termination must be in writing and must contain some specific information, including the reasons for termination and instructions for appeal, under the Employment Protection Act. A dismissal is never dependent on approval by the union, but employers must consult with the union in many situations, including redundancy. If the employer does not consult with the relevant trade unions when required, the employer may be liable to pay damages to the trade unions concerned and the employee(s) subject to dismissal.

It is generally required that the employee receives at least a written warning before being legally dismissed.

Employees employed during a probationary period can be dismissed at any time and without notice.

Employees with fixed-term employment must leave at the end of the period. However, these employees are often entitled to a formal notice of termination. Fixed-term employees can only be dismissed during the agreed employment period based on truly grave misconduct.
Oral dismissals are not void, but can render the employer liable for damages.

20. What protection do employees have against dismissal? Are there any specific categories of protected employees?

20.1 Protection against dismissal

The Employment Protection Act regulates the circumstances under which an employer can terminate employment. Under the Act, the employer must have objective grounds (just cause) for terminating employment, that is, primarily either redundancy or personal reasons relating to the employee.

The Act states that there is no just cause when it is reasonable to require the employer to provide alternative work for the employee.

In most cases, dismissal for personal reasons is connected to misconduct, such as disciplinary dismissal. The employer has a far-reaching duty to correct any improprieties or wrongs by pointing them out in advance to the employee, so that the employee can adjust and have a chance to remedy the situation. The employer also has a responsibility to provide for rehabilitation if the employee is suffering from a physical and/or mental condition that affects his working ability. The employer must accept performance that is not exemplary. Dismissal is only considered based on just cause if the attempts to correct improprieties or wrongs fail.

There is a distinction between dismissal with or without notice. Dismissal without notice is only permitted in rare cases of truly egregious misconduct.

20.2 Protected employees

An order of priority according to length of employment must be observed, as laid down by law or applicable collective agreement. The right to dismiss safety and union delegates and representatives is limited by law and is often further limited by collective agreement.

REDUNDANCY/LAYOFF

21. How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

21.1 Definition of redundancy/layoff

An employer must have just cause (objective grounds) for giving notice of termination (see above, Question 20). Redundancy normally constitutes a closedown of business, re-organisation, downsizing, relocation or introduction of labour-saving technology.

21.2 Procedural requirements

The employer must observe a special ranking order of priority, as laid down by law or applicable collective agreement. Ranking is based on length of service (seniority or last-in, first-out).

A right for re-employment may apply after termination due to redundancy.

The employer must consult with relevant trade unions before terminating any employment due to redundancy.

A requirement for terminating an employment contract due to a shortage of work is that the employee cannot reasonably be offered a separate position within the company.

21.3 Redundancy/layoff pay

Employees are entitled to payment from their employer for the whole notice period.

21.4 Collective redundancies

A collective redundancy of more than five employees requires the employer to provide written notice to the Employment Office before the notice of termination, as follows:
• If no more than 25 workers are affected: two months before the redundancy;

• If more than 25 but not more than 100 workers are affected: four months before the redundancy; or

• If more than 100 workers are affected: six months before the redundancy.

The employer must seek consultation with the relevant trade union in connection with the notice to the Employment Office.

EMPLOYEE REPRESENTATION AND CONSULTATION

22 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

22.1 Management representation

In a private limited liability company of at least 25 employees, the employees have the right to be represented on the board of directors by two representatives and two deputy officers. If the company has 1,000 employees or more, the employees have the right to three representatives and three deputy officers. The employee representatives have the same rights and obligations as the other directors of the board.

22.2 Consultation

An employer bound by a collective agreement must consult with the relevant trade union on all important decisions concerning the business or important change of employment for any employee belonging to a trade union, under the Employment (Co-Determination in the Workplace) Act. Important decisions include:

• Closedown of the business;

• Transfer of undertaking;

• Outsourcing of business;

• Use of contractors;

• Re-organisations;

• Appointment of business leaders;

• Layoffs; and

• Major investment decisions.

If the employer is not bound by a collective agreement, consultation takes place with all trade unions affected (i.e., unions with members employed by the employer). However, this duty only covers transfers of undertaking and terminations due to redundancy.

Consultations must also take place when the terms and conditions of an individual employment contract are changed. It is not required for the trade union to agree to the decision.

22.3 Major transactions

Transfers of undertakings always carry an obligation to consult.

A share transfer carries an obligation to consult with the relevant trade unions for the seller and the buyer. The target company does not normally have an obligation to consult. However, the
employer must always consult with relevant trade unions if the transfer involves re-organisation, business leader appointments, or other important changes within the company.

What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Remedies

The employer may be liable to pay punitive damages to the trade unions concerned, if the employer does not consult with the relevant trade unions when required.

Employee action

Employees who are bound by a collective agreement cannot initiate or participate in industrial action such as strikes, blockades, boycotts or other comparable industrial action for the duration of the collective agreement.

CONSEQUENCES OF A BUSINESS TRANSFER

Is there any statutory protection of employees on a business transfer?

Automatic transfer of employees

If the business transfer qualifies as a transfer of undertaking by law, certain rules apply. Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses, has been implemented in Sweden, as follows:

- All of the employees belonging to the concerned business are automatically transferred to the acquirer of the business. The terms and conditions of employment of the transferred employees remain unchanged and must be respected by the new employer;
- The acquirer is bound by any applicable collective agreement of the transferring company; and
- The employees affected can oppose to the transfer and would, in that case, remain employed by the transferor.

Protection against dismissal

Employment contracts cannot be terminated merely because of the transfer of undertaking. A transfer of an undertaking does not in itself constitute a just cause.

Employees that are transferred to a new employer can carry forward a previous period of employment at the former employer, for the purposes of establishing the order of priority in redundancy situations at the new employer.

Harmonisation of employment terms

Employees that are transferred to a new employer are entitled to the same terms and conditions of employment at the new employer, if the transfer is classified as a transfer of an undertaking. The former terms and conditions of the contract may not be fully applicable since the transfer may include a different area of work.

EMPLOYER AND PARENT COMPANY LIABILITY

Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company’s employees?
25.1 Employer liability

Liability for damages to third parties (including fellow-workers and the employee himself or herself) caused by an employee during work is primarily the obligation of the employer. The Damages Act excludes employees from liability, except where the situation involves very grave misconduct.

25.2 Parent company liability

In general, a parent company is not held liable for the acts of its subsidiary companies' employees.

EMPLOYER INSOLVENCY

26 What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

26.1 Employee rights on insolvency

The Wage Guarantee Act ensures payment of employees' claims arising from their employment in the event of the employer's insolvency. The wage guarantee covers most of the prioritised salary claims set out in the Priority of Rights Act.

Employees are guaranteed outstanding salaries and salary during the period of notice under the Employment Security Act. The employee must notify the claim for compensation to the administrators in bankruptcy. The decision normally takes up to one year since the bankruptcy must be finalised before the claim is paid.

HEALTH AND SAFETY OBLIGATIONS

27 What are an employer's obligations regarding the health and safety of its employees?

The employer has a primary responsibility to ensure a good working environment and has a general duty to consider all the factors that could affect employees' health and safety. The Work Environment Act contains rules on the obligation to prevent illness and accidents at work. The main provisions of the Act are that:

- The three parties (employer, employees and unions) must co-operate;
- Efforts to provide a satisfactory working environment must be carried out in a systematic and orderly way; and
- Employers are responsible for rehabilitation of employees with medical and/or other problems.

Workplaces of more than five employees who work on a regular basis must appoint at least one safety delegate. Workplaces of more than 50 employees require a safety committee.

TAXATION OF EMPLOYMENT INCOME

28 What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

28.1 Foreign nationals

Foreign nationals working in Sweden for less than six months must pay tax in accordance with the Special Income Tax for Non-Residents Act ("SINK"), unless a tax treaty with the country in question limits the Swedish taxation.

The income of posted employees who are only going to work for a maximum of 183 days during one year is exempt from taxation if the foreign employer does not have a fixed operating base in Sweden.
A foreign national working in Sweden for at least six months is subject to an unlimited tax liability and must submit an income tax return. An unlimited tax liability may also apply when it comes to repeated periods of residence in Sweden.

### 28.2 Nationals working abroad

Nationals working abroad for less than six months must pay tax in Sweden on their overseas income, with the foreign tax paid deducted. Nationals working for at least six months and paying tax in the country of employment may be exempt from paying tax in Sweden.

In Nordic countries, the main rule is that tax is paid in the country of work from the first day.

### 29 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

#### 29.1 Rate of taxation on employment income

SINK is a state flat-rate tax of 20%, which is deducted by the employer from the employee's salary. The employee therefore does not have to specifically declare this income from work in Sweden.

Employees that work in Sweden for more than six months must register to pay tax in Sweden. Income tax comprises municipal tax and state tax:

- Municipal tax is on average 31.99% (the tax rate varies with place of residence in Sweden and ranges from 29% to 35%).
- There is an additional 20% state tax for income ranging from SEK443,300 to SEK629,200.
- An extra 5% state tax is due on income over SEK629,200.

This means that the effective rate of income tax can be as high as 60%.

#### 29.2 Social security contributions

An employer must pay social security contributions for the work their employees perform in Sweden. The liability to pay social security contributions applies to both Swedish and foreign companies (regardless of whether the employer operates from a permanent establishment in Sweden or not).

Social security charges are 31.42%, and for some groups of workers 25.46%.

There are exceptions to this rule, for example, employees employed by a foreign company and posted to Sweden to work on the foreign employer's behalf for less than 12 months may remain in the social security system of their country of residence (less than 24 months for EU/EEA citizens). Membership of the other country's national insurance system must be verified by a certificate.

### BONUSES

#### 30 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is common to reward key employees/management employees through bonus payments. These are both contractual and discretionary.

The Financial Supervisory Authority has issued rules concerning banks and other credit institutions that require these companies to have a remuneration policy that does not encourage short-term profits and excessive risk-taking.
INTELLECTUAL PROPERTY (IP)

31 If employees create IP rights in the course of their employment, who owns the rights?

It is necessary to clearly state in the employment agreement that all intellectual property created by the employees in the course of company business is the company's property.

The right to intellectual property created by employees is often regulated in collective agreements. There are no formal requirements for the transition of rights to the employer and this may in some circumstances be implied by the nature of the employment relationship.

31.1 Patent

The right to employees' inventions are regulated by the Right to the Inventions of Employees Act. Where research or invention activities constitute the primary work duties and an invention has arisen as a result of these activities, the employer is entitled to the invention, provided the use of the invention falls within the scope of the employer's business activity.

31.2 Copyright

Sweden does not have special regulations concerning copyright created in employment, except regarding computer programmes, which are presumed to belong to the employer. According to the Swedish Copyright Act the creator of a work owns the copyright, unless otherwise agreed. The employer is allowed to use copyrighted works that are the result of the employee's normal duties within the employer's regular business operation.

RESTRAINT OF TRADE

32 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

32.1 Restriction of activities

Employees have a far-reaching duty to be loyal to their employer and must refrain from competing with the employer or preparing for such activities while being employed.

Collective agreements may include provisions regarding the restriction of activities during employment, such as stipulating that employees must consult with their employers before undertaking secondary employment. Activities may also be restricted in the individual employment contract.

32.2 Post-employment restrictive covenants

Non-competition clauses are permitted under the Contracts Act, although only to the extent considered reasonable. Restrictions longer than two years are generally not considered reasonable, so the restriction period should be carefully considered on an individual basis.

PROPOSALS FOR REFORM

33 Are there any proposals to reform employment law in your jurisdiction?

On 17 February 2017, the Swedish government adopted a bill on new legislation for posted workers. The legislative amendments help create a more effective and efficient system for the protection of the rights of posted workers under the EU Posting of Workers Directive and the Enforcement Directive. The legislative proposal also contains provisions aimed at increasing transparency and predictability when posting workers so that it will be easier for companies that post workers to find out what conditions apply in the Swedish labour market. The new legislation is intended to enter into force on June 1, 2017.
The Data Protection Act will also be reformed during the summer of 2017 on the basis of the new Data Protection Directive Regulation (EU) 2016/679.

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March 2017
Switzerland
SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:
   • Foreign nationals working in your jurisdiction?
   • Nationals of your jurisdiction working abroad?

1.1 Laws applicable to foreign nationals

The conflict of law rules of the Federal Statute on International Private Law (“PILA”) determines the applicable law. In principle, in the absence of a contractual choice of law, the law of the country in which the employee mainly works applies (irrespective of the employee's nationality) (Article 121, PILA). If this cannot be established, the law of the state where the employer has a branch office or, if there is no such branch office, where the employer has its headquarters, applies.

Contractual choice of law clauses are valid, provided the law of the employee's usual residence or the law of the branch office or headquarters of the employer is selected.

If foreign law applies to an employee who is working for a Swiss employer, Article 18 of the PILA provides that important mandatory provisions of Swiss law will apply nonetheless. This mainly concerns public statutory provisions protecting employees' health and safety. Conversely, even if Swiss law otherwise applies to the contract, Article 19 of the PILA allows for the application of mandatory foreign law in exceptional circumstances if this appears necessary to protect employees. Special legal provisions also exist relating to social security.

1.2 Laws applicable to nationals working abroad

See above, Laws applicable to foreign nationals.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

An employee or worker provides services to the employer based on an (oral or written) employment agreement which must fulfil, in principle, the following criteria:

• The employee must provide services to the employer, but does not have an obligation to be successful in the provision of those services;

• The employee is remunerated for the time he/she has been working;

• The employee is subordinate to the employer (and is integrated into the organisation of the employer), who can give the employee instructions; and

• The employment relationship is intended to last for a continuing period of time (however, this can be limited).

Employment law does not apply to individuals providing services on an independent basis (that is, where there is no subordination relationship). However, in some specific cases, employment law may be implied in part.

Specific provisions apply to certain types of employment relationships, such as apprenticeship contracts, travelling salesman's contracts, homework contracts, and personal lending. Different
rules may also apply depending on the type of work performed (for example, office work, night work, and so on).

2.2 **Entitlement to statutory employment rights**

See above, *Categories of worker*.

2.3 **Time periods**

There are no duration restrictions for employment contracts.

RECRUITMENT

3 Are any grants or incentives available for employing people? Does any information/paperwork need to be filed with the authorities when employing people?

3.1 **Grants or incentives**

There are no grants or incentives available for employing people.

3.2 **Filings**

Filings must be made to register the employee for the necessary social security schemes. In addition, certain applications/registrations may need to be filed if the employee is not a Swiss national (see below, *Permission to work*).

4 Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

In principle, background checks are permissible to the extent that the information requested or searched is objectively necessary to determine whether the candidate is suited for the job, or to properly execute the contract. Additional data protection provisions may apply, especially if the third party is domiciled outside of Switzerland.

PERMISSION TO WORK

5 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

5.1 **Visa**

Nationals of EU/EEA countries do not require a visa.

The Federal Office for Migration maintains a list of countries the nationals of which must obtain a visa to enter Switzerland. These persons must obtain a visa in addition to a work permit (see below, *Permits*).

5.1.1 **Procedure for obtaining approval**

The visa is issued by the Swiss diplomatic representation abroad upon approval of the cantonal migration authority. A work permit must first be obtained (see below, *Permits*).

5.1.2 **Cost**

A visa currently costs EUR 60. Additional costs must be added for the issuance of documents on arrival.

5.1.3 **Time frame**

The length of the process depends on the citizenship of the foreign national and the canton where the application is filed. The process usually takes between four to eight weeks.
5.1.4 Sanctions

Individuals who enter Switzerland in breach of Swiss law face criminal sanctions (imprisonment for up to a year or a monetary fine).

5.2 Permits

There is a dual system for granting foreign nationals access to the Swiss labour market.

EU and European Free Trade Area (“EFTA”) nationals are admitted to the Swiss labour market under the agreement on the free movement of persons between the EU and Switzerland. All other nationals are only admitted in limited numbers, if they are well qualified and fulfil other requirements.

On 9 February 2014 new constitutional provisions regarding the Swiss migration policy were adopted. They require that migration be limited and may impact the legal situation of EU/EFTA nationals taking up work in Switzerland in the future. The new provisions should have been implemented by authorities in the form of statutory law within three years. As recently as December 2016, the Swiss Parliament adopted a “light” version of the proposal to assure preferential treatment of Swiss nationals in the labour market. The new law, which is compatible with the existing rules on the free movement of persons and does not jeopardise Switzerland’s bilateral agreements with the EU, is not yet in force.

5.2.1 EU/EFTA nationals

Full free movement of persons applies to citizens of Germany, France, Austria, Italy, Spain, Portugal, UK, Ireland, Denmark, Sweden, Finland, Belgium, The Netherlands, Luxembourg, Greece, Cyprus, Malta, Norway, Iceland, Liechtenstein, Poland, the Czech Republic, Slovakia, Hungary, Estonia, Latvia, Lithuania, Slovenia, Bulgaria and Romania and, since 1 January 2017, citizens of Croatia. However, (i) Croatian nationals are – until 31 December 2019 – subject to further restrictions (ie quotas; control of salary and working conditions; no person for the job can be recruited from the Swiss labour market or an EU/EFTA member state) and (ii) in relation to Bulgarian and Romanian nationals, the Swiss Federal Council can introduce quotas until 31 May 2019 and in respect of Croatian nationals from 1 January 2020 until 31 December 2026 if immigration exceeds a certain threshold.

As a result of the full freedom of movement, employees who are employed by a Swiss employer do not require a work permit.

EU/EFTA national may be posted to Switzerland by an employer from an EU/EFTA member state and can work or provide services in Switzerland without a work permit for up to 90 days in a calendar year (provided that the employer itself has not used up its annual quota of 90 days). The foreign employer must register those employees with the authorities eight days in advance through an online notification procedure. Those employees who will work for more than 90 days a year in Switzerland simply have to register with the communal authorities and apply for a work permit. The work permit is subject to a quota system and is only granted to those who are well qualified and fulfil other requirements.

5.2.2 Other foreign nationals

Persons from non-EU/EFTA countries are only admitted if:

- They are well qualified (degree from a university or other higher education institution and several years of professional experience); and
- No person for the job can be recruited from the Swiss labour market or an EU/EFTA member state.

Exceptions can be granted, among others, for:

- Temporary duties as part of large projects for companies with headquarters in Switzerland (international assignment);
- Execution of special mandates and projects; and
• Intra-company transfers of managers and specialists.

Further:

• The salary, social security contributions and employment terms of those employees must reflect conditions customary to the region and the particular sector;

• A quota must be available; and

• With respect to international assignments, non-EU/EFTA nationals who have worked for at least 12 months for an employer located in an EU/EFTA country may be posted to Switzerland and can work or provide services in Switzerland without a work permit for up to 90 days per calendar year (provided that the employer itself has not used up its annual quota of 90 days). The foreign employer must register those employees with the authorities eight days in advance through an online notification procedure. Non EU/EFTA nationals who will work in Switzerland for more than 90 days per year need to apply for a work permit. The work permit is only granted to employees who are well qualified and fulfill other requirements. Furthermore, work permits for a duration of more than four months (or 120 days) per year are subject to a quota system.

5.2.3 Procedure for obtaining approval

The procedure for obtaining approval depends on whether the applicant is an EU/EFTA national, or another foreign national:

5.2.3.1 EU/EFTA nationals

EU/EFTA nationals who want to work for more than 90 days per year in Switzerland must register with the communal authorities and apply for a work permit before taking up work.

5.2.3.2 Other foreign nationals

Other foreign nationals must obtain a work and a residence permit. The employer must submit the application for the work permit to the cantonal labour authority, which makes a preliminary decision. It then submits the file to the federal office for migration, which issues the federal decision.

If the federal office for migration approves the application, the cantonal migration authority authorises the Swiss diplomatic representation abroad to issue the visa (see above, Visa). The foreign national can then collect the visa at the Swiss representation abroad.

5.2.4 Cost

The cost depends on the type of work permit and the nationality of the employee.

5.2.5 Time frame

The length of process depends on the citizenship of the foreign national and the canton where the application is filed. It can take from a few days to up to four months.

5.2.6 Sanctions

Employers who knowingly employ individuals who are not entitled to work in Switzerland are subject to criminal sanctions (imprisonment for up to a year or a monetary fine). Individuals who stay and/or work in Switzerland in breach of Swiss law also face criminal sanctions.
RESTRICTIONS ON MANAGERS AND DIRECTORS

6 Are there any restrictions on who can be a manager or company director?

6.1 Age restrictions

No specific age restrictions apply, but managers of Swiss companies must be at least 18 years old.

6.2 Nationality restrictions

There are no nationality restrictions on managers. However, foreign nationals need to obtain the necessary work permits (see above, Permission to work). While there are no nationality restrictions on members of the board of directors of Swiss companies, at least one person with individual signing power or two persons with joint signing power authorised to represent the company must reside in Switzerland.

6.3 Other

Only physical persons (and no legal entity) can be members of the board of directors of a Swiss company. Moreover, due to conflicts of interest, specific public law statutes can prohibit a person's membership on a board of directors.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

7 How is the employment relationship governed and regulated?

7.1 Written employment contract

No written employment agreement is required. However, certain covenants are only valid if agreed in writing and signed by both parties.

7.2 Implied terms

An employment contract can include implied terms to the extent the parties act in a certain manner.

The Code of Obligations of 30 March 1911 implies terms into the employment relationship if the employment contract is silent on a matter. Many provisions are mandatory and cannot be contractually changed, or can only be changed in the employee's favour.

There are also numerous public law provisions aimed to protect certain categories of employees, such as women, adolescents, agency workers or people working at night.

7.3 Collective agreements

Collective agreements apply to certain sectors. They can be widely negotiated between trade unions and industry associations, or between trade unions and certain (usually large) companies. Upon a decision of the competent authorities, collective agreements can be declared binding for all employers in the sector concerned.

In addition, the Federal Government can enact mandatory standard employment terms for certain industries or certain types of workers.

8 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

The employment agreement can contain an employer's right to unilaterally change specific terms and conditions of employment, provided that clause is not abusive (which could be the case with respect to the main aspects of the contract, such as salary, holidays, and so on). The right must be expressly agreed and stated.

The employer can issue a "modification-termination" by offering changes in the terms and conditions of employment, and terminating the employment at the same time in the event that the
employee does not accept the changes. However, the applicable notice period must be observed (see below, Question 19). Additionally, if modification-terminations are given to numerous employees, the provisions on mass dismissals may apply (see below, Question 21).

MINIMUM WAGE

9 Is there a national (or regional) minimum wage?

There is no statutory minimum wage (subject to the exclusion of the three cantons Tessin, Jura and Neuenburg). However, collective bargaining agreements and mandatory standard employment contracts can include minimum wages for certain categories of employees.

RESTRICTIONS ON WORKING TIME

10 Are there restrictions on working hours? Can an employee opt out on either an individual or collective basis?

The Federal Statute on Employment of 13 March 1964, as amended (the "Statute on Employment"), and its regulations contain rules about working hours and rest breaks. These provisions do not apply to members of top management.

10.1 Working hours

Under the Statute on Employment, the maximum working time is 45 to 50 hours per week, depending on the field of employment. Hours worked over that threshold that are not compensated by time off, must be compensated at the hourly rate plus a 25% premium (although there is a yearly buffer of 60 hours for office workers). Below this maximum, the parties can contractually agree working hours and can in principle exclude compensation of overtime in writing. Most employees work between 40 and 42 working hours per week.

Working hours must be recorded. Only few employees benefit from new simplified rules on time tracking duties that have been in force since 2016.

10.2 Rest breaks

Working time must factor in rest breaks of:

- 15 minutes for working time of more than five and a half hours;
- 30 minutes for working time of more than seven hours; or
- One hour for working time of more than nine hours.

A daily rest time of at least 11 consecutive hours must be granted. For adults, daily rest time may be reduced to eight hours once a week, provided an average of 11 hours is maintained over two weeks.

One day off every week must be granted, in principle on a Sunday.

10.3 Shift workers

The Statute on Employment and its regulations also contain provisions on shift workers, mainly providing for a periodical change of shift hours, a balance between day and night shifts, maximum working time, and rest days. Specific rules also apply with respect to resting days for companies with continuous working. In particular, employees must be granted at least 61 resting days of at least 35 consecutive hours (including the daily rest time). Out of these, 26 resting days must in principle fall on a Sunday (and including the period between 6 a.m. to 4 p.m.).
HOLIDAY ENTITLEMENT

11 Is there a minimum paid holiday entitlement?

11.1 Minimum holiday entitlement

The minimum holiday entitlement is four weeks per year. For employees under the age of 20, the minimum is five weeks. It is possible for parties to contractually agree a longer holiday entitlement.

11.2 Public holidays

Public holidays are in addition to the minimum holiday entitlement. They include, among others, the Swiss National Day (on 1 August), cantonal public holidays and local holidays.

ILLNESS AND INJURY OF EMPLOYEES

12 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

12.1 Entitlement to time off

An employee is excused from working if unfit to work due to illness or injury.

Employees who are ill/injured also enjoy statutory protection from dismissal. The extent of this period of protected sick leave depends on the length of service:

- In the first year of employment: 30 days' statutory protection;
- Between the second and fifth year of employment: 90 days’ statutory protection; and
- From the sixth year of employment: 180 days' statutory protection.

A notice of termination issued during the protected period is void. Further, if a notice of termination was previously issued but the employee then becomes ill during the termination notice period, that notice period is extended for the duration of the illness (up to a maximum of the relevant statutory protection period that applies).

12.2 Entitlement to paid time off

The employer must continue to pay the employee’s salary and other contractually agreed compensation for a limited time, provided the employment relationship has already lasted or was concluded for longer than three months.

Courts in the various Swiss regions have interpreted this statutory provision somewhat differently in relation to the limited time period. Generally, the duty to continue salary payments depends on the duration of services the employee has actually rendered:

- In the first year of employment, salary payments must be made for three weeks;
- In the second year, between one and two months; and
- In the third year, between eight and nine weeks.

The duty to continue salary payments further increases with years of service, with a maximum limit of between six months to one year.

The employer and the employee may agree on an alternative solution (such as payment of salary by way of insurance during a certain period of time), provided that such alternative solution is at least equally beneficial for the employee. The agreement must be in writing.
If the incapacity to work has been caused by injury, the mandatory accident insurance concluded by the employer pays 80% of the salary (capped to a yearly salary of CHF 148,200) from the third day. The employer must pay 80% of the salary during the first two days and, if the yearly salary is over CHF 148,200, must top up the insurance payments during the limited period of time mentioned above so that they reach 80% of the employee's effective salary.

12.3 Recovery of sick pay from the state

The employer cannot recover salary payments for sick pay from the state. However, most employers take out insurance to protect against the risk of prolonged salary payments to employees who fall ill.

STATUTORY RIGHTS OF PARENTS AND CARERS

13 What are the statutory rights of employees who are:

- Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
- Carers (including those of disabled children and adult dependants)?

13.1 Maternity rights

Under mandatory public laws, women are not allowed to work (and employers cannot employ women at this time) for a period of eight weeks after they have given birth. Moreover, they have a right to a total of 14 weeks of maternity leave after they have given birth.

If a woman chooses to take her maternity leave, and provided she fulfils the statutory requirements, the state pays her compensation amounting to 80% of her average salary for a period of 14 weeks from the date of birth (cantonal legislation may provide further protection). The compensation is currently capped at CHF 196 per day.

There are additional statutory rules protecting women during pregnancy and following birth. In particular, a pregnant woman is protected against dismissal during the whole pregnancy and for 16 weeks following birth.

13.2 Paternity rights

There are no specific statutory paternity rights. However, many employers have issued internal regulations granting fathers some limited time off in the case of childbirth.

13.3 Surrogacy

Surrogacy is prohibited in Switzerland.

13.4 Adoption rights

Federal statute does not provide specific rights in the case of adoption. However, cantonal legislation may do so.

13.5 Parental rights

Employees with family duties have a statutory right to take up to three days off work to take care of sick children. Statute does not provide other special rights for parents or carers. In practice, many employers have internal regulations that allow parents or carers to have some flexibility in unusual family situations.

13.6 Carers' rights

See above, Parental rights.
CONTINUOUS PERIODS OF EMPLOYMENT

14. Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

14.1 Statutory rights created

Statute and court decisions create various benefits for continued employment. This applies to, for example:

- Severance payments (see below, Severance payments);
- Statutory termination notice periods (see below, Notice periods); and
- Duration of salary payments and termination protection in the case of illness (see above, Question 12).

14.2 Consequences of a transfer of employee

In the transfer of an employment contract in connection with the sale of a business (or part of it), all rights, including those acquired before the transfer, remain with the employee.

FIXED TERM, PART-TIME AND AGENCY WORKERS

15. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

15.1 Temporary workers

The general rules of employment law also apply to temporary workers. Certain specific issues arising in relation to these workers (for example, holiday entitlements and surcharges to the hourly salary to compensate for holidays) have been dealt with by the courts within the existing statutory framework.

There is no limit to the duration of a fixed term contract. However, if the same parties enter into successive fixed term employment contracts without an objective reason to do so, a court may consider that the parties have in fact entered into an employment agreement for an unlimited period.

A fixed term contract terminates on the last day of its validity. It is not necessary to issue a notice of termination.

A fixed term contract cannot be terminated prematurely by the employer by way of paying the employee a severance in lieu of notice unless the employee agrees to terminate the contract.

15.2 Agency workers

A special statute regulates agency work. The statute imposes a permit requirement on companies in the agency business. The agency worker enters into an employment contract with the agency company that provides that the employee will perform their work for a variety of other companies. The statute sets certain minimum standards for employment contracts of this nature, for example, shorter notice periods.

15.3 Part-time workers

Part-time workers have the same rights as full-time workers. However, workers who work less than eight hours a week for the same employer are not automatically insured against non-occupational accidents.
DATA PROTECTION

16 Are there any requirements protecting employee privacy or personal data? If so, what are an employer’s obligations?

16.1 Employees’ data protection rights

The employer can only deal with and shore data that has a direct connection with the employment relationship.

16.2 Employers’ data protection obligations

The Federal Data Protection Act of 19 June 1992 (as amended) governs how an employer can use this data. Generally, the employer cannot:

- Violate an employee's personal rights;
- Make use of the data in bad faith; or
- Use the data disproportionally.

Transfers of personal data abroad without the employee's consent can cause substantial difficulties, primarily where the receiving country does not provide data protection equivalent to Switzerland. Usually it is advisable to obtain legal advice on this issue.

DISCRIMINATION AND HARASSMENT

17 What protection do employees have from discrimination or harassment, and on what grounds?

17.1 Protection from discrimination

There is broad protection of the employee's personal rights. A discrimination claim can be in relation to:

- Race;
- Religion;
- Ethnic background; or
- Sexual orientation.

An employee affected by discriminatory behaviour has a variety of legal measures available, including:

- Temporary refusal to work;
- Rejecting instructions;
- Claims for damages and/or tort; and
- Immediate termination for cause.

Discrimination due to gender is subject to special provisions and sanctions in the Federal Law on Equal Treatment of 24 March 1995 (as amended).
Protection from harassment

Sexual harassment is subject to the provisions and sanctions in the Federal Law on Equal Treatment. The employer must put in place reasonable measures (in particular, clear written guidelines) to prevent cases of sexual harassment.

WHISTLEBLOWERS

Do whistleblowers have any protection?

Statutory protection of whistleblowers is weak but court cases have held that the dismissal of an employee due to whistleblowing is deemed to be abusive. A Bill is being discussed in the Federal Parliament to improve whistleblower protection.

TERMINATION OF EMPLOYMENT

What rights do employees have when their employment contract is terminated?

19.1 Notice periods

Notice periods are usually expressly stated in the employment contract.

Notice periods must always have the same duration for employers and employees.

Notice periods cannot be shorter than one month, except if otherwise agreed in a collective bargaining agreement, and even then only for the first year of employment.

If the employment contract does not address notice periods, the statutory notice periods are:

- During the first year of employment, one month following the end of the calendar month;
- Between the second and ninth year of employment, two months; and
- After nine years of employment, three months.

The first month of employment is deemed a probationary period, which can be excluded or extended by written contract to a maximum of three months. During the probationary period, notice of seven days can be given at any time.

After 10 years, any employment relationship contracted for a longer duration may be terminated by either party by giving six months’ notice.

19.2 Severance payments

Severance payments must only be paid if the employee affected is over the age of 50 and has worked for more than 20 years for the same employer.

The statutory minimum severance payment is equal to two months’ salary. If the employee receives, or will receive, payments from a social security scheme that has totally or partly been funded by the employer, there is no obligation on the employer to make a severance payment.

It is not uncommon in employment contracts for members of the top management to specifically agree severance payments in the case of early termination or dismissals following takeovers (golden parachutes). However, such payments are in principle no longer permissible with respect to board and executive members of Swiss public companies listed on a stock exchange.

19.3 Procedural requirements for dismissal

Notice of termination does not need to be in any specific form. In practice, most employment contracts provide that notice must be in writing. A termination notice only becomes effective at the time of receipt by the affected person.
Dismissals do not need to be reasoned or justified, that is, a reason does not have to be provided. Only on the specific request by the employee must the employer state the reasons in writing.

Except in the case of a mass dismissal (see below, Question 21), there is no specific filing required. However, the relevant social security authorities must be informed.

20 What protection do employees have against dismissal? Are there any specific categories of protected employees?

In principle, employment agreements can be terminated freely by either party, provided the applicable notice period is observed. However, employees are protected in certain cases. The consequences of an unlawful termination depends on the circumstances.

20.1 Protection against unfair dismissal

The employer is prohibited from dismissing an employee for specific reasons.

Generally, a dismissal is deemed abusive if issued:

- Due to a quality inherent to the personality of the employee (for example, dismissal due to race or gender);
- Because the employee exercises a constitutional right; or
- To prevent an employee from asserting contractual claims.

Additionally, in the context of a mass dismissal, no final decisions can be taken on dismissals before the completion of the consultation process (see below, Question 21).

Abusiveness in those cases does not render a dismissal invalid. The consequence is the payment of compensation of up to six months' salary (or up to two months' salary for mass dismissals) at the discretion of the judge.

20.2 Protection of specific employees

Employees who are members of trade unions and/or fulfil certain functions in the company's employee representation bodies are specifically protected. The consequence of a violation of this provision is the payment of compensation of up to six months' salary at the discretion of the judge.

After expiration of the probationary period (which can last up to three months), temporary protection against dismissal also applies in the case of illness (see above, Question 12), pregnancy, and mandatory military service. Dismissal notices issued in these circumstances are void.

REDUNDANCY/LAYOFF

21 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

21.1 Definition of redundancy/layoff

Swiss employment law includes rules on mass dismissals. There are certain threshold numbers of redundancies that trigger the mass dismissal regulations, depending on the overall number of employees.

21.2 Procedural requirements

If an employer intends to carry out a mass dismissal it must inform the employees (or any employee representation body) about the intended measures and the reason for those measures. There are also consultation requirements.

Employees must have an opportunity to provide their own counter proposals, showing how the dismissals can be fully or partially avoided or how the negative consequences can be mitigated.
The employer must provide sufficient information to the employees for them to be able to make such proposals.

After completion of the consultation process, the employer must notify the competent public authority, which can then intervene and make certain proposals aimed at protecting the employees who become redundant. The notification to the public authority is also decisive for the termination date of the employment agreement.

If the employer does not duly consult the employees before taking the decision to dismiss, the dismissals are deemed abusive and the employees can claim compensation of up to two months' salary at the judge's discretion (see above, Protection against unfair dismissal).

21.3 Redundancy/layoff pay

Companies with at least 250 employees, where at least 30 employees are dismissed within a 30 day period, must conduct negotiations with the employees with the aim of establishing a social plan. If the parties cannot agree on a social plan, they have to enter into arbitration.

It has become customary for large companies to set up a social plan in cases of mass redundancies that provides for certain benefits, such as:

- Additional severance payments;
- Additional contributions to pension schemes;
- Assistance in finding new jobs; and
- Financing transition arrangements (for example, schooling).

EMPLOYEE REPRESENTATION AND CONSULTATION

22 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

22.1 Management representation

Swiss statutory law does not provide for employee representation in management.

22.2 Consultation

Consultation rights exist relating to:

- Employment safety matters;
- Transfers of business;
- Mass redundancies; and
- Accession to pension fund organisations.

22.3 Major transactions

There are consultation and information requirements if individual employment relationships are transferred to another legal entity in connection with a corporate transaction, including mergers. These requirements do not apply if the transaction only involves the sale of shares.

23 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

If companies violate the statutory information and consultation requirements for a transaction under the Federal Merger Act of 3 October 2003 (as amended) employees have a right to block
the transaction by obtaining temporary restraining orders. However, there are no other specific sanctions. Generally, an individual employee has a claim for specific performance or for damages to the extent damage can be established).

CONSEQUENCES OF A BUSINESS TRANSFER

24 Is there any statutory protection of employees on a business transfer?

24.1 Automatic transfer of employees

In a transfer of a business or part of the business, the employment agreements for all employees engaged in the business are automatically transferred by operation of law. Issues can arise for people working for different business units, where case-by-case solutions must be negotiated.

24.2 Protection against dismissal

There is no general protection against dismissals, that is, employees can be dismissed before the transfer by the former employer, or after the transfer by the new employer, by observing the contractual notice periods. However, the dismissal must not have the aim of avoiding the automatic transfer of the employees to the new employer. Where applicable, the legal requirements on mass dismissals must be observed (see above, Question 21).

Employees have a right to decline the transfer, by filing an objection which will lead to the termination of the employment contract within the statutory notice period.

24.3 Harmonisation of employment terms

Harmonisation of employment terms after the transfer is only possible with the consent of each individual employee. If certain employees do not accept the proposed changes, the only option is dismissal.

EMPLOYER AND PARENT COMPANY LIABILITY

25 Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company's employees?

25.1 Employer liability

The employer is liable in tort for damage to third parties due to the acts and/or omissions of employees in performing their professional activities, except if it is proved that the employer used all reasonable care to prevent damage of this type, or the damage would have occurred irrespective of this care.

The employer is also liable for damage to a contractual third party caused by breach of contract due to acts and/or omissions of an employee during the fulfilment of contractual obligations, except if the employer can prove that the employee acted with the same level of care as could have been expected from the employer.

The employer can take recourse against the responsible employee.

25.2 Parent company liability

Parent company liability only exists in very narrow circumstances, mainly if a parent company, through its behaviour, creates a reasonable expectation that it would assume liability for its subsidiary.
EMPLOYER INSOLVENCY

26 What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

26.1 Employee rights on insolvency

In the case of bankruptcy proceedings, claims of employees resulting from the employment relationship which arose during the six months prior to the opening of the proceedings are given priority and are satisfied out of the proceeds of the bankrupt estate.

26.2 State guarantee fund

If an employer becomes insolvent, the unemployment insurance generally covers the employee's last four monthly salaries (capped at a salary of CHF 10,500 per month).

HEALTH AND SAFETY OBLIGATIONS

27 What are an employer’s obligations regarding the health and safety of its employees?

There are numerous public mandatory laws dealing with health and safety matters, for example, regulations on night and shift work, accident protection, maximum employment time and protection of juvenile workers under age 18. The most important statute is the Statute on Employment.

TAXATION OF EMPLOYMENT INCOME

28 What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

28.1 Foreign nationals

Swiss tax law distinguishes between foreign nationals working in Switzerland who are subject to unlimited taxation and those subject to limited taxation.

28.1.1 Unlimited taxation

A foreign national is subject to unlimited taxation in Switzerland if they either:

- Effectively establish their home in Switzerland; and
- Remain in Switzerland without any significant interruption for at least 30 days with employment activity (or for at least 90 days without employment activity).

In these instances, the foreign national is a Swiss tax resident subject to Swiss federal, cantonal and communal income tax on their worldwide income, regardless of source. Certain exceptions apply to this rule including income from enterprises. An exception applies to foreign nationals domiciled in a country with a double taxation treaty with Switzerland (where the foreign national will be subject to limited taxation only).

Permanent establishments or real estate situated outside Switzerland is, subject to the progression provision, exempt from Swiss income tax.

Unless the foreign national has been granted a residency permit C or is married to a Swiss national or a holder of residency permit C, the foreign national is subject to tax on employment income at source. If the annual total income (from employment subject to taxation at source) exceeds CHF120,000 per year, the foreign national must file a tax return. Income tax at source is credited against tax on income declared in the tax return.
28.1.2 **Limited taxation**

Non-Swiss tax resident foreign nationals are only subject to tax on income from performing a gainful activity in Switzerland (and certain other types of Swiss income, for example, directors’ fees). Non-resident foreign national workers are subject to income tax at source and are not required to file tax returns.

An exception applies to foreign nationals domiciled in a country with a double taxation treaty with Switzerland who are assigned to Switzerland for no more than 183 days by an employer. Subject to the conditions in the applicable treaty, the employee’s state of residence can continue to levy income taxes on dependent personal services rendered by the employee in Switzerland. In this case, Switzerland cannot impose income tax on the employment income.

28.2 **Nationals working abroad**

Swiss nationals working abroad who are not Swiss tax residents are not subject to Swiss income tax on employment income.

Swiss nationals working abroad who are Swiss tax residents working in a country with a double taxation treaty with Switzerland are, subject to the progression provision, usually exempt from income tax in Switzerland.

An exception applies if the Swiss national is assigned by their employer to a treaty country for no more than 183 days.

Subject to treaty conditions, Switzerland can continue to levy income tax on income earned abroad. Under the progression provision, Switzerland applies progressive income tax rates, which are calculated on income earned worldwide by individuals who are Swiss residents, regardless of whether this income is in fact taxed in Switzerland or not.

29 **What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?**

29.1 **Rate of taxation on employment income**

Income tax is imposed by the Swiss federation and the Swiss cantons and communes. The income tax rates vary from canton to canton, and within the canton from commune to commune. They are generally at progressive tax rates. For example:

- Employees earning a gross annual income of CHF150,000 are subject to combined federal, cantonal and communal income taxes of approx. 9.6% up to a maximum of approx. 23.5% (depending on, among other things, domicile); and
- For gross annual income of CHF 500,000, the income tax rate varies between approx. 15% and 33% (depending on, among other things, domicile).

These tax rates apply to a single taxpayer for the tax year 2015. The tax rates are subject to change.

29.2 **Social security contributions**

Subject to social security agreements (respectively the bilateral agreements between Switzerland and the EU on the freedom of movement) remuneration an employee receives for performing work in Switzerland is generally subject to Swiss social security contributions. Social security liabilities arise at the same time as income tax liabilities.

The following social security rates apply in 2016:

- AHV (first pillar coverage of old age and survivorship): 8.4%;
- IV (first pillar coverage of disability): 1.4%; and
- EO (coverage of salary payment in the case of military service and motherhood): 0.45%. 
The total rate of 10.25% is shared by the employer and the employee (5.125% each).

Wages up to CHF 148,200 are also subject to:

- Contributions for ALV (coverage of unemployment): 2.2%. Wages above CHF 148,200 are subject to contributions at a rate of 1.0% (no cap). These contributions are also shared equally between the employer and the employee; and

- Mandatory accident insurance. The insurance premium is dependent on the industry of the employer and the individual insurance contract concluded between the employer and the insurance company.

**BONUSES**

**Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?**

It is quite common for Swiss companies to pay variable compensations or bonuses, which can be contractual or fully discretionary. Case law has set criteria under which a bonus intended as discretionary nonetheless qualifies as contractual compensation.

Payment of discretionary bonuses over a period of time (usually in excess of three years) without explicit reservation confers on the employee a legal right to claim payment of a bonus. In addition, if a discretionary bonus effectively paid out in a specific year makes up a substantial part of an employee's overall compensation, courts tend to hold that at least a portion of the bonus is contractual. Following a recent decision of the Swiss Federal Supreme Court, a newly introduced threshold amount determines whether the bonus is part of the salary or a discretionary gratuity. In absence of a determined or objectively determinable bonus any amount exceeding five times the median annual income (ie 2015: CHF 367,725) is considered a discretionary gratuity.

New statutory provisions regarding the compensation of board and executive members of public companies listed on a stock exchange entered into force in January 2014. Based on these provisions, listed Swiss companies may need to amend their compensation regulations and partly insert them into their articles of association. The compensation is subject to shareholder approval. Certain kinds of remuneration (severance pay, advance payments, transaction bonuses) are not permitted, or only permitted under limited circumstances.

The Swiss Financial Market Supervisory Authority ("FINMA") has issued a circular on the remuneration of employees of financial institutions. The circular contains a series of principles which must be observed for remuneration plans (deferred payment, vesting periods, clawback provision, and so on). The principles set out in the circular are mandatory for all employees of financial institutions with an equity capital over CHF2 billion.

**INTELLECTUAL PROPERTY (IP)**

**If employees create IP rights in the course of their employment, who owns the rights?**

If the IP right has been created in the performance of the employee's duties, the IP right belongs to the employer by operation of law.

For IP rights created by an employee by coincidence, that is, not in performance of contractual duties, the employer has an option to acquire the IP right in exchange for payment of adequate compensation, where this is specifically agreed in the employment contract.
RESTRAINT OF TRADE

32 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

32.1 Restriction of activities

During employment, the employee is prohibited from engaging in any competitive activity by operation of law.

32.2 Post-employment restrictive covenants

Swiss employment law allows the employer and employee to contractually agree on post-employment non-compete clauses. Such agreements are only valid if they are made in writing.

There are restrictions in terms of duration (maximum of three years) and geographical scope.

These clauses are only valid if the employee has acquired knowledge of the employer's clientele or other confidential business information.

The prohibition lapses if the employer terminates the employment relationship without the employee having given the employer any reasonable grounds to do so (though a restrictive covenant can be included in a termination agreement).

PROPOSALS FOR REFORM

33 Are there any proposals to reform employment law in your jurisdiction?

A Bill to improve protection afforded to whistleblowing is pending in the Federal Parliament.

In November 2013, the Swiss Federal Council approved a preliminary draft to implement changes to the Swiss social security system. The preliminary draft proposes to make changes in respect of, among other things, the following:

- Harmonisation of the retirement age of men and women at 65 years;
- Flexible and individual structuring of retirement; and
- Equal treatment of employees and self-employed persons.

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UK

SCOPE OF EMPLOYMENT REGULATION

1. Do the main laws that regulate the employment relationship apply to:
   - Foreign nationals working in your jurisdiction?
   - Nationals of your jurisdiction working abroad?

1.1 Laws applicable to foreign nationals

Most laws regulating the employment relationship apply to foreign nationals wholly or ordinarily working in the UK, just as they do to British citizens. The law chosen by the parties in the employment contract will govern any contractual disputes, but it will not otherwise stop UK legislation applying to the employment relationship.

1.2 Laws applicable to nationals working abroad

UK employment law may apply to UK nationals working abroad, depending on the strength of the connection between their employment relationship and the UK.

EMPLOYMENT STATUS

2. Does the law distinguish between different categories of worker? If so, what are the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

An individual may be an employee, a worker, or self-employed. The distinction is important, as it determines an individual's statutory employment rights, and how he is taxed.

Assessing an individual's status is not just determined by how the parties label the relationship. It is a question of law and fact.

An employee is an individual who has entered into, or works under, a contract of employment. A contract of employment may be in writing, but can also be found to exist by virtue of how matters operate in practice. In determining whether an individual is an employee, an employment Tribunal will assess his integration into the workforce, considering:

- The degree of day-to-day control exerted over the individual by the business;
- Whether the business is obliged to provide work for the individual, and he is obliged to do it; and
- Whether the individual is required to provide services personally or can send a substitute.

The more these elements are present, the more likely the individual is to be deemed an employee.

The category of worker is slightly wider. It includes employees, but will also include an individual who has entered into a contract personally to perform any work or services for another party, as long as that other party is not the client or customer of any business carried on by the individual. Identifying an individual's employment status is not always straightforward, and categorisation of individuals as workers has proven particularly
contentious over recent years (notably in the context of LLP members, who are now highly likely to be regarded as workers).

An individual is self-employed if he provides services to another party in the course of running a business or profession in his own right.

2.2 Entitlement to statutory employment rights

Employees are entitled to the full range of statutory employment rights discussed in this chapter. This includes rights during employment, such as the right to a written statement of terms, and certain statutory minimum payments in the event of illness and some forms of family-related leave. It also includes rights on termination, including the right to a statutory minimum notice period, and some protection against dismissal. Some of these rights only apply after the employee has attained a minimum period of service (for example, unfair dismissal protection).

Workers are entitled to a more limited range of statutory employment rights. Like employees, they are entitled not to be discriminated against on the basis of a statutorily protected characteristic and to accrue a statutory minimum amount of holiday. However, they do not enjoy the same level of protection against dismissal as employees.

Self-employed individuals have few statutory employment rights, but are still entitled to certain minimum rights, such as a safe working environment when working at a client's premises.

2.3 Time periods

An individual's employment status is not determined by how long arrangements have been in place. Time periods are, however, relevant in the case of employees, who do not accrue some statutory rights until after they have served a certain period of continuous employment with the same employer.

RECRUITMENT

3 Are any grants or incentives available for employing people? Do any filings need to be made when employing people?

3.1 Grants or incentives

The government runs various schemes which aim to increase employment and training opportunities for young people. These include the National Apprenticeship Service (www.apprenticeships.gov.uk) which provides funding to employers who hire apprentices.

3.2 Filings

Before employing its first employee, an employer must usually register with the tax authority, HM Revenue and Customs (HMRC). It must set up payroll processes to ensure that all employees receive an individual written pay statement, and that HMRC is aware of all employees’ national insurance numbers and earnings.

Employers in certain sectors may also have to make filings in respect of new employees with the appropriate regulatory body (for example, the Financial Conduct Authority in the financial services sector, and the Law Society in the legal sector).

BACKGROUND CHECKS

4 Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

There are limits on an employer's (or a prospective employer's) ability to lawfully obtain and act upon personal information regarding an applicant including, in particular, an applicant’s criminal record or medical history.
Employers should take care only to request information from an applicant that is relevant to his application, and should make it clear to applicants how and when such information will be processed and verified. Helpful guidance has been issued by the UK Information Commissioner's Office (the body responsible for enforcement of the Data Protection Act 1998) in relation to the:

- Verification of information provided by applicants (such as checking that details are accurate and complete, taking up references, and so on); and

- Vetting of applicants (such as making independent enquiries from third parties about an applicant's background and circumstances).

As part of the verification process, employers may seek verification of an applicant's criminal convictions record from the Disclosure and Barring Service (the DBS). Current guidance suggests that this step should only be taken where the need to protect the employer's business, customers, clients or others makes it appropriate. It is now a criminal offence for an employer to try to circumvent these provisions by requiring a job applicant or employee to use a subject access request to obtain a copy of his own criminal record as a condition of employment or continued employment.

Employers should also be careful about how they use information provided by the DBS. Certain UK criminal convictions are deemed "spent" after a set period of time has passed, so are not subject to disclosure by the individual concerned, and should not be used by the employer as the basis for refusing to employ an applicant (with certain exceptions, for example roles in the teaching, medical and legal professions). However, there is no specific penalty for breach of this legislation, so an applicant turned down on this basis may have limited recourse in practice.

More general vetting of an applicant (for example, background checks by third parties) is considered highly intrusive, and should only be used where there are particular and significant risks to the employer, its customers, clients or others, and there is no less intrusive and reasonably practicable alternative. It should generally be used to obtain specific information, rather than for general intelligence-gathering, and at a late stage in the recruitment process (so that the number of applicants subject to vetting is minimised).

Similar considerations apply where an employer wishes to access an applicant's medical records or conduct a health check as part of the recruitment process. Employers should look to obtain specific information that is relevant to the role (for example, a vision test, for a role requiring a particular level of eyesight), or necessary to identify any reasonable adjustments required for a disabled applicant, rather than seeking general disclosure of an applicant's medical history. Where information is requested from an applicant's own doctor, the applicant must first consent under the Access to Medical Reports Act 1988.

The Equality Act 2010 stipulates that, other than in certain limited circumstances, a prospective employer must not ask about the health of an applicant before offering work to him (or including the applicant in a pool of applicants from whom the employer will choose a successful candidate). This is intended to stop employers using an applicant's medical records as a selection tool.

**PERMISSION TO WORK**

5 What prior approvals do foreign nationals require to work in your country?

Employers must prevent illegal working, and those who do not comply with their obligations can face criminal and civil penalties. It is therefore important that employers establish the approvals required for foreign nationals working in the UK.

Nationals of countries in the European Economic Area (EEA) and Switzerland do not require prior approval to live and work in the UK.

Other foreign nationals generally need to apply for prior approval to work in accordance with the UK’s Points-Based System for immigration (PBS). There are some exceptions, for example the spouses and civil partners (and, in certain circumstances, unmarried
partners) of British citizens, EEA nationals, Swiss nationals and their dependants.

6

Visa

6.1

Procedure for obtaining approval

Under the PBS, there are five tiers through which an individual might acquire the right to work in the UK. The most relevant tiers for potential employees are:

- Tier 1: the highly-skilled tier aimed at individuals who will contribute to the UK’s productivity and growth. It has various sub-categories, including entrepreneur, investor and person of exceptional talent, although some of these are now closed to new applicants.

- Tier 2: comprises skilled workers who are coming to the UK under the general or intra-company transfer sub-categories, to fill a gap in the UK labour market, and who have a job offer from an employer with a sponsor licence.

- Tier 5: comprises certain temporary workers and migrants under the youth mobility scheme, who have a job offer from an employer with a sponsor licence.

Typically, employers seek permission for potential employees using Tier 2. This requires the employer to obtain a UK Visas & Immigration (UKVI) sponsor licence before making a job offer to the chosen candidate.

The licence can be obtained by successfully submitting an application form and supporting documents to UKVI to establish the employer’s credentials as an appropriate licence-holder. In deciding whether to grant a licence, UKVI will consider factors including the applicant’s human resources systems and compliance record.

Once an employer obtains a licence, the next steps to engage a candidate under the PBS depend on the sub-category into which he falls.

The sponsoring employer is likely to have to:

- Demonstrate that the role cannot be filled by the resident labour market, unless the candidate or role is exempt from this requirement;

- Ensure that the candidate meets all requirements of the relevant category, and does not have any adverse immigration history that could affect his application;

- Deal with any issues regarding dependants of the candidate; and

- Apply to the UKVI for approval to issue the candidate with a certificate of sponsorship (COS), which is akin to a work permit (although issued by the employer, rather than the UKVI).

Unless an individual meets the criteria for an unrestricted COS (for example, because he will earn £155,300 per year or more), the employer must apply for a restricted COS, which are subject to an annual quota. To comply with this quota, in any given month, the UKVI scores all applicants for a restricted COS against the PBS, awarding points for various factors, including:

- Level of salary;

- Whether the job is on UKVI’s list of shortage occupations; and

- Whether the resident labour market test has been conducted.

Prospective employers of the top-scoring candidates are then authorised to issue a COS to those individuals. This will last for a set period of time (for example, the initial length of stay under a Tier 2 COS is three years, but can be extended).
6.1.1 Expiry and renewal

An individual can apply for permission to extend the length of his COS (and in certain circumstances to settle permanently in the UK, usually after five years’ continuous residence under an eligible category).

If an individual makes any such application before the end of his existing authorised stay, he can continue living and working in the UK under the terms of his existing COS until UKVI determines his application, so long as the terms of his employment (for example level of salary) continue to satisfy the appropriate criteria.

However, if he does not apply until after his existing authorised stay has ended, he is not entitled to remain or work in the UK while the application is under consideration, and must usually leave the country unless and until his application succeeds and he can return.

An employer must also issue a new COS if an individual moves to a new role categorised under a different Standard Occupation Classification (SOC) code to his original role.

6.1.2 Cost

The cost of a visa depends on the category of visa, the applicant's nationality and whether the application is made from within or outside the UK. At the time of writing, for example, the fee for an employer to assign a COS to an individual is GB£199 for a Tier 2 COS, and GB£21 for a Tier 5 COS (although other fees may also apply).

6.1.3 Time frame

Individuals can use the UKVI website to track the typical time it takes to process an application from their country. Generally, UKVI indicates that the majority of applications that do not involve requests for indefinite leave to remain (that is, permanent settlement in the UK) are resolved within three weeks of application, and the vast majority within 12 weeks. Settlement applications may take longer.

6.1.4 Sanctions against employers

Employers have a duty to prevent illegal working. Failure to identify migrants who require permission to work in the UK or to undertake prescribed document checks can result in criminal and civil penalties for the employer, including imprisonment and/or fines. Fines can be up to GB£20,000 per illegal worker under the civil penalty system, and are potentially unlimited where criminal liability is found.

Sanctions depend on when the worker started employment with that employer. Employers who did not check staff employed before 27 January 1997 will not be liable to sanctions if those individuals are found to be illegal migrant workers.

6.2 Permits

Non-EEA or non-Swiss nationals can visit the UK as business visitors for up to six months without going through the full PBS process. Further information can be found on the UKVI website.

6.3 Sanctions against individuals

An individual who fails to satisfy the immigration authorities that he is a genuine business visitor risks being denied entry to, and removed from, the UK. An individual who breaches immigration rules or is removed from the UK also risks a mandatory ban from the UK for up to 10 years.
RESTRICTIONS ON MANAGERS AND DIRECTORS

7 Are there any restrictions on who can be a manager or company director?

7.1 Age restrictions
Managers and company directors must usually be at least 16 years old. There is no upper age limit.

7.2 Nationality restrictions
There are no nationality restrictions on who can be a manager or company director.

7.3 Other
An individual cannot be a company director without express permission from the UK court that made the relevant disqualification or bankruptcy order if he either:

- Has been disqualified from acting in this capacity; or
- Is an undischarged bankrupt.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

8 How is the employment relationship governed and regulated?

8.1 Written employment contract
An employer must give each employee a written statement of the particulars of his employment within two months of employment starting. The statement must contain:

- Names of the employer and employee;
- The employee's job title or a brief description of his role;
- The employee's start date (and when his continuous employment began, if earlier);
- The place of work, and (if different) the employer's address;
- How much and how often the employee will be paid;
- Terms and conditions relating to hours of work;
- Terms and conditions relating to holiday entitlement;
- Terms and conditions relating to sickness absence and sick pay;
- Terms and conditions relating to pensions (including whether the employee's pension is covered by a contracting-out certificate);
- Notice periods to terminate employment;
- For a non-permanent employee, how long the contract is expected to continue (or if it is for a fixed term, the date on which it will end) (see Question 15);
- Details of disciplinary and grievance procedures that apply to the employee; and
- Details of collective agreements that apply to the employee.

Certain further information must also be provided to employees expected to work outside
the UK for periods of more than one month.

8.2 **Implied terms**

English law implies certain terms into employment contracts. These include:

- The duty of mutual trust and confidence.
- Obligations on the employee to:
  - serve the employer faithfully;
  - obey the employer's reasonable and lawful orders; and
  - exercise reasonable skill and care in performing his duties; and not, during the employment relationship, disclose the employer's confidential information or disrupt its business.
- Obligations on the employer to:
  - pay wages (provided the employee is willing and able to perform work), unless there is a contractual right not to do so; and
  - take reasonable care of the employee's health and safety; and promptly give the employee a reasonable opportunity to obtain redress for any grievances.

8.3 **Collective agreements**

Collective agreements are typically made between an employer and a trade union. Such agreements are not legally binding. Their terms do not form part of an individual's employment contract, unless they are apt for incorporation and incorporated into an employee's contract. Collective agreements are less common in the UK private sector than in the public sector.

9 **What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?**

An employment contract can permit an employer to make limited unilateral changes to the terms and conditions of employment. However, such "flexibility clauses" are given a restrictive interpretation by the courts, and their exercise is also limited by various implied terms (like the obligation to exercise the flexibility in a way that does not breach the mutual trust and confidence between employer and employee).

An employer who wishes to impose changes that go beyond those authorised by the contract without the employee's express consent has two main options:

- Impose the changes and accept the potential consequences, which could range from successful implementation (if the employee acquiesces to the change) through to potential claims (for example, breach of contract and/or constructive dismissal) if the employee objects and brings a legal claim.
- Give notice to terminate the employee's employment and simultaneously offer re-engagement, on the terms the employer wishes to impose, commencing immediately after the existing employment terminates. Employees with sufficient service might bring a claim for unfair dismissal in response, but such claims can be potentially defensible. However, this approach is somewhat aggressive, and could also trigger collective consultation obligations if sufficient numbers of employees are affected.
MINIMUM WAGE

10  Is there a national (or regional) minimum wage?

10.1 All UK workers who are over school leaving age (currently 16) must be paid the National Minimum Wage (NMW). The NMW hourly rate depends on the worker's age. Rates are updated annually. Current rates with effect from 1 October 2016 are available on the UK Government website here and are reviewed annually.

Employees who are not paid the NMW can bring a claim in an employment tribunal. It is a criminal offence for an employer to refuse to pay the NMW.

If the employer provides the worker with free accommodation, it can offset the value of this against his NMW entitlement, by deducting a certain amount per day from his pay. No other benefits in kind count for these purposes.

Employers should keep records that confirm eligible employees have been paid at least the NMW. It is a criminal offence to pay eligible employees less than the NMW.

The Government has also announced plans to introduce a new compulsory "national living wage", which will effectively "top up" the NMW rate for certain eligible workers (see Question 33).

RESTRICTIONS ON WORKING TIME

11 Are there restrictions on working hours? Can an employee opt out on either an individual or collective basis?

11.1 Working hours

Workers are not generally permitted to work more than 48 hours per week (normally averaged over a 17-week period). However, most workers can, and do, opt out of this limit, although they can opt back in at any time, by giving written notice to the employer. The minimum notice required by statute is seven days, but this can be extended to up to three months by the contract of employment.

11.2 Rest breaks

Generally, a worker whose daily working time is over six hours is entitled to a 20-minute rest break away from his work station. Most workers are also entitled to a:

- Daily rest break of 11 hours of continuous rest in every 24-hour period; and
- Weekly rest break of 24 hours of continuous rest in every seven-day period (or 48 hours of continuous rest in every fortnight).

Workers may be entitled to compensatory breaks if they are required to work during periods which would otherwise be a rest break or rest period.

11.3 Exceptions

Exceptions apply to certain workers, for example, those working in sectors requiring continuity of production. Special provisions also apply to night workers, and young workers (those under the age of 18).

Night workers cannot work more than an average of eight hours at night and must be offered free health assessments by their employer.
11.4 **Shift workers**

Shift workers are generally entitled to rest breaks on the same basis as other workers, but there are exceptions to this position, like where a shift worker changes shift and cannot take a rest break between the end of one shift and the beginning of the next, or is engaged in split shifts that involve periods of work split up over a day (for example, cleaning or catering staff). If a shift worker cannot take his rest entitlement in the usual manner, they are entitled to compensatory rest instead.

**HOLIDAY ENTITLEMENT**

12 **Is there a minimum paid holiday entitlement?**

12.1 **Minimum holiday entitlement**

All workers have the right to 5.6 weeks' paid holiday each year. For these purposes, a week means a normal working week for that individual (although the maximum statutory entitlement is 28 days, regardless of how long the normal working week is). If a worker starts or ends work part way through a holiday year he is entitled to paid holiday on a pro rata basis.

Holiday pay is paid at the same rate as normal pay, and should include any elements of pay directly linked to the work that the worker is required to carry out. Recent case law indicates that this should include commission, shift allowances and at least some forms of overtime (for example, where there is a settled pattern of work and a correspondingly regular overtime payment), at least in respect of the 20 days' holiday conferred by the underlying European legislation. Further case law is expected on this issue in the coming year.

It is unlawful to pay a worker in lieu of holiday entitlement except on termination, when a payment can be made in lieu of holiday that has accrued but not been taken.

12.2 **Public holidays**

There are currently eight permanent public and bank holidays in England and Wales. Although these can be (and frequently are) included in the minimum holiday entitlement of an employee, an employer does not have to let a worker take holiday on these days, if it otherwise provides him with his statutory holiday entitlement.

**ILLNESS AND INJURY OF EMPLOYEES**

13 **What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?**

13.1 **Entitlement to time off**

Employees do not have a specific statutory right to take a set period of time off work in the event of illness or injury. However, it is generally recognised that there will be times when an employee is unable to attend work for these reasons.

An employee's written statement of particulars of employment should contain (or refer to) the terms that apply if he is unable to work due to illness or injury, including any sick pay to which he may be entitled.

Employers should also be aware that, if an employee becomes ill before or during a period of pre-booked holiday, he may request that the time off be re-classified as sick leave, so that he can take the holiday at a later date once he is well. Employers should ensure that appropriate measures are put in place for the reporting of sickness, and supporting medical evidence, in these circumstances to guard against potential abuse.
13.2 Entitlement to paid time off

Employees who are unable to work due to illness or injury for four or more consecutive days are entitled to receive statutory sick pay (SSP), provided they meet the qualifying conditions. Employees do not receive SSP for the first three days of any sickness absence. The current weekly rate of SSP is £88.45, which will increase to £89.35 from 2 April 2017. The maximum entitlement is 28 weeks' SSP during any period of incapacity for work (or any series of linked periods).

An employee may also be entitled to contractual sick pay (that is, pay during sick leave at a higher rate than SSP) if the employer offers this benefit.

13.3 Recovery of sick pay from the state

SSP, and any contractual sick pay, is paid by the employer. Since 6 April 2014 this cost is no longer recoverable from the state.

STATUTORY RIGHTS OF PARENTS AND CARERS

14 What are the statutory rights of employees who are:

- Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
- Carers (including those of disabled children and adult dependants)?

14.1 Maternity rights

Currently, all pregnant employees are entitled to both:

- 26 weeks' ordinary maternity leave (OML); and
- 26 weeks' additional maternity leave (AML).

Employees do not have to take all 52 weeks of their maternity entitlement, but must take two weeks' compulsory leave directly after the baby is born (or four weeks, in the case of some factory workers).

Employees entitled to take maternity leave are also entitled to receive up to 39 weeks' statutory maternity pay (SMP) if they meet certain requirements as set out here. Eligible employees are entitled to SMP at rates set by the government, available here.

If an employee does not qualify for SMP, she may qualify for maternity allowance, which is a social security benefit paid by Jobcentre Plus (and currently available at the same rate as SMP). Except for remuneration, employees remain entitled to the benefit of contractual terms and conditions of employment during OML and AML.

An employee returning from OML is entitled to return to the same job she held before her absence on the same or no less favourable terms of employment (unless a redundancy situation has arisen in the interim, in which case she is entitled to certain preferential treatment). An employee returning from AML has similar rights, unless it is not reasonably practicable for her to return to the same job, in which case the employer must let her return to another suitable and appropriate role.

14.2 Shared parental leave (SPL)

The new system of shared parental leave (SPL) and shared parental pay (SPP) enables two eligible parents share the OML/AML and SMP entitlement currently available to the mother, or a couple of adopters share the SAL and SAP entitlement currently available to the primary adopter, on the general basis set out below.
In a maternity context, if an expectant mother chooses to take SPL with her partner (instead of taking OML/AML herself), the couple can share up to 50 weeks' SPL and up to 37 weeks' SPP, between them. This is broadly equivalent to the maternity rights that the mother would otherwise have had, with the exception of:

- The two weeks’ compulsory maternity leave directly after the baby is born, which the mother must still take; and

- The rate of SPP, which is equivalent to the lesser "flat rate" of SMP only (as there is no higher rate for the first six weeks of leave).

Each parent can request SPL in up to three separate blocks of leave, to be taken either at the same time as each other or separately. Various advance notification requirements apply, and the employer's flexibility in responding to a request depends on the manner in which the SPL is requested:

- Where a parent requests a single continuous period of SPL, the employer must agree to the request; and

- Where a parent requests multiple discontinuous periods of SPL, the employer can agree to the request, refuse it, or propose alternatives. If the employer refuses the request, the employee can choose to take the total amount of leave requested as a single continuous period instead (rather than in separate blocks), or can withdraw the request.

Where the parents work for different employers, the employers do not have to contact each other to discuss their employees' respective leave requests, although in practice it can be helpful to do so.

Employees taking SPL have broadly similar rights to return to work as under the relevant maternity or adoption leave regime.

14.3 Paternity rights

Eligible employees are entitled to two weeks' ordinary paternity leave (OPL) and ordinary statutory paternity pay (OSPP). To be eligible an employee must meet the requirements set out here.

An employee who takes paternity leave may also be eligible for OSPP if he meets the necessary criteria. The rates of OSPP are set out here. Employees on paternity leave receive the benefit of all contractual terms and conditions of employment during OPL except remuneration (which is replaced by OSPP).

An employee returning from OPL is entitled to return to the same job he held before his absence, on the same or no less favourable terms of employment, unless the OPL was not an isolated period of leave, or was combined with other statutory leave (for example, parental leave exceeding four weeks). In the latter case, the employer is entitled to propose a suitable and appropriate alternative job for the employee, if it is not reasonably practicable for him to return to his old role.

14.4 Surrogacy

Surrogate mothers are entitled to take maternity leave and pay if they meet the relevant criteria.

Adoption and paternity leave are available for parents under a surrogacy arrangement if they adopt the child. There is no entitlement to maternity leave for the female adopter of a child born by way of a surrogate.

14.5 Adoption rights

An eligible employee who has elected to be the primary adopter of a child is entitled to statutory adoption leave (SAL), whether adopting from the UK or overseas (although
slightly different procedural requirements apply in each case).

Eligible employees are entitled to 26 weeks' ordinary adoption leave (OAL) and 26 weeks' additional adoption leave (AAL), provided they fulfil the necessary evidential and procedural requirements.

For a child placed for adoption after 5 April 2015, the adopter no longer needs to meet the previous requirement for 26 weeks' continuous employment before the start of the week when matched with the child by the adoption agency. However, this requirement still applies for an employee to be entitled to statutory adoption pay (SAP). Employees who satisfy the criteria are paid SAP at the lower of £139.58 per week or 90% of the employee's average weekly earnings (calculated according to the set statutory formula), for up to 39 weeks.

An employee returning from OAL is entitled to return to the same job held before absence, on the same or no less favourable terms, unless the OAL was not an isolated period of leave, or was combined with other statutory leave (for example, parental leave exceeding four weeks). In this case, as on the return from AAL, the employer can propose a suitable and appropriate alternative job if it is not reasonably practicable for the employee to return to his old role.

An eligible couple adopting can choose to take SPL/SPP instead of any SAL/SAP entitlement. This effectively lets them share the SAL and SAP entitlement previously only available to the primary adopter, in a similar manner to maternity leave and pay. Adoption leave can also apply in surrogacy cases.

14.6 Parental rights

Parental leave allows eligible employees to take unpaid time off to care for a child or make arrangements for the child's welfare. An eligible employee can take off up to 18 weeks' unpaid parental leave for each child, up to the child's 18th birthday.

14.7 Carers' rights

Any employee with at least 26 weeks' continuous service can make a flexible working request if certain criteria are met. If granted, such requests involve a permanent change to the employee's terms and conditions, for example, by allowing him to work particular hours or to work from home. They are therefore often made by employees with caring responsibilities (although this is no longer a prerequisite).

An employer has three months to consider and respond to an employee's flexible working request, and must do so in a reasonable manner. ACAS has published useful guidance outlining how an employer might comply with this requirement.

An eligible employee may only make one flexible working request within any 12-month period. An employer is not obliged to agree to a request if a statutory reason for rejection applies, for example, cost, impact on performance, or inability to reorganise work among other staff.

CONTINUOUS PERIODS OF EMPLOYMENT

15 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

15.1 Statutory rights created

Employees only acquire some statutory rights after a certain period of continuous service with an employer. These include the rights to:

- Request a flexible working arrangement (after 26 weeks' service);
- Some forms of family-related leave (generally after 26 weeks);
• Not be unfairly dismissed (two years);
• A statutory redundancy payment in the event of redundancy (two years);
• An increased period of statutory minimum notice of termination of employment from the employer; and
• Consequences of a transfer of employee.

If an employee transfers to another entity associated with his employer (typically another company in the same group), his continuity of service is generally preserved.

Continuous employment is also preserved where an employee's employment transfers to another employer by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

FIXED TERM, PART-TIME AND AGENCY WORKERS

16 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

16.1 Fixed-term employees

A fixed-term employee is an employee employed for a fixed period of time, rather than on a permanent basis. If an employer wishes to engage employees temporarily or for a specific task itself, rather than via an employment business, it will often do so on a fixed-term basis.

Generally, an employer should not treat a fixed-term employee less favourably than a comparable permanent employee in relation to his contractual terms, or subject him to any detriment because of his fixed-term status, unless that treatment can be objectively justified. An employer can objectively justify a difference in contractual terms if the fixed-term employee's terms, taken as a whole, are at least as favourable as those of a comparable, permanent employee. Remuneration and benefits may also generally be applied on a pro rata basis to reflect the time actually worked.

Fixed-term employees accrue employment rights in the same way as permanent employees. In addition, a fixed-term employee will be considered automatically unfairly dismissed if the reason for his dismissal was that he sought to assert a right conferred on him by the legislation governing fixed-term employees.

Employers should also be aware that an employee who is continuously employed under a series of fixed-term contracts for at least four continuous years will be deemed to be a permanent employee. The employer must also be able to objectively justify continuing to use fixed-term contracts after this time.

16.2 Agency workers

The term "agency worker" is usually used to describe an employee who is employed by an employment business, but assigned to work for a particular client (usually, but not always, on a fixed-term basis).

The default position is that, if a qualifying agency worker spends 12 continuous weeks working for a particular client, he becomes entitled to the same basic working and employment conditions he would have received if the client had recruited him directly. Broadly, this means an entitlement to the terms and conditions that ordinarily apply to the client's own staff, potentially including the right to an equal rate of pay.

However, this situation can be avoided if the employment business in question employs the agency worker on a permanent basis, and his employment contract meets certain minimum requirements (for example, a minimum amount of pay between assignments).
Qualifying agency workers are also entitled, from the start of an assignment, to be treated in the same way as direct employees in relation to:

- Vacancies; and
- Access to collective facilities and amenities (unless differential treatment can be objectively justified).

The employment status of agency workers can be complicated. Clients should take care to clearly document the arrangement, and confirm that the employment business (not the client) is the employer of the agency worker, and will comply with its obligations accordingly.

**16.3 Part-time workers**

A part-time worker is an individual paid wholly or partly by reference to the time he works, and who works fewer hours in a given period than a comparable full-time worker. A part-time worker can be engaged on a permanent or fixed-term basis.

Similarly to fixed-term employees (see above, Fixed-term employees), a part-time worker is entitled to be treated no less favourably than a comparable full-time worker by reason of his part-time status, unless the employer can objectively justify the differential treatment. Remuneration and benefits may also generally be applied on a pro rata basis to reflect time actually worked.

Part-time employees accrue employment rights in the same way as full-time employees. In addition, a part-time employee will be considered automatically unfairly dismissed if the reason for his dismissal was that he sought to assert a right conferred on him by the legislation governing part-time workers.

**DATA PROTECTION**

**17 Are there any requirements protecting employee privacy or personal data? If so, what are an employer's obligations?**

**17.1 Employees' data protection rights**

In the course of employment, an employer will typically obtain, process and store personal data (including sensitive personal data) about its employees. For data protection purposes, this makes the employer a data controller (and data processor), and the employee a data subject, in each case with corresponding rights and obligations.

Employers should therefore be aware that an employee has the usual rights of a data subject in relation to any of his personal data that the employer holds. This includes the right to be notified of the employer's data policies and procedures and the purposes for which personal data may be collected and used.

An employee can also make a data subject access request to obtain details about the personal data that his employer holds about him (including information about the nature of the data held, the purposes for which the employer processes it, and the recipients to whom it has been disclosed).

To make such a request, the employee must follow a prescribed statutory process. Unless an exemption applies, the employer must respond to a request within 40 days of receipt or face possible enforcement action by the Information Commissioner's Office (ICO) (which can include significant fines) or an application to the court.

**17.2 Employers' data protection obligations**

An employer has obligations as a data controller and data processor of its employees' personal data, and must ensure that it complies with applicable legislation (currently the Data Protection Act 1998) and related guidance (such as that published by the ICO).
Broadly, this means ensuring that personal data is processed securely, in a proportionate manner, for legitimate reasons. "Processing" can cover a wide range of actions, including obtaining, using, disclosing, transferring, storing, securing and archiving the personal data in question. Particular restrictions and safeguards apply if an employer intends to transfer personal data outside the EEA (whether to third parties or other group companies).

17.3 Proposed reforms

A new EU-wide General Data Protection Regulation (GDPR) will apply in the UK and across all other EU member states from 25 May 2018, two years following its entry into force on 24 May 2016. The GDPR will be a single directly enforceable pan-European data protection law giving data subjects greater rights and placing additional obligations on data controllers and processors. In a referendum held on 23 June 2016, the UK voted to leave the EU (Brexit), though it is not anticipated that this will occur until the end of 2018 at the earliest. In that regard, the UK Government and the ICO have confirmed that the GDPR will come into force in the UK as planned in May 2018. It currently remains to be seen exactly what data protection laws the UK will adopt following Brexit, although it is anticipated that they will retain broad equivalence with rights and obligations under the GDPR.

DISCRIMINATION AND HARASSMENT

18 What protection do employees have from discrimination or harassment, and on what grounds?

18.1 Protection from discrimination

It is unlawful to discriminate against job applicants and workers on the basis of any of the following protected characteristics:

- Sex;
- Marital or civil partnership status;
- Race (including colour, nationality and ethnic or national origin);
- Gender reassignment;
- Religion or belief;
- Sexual orientation;
- Pregnancy and maternity;
- Age; and
- Disability.

Job applicants and workers are protected from various forms of discrimination, including:

- Direct discrimination;
- Indirect discrimination;
- Harassment; and
- Victimisation.

The forms of discrimination apply to each of the protected characteristics to varying degrees.
A worker does not need any qualifying period of service before bringing a discrimination claim (or even to have started work at all, in the case of job applicants). The amount of compensation that can be awarded in the event of a successful claim is uncapped, although it is generally linked to actual and/or potential future loss suffered by the individual, in the usual way.

Protection from harassment

Harassment is a form of unlawful discrimination. It is prohibited if it relates to any of the protected characteristics (except for marital or civil partnership status, or pregnancy and maternity).

An employer is liable for harassment if it is found to have engaged in unwanted conduct related to a relevant protected characteristic, that either:

- Has the purpose or effect of violating a worker's dignity; or
- Creates an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

The test for whether the conduct had either of these effects is partly subjective, and partly objective. The first step is to consider whether the individual in question perceived the conduct as having this effect. If so, the next step is to determine whether it was objectively reasonable for the conduct to have had that effect or whether the individual was being hyper-sensitive in perceiving it as such.

An employer should also take care in dealing with any situation involving the harassment of its workers by third parties (for example, customers). Even though employers are no longer specifically liable for third-party acts, it is potentially arguable that an employer's reaction (or failure to react) to this situation could amount to harassment by the employer itself in certain circumstances.

WHISTLEBLOWERS

Do whistleblowers have any protection?

Whistleblowers are protected by the Public Interest Disclosure Act 1998 (PIDA). If a worker makes a protected disclosure in accordance with the PIDA, he has the right to not be subjected to a detriment or dismissed because he made that disclosure, provided he has a reasonable belief that the disclosure was made in the public interest.

A worker who is subjected to a detriment (or, in the case of an employee, dismissed) in these circumstances can bring a claim for compensation regardless of his length of service. If the Employment Tribunal finds that an employee was dismissed because he made a protected disclosure, the dismissal will be automatically unfair. Compensation in the event of a successful claim is uncapped, although any compensatory award made to a worker may be reduced by up to 25% if the Employment Tribunal considers that the worker did not make the relevant disclosure in good faith.

TERMINATION OF EMPLOYMENT

What rights do employees have when their employment contract is terminated?

Notice periods

All employees are entitled to receive from their employer the minimum notice of termination to which they are entitled by statute.

An employee who has been continuously employed for more than one month but less than two years is entitled to receive one week's notice. Thereafter, he is entitled to receive an additional week's notice for each complete year of service, up to a maximum of 12 weeks. By contrast, the statutory minimum notice that an employee must give to his
employer does not increase with time but remains fixed throughout employment at one
week.

It is common for employment contracts to provide for notice periods that exceed the
statutory minimum, in which case the longer contractual period will apply. Employment
contracts also often give employers the discretionary right to make a payment in lieu of an
employee's notice period, although care should be taken in drafting and exercising such
provisions.

An employee may be dismissed summarily (that is, without any notice period) if he
commits a repudiatory breach of the employment contract that would justify this (for
example, gross misconduct).

20.2  

Severance payments

An employee who has been continuously employed by his employer for two years is
entitled to a statutory redundancy payment (SRP) if he is dismissed on grounds of
redundancy. SRP is calculated in accordance with a statutory formula based on the
employee's age, salary and length of service.

There are no further statutory rights to severance payments, although an individual's
employment contract may provide for some form of severance payment. On termination,
the employee is entitled to any amounts he has accrued under the contract that have not
yet been paid.

An employee who has the required length of service and brings a successful claim for
unfair dismissal may also be awarded a compensation payment. This will consist of:

- A basic award (calculated in the same way as SRP but only payable if the employee
  has not already received this); and

- A possible compensatory award based on an employee's actual and/or potential
  future financial loss. This is currently capped at the lower of GB£78,335, or 52 weeks'
  actual gross pay at the time of dismissal.

Currently, any redundancy payment or other such compensation payment may be paid
free of tax up to GB£30,000 in aggregate and without payment of National Insurance
Contributions (NICs). However, HMRC is currently reviewing this arrangement.

20.3  

Procedural requirements for dismissal

An employer should comply with any contractual obligations regarding termination of
employment to avoid giving rise to a breach of contract claim.

A fair and reasonable process is required in dismissing any employee who has acquired
the right not to be unfairly dismissed. It is also good practice for an employer to follow
such a process in other cases, to reduce the risk of other claims that might arise from the
dismissal, for example, discrimination claims.

What constitutes a fair and reasonable process depends on the circumstances and the
reason for the dismissal. For example, when dealing with misconduct issues, employers
should comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures
(Code). This typically involves:

- Conducting a reasonable investigation;

- Determining whether it is appropriate to instigate the disciplinary procedure;

- Informing the employee of the allegations against him;

- Holding a disciplinary hearing; and
Providing an opportunity to appeal.

This is particularly important when dealing with employees who are entitled to claim unfair dismissal, as failure to follow the Code can result in an employee's compensation award being increased by up to 25%, in the event of a successful claim. Similarly, an employee who fails to comply with the Code could suffer a reduction in his compensation award of up to 25%.

21 What protection do employees have against dismissal? Are there any specific categories of protected employees?

21.1 Protection against dismissal

Employees who have been continuously employed by an employer for two years or more have a right not to be unfairly dismissed.

An employee is unfairly dismissed unless an employer can establish that both:

- One of the five statutory reasons for dismissal applies, namely:
  - conduct;
  - capability;
  - redundancy;
  - breach of statutory restriction; or
  - some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held; and

- It acted reasonably in treating that reason as sufficient to justify dismissal of that employee. In practice this generally requires that, among other things, the employer follows a fair and reasonable process in effecting the dismissal.

Some specific categories of employee are not entitled to claim unfair dismissal, generally key roles in the public sector (for example, members of the armed forces and police service employees).

Employees who successfully bring a claim for unfair dismissal may be entitled to compensation.

21.2 Protected employees

An employee who does not meet the minimum service requirement can still claim unfair dismissal in certain situations, for example where the dismissal relates to:

- His political beliefs or affiliations;
- His membership or non-membership of a trade union, or participation in union-related activity;
- His participation in health and safety-related activity;
- His status as an employee representative (or candidature for such a role);
- His status as a fixed-term employee or part-time worker;
- A protected characteristic possessed by the employee or a claim of discrimination previously made by the employee;
• A protected disclosure made by the employee; and
• The employee:
  o taking maternity, paternity, adoption, parental or shared parental leave;
  o taking time off to care for dependants or to study or train; or
  o exercising a statutory right to request a flexible working arrangement.

REDUNDANCY/LAYOFF

22 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

22.1 Definition of redundancy/layoff

An employee is made redundant when he is dismissed by his employer wholly or mainly as the result of any of the following:

• Business closure (the employer closing down, or intending to close down, the business for which an employee works);
• Site closure (the employer closing down, or intending to close down, the particular site where an employee works); and/or
• Headcount reduction (the employer needing fewer employees to carry out work of a particular kind, either across the business or at the particular site where the employee works).

An employee is "laid off" when his employer exercises a contractual right not to provide him with work, or, therefore, pay during a given period.

The following answers focus on redundancy only.

22.2 Procedural requirements

Redundancy is a potentially fair reason for dismissal if a genuine redundancy situation exists. However, for the dismissal to be fair, the employer must also act reasonably in treating the redundancy situation as sufficient to justify dismissal. In practice, this means that the employer should follow a fair and reasonable redundancy process. What constitutes a fair process depends on the circumstances, but it will generally involve:

• Making a fair assessment of which roles are at risk of redundancy;
• If appropriate, using a fair and objective method of selecting which individuals are to be put at risk of redundancy;

The employer should also consult affected employees about:

• The proposed redundancy;
• The selection process; and
• Any potential alternatives to redundancy, such as any suitable alternative vacancies in the employer's organisation into which those at risk of redundancy might be redeployed.

If redundancies are confirmed, those dismissed should be given an opportunity to appeal. The employer may also have to comply with collective consultation obligations (see below).
**22.3 Redundancy pay**

Employees with two or more years’ continuous service are entitled to receive SRP if they are made redundant.

SRP is calculated on the basis of a set formula that takes account of the employee's age, salary and length of service at the termination date. An employee is entitled to receive:

- Half a week’s pay for each complete year of employment while under the age of 22;
- One week’s pay for each complete year of employment between the ages of 22 and 40; and/or
- One-and-a-half week's pay for each complete year of employment at the age of 41 or over.

The amount of a week's pay for these purposes is capped by statute at GB£479, and the maximum amount of SRP payable to any employee is capped at GB£14,370.

**22.4 Collective redundancies**

An employer must consult collectively with elected employee representatives if it proposes to dismiss as redundant 20 or more employees within a period of 90 days or less. Recent case law has confirmed that the figure of 20 is drawn from redundancies proposed at one establishment, rather than across the employer's entire workforce (although what is meant by “establishment” will depend on the facts in each case).

Employers should also be aware that, for these purposes, a "dismissal" will include any dismissal proposed for a reason that does not relate to the particular employee. Dismissals proposed should an employee not agree to changes in his terms and conditions will therefore count towards the total as well as redundancies (although the non-renewal of a fixed-term contract when it expires will not).

Absent any pre-existing arrangements, an employer's collective consultation obligations include making arrangements for the election of employee representatives, and consulting with those representatives about whether there are any:

- Alternatives to the proposed redundancies; and
- Ways to mitigate the impact of the proposed redundancies on affected staff.

Consultation should start in good time before any redundancies are confirmed. Any dismissals should not take effect until at least:

- 30 days after an employer's consultation obligations have been triggered if between 20 and 99 redundancies are proposed; or
- 45 days after an employer's consultation obligations have been triggered, where 100 or more redundancies are proposed.

Further guidance on managing collective redundancies generally is provided by the ACAS guide "Handling large-scale redundancies". ([http://www.acas.org.uk/media/pdf/b/2/Handling-large-scale-collective-redundancies-advisory-booklet.pdf](http://www.acas.org.uk/media/pdf/b/2/Handling-large-scale-collective-redundancies-advisory-booklet.pdf)).
EMPLOYEE REPRESENTATION AND CONSULTATION

23 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

23.1 Management representation

Employees do not have a statutory right to management representation. Employers and employees can enter into a collective agreement that provides for some form of management representation, but these are rare, particularly in the private sector.

23.2 Consultation

Employers are under no general duty to consult with employees regarding issues that affect them, unless a works council or information and consultation body exists in relation to their workforce. In this case, the employer should comply with its obligations under any relevant agreement reached with the works council or consultation body.

23.3 Major transactions

There is no statutory obligation to consult employees in the event of a proposed sale of their employer’s shares.

However, an employer will have obligations to inform (and potentially consult) staff if it intends to be party to a transaction to which TUPE applies (for example, an asset/business acquisition or a service provision change).

24 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

24.1 Remedies

If an employer fails to comply with its obligations to collectively consult in a redundancy situation, the affected employees (or their representatives) can bring a claim for compensation of up to 90 days’ (uncapped) pay each.

If an employer fails to inform (and, if necessary, consult with) employee representatives when required to do so by TUPE, it faces a similarly stringent claim for up to 13 weeks’ (uncapped) pay per affected employee.

The amount of any such “protective award” is assessed on a sliding scale, so the employer should get credit for any steps towards compliance that it does take in either case.

24.2 Employee action

If an employer breaches its information/consultation obligations, affected employees or their representatives may bring a claim against it as set out above, but they cannot block the transaction/redundancy programme in question from going ahead.

CONSEQUENCES OF A BUSINESS TRANSFER

25 Is there any statutory protection of employees on a business transfer?

25.1 Automatic transfer of employees

TUPE protects the employment of employees affected by a business transfer or a service provision change. It automatically transfers the employment of all those assigned to the undertaking in question (that is, the part of the business being sold, or the function being in/outsourced) to the transferee (that is, the buyer of the business, or the provider of the
Transferring employees’ terms and conditions of employment are protected and transfer intact (except for any terms relating to old age, invalidity and survivor's benefits under an occupational pension scheme, to which different rules apply).

25.2 Protection against dismissal

In tandem with the automatic transfer of their employment, employees with unfair dismissal rights also receive additional protection from dismissal, before and after the transfer.

Dismissal is automatically unfair if the sole or principal reason for it is the transfer itself.

A dismissal will also be unfair if the sole or principal reason for it is an economic, technical or organisational reason that entails changes in the numbers or functions (or a change in the workplace) of the workforce (an ETO reason), unless the employer can also show that a fair process was followed.

25.3 Harmonisation of employment terms

Employers often wish to change the terms of any employees inherited under TUPE to harmonise them with their existing workforce.

However, this can be difficult to achieve in practice, because TUPE provides that any change to a transferring employee's terms and conditions of employment will be void and unenforceable if the sole or principal reason for the change is the transfer itself.

However, TUPE does not prevent a change to an employee’s contractual terms if either:

- The terms of the contract itself permit the employer to make that change; or
- The sole or principal reason for the change is an ETO reason, and the employer and employee both agree to the change.

An employer also has scope to change terms that are incorporated into an employee's contract from a collective agreement, so long as the change takes effect more than one year after the transfer date, and overall leaves the rights and obligations in the contract "no less favourable" to the employee than previously.

Employers who seek to harmonise terms will generally still run the risk that an employee might claim that any detrimental change to their old terms is not valid under TUPE, while potentially accepting any changes that do benefit them.

In practice, employers therefore often wait until some time after the transfer before making any changes, to lessen the chance an employee might claim that the change is connected with the transfer. However, the passage of time is no guarantee that a connection with the transfer will not exist. It can therefore be more effective to look for a strong ETO reason to make changes (for example, a general reorganisation of the transferee's business, affecting all employees rather than just those transferred).

25.4 Information and consultation

Transferring employees are entitled to elect representatives, whom the employer must:

- Inform about the proposed transfer; and
- Consult about any measures envisaged in relation to the proposed transfer that will impact on affected employees.

The employer can discharge any consultation duties under TUPE by engaging in consultation with the employee representatives with a view to reaching agreement. It is
not a requirement of TUPE that agreement is actually reached between the parties before the proposed transaction can proceed. TUPE does not therefore give the employees of either party a right to block a proposed transaction.

EMPLOYER AND PARENT COMPANY LIABILITY

26 Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company’s employees?

26.1 Employer liability

An employer can be vicariously liable at common law for damage caused by an employee acting negligently in the course of his employment.

An employer can also be liable for an employee's discriminatory acts, if these were committed in the course of employment (regardless of whether or not they occurred on the employer's property). An employer can establish a defence to such vicarious liability if it can show that it took such steps as were reasonably practicable to prevent the employee from committing the act, for example:

- Conducting diversity training; or
- Ensuring that such behaviour is not tolerated in the workplace but always rigorously dealt with under the employer's disciplinary procedures.

26.2 Parent company liability

A parent company is not liable for the acts of a subsidiary company's employees solely because of the corporate relationship between the parent and subsidiary company. However, a parent company can be liable for an act or omission of its subsidiary company if it is deemed to have assumed a duty of care.

EMPLOYER INSOLVENCY

27 What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

27.1 Employee rights on insolvency

An employee's rights on the insolvency of his employer vary depending on the type of insolvency procedure involved.

In the event of the employer entering compulsory liquidation or court-appointed receivership, each employee's contract of employment is deemed to be automatically terminated by operation of law. If the employee is not offered re-employment by the liquidator/receiver, an employee's rights in this situation are limited. He cannot claim unfair dismissal, as the termination of his contract does not constitute a dismissal for the purposes of the relevant legislation. In some circumstances, he may be able to bring a claim for wrongful dismissal (for example if, in relation to a compulsory liquidation, the moratorium on legal proceedings against the insolvent company is lifted). However, even if successful, this will rank as an unsecured claim, and so it is highly unlikely that any amount awarded would be recovered in full.

There is no automatic termination of employment contracts in other insolvency scenarios (such as creditors' voluntary liquidation, administration, administrative receivership or a creditors' voluntary arrangement). Specific rules apply to the adoption of contracts by administrators and administrative receivers. These provide for a 14-day window within which the administrator or administrative receiver may review arrangements and then
decide, in his capacity as an agent of the employer, whether an employee's contract is to be "adopted" or terminated.

An employee dismissed as a result of this may be able to bring the usual range of employment claims against the company (rather than, generally, the insolvency practitioner). However, even if successful, these would rank as unsecured claims, and so it is highly unlikely that any amount awarded would be recovered in full.

An employee retained after expiry of this 14-day window is in a better position. His employment continues on the same terms as previously (unless renegotiated) and certain payments, including his wages/salary from this time onwards, will also be paid in priority to certain other debts of the company.

In either case, any outstanding remuneration owed to employees (for example wages, sick pay, maternity pay and accrued holiday pay unpaid by a business in the four-month period prior to insolvency) will be treated as a preferential debt. This gives it a higher ranking than unsecured debt – but the amount of any such preferential debt recoverable is capped at GB£800 per employee.

27.2 State guarantee funds

Certain state guaranteed funds may assist an employee in recouping some of the debts owed to them by an insolvent company:

- Employees can claim up to a maximum limit of eight weeks’ arrears of pay from the National Insurance Fund (NIF), capped at GB£3,832. Employees can also claim up to 12 weeks’ statutory notice pay (capped at GB£5,748), up to six weeks' holiday pay (capped at GB£2,874) and the whole or any part any unpaid SRP;
- Liability for any outstanding debts owed to employees by way of SSP, SMP, SPP or SAP passes to HMRC on insolvency; and/or
- The Pension Protection Fund may assist employees whose defined benefit pension schemes have been affected by a participating employer's insolvency.

HEALTH AND SAFETY OBLIGATIONS

28 What are an employer's obligations regarding the health and safety of its employees?

Employers are under a statutory duty to ensure, as far as reasonably practicable, the health, safety and welfare at work of their employees. They must therefore take reasonable steps to provide a safe workplace and a safe system of work.

Employers are liable to civil and criminal penalties if they fail to comply with these statutory duties. For further information on an employer's obligations, see the Health and Safety Executive website (www.hse.gov.uk).

TAXATION OF EMPLOYMENT INCOME

29 What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

Taxation of individuals in the UK is determined by residence and domicile status. Residence is defined according to the satisfaction of certain criteria contained within a statutory residence test (SRT) and domicile is a concept that derives from case law. Domicile can be determined by origin, choice or dependency and does not necessarily align with nationality.
The SRT distinguishes between "Arrivers" and "Leavers". In outline, Arrivers are individuals who have not been resident in the UK for any of the three previous tax years and Leavers are those who have been. Residence is determined by the number of days an individual spends in the UK during the tax year in question and that individual's connections to the UK. The application of the SRT is very fact specific, however, as a basic rule, where an individual has spent 183 days or more in the UK, that individual will be considered UK resident for the tax year in question. The UK tax year runs from 6 April to 5 April. For the purpose of SRT, a "day" is defined by statute. Broadly, a day counts as a day spent in the UK where the individual is present in the UK at the end of the day (midnight).

29.1 Foreign nationals

Work carried out in the UK by a foreign national employee is taxable in the UK. This is the case regardless of where the employing entity is located.

Foreign nationals can be resident in the UK for tax purposes. Potentially, individuals resident in the UK can be liable to UK tax on their worldwide income (subject to reliefs for double taxation). However, the rules relating to residence and domicile are very complex and some short term residents and individuals who are regarded as resident but not domiciled in the UK may not be taxed on offshore income and gains if the funds are not remitted to the UK (the Remittance Basis). If a non-UK domiciled but UK resident employee who claims the Remittance Basis of taxation carries out their employment duties overseas for an overseas employer, then HM Revenue & Customs (HMRC) may accept that the overseas employment income is not subject to UK tax, to the extent that the funds are not remitted to the UK. However, HMRC would apply UK tax to overseas employment income if any duties are carried out in the UK, apart from "merely incidental" duties.

It used to be commonplace for UK resident non-domiciled individuals with employment activities in both the UK and overseas to enter into separate dual employment contracts with both a UK employer and an overseas employer in order to avoid UK tax on remuneration received for overseas duties, provided that the Remittance Basis was claimed and funds were not remitted to the UK. However, new legislation introduced in the tax year 2014-2015 has greatly restricted use of dual employment contracts in this way.

Foreign nationals who are not resident in the UK for tax purposes will pay UK tax only on UK source income and gains including UK source investment income.

Broadly, where an individual is in full time work in the UK and there is no significant break in work over 30 days, that individual will most likely be considered resident for UK tax purposes.

For the purposes of the SRT, a "working day" means at least three hours spent working.

29.2 Nationals working abroad

Under the SRT, where an individual is employed in full time work abroad without spending significant time in the UK, they will most likely be considered non-resident for UK tax purposes.

However, UK nationals working abroad who maintain their UK tax residency would be liable to UK income tax on their worldwide income, subject to certain relief.

If a UK national living or working abroad remains outside the UK for an extended period of time, they may lose their tax status as UK resident. In this instance, they would be treated in the same way as a foreign national non-resident and would only be liable to UK tax on their UK source income and gains, including employment carried out in the UK and their UK source investment income.

For further information, see the HMRC website (www.hmrc.gov.uk).
30.1 Rate of taxation on employment income.

For the 2016 to 2017 tax year, income is taxed at the following rates, depending on the level of income after any applicable allowances or relief:

- Income up to GB£32,000 is taxed at 20%;
- Income of GB£32,001 to GB£150,000 is taxed at 40%; and
- Income over GB£150,000 is taxed at 45%.

Most individuals receive a tax-free allowance, which for the 2016 to 2017 tax year is GB£11,500. This is tapered away for individuals earning in excess of GB£100,000.

30.2 Social security contributions

Employees and employers make social security contributions through paying NICs. The rates are reviewed annually. For the 2016 to 2017 tax year, the rates are as follows:

- Employees pay 12% NICs on their earnings between GB£155 and GB£827 per week. Earnings over GB£827 per week are subject to 2% NICs; and
- NICs made by employers depend on whether or not an employee is part of a contracted out pension scheme. Employers pay 13.8% NICs for all earnings above GB£156.01 per week for employees who are not part of a contracted-out pension scheme, and 10.4% NICs for all earnings above GB£156.01 for employees who are part of a contracted out pensions scheme.

BONUSES

31 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is common to reward and incentivise employees through the use of bonuses and similar arrangements.

These arrangements are generally a matter of contract between the employer and the employee. They are often expressed as being discretionary, but are, in fact, subject to the implied contractual duties (see Question 7). These require employers to exercise discretion, in relation to bonus decisions, in a manner that is not capricious, irrational or perverse.

In operating bonus arrangements, employers must also comply with various statutory duties. For example, bonuses must not be allocated in a discriminatory manner. There are further specific regulatory restrictions governing the amount, nature and composition of bonuses and similar arrangements in certain parts of the financial services sector.

INTELLECTUAL PROPERTY (IP)

32 If employees create IP rights in the course of their employment, who owns the rights?

The general position is that IP rights created in the course of an employee's employment belong to his employer. However, the question of what is done in the course of employment can be disputed. It is therefore generally advisable to include express provisions regarding IP rights in any employment contract, to ensure that the employer can establish ownership if the need arises.
RESTRAINT OF TRADE

33 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

33.1 Restriction of activities

Employees are subject to certain implied duties to protect the interests of the employer during the employment relationship (see Question 7). Employers are advised to supplement these duties with express contractual obligations. These might include, for example:

- Express confidentiality obligations; and/or
- Obligations not to have any outside interests that might have potential to damage the employer's business interests.

33.2 Post-employment restrictive covenants

Employers are also entitled to protect their legitimate business interests by restricting the post-termination activities of former employees in certain limited respects. Legitimate business interests can include confidential information, trade secrets, connections with customers and workforce stability.

The courts will only enforce a post-employment restrictive covenant to the extent the former employer can show that it:

- Protects a legitimate business interest of the employer (see above); and
- Goes no further than reasonably necessary (in relation to general scope, geographic coverage and/or duration) to protect that legitimate business interest.

Whether a covenant goes no further than reasonably necessary is an inherently fact-specific analysis. They should, accordingly, be drafted as precisely (and narrowly) as possible to maximise potential enforcement. An employer is not obliged to make any payment to a former employee in exchange for being bound by such restrictions.

PROPOSALS FOR REFORM

34 Are there any proposals to reform employment law in the UK?

34.1 Referendum

34.1.1 Following the 2016 referendum outcome, the Government has announced its intention to trigger the UK's withdrawal from the EU by giving notice under Article 50 of the Treaty on European Union. That notice, once given (which current Government indications suggest will be in the first quarter of 2017), will trigger a two-year deadline for the UK and EU to negotiate a withdrawal agreement, although the deadline can be extended with the unanimous consent of the remaining EU member states. During the negotiation period, EU laws and treaties will still apply to the UK, including the right for EU nationals to work in the UK. This means that all current EU-derived employment laws should remain in place for at least two years.

34.1.2 In theory, if the UK ultimately leaves the single market, the UK Government could propose material changes to existing employment laws, but that is considered unlikely in practice for a host of social, political and commercial considerations; future trade agreements with the EU are highly likely to require continued compliance with key EU labour laws.
Conceivably, within the scope of any withdrawal agreement, tweaks might be made to UK employment laws to make the country more attractive to outside investment and to address some of the less popular EU-derived developments (such as the continued accrual of holiday entitlement during long-term sick leave, the expansion of sums to be included in holiday pay, the difficulty of harmonising terms and conditions of employment following a TUPE transfer and the agency workers regulations), but it is likely, overall, that the impact on key employment laws will be minimal.

Developments to UK employment law anticipated in the meantime include:

- **Salary sacrifice arrangements.** It is anticipated that tax savings on employee perks like gym membership and the provision of a mobile phone bought through a salary sacrifice scheme will be abolished in 2017, but that salary sacrifice schemes covering key employee benefits like pensions and childcare vouchers will not be affected.

- **Gender pay gap reporting.** It is expected that, by April 2017, larger employers (private and voluntary sector employers with 250 or more employees) will be mandatorily required to publish an annual report containing data on any gender pay gap.

- **Free childcare.** The Government is planning to double the number of hours of free childcare for three and four year old children in working families from the current 15 hours to 30 hours from September 2017.

- **Taxation of termination payments.** From April 2018:
  - the existing GBP30,000 income tax exemption and employee NICs for termination payments will continue to apply (however, employers’ NICs will be due on termination payments made in excess of GBP30,000);
  - all payments in lieu of notice will now be taxed (even if they are non-contractual);
  - foreign service relief will be withdrawn; and
  - exemptions on disability payments will be limited in respect to injury to feelings.

- **General Data Protection Regulation.** New EU-wide data protection laws will come into force on 25 May 2018 (before the UK’s anticipated withdrawal from the EU).

- **Grandparents’ leave.** The Government intends to extend SPL and SPP to working grandparents by 2018.

- **Senior managers’ regime.** During 2018, it is expected that the current senior managers’ regime (which regulates the conduct of senior managers in UK banks) will be extended to all persons regulated under financial services legislation.

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