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Employment Litigation: Procedures, Remedies and Best Practices

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INTRODUCTION

For employers with operations in multiple jurisdictions, litigation over disputes related to employment matters is a very real concern, which applies to every sector of industry, in every region of the world.

EMPLOYMENT LITIGATION

Typical points of contention include discrimination, harassment, wage and hour violations, wrongful dismissal, breach of contract, as well as safety in the workplace violations, amongst others. However, while the issues that give rise to such claims are similar, the litigation process is unique to each jurisdiction. For instance, Australia, Colombia, France, Sweden, the United Arab Emirates and the United Kingdom have designated specialized employment tribunals to oversee employment law claims. Conversely, in the United States and Canada, specialized employment courts simply do not exist. Correspondingly, a dedicated labour and employment bar does not exist in China, India or Japan, though there are of course attorneys in those jurisdictions who specialize in that field. Moreover, some countries, such as Belgium and Germany, have different proceedings concerning individual claims arising out of an employment relationship and proceedings concerning the relationship between the employer and other employee representatives (e.g. works councils), referred to as 'collective disputes'. This distinction is important, as different procedural rules apply to each type of proceeding.

EUROPEAN UNION

To further complicate matters, employers with personnel inside the European Union are required to follow the laws of the Member States, EU regulations, and decisions of the Court of Justice of the European Union (CJEU), since EU law takes precedence over national laws. The litigation process for issues involving European Union directives is quite complex. Essentially, the procedure to challenge a European Union directive requires a national court to question the CJEU on the interpretation or validity of the law. The reference for a preliminary ruling promotes active cooperation between the national courts and the CJEU and the uniform application of EU law throughout the EU. Here too, there is an important distinction regarding the party that may request the preliminary ruling. For example, most employers would fall under the category of private litigants or non-preferential plaintiffs (anyone other than Member States, the Commission, the European Parliament and the Council) and must demonstrate an interest in the outcome of the claim in order to request the annulment of a European act. In other words, the contested act must be addressed to the plaintiff or must concern him or her directly.

ADR

Employers and employees faced with a long, drawn-out court battle, often utilize alternative dispute resolution (ADR) procedures to resolve the claim. The most popular forms of ADR include mediation, conciliation hearings and arbitration. ADR also varies greatly by region. In Argentina (specifically within the City of Buenos Aires), Norway, Romania and Switzerland, the law establishes a mandatory conciliation procedure before a claim can be filed with the courts. Following the conciliation hearings, mediation and arbitration remain available to both parties in order to resolve the issue before resorting to litigation. Over the years, mediation has become a popular alternative to resolve employment law disputes, especially in the United States, given the time, expense and potentially negative exposure of litigation. Meanwhile, mediation is rarely used in Brazil, except in conflicts related to collective bargaining.

APPEALS

Similarly, while all jurisdictions allow for some level of appellate review, the laws governing this procedure are extremely precise and detail everything from whether the

decision can be appealed on points of fact or law, which party may appeal, the time frame to appeal, the required credentials for the attorney handling the appeal, as well as which decisions are indeed final and cannot be appealed.

TIPS

Defending a lawsuit can be time consuming, very expensive and can negatively impact the morale of the workforce, the company's public relations image as well as the company's financial stability. Therefore, the central pillars to avoid litigation or minimize the impact of litigation on the employer's business are: knowledge of the applicable legal sources which affect the individual employment relationship, a clear contractual basis for the individual agreements, and efficient dispute-management and documentation. The following 'best practice' policies are recommended for employers:

- draft complete and precise contracts, have them reviewed by an attorney and update them on a regular basis so they are in line with applicable legislation;
- create a proper personnel file for each employee and document shortcomings with written evidence and implement evaluation procedures;
- define work expectations and communicate with the employees and allow them - to the extent possible - participate in decisions that affect them;
- where applicable, invest in social dialogue with the works council, the trade union delegation and the unions to avoid collective labor disputes or to have them settled promptly;
- seek legal advice at an early stage of a conflict or even before a problem arises;
- evaluate whether it may be preferable to settle the case out-of-court by means of a settlement agreement.

As indicated above, there are numerous scenarios, procedures and considerations involved in employment litigation and several ways an employer can minimize the risk of litigation. For these reasons, L&E Global has created this international guide in order to provide our members' clients, HR professionals and academics an introductory analysis of the litigation process throughout the globe.

For more information on the law in a particular L&E Global member country please contact:

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ARGENTINA

I. Overview

a. Introduction

In Argentina, the right to work is protected by the National Constitution, International Treaties, Conventions of the International Labour Organization ("ILO"), and local regulation.

Argentine labour regulation is characterized by its protective nature. This protective nature is based on the fact that the legislator considers the employee the weaker party in the labour relationship. Due to this lack of equality in the negotiation power, the *protective principle* was enacted. This principle is core to Argentine employment case law and regulation.

The *protective principle* covers both individual and collective employment relationships. The application of this principle tends to balance the preexisting differences between the employer and the employee, and is expressed through three (3) rules:

- In cases of doubt, the criterion most favorable to the employee must prevail. It determines that if there is any doubt in the interpretation of any regulation, judges must apply the criterion most favorable to the employee.
- Application of the most favorable provision, which means that if there is any doubt about the application between two (2) legal rules, the application most favorable to the employee prevails.
- Application of the most beneficial condition, which determines that the situation that is most beneficial to the employee must be respected and cannot be modified in any way that detriments the employee's rights.

Other principles that govern labor relationships are listed below:

- **Non-waiver principle**: It provides that the employee cannot waive the rights acknowledged by labour regulations. Thus, if the employee waives any right, such waiver will be considered void.
- **Principle of continuity**: It determines that employment agreements are for an indefinite period of time, thus labour relationships are supposed to last until employees meet the requirements to apply for the pension benefits granted by the Argentine Social Security System.
- **Principle of prevalence of facts**: It grants priority to facts, over formalities. For example, if a lease of service agreement has been executed, but the facts evidence the existence of an employment relationship (subordination notes), the latter will prevail and the executed agreement will be of no value.
- **Territoriality principle**: All the aspects concerning employment relationships will be governed by Argentine regulations regardless of whether the employment agreement has been entered into abroad, as long as services are rendered within Argentine territory.
- **Principle of non-discrimination and equal treatment**: It refers to equality before the law and equal treatment under equal conditions. It also prohibits employers discriminating on the grounds of an employee's sex, race, nationality, religion, marital status, political or trade union ideas, age, disability or physical appearance.

The most important characteristic of the legal culture related to employment is the existence of "labour public order provisions" which establish minimum rights and rules governing labour relationships that cannot be waived by agreement of the parties. Terms of individual labor agreements that establish less rights or benefits than those established by applicable law or a Collective Bargaining Agreement ("CBA") will be void and automatically replaced by the more beneficial terms as established by law or a CBA.

Any modification must be made to increase an employee's rights, and not to reduce them.

b. Claims

Constructive dismissal: An employee may consider himself/herself constructively dismissed before an employer's breach of the labour contract of sufficient seriousness to constitute an offense that prevents the continuation of the relationship.

The employee must notify the employer of such termination by legal notification and prior forewarning, to repair the alleged offense.

Incorrect or lack of registration of the labor relationship is the most common example of constructive dismissal. In this case, the employee must file a formal claim regarding the incorrect or lack of registration by means of a legal notification and require the employer to properly register the relationship, with a penalty for constructive dismissal because of the employer's exclusive fault. If the employer declines such a request, the employee will be entitled to consider himself/herself constructively dismissed, and claim severance compensation, plus applicable fines for incorrect or lack of registration.

Abusive modification of labour conditions: The employer has the right to modify labour conditions provided that certain limits are observed:

- It must not involve a modification related to essential labour conditions, such as compensation, place of work, working schedule or tasks.
- It must be reasonable.
- It does not cause any material or moral damage to the employee.

If the employer fails to comply with any of these limitations, contributing to an abusive exercise of its right, an employee will be entitled to:

- File an injunction to have his/her original labour conditions resume, or
- Consider himself/herself constructively dismissed.

Labour fraud: It usually takes place in the following situations:

- Hiring employees through a Temporary Employment Agency ("TEA"): The company that hires this kind of employees ("User Company") will have to provide evidence that the hiring responds to one of the extraordinary circumstances established by law. In cases of non-compliance with any such requirements, the employee may claim that the User Company fraudulently used the TEA to avoid correct labour registration, in violation of local labour regulation, and claim to be correctly registered by the User Company. If the User Company then refuses to currently register the employee, the employee may be considered constructively dismissed and claim severance compensation, plus applicable fines for incorrect registration.
- Misclassification of independent contractors: There is a legal presumption that the rendering of services implies the existence of a labour relationship, and the company/employer has the burden to provide evidence to demonstrate otherwise.

If an independent contractor agreement evidences any subordination in the working relationship (for example, exclusivity, compliance with a fixed working schedule, and use of corporate email accounts), the relationship will be considered a non-registered labour relationship. As a consequence, the employee may request that the employer "regularize" his/her situation. If the employer refuses to do so, the employee may consider himself/herself constructively dismissed and claim severance compensation, plus fines for incorrect registration.

Work-related accidents or sickness: Employees affected by work-related accidents or sickness, are able to choose between compensation based on the Labour Risk Regime and compensation based on Civil Law regulations.

Under the scope of compensation based on the Labour Risk regime, the Labour Risk Insurer (*Aseguradora de Riesgos del Trabajo* - "ART" -) or the employer, if the employer has not engaged an insurer, is responsible for paying compensation according to the statutory formula (the amount of compensation is based on whether the resulting disability is temporary, partially permanent, or total). If the employee decides to be compensated based on the Civil Law regime, the compensation will be determined by the judge hearing the case.

c. Administrative Agencies that Investigate or Adjudicate Claims

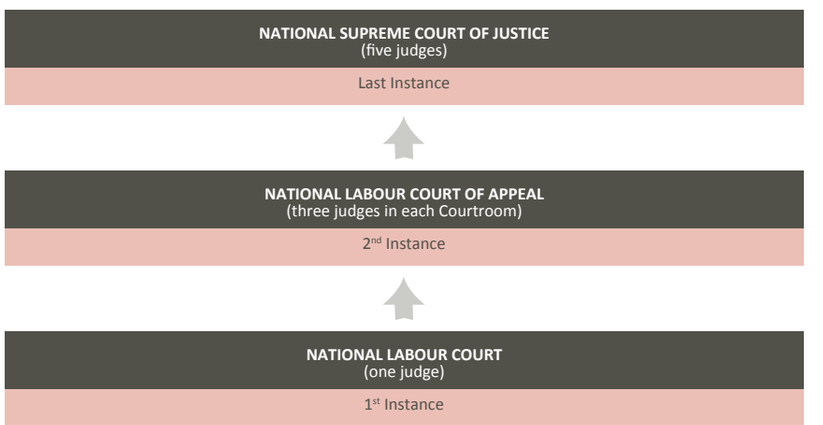
The Ministry of Labour and Social Security (*Ministerio de Trabajo, Empleo y Seguridad Social* -"MTEySS"-) is a national entity under the control of the Federal Executive Branch. It is in charge of investigating or adjudicating employees' claims regarding individual and collective labour relationships. This entity is located in the City of Buenos Aires, but every province has a similar organization in its territory.

By means of Decree No. 355/02, the Federal Executive Branch established that the MTEySS must promote, regulate and supervise the accomplishment of employees' essential rights, especially those rights related to freedom of association, collective bargaining, equal opportunity and treatment and the elimination of forced and child labour.

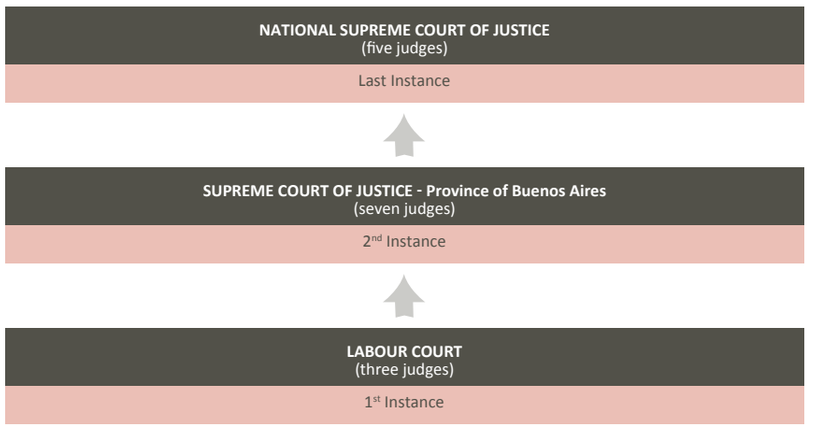
In view of achieving such aim, the MTEySS is able to evaluate, conciliate, mediate and/or arbitrate individual and collective labour conflicts.

d. Court / Tribunal System

NATIONAL LABOUR COURT SYSTEM



LABOUR COURT SYSTEM: PROVINCE OF BUENOS AIRES



e. Alternative Dispute Resolution (ADR)

Mandatory Labour Conciliation Service (*Servicio de Conciliación Laboral Obligatoria* - "SECLO" - mandatory procedure that only applies to the Buenos Aires City jurisdiction)

Spontaneous agreement: Once the employment relationship has terminated, the parties may spontaneously enter into a severance agreement ratifying the termination before the MTEySS. The purpose of such an agreement is to minimise the success rate of any future claim. For the agreement to be valid, it must comply with legal procedures, including the requirement to obtain the Ministry of Labour's approval.

Conciliatory agreement: If an employee is dismissed but he does not agree with the amount paid as severance, he/she may file a claim under the conciliatory procedure provided by the MTEySS. This step of the procedure is mandatory if the employee later intends to file a claim in court. Under this procedure, both parties have to attend a conciliation hearing in an attempt to settle the disputed severance payment. There are two (2) possible outcomes:

- The parties reach an agreement, following which the MTEySS must approve the settlement for it to be valid.
- The parties fail to reach an agreement. If this occurs, the claimant will then be able file a claim in court.

Optional Labour Conciliation Proceeding for Commerce and Services (*Secretaría de Conciliación Laboral Optativo para Comercios y Servicios* – SECOSE -)

This procedure applies to employees covered by CBAs applicable to employees within the commercial sector. Under this procedure, the SECOSE appoints a conciliator and fixes a hearing date. There are two (2) possible outcomes:

- If the parties reach an agreement under this procedure, the MTEySS will approve the severance agreement.
- If no agreement is reached, the proceeding will be terminated and the claimant will then be able to file a claim before the labour court.

Mandatory Conciliation Service for Domestic Service Personnel (*Servicio de Conciliación Obligatoria para el Personal de Casas Particulares* – SECOPECP -)

Under this procedure, SECOPECP appoints a conciliator and sets up a hearing. If the parties reach an agreement, the severance agreement will then be sent to the Domestic Service Labour Court for approval. If the parties fail to reach an agreement, the claimant will then be able to file a claim before the Domestic Service Labour Court.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

Beginning: Within the jurisdiction of the City of Buenos Aires, prior to initiating any judicial procedure, certain pretrial procedures (explained below) must be completed.

Once the pretrial procedure is complied, the plaintiff will then be able to file a claim against the partied that he/she considers responsible. The defendant will then be notified of the claim so that it can reply, in defense of the claim.

If the defendant does not reply to the claim in due time - ten (10) days, although it may be extended by law - the procedure will be continued in the absence of the defendant.

Prior to the parties providing evidence, the Court of Law will set a hearing. The aim of such hearing is to assist the parties in reaching an agreement.

Evidence period: If agreement is not possible, the judge will make an order for the parties to produce evidence and the trial will continue its ordinary process.
Evidence may take the form of:

- a statement
- documentary evidence
- an expert assessment
- information request
- witnesses evidence

Judgment: Once the evidence offered by both parties is submitted, both of parties are permitted to file its closing arguments.

Following this step, the judge must issue a judgment, which may be appealed by the parties.

Execution of the judgment: If the definitive judgment is not complied with, the affected party can initiate an execution procedure before the same Labour Court.

ii. Pretrial Proceedings

Local procedural rules regarding pretrial proceedings vary from province to province. For example, in the city of Buenos Aires, the exhaustion of a conciliation process (*Servicio de Conciliación Laboral Obligatoria* -"SeCLO"-) before the MTEySS is a precondition to filing a complaint before a Court of Law. In this process, both parties must attend a conciliation stage, which seeks to assist the parties settle the claim.

If the parties reach an agreement, the agreement must receive MTEySS' approval for the settlement to be valid. Once the agreement is approved, the parties have a legal certainty

of ninety nine per cent (99%) that the agreement is valid and may be enforceable in the future should the employee bring a further claim in the matter.

If the parties do not reach an agreement, the claimant will then be able to file a judiciary claim for a Court of Law to resolve the issue.

iii. Role of Witnesses, Counsel and Court / Tribunal

Witnesses: They are required to attend to the Court at the specified date for their deposition hearing. If a witness fails to attend to the hearing, the Court will compel him/her to be present, with a police presence.

Witnesses must tell the truth, otherwise they will be punished with the crime of false testimony.

It is important to point out that parties are only allowed to offer up to five (5) witnesses each. If more witnesses are included on the list, only the first five (5) witnesses will be summoned by the Court. Witnesses' identification must be clear, specifying their name, last name, address and profession.

Persons under fourteen (14) years of age are not allowed to testify. In addition, relatives (blood and in-laws), and spouses are excluded as witnesses by law.

Counsel: Parties must be represented by an attorney to be able either to file or reply to a judicial claim.

When giving legal advice or acting before a Court of Law, attorneys must observe their duties and expected conduct, ruled by the Ethics Code. Moreover, attorneys must respect the duty of loyalty in connection with his/her client's interests.

If an attorney breaches the provisions of the Ethics Code, they could be sued before the Disciplinary Court of the Bar Association where the attorney is enrolled.

Court: Judges are in charge of solving issues within their own jurisdiction. They must be impartial and must issue their sentence based on the applicable law, international treaties, labour principles, case law, jurisprudence, etc.

iv. The Appeal Process

Once the Court has issued its decision, parties have six (6) business days to file an appeal. For the appeal process to continue, parties must present a reasonable view of the parts of the decision that they consider to be detrimental to the rights involved.

Parties are not permitted to file evidence before the Court of Appeals.

The Labour Court of Appeals - through one of its ten (10) courtrooms, chosen at random - is responsible for appeals.

Whilst a matter is before the Court of Appeals pending a solution, the original decision will be suspended and will not have any effect.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Costs: The general principle is that the costs arising from a judicial process must be covered by the defeated party. However, in exceptional circumstances the hearing judge is able to exempt the defeated party form its payment, or summon the winning party to cover them.

Moreover, the judge may determine that each party covers their own costs.

Attorneys' fees: In the case of the winning party, attorneys' fees may be stipulated by the judge in a range from eleven per cent (11%) to twenty per cent (20%) of the total amount of the judgment/sentence.

In the case of the defeated party, attorneys' fees may vary in a range from seven per cent (7%) to seventeen per cent (17%) of the total amount of the judgment/sentence.

In both cases, decisions about attorneys' fees may be appealed.

Remedies: There are two (2) kinds of remedies available in the Argentine labour law system:

- Ordinary Remedies: These are aimed at achieving the revision of the first instance decision by the hearing judge, or by the higher instance court.
- Extraordinary Remedies: These are generally applied in exceptional occasions before the National Supreme Court.

Timing: Generally, labour claims procedure may last from one (1) to ten (10) years depending on certain circumstances (assigned Labour Court, quantity and difficulty regarding evidence offered by the parties, procedural pitfalls, delay in notifying Court's decision, appeal process, etc.).

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The following are the main points of the Labour Union legislation currently prevailing:

- Workers are guaranteed the right to organize themselves into unions and to decide whether or not to join.
- Unions may be formed among workers who engage in the same or similar activities with common interests, and among workers engaging in different activities of the same trade, profession or job category. Unions representing the same activity, trade, profession or job category may form federations. Such federations may then form regional labour organizations, which in turn may belong to the General Confederation of Labour (CGT).
- Supervisory personnel may organize in unions, but may not belong to the same unions as non-supervisory personnel.
- Unions may not be formed on the basis of political ideologies, religious creeds, nationality, race or sex, and they may not engage in political activities or support them.
- Only union members may be assessed for union dues, but non-member workers may be required to contribute to unions if so provided for in the applicable CBA.
- Unions and federations must keep the Labor Ministry informed of data concerning their assets, names of members and officers, etc., and may be audited by the authorities.
- Official recognition is only granted to the most representative union for an activity, but a rival union may replace such union if it obtains a significantly greater number of members. Only the officially recognized union may engage in collective bargaining and collective agreements (when no federation is involved) and represent workers before the government, its agencies, or courts of law. Federations may also be recognized, and when this occurs they handle the collective bargaining and collective labour contracts on behalf of their member unions.
- Unions and federations enjoy certain tax exemptions.
- Officers and delegates (shop stewards) of officially recognized unions may not be dismissed from their jobs while they hold office and for one (1) year thereafter.

An employer is not required to bear the cost of a worker's compensation and payroll while an officer works full time for a union. However, an employer must re-engage that worker once they cease full time work for a union.

- There are regulations governing unfair practices on the part of employers or the associations representing them and the labor courts are empowered to hear the cases arising in this sphere. The cost of litigating labor matters in Argentina can be quite expensive, since the experts appointed by the competent court used to charge a percentage of the value of the lawsuit, while the employer being liable for such costs. Certain rules are either enacted or designed to reduce said cost.

d. Specialized Litigation Bar

Attorneys must be enrolled under the Bar Association of the jurisdiction where they intend to render their services. Otherwise, they are not allowed to act before any Court of Law.

Mandatory enrolment under the Bar Association is required regardless the attorney's specialization (criminal, labour and employment, civil, corporate).

III. Tips to Avoid Litigation

Employers with operations in multiple jurisdictions should avoid:

- Entering into independent contractor, distributor or sales representative or other designated status agreements without considering the protective nature of the Argentine labour regime
- Applying international agreements or policies in a foreign language without local legal review. In view of the protective nature of labour regulations in Argentina, all documents executed should be in Spanish, in addition to any other language that the employer wishes to use.
- Staffing agency employees: It is important for employers to comply with requirements regarding working hours, forms, etc. Otherwise, if there is a conflict there is a risk that the staffing agency employee argues the existence of a labour relationship with the company.
- Sometimes an employer wishes to apply the law of its country of origin. However, in Argentina, based on the territorial principle, the law of where services are rendered applies, disregarding any agreement between the parties regarding jurisdiction.
- Paying non-registered amounts: In cases of incorrect registration, there will be risks of severe fines payable to employee, plus social security and tax contingencies.

IV. Trends and Specific Cases

a. New or Expected Developments

- The scope of the employer's duty regarding safety has been extended by case law. Presently, the duty not only involves compliance with safety and hygiene standards and the measures taken to avoid damages to employees' physical health, but also the obligation to provide a healthy workplace, free of moral or sexual harassment or discrimination.
- An employee's drug or alcohol abuse is considered a disease. Therefore, if an employee is absent from work due to their drug or alcohol abuse they must produce a medical certificate evidencing same and take paid sick leave. Disciplining an employee because of their drug or alcohol abuse can attract an action in discrimination.
- Employers are able to monitor their employees' corporate e-mail accounts, as it is considered a work tool granted by employers for employees to render their services.

However, given the Constitution establishes a right to privacy in "mailing, letters and private papers," an employee has an expectation of privacy in any mail he receives. This right prevails over the employer's right to exercise any kind of control over the employee. Thus, before an employer accesses any of its employees' correspondence, it must receive authorization from the employee to do so, and comply with certain other requirements, or it will be at risk of committing a criminal offense punishable by up to six (6) months imprisonment. Based on the employee's expectation of privacy, employers should put in place a human resources/company policy addressed at minimizing its exposure to claims based on violations of employees' right to privacy.

- Remote work is a growing trend. It is a new and flexible form of work and is increasingly gaining importance as a retention measure used by Human Recourses. Despite of the fact that remote work is generally considered a benefit for employees, it is important that employers manage remote work effectively, so as to prevent risks and to minimize an employer's liability. Employers must be alert to the legal issues associated with remote work prior to implementing any such working scheme.

b. Recent Amendments to the Law

i. Labour Risk Regime

On October 26, 2012 Law No. 26,773 was enacted, which modified the Labour Risk Law No. 24,557 (*Ley de Riesgos del Trabajo* - "LRT" -). The main aspects of the law are:

- It establishes a repair regime conformed by this law, the LRT and Decree No. 1,694/09.
- It revokes the exclusion of employer civil liability. As a result, victims must now choose, between the compensation granted by the LRT regime and the compensation of the civil system, which implies the application of civil legislation and its own principles, excluding the protective labour principles.
- Within fifteen (15) days of an employee's death or disability determination, those who are forced to make monetary reparations to the employee must reliably notify the victims or the interested party of the amount of the corresponding compensation regarding the LRT regime.
- Once notified, the employee or the interested party may receive such amounts, or may file a claim before a Civil Court.
- In terms of compensation benefits, the LRT regime enables a single payment for damages, which will be updated by an index published by the MTEySS.

In 2014, two (2) new Decrees further modified the Labour Risk Regime.

- Decree No. 49/2014, on New Illnesses, incorporated to the List of Occupational Diseases: This Decree incorporated new affections like varicose veins and hernias to the Official List of Occupational Diseases and established how to analyze the existence of an occupational disease, the authority who will be responsible for determining the existence of an occupational disease, and the mechanisms for establishing the corresponding compensation.
- Decree No. 472/2014, regulating Law No. 26,773: This Decree complements the system of compensation for occupational accidents and diseases, establishing a mechanism for regular increase in the compensation amounts.

ii. Employees' freedom of thought

On December 14, 2013 Law No. 26,911 was enacted, which modified Section 73 of the National Employment Law ("NEL") regarding an employee's freedom of thought.

The amended section provides that an employer must not make surveys or investigations, at any time, about the political, religious, labour, cultural or sexual preference of an employee. The section also provides that an employee is free to express his/her point of view on such issues at the workplace, as long as it does not interfere with the normal course of his/her tasks.

However, the section does not set fines or penalties for an employer's breach of these protections. The relevant fines and penalties will need to be established by the courts and administrative authorities.

iii. Promotion of Registration of Labour Relationships and Prevention of Labour Fraud

On May 21, 2014 Law No. 26,940 was enacted, however, it did not come into effect until October 2, 2014. This law establishes a system of incentives and sanctions aimed at minimizing unregistered labour relationships.

The MTEySS and the Federal Tax Bureau (*Administración Federal de Ingresos Públicos* - "AFIP" -) are the public institutions responsible for these monetary incentives and sanctions.

Also, through this law, the Executive Power created a public record called "REPSAL", which includes information concerning those employers who do not register their employees or who breach labour laws. The record is available online for all who wish to view it.

iv. Amendments to the Proportional Semi-Annual Bonus Payment

On January 20, 2015 Law No. 27,073 was published in the Official Gazette. This regulation determines certain payments dates for collection of the proportional semi-annual bonus payment called "aguinaldo", or "sueldo annual complementario" ("SAC"), modifying Section 122 of the NEL.

The SAC must be paid in two (2) payments. Such payments have an expiration date, being the first on June 30th, and the second on December 18th of each year from 2015. The amount that employers must pay each semester is equivalent to fifty per cent (50%) of the highest monthly salary collected in the prior six-month term, as it was in the NEL before this amendment.

In order to calculate the second SAC payment, the employer must calculate the salary for December and pay the employees fifty per cent (50%) of such calculation on December 18th.

If the calculation made by the employer does not match the salary effectively accrued, the second payment of the SAC must be recalculated as follows: the difference between the payment accrued and the payment made by the employer on December 18th must be included in December's salary.

If an employer does not respect the payment dates established by law regarding the SAC payment, the MTEySS may impose a fine and such failure may be considered sufficient cause for a constructive dismissal by the relevant employee.

V. Conclusion

The labour scenario in Argentina is "employee friendly", with labor regulations establishing certain minimum and irrevocable conditions of employment.

In view of this characteristic, it is highly advisable for employers with operations in Argentina, and, in particular, in multiple jurisdictions, to be aware of local regulations before commencing operations.

It is also important to point out that judicial decisions depend on the implementation of labour law and also the applicable socio-cultural and economic conditions.

AUSTRALIA

I. Overview

a. Introduction

In Australia, litigation over employment or labour issues takes a variety of forms and is very common. While labour law is often seen as the "poor cousin" of areas such as commercial law, it would not be an exaggeration to say that the workplace environment is central to the Australian culture and quality of life, and that without the benefit of employment and labour law Australian society would be very different.

In order to understand the way that employment litigation in Australia takes place, it is important to note that Australia operates as a federation, with two separate but connected levels of government with their own courts and legal systems. Thus, there is a Commonwealth (federal) system of government sitting alongside systems for each State (Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia). There are also separate legal systems and courts for the relevant Territories (the Australian Capital Territory and the Northern Territory), which, while not having full recognition of States, nevertheless have a degree of autonomy and their own legislatures. Under Australia's Constitution, there are powers that are given to the Commonwealth Government alone (for example, defence) and powers that are shared with the States. Where powers are shared, the Constitution provides for resolution of any conflict between State law and Commonwealth law by providing for the priority of the federal law. Where the Constitution is silent, the power resides exclusively in the States. The Constitution created the High Court of Australia and granted extensive powers over Constitutional issues that arise in any part of Australia, as well as acting (subject to leave in appropriate cases) as an appellate court sitting at the apex of the Australian legal system. The Constitution also allowed the Commonwealth to create federally based courts, which the Commonwealth Parliament has done. Two (the Federal Court of Australia and the Federal Circuit Court) are particularly relevant to employment matters, because they have jurisdiction to deal with certain employment related issues. The system of Courts in Australia is discussed in detail below in Section (d).

There are provisions under the Australian Constitution to allow States to refer their powers to the Commonwealth. This referral power is important, because from January 2010 the majority of States referred a large part of their industrial relations power to the Commonwealth. However, the referral was not universal nor complete: for example, States generally retained the power to regulate the employment conditions of their own Government employees, and in some cases, retained the right to regulate local government (the third tier of government in Australia).

The result is that employment litigation in Australia can be undertaken in both Federal and State jurisdictions, and can be governed by legislation made either by the Federal Parliament, or by a State Parliament, or indeed can be taken under the common law, a system of judge-made law that Australia inherited from its British beginnings. The result is at times a bewildering array of potential causes of action, in an equally bewildering choice of venues, including federally-based courts operating under the Australian Constitution, tribunals created by Federal Statutory law, common law based Supreme Courts in each of the States, District or County Courts (the title varies from State to State); Local Courts or Magistrates Courts (again, titles vary); in some States statutory-based specialist courts (such as Industrial Courts or Industrial Magistrates) as well as a variety of tribunals created under State legislation. To add to the complexity, some State Courts (Supreme Courts, for example) can exercise federal jurisdiction in some matters (federal statutes can confer federal jurisdiction on State courts, for example), and some federal courts can exercise common law jurisdiction (the Federal Court, for example, when dealing with a statutory claim under Commonwealth legislation, can also deal with a related common law claim (such as breach of contract) under what is referred to as its

accrued jurisdiction). In an attempt to reduce the incidence of related matters running under both State and federal systems, cross-vesting legislation is also available, allowing one court to refer or take up litigation commenced in another jurisdiction.

Employment or labour-related litigation not only functions under a choice of systems, but can cover a variety of topics. At the highest level, for example, the High Court of Australia can deal with fundamental issues of whether an employment statute is validly enacted under the Australian Constitution. At the other extreme, the industrial tribunals can deal with a claim by a single individual that he or she has been unfairly dismissed, or has not been paid his or her entitlements under an industrial instrument, no matter how small the claim. Types of claims available in Australia are discussed in more detail in Section (b).

b. Claims

Australian law recognises various labour and employment law claims. Note that many claims overlap and can be brought in more than one jurisdiction (see Section (d) for the Court system in Australia, as well as noting the Introduction in Section (a) above). Claims can be combined in most jurisdictions: for example, a single claim could involve allegations of breach of contract, negligence, underpayment of wages and statutory entitlements and discrimination. In appropriate circumstances, such a combined claim could be brought before a State or a Federal Court, and could be taken at a lower or intermediate court level (such as a Local or Magistrates Court Level, or a District or County Court Level) or at a Superior Court level (such as a Supreme Court of a State). The following lists the main areas where claims can be brought, but it does not purport to be a closed list.

Constitutional issues and the settlement of legal issues on ultimate appeal

While in some sense the resolution of constitutional questions, and settling legal issues (such as declaring what the common law is in Australia, and providing an ultimate decision on the interpretation of an employment statute) are not separate "claims" under Australian labour or employment law, they are listed separately because in the history of Australian industrial relations, the role of the High Court, and the role of constitutional questions in particular, has been very important. While the High Court is not the only Court capable of answering questions about the Australian Constitution, it is the ultimate Court that deals with such questions, and the ultimate court of appeal in the Australian legal system, and it has been extremely influential in the development of Australia's industrial system.

Historically, the States dealt with the bulk of employment and industrial systems, because the Australian Constitution gave to the Commonwealth Parliament the power to deal with "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". Such an approach to the legislative power limited the Commonwealth power as any industrial or employment issue that was internal to a State was exclusively the domain of State law, and so dual State and Federal systems operated alongside each other over that time. Over the years, there has been significant litigation over whether various forms of legislation at both State and Federal levels were valid exercises of power, and jurisprudence over such an approach was shaped by the High Court for nearly a century.

Following some decisions of the High Court that suggested an alternative approach may be possible (for example, the outlawing of secondary boycotts under Australia's then Trade Practices Act was based on the corporations' power and had held to be valid by the High Court, as was the statutory scheme in 1996 which included provisions for enterprise flexibility agreements, certified agreements and unfair dismissal remedies)

the Commonwealth Parliament in 2005 changed the focus of the federal industrial legislation by relying, not on the conciliation and arbitration power, but on the power given to the Commonwealth in the Australian Constitution to legislate for various types of corporations (trading, financial and foreign corporations). The States and some trade unions challenged the Constitutional validity of the legislation and in late 2006 (in State of New South Wales v Commonwealth of Australia) the High Court held by a majority that legislation based on that power was valid, giving a very wide reading to the use of the corporations' power. This power extended to:

- the regulation of the activities, functions, relationships and the business of a corporation
- the creation of rights, and privileges belonging to a corporation
- the imposition of obligations on a corporation.

This meant the Commonwealth could:

- regulate the conduct of those through whom a corporation acts, including its employees
- regulate those whose conduct is, or is capable of, affecting its activities, functions, relationships or business (including trade unions).

Following a change of government, new federal industrial legislation (the current *Fair Work Act 2009*) was introduced. This legislation continued to be based on the corporations' power, but was amended to allow States to also refer their industrial relations powers to the Commonwealth (an invitation that was largely accepted), thus broadening the powers of the Commonwealth in the area of employment and industrial relations even further.

Nevertheless, there have been, and no doubt will be, challenges to particular provisions of the legislation on the basis that it is prohibited by the Constitution. As such, it will remain an important part of the industrial and employment landscape in Australia, even if its use is less than when industrial relations was based on the conciliation and arbitration power.

Common law based claims

Many claims in the employment and industrial relations sphere in Australia can be the subject of claims under Australia's shared common law heritage. This can be as simple as a claim for breach of contract, or a claim for damages based on wrongful dismissal. Claims can be for breach of express terms of the contract of employment, or for terms implied at law, such as the term that requires an employer to provide a safe system of work. Such claims can be founded not just in contract, but also in tort. Claims, for example, could be based on the tort of negligence. Further remedies can include specific performance, equitable damages, declaration and injunctions.

Union activity can be curtailed by reliance on the ancient tort of intimidation and nuisance, for example. Torts of deceit and injurious falsehood are occasionally pleaded in the Australian Courts, and even matters such as trespass to the person will be seen from time to time in matters such as sexual harassment cases. The "economic torts", particularly allegations of interference with contractual relations, will regularly be the subject of disputation when an employee leaves one employer and seeks to work for a competitor.

Claims based around personal injury

It is possible for employees in Australia to make a claim based on personal injury caused by the workplace. Such claims can be made under several causes of action, and can be brought relying on either the wrongful conduct of the employer, or the wrongful conduct of another employee, where there is a sufficient connection to the employment (vicarious liability).

Firstly, as noted above, employees can take common law claims based on negligence, potentially coupled with a claim based on breach of the implied contractual term that the employer will take reasonable care of the health and safety of the worker. This may also be combined with a claim based on breach of a statutory duty of care imposed by the Work Health and Safety Acts in place in the various Australian jurisdictions. Such claims are typically heard in the civil courts (Supreme Court of a State, or a County or District Court).

Secondly, there is in each Australian jurisdiction a form of non-fault insurance for employees who are injured at work, usually referred to as Workers Compensation. These differ from jurisdiction to jurisdiction, but typically involve a form of weekly payment to injured workers and a rehabilitation system to return injured workers to their employment as soon as possible. Such claims are dealt with in various statutory tribunals or bodies. Legal involvement in such systems is highly regulated, and as such tends to be the domain of specialist firms, which do not necessarily deal with other employment related work. Note that the legislation around workers compensation will often impose conditions on employees taking common law actions in relation to a workplace injury. Amounts of compensation under such statutory schemes are modest in comparison with common law damages.

Thirdly, damages for personal injury can be claimed as part of damage flowing from other forms of statutory relief. For example, an employee who has been the subject of sexual harassment and whose health has been injured as a result (for example, they may suffer a permanent psychiatric condition as a result of the treatment to which they were subjected) may claim, as part of the compensation, damages for that personal injury.

Fourthly, there are a variety of provisions in employment and industrial statutes that relate to employees who are ill or who suffer an injury at work. For example, most workers will be covered by the Commonwealth *Fair Work Act*, which in effect prevents termination of employment for reasons relating to short-term illness or disability (that is, where the absence is less than three months). All jurisdictions provide for a form of paid leave when an employee is unfit to work. Under the *Fair Work Act* it is a civil offence, and the employee is given a statutory right to claim compensation, if the employer takes any form of adverse action because the employee claims such leave (or any other workplace right). Other jurisdictions also make additional provisions: in New South Wales, for example, there is a provision that allows an employee injured at work who has been dismissed to seek reinstatement following his or her recovery.
Where a third party wrongfully injures an employee and the employer suffers loss of the employee's services, the employer also has a cause of action against the third party for the loss of services (the ancient tort action per quod servitium amisit). A number of the States have statutory limitations on such actions.

Statutory claims involving dismissal or other action against employees

As well as common law claims for wrongful dismissal, the various jurisdictions in Australia provide for statutory claims relating to dismissal (and in some cases, other forms of adverse action) of employees.

The *Fair Work Act*, for example, contains provisions that give certain persons who have been dismissed a remedy for any dismissal from employment that is "harsh, unjust or unreasonable". There are limits on the action: it must, for example, be a case of termination at the initiative of the employer (and so, not, for example, a resignation); there must be minimum periods of service (depending on whether the employer was a small business or not, 12 months or six months), there are monetary caps (currently $133,000 salary per year, though this is indexed each year) unless the person is also covered by a Modern Award (a form of subsidiary legislation made by the Fair Work Commission under the *Fair Work Act*) that sets out terms and conditions of employment) and the termination is not a genuine redundancy (defined in turn in the Act itself to require consultation and other steps as well as it being objectively a case of redundancy).

The *Fair Work Act* also prohibits what is referred to as "adverse action". Under these provisions, an employee is given the right to make a claim (and the employer can be prosecuted for a civil breach of the *Fair Work Act*) if they are subjected to forms of "adverse action" resulting from the exercise of any "workplace right". It applies to employees and to others with a workplace right, such as independent contractors. A workplace right is defined broadly, and will cover claiming benefits under an industrial instrument or a workplace law, having the ability to participate in industrial proceedings, being able to make a complaint or inquiry either under a workplace law or industrial instrument or under the contract of employment. It is also adverse action to take various forms of discriminatory action against an employee (see below). The adverse action provisions are based on freedom of association provisions in earlier legislation, which prohibited action against employees because of union activity, but are now much broader and are proving to be fertile ground for claims by employees. The jurisprudence around these provisions is still not settled.

Both forms of action, unfair dismissal and adverse action, have short limitation periods, 21 days from termination of employment.

A reasonably recent amendment to the *Fair Work Act* has seen the introduction of an anti-bullying jurisdiction, where an employee who claims to have been bullied at work can seek orders from the Fair Work Commission that the bullying stop. This form of claim does not allow for an award of compensation.

State jurisdictions have similar statutory rights to seek reinstatement if a dismissal is unfair (now of limited significance, as most employees will be covered by the Federal system. State systems remain of significance for State public servants, and in some jurisdictions, employees of local government). Some States have specific provisions that supplement the bullying jurisdiction of the Fair Work Commission. Victoria, for example, amended its *Crimes Act 1958* to insert section 21A, extending the definition of stalking to include bullying behaviour such as making threats, abusive language and offensive words. The *Personal Safety Intervention Orders Act 2010* (Vic) contains mechanisms for people who have suffered from behavior, which is often associated with bullying including: assault, harassment, serious threats and stalking to obtain an intervention order.

Claims based around prohibited discrimination in employment

In Australia, unlawful discrimination is prohibited by legislation at the federal, state and territory levels, with discrimination law providing employees with rights, remedies and redress for prohibited conduct arising during their employment.

Prohibited discrimination at the Federal level

At the federal level it is unlawful to discriminate against a person on the grounds of sex, race, disability and age. Legislation includes:

- Sex Discrimination Act 1984
- Racial Discrimination Act 1975
- Disability Discrimination Act 1992
- Age Discrimination Act 2004

As an example of how the legislation works, under the Disability Discrimination Act it is unlawful for an employer or person acting or purporting to act on behalf of the employer to discriminate against a person on the ground of their disability in the following circumstances:

- in the arrangements made for determining who should be offered employment
- in determining who should be offered employment; and
- in the terms or conditions in which employment is offered.

Discrimination can be "direct discrimination" or "indirect discrimination". Direct discrimination arises when a person is treated less favourably because of his or her attribute than a person without that attribute would be treated in the same circumstances. Indirect discrimination occurs where a requirement, condition or policy that appears on its face to be neutral operates in practice in a way which impacts less favourably on a particular group because they have the relevant attribute.

There is no specific prohibition on the grounds of religious belief in any of the federal acts governing discrimination law. However, protection against such discrimination is a human right explicitly guaranteed by Article 26 of the *International Covenant on Civil and Political Rights*. The Covenant is a Schedule to the *Australian Human Rights Commission Act 1986* (Cth) which enables the Australian Human Rights Commission to inquire into a complaint of discrimination on the ground of religion in some circumstances (where the conduct is committed by the Commonwealth or its agencies). The Human Rights Commission can also "inquire into any act or practice, including any systemic practice that may constitute discrimination" where discrimination has the same meaning as used in the ILO Convention Concerning Discrimination in Respect of Employment and Occupation (No 111,1958) (any distinction, exclusion or preference made on any basis, including race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation) but this power does not extend to grounds already covered by the four federal anti-discrimination Acts, and the Human Rights Commission is limited to investigating a complaint and attempting to resolve it via conciliation.

Under the *Fair Work Act* an employer must not take an adverse action against an employee because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. Adverse action includes dismissal, injury alteration of position and discrimination between employees.

Prohibited discrimination at the State level

The laws in the States and Territories generally prohibit discrimination on a much broader range of grounds than the Commonwealth legislation. By way of example, the *Anti-Discrimination Act 1977* (NSW) prohibits sexual harassment of employees, sex discrimination, discrimination on the grounds of marital or domestic status, discrimination on the ground of disability, discrimination on the ground of a person's responsibilities

as a carer, discrimination on the ground of homosexuality and age discrimination. In relation to Queensland, the *Anti-Discrimination Act 1991* (Qld) prohibits discrimination in work and work related areas on the grounds of sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or religious activity, trade union activity, lawful sexual activity, sexuality, family responsibilities, and association with a person identified on the basis of these attributes. Victoria has a similar scheme under the *Equal Opportunity Act 2010* (Vic) which prohibits discrimination in employment for the following reasons: age, breastfeeding, employment activity, gender identity, disability, industrial activity, lawful sexual activity, marital status, parental status or status as a carer, psychical features, political belief or activity, sex, sexual orientation, personal association with a person who identifies with one or more of these attributes. Victoria also has a broad protection of human rights under its *Charter of Human Rights and Responsibilities Act 2006* (Vic). This allows for enforcement of human rights on a broader level.

Recovery of employee entitlements

Employees can claim work-related entitlements in a variety of ways. As noted above, there is a provision for a simple claim for breach of contract should an employer fail to pay employees their entitlements.

In addition, in Australia, many entitlements find their source in some form of regulated industrial instrument. Modern Awards, for example, are a form of delegated legislation made by the Fair Work Commission, and contain rates of pay and conditions for a variety of industries. Employees can also enter into collective agreements ("enterprise agreements") which are approved by the Fair Work Commission and registered under the *Fair Work Act*. Further, the *Fair Work Act* itself provides for minimum employee entitlements (the National Employment Standards), such as parental leave and related entitlements, annual leave, personal carer's leave and compassionate leave, community service leave, public holidays, notice of termination and redundancy pay. For entitlements arising under the Act or under an industrial instrument, action can be taken as a statutory claim, either before the Federal Court, the Federal Circuit Court, or an eligible State court (a District, County or Local Court, a magistrates court, the Industrial Relations Court of South Australia or the Industrial Court of New South Wales).

The legislation provides for a simplified procedure for "small claims", where the amount in question is under $20,000.

Claims around work health and safety

Where there has been a failure to take care of a worker's health and safety, the worker may have a variety of remedies. As noted above, the law in Australia implies a duty of care as a term of a contract of employment, and a failure to take care of the employee's safety can give rise to claims for breach of contract as well as in negligence.

Most Australian jurisdictions have adopted harmonised work health and safety laws (those jurisdictions which have not adopted the harmonised legislation nevertheless have similar statutes), which impose high levels of obligation on those conducting a business or undertaking to take reasonable care to ensure the health and safety of those working in the business or undertaking, as well as other people (such as visitors to the workplace). Significant penalties apply to breaches of these obligations, and the regulatory bodies in each jurisdiction are active and regularly prosecute for breaches. While the various work, health and safety statutes do not give employees a direct right of action, failure to abide by the work, health and safety legislation (in particular, failure to follow prescribed safety guidelines published from time to time under the legislation) will be available as evidence to an employee considering action, for example, in negligence.

Collective disputes and other representational action

Unions and employer bodies, and to a lesser extent, collective groups of employees, have access to the Fair Work Commission (and the courts where appropriate under the legislation) in a variety of circumstances related to the negotiation of industrial conditions. Such circumstances include:

- making of, and review of, modern awards. The *Fair Work Act* provides for the Commission to make, and review on a regular basis, Modern Awards that govern pay and conditions within a particular industry. The Act makes provision for employers and unions to take part in such reviews by making submissions (including if necessary calling evidence). There are also provisions for regular review of superannuation provisions in awards.
- enterprise agreement making and bargaining generally. The *Fair Work Act* makes provisions for employees to make collective agreements concerning their conditions of employment. Unions (and others) can be appointed to assist as bargaining agents. As well as seeking approval of the agreement (or opposing
- registration, as the case may be) there are provisions for other forms of application related to the bargaining process. For example, if there is concern that the parties are not bargaining in good faith, another party can seek a bargaining order,
- or where there is a breach of that order, a serious breach declaration. There is a provision for an application to be made to the Commission to deal with a bargaining dispute.
- low paid employees. There is a provision for the Commission to make a declaration in relation to low paid employees, who have not historically had the benefits of collective bargaining.
- workplace determinations. These can be related to low paid workers, industrial action, or workplace bargaining.
- minimum wages and equal remuneration.
- protected industrial action. Under the *Fair Work Act*, certain industrial action is legal. Unions can make application in relation to such action, including seeking a ballot to approve such action.
- dealing with disputes. While the ability of the Federal Commission to deal with an industrial dispute is limited, the Act provides for the Commission to deal with disputes in accordance with the dispute settlement process set out in the enterprise agreement (or in default, a model clause set out under the Act).

Under State systems (now largely irrelevant to most employees in this respect), the ability to approach the State Commissions is much broader. For example, a union or an employer can under the New South Wales Act notify an industrial dispute whenever the circumstances made it likely that there could be some form of industrial action. This often took the form of a simple letter to the Industrial Registrar but could even be a phone call giving the important details. The Registry will record the necessary facts and alert the President of the Commission, who will then allocate the matter to a member of the Commission. A compulsory conference will then be convened, again by telephone. This represents a much more interventionist approach than currently adopted federally.

Intra-union and inter-union disputes

Generally, trade unions and employer organisations in Australia that wish to participate in the industrial relations system are required to be registered. Most States, and the Commonwealth, provide for registration of unions and industrial associations. Some Acts, such as the Commonwealth's *Fair Work (Registered Organisations) Act 2009*, provide for incorporation of industrial bodies. While far less important than it once was, no survey of forms of action in the Australian industrial relations system would be complete without noting that disputes within unions and between unions can be taken

before the industrial tribunals and courts in Australia. Many of these cases have involved significant legal issues, and have been complex and sometimes related to intractable problems within the labour movement. Examples of types of actions include:

- challenges to registration. Union registration in Australia generally discourages more than one union being formed in relation to the same area, and imposes a test (usually you cannot register a new union if the proposed members can "conveniently belong" to an existing registered union).
- demarcation disputes. When two or more unions claim coverage over the same area of work, disputes between the unions can often end in litigation. The various jurisdictions in Australia make provisions for the resolution of such disputes. This can be both at the instigation of one or more of the unions involved, or by an employer affected by the dispute.
- challenges to union elections. Legislation allows for challenges and inquiries into union elections to be conducted.
- membership issues. While membership is no longer as important as it once was, the legislation contains provisions for employees denied membership, or members whose membership is being removed, to challenge such decisions.
- State and Federal Branch disputes. Unions that are registered federally can be organised into State branches. Some States have separate systems of registration, and so a State union and the State Branch of a Federally registered organisation can claim the same members and assets. While once a common source of dispute, these have largely been resolved by provisions in the Fair Work (Registered Organisations) Act that allow for complementary registration.
- Deregistration proceedings. Where a union has become defunct, or, more importantly, has been involved in improper conduct, there may be proceedings in the nature of a show cause summons, related to deregistration of that union. These are rare applications.
- Right of entry issues. Union officials are given by statute certain limited rights to enter workplaces, for either the exercise of rights to converse with members or potential members, as well as to investigate suspected breaches of legislation (both industrial and work health and safety legislation). There are provisions that allow challenges to right of entry, for remedies for refusal to allow right of entry, and for cancellation of rights in the event of misuse or abuse of the rights.

Prosecutions

Many provisions in Australia's industrial legislation provide for penalties. For example, failure to pay prescribed wages, or taking adverse action against an employee, will not only allow the employee to recover the entitlements, but will open the employer to prosecution for breach. Often, the provisions will make it clear that the penalties are civil penalties, and though large fines may be involved, successful prosecution will not involve conviction for a criminal offence. Prosecutions can be launched by various regulatory bodies (for example, in the Federal system, the Fair Work Ombudsman (see below), but also, in some cases, by unions on behalf of their members.

As well as offences under industrial legislation, there are other relevant offences: for example, under the various Work Health and Safety Acts.

c. Administrative Agencies that Investigate or Adjudicate Claims

There are a number of administrative agencies that will investigate claims. In the Commonwealth arena, the Australian Constitution prevents an administrative body from also holding judicial functions, and so administrative agencies will not hold adjudicative powers or functions. This limitation does not exist at the State level, and so it is possible, for example, that an Industrial Relations Commission of a State could have both an administrative and a judicial role.

Commonwealth bodies include:

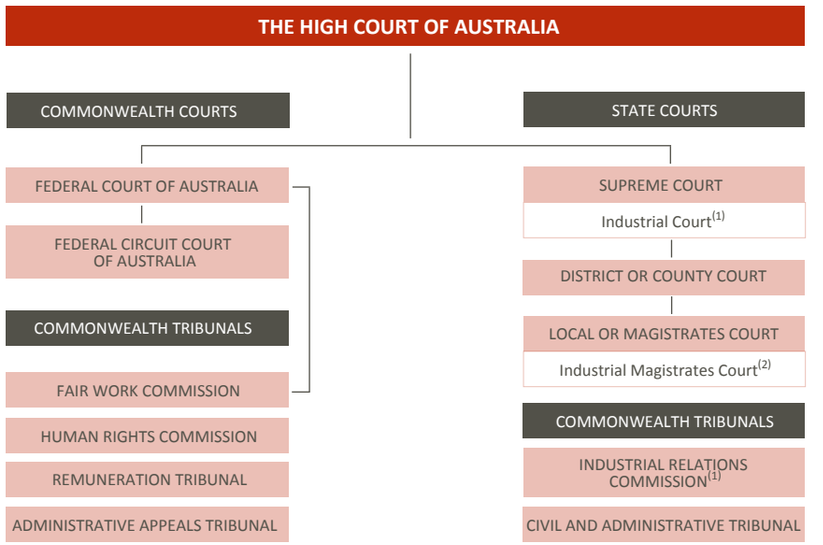
- The Fair Work Ombudsman, legally separate to the Fair Work Commission despite the similar name, is charged with promoting workplace compliance with awards, enterprise agreements and other statutory obligations. It has inspectors who investigate and if necessary prosecute workplace breaches.
- The Australian Human Rights Commission is authorised to investigate complaints of discrimination, harassment and bullying under federal laws on the grounds of: sex, disability, race and age. Further grounds are made available for employment complaints, including: sexual preference, trade union activity, criminal record, political opinion, religion or social origin. Complaints can be resolved through conciliation. If the matter cannot be resolved, the Commission issues a certificate to that effect which entitles the complainant to commence action in the Federal Court or the Federal Circuit Court.
- Fair Work Building and Construction is an Australian Government agency responsible for ensuring workplace laws are followed in the building and construction industry. It gives workers and employers information about their rights and responsibilities, investigates issues of non-compliance with workplace laws in the building and construction industry (in particular, breaches of the Building Code, and eventually, when implemented, the Fair and Lawful Building Sites Code 2014) and takes legal action when those laws are breached. It is very active in its prosecution role.

At the State level, each State has different tribunals that cover a variety of issues. For example, some States will have industrial inspectors, who carry out investigation of allegations of breaches of industrial laws, and under Work Health and Safety legislation, the States all have regulators (usually the WorkCover authority) which will investigate breaches of the work health and safety laws. Each State has a tribunal that covers issues of discrimination (see Section (d) below).

d. Court / Tribunal System

As noted above, there are concurrent court and tribunal systems in Australia, because power is shared between the Commonwealth and the States. The system is illustrated in Diagram 1:

THE AUSTRALIAN COURT SYSTEM AS RELATED TO INDUSTRIAL RELATIONS AND EMPLOYMENT



1) In some states, there is a separate Industrial Court, usually of Supreme Court Status. in some juridictions, it is combined with the Industrial Relations Commission of that State. There is sometimes a direct appeal to the State Supreme Court, other times the Supreme Court will simply exercise supervisory juridiction.
2) Some States also have a separate Industrial Magistrate Court system

The High Court of Australia sits at the apex of the system, having both original and appellate jurisdiction granted by or under the Australian Constitution. It is the court of ultimate resort for both the Commonwealth system and the State systems.

In the Commonwealth system, there are two main courts that deal with industrial relations and employment matters. The Federal Court of Australia and the Federal Circuit Court (previously the Federal Magistrates Court) deal with various issues under the *Fair Work Act*, and under human rights legislation more generally. It is not their sole area of work. Federal tribunals include the Fair Work Commission, which is the main industrial tribunal in Australia. It has members at various levels, and exercises a broad range of powers, from setting award rates and conditions of employment, approving enterprise bargaining results in the form of enterprise agreements, to adjudicating on unfair dismissal claims, conciliating adverse action claims and dealing with industrial disputation. The Human Rights Commission is charged with dealing with complaints about breaches of the various discrimination Acts, as well as having an educative role in that area. The Remuneration Tribunal sets pay rates for a variety of officials in the Federal Public Service. The Administrative Appeals Tribunal has broad jurisdiction to review administrative acts by the Commonwealth, but also deals with claims in relation to workers' compensation in the Commonwealth area.

It should be noted that because of the Australian Constitution, it has been held that the Commonwealth Government cannot bestow both administrative and judicial power on the same body. Judicial power can only be granted to a court that complies with the

requirements (express and implied) under Chapter III of the Australian Constitution. It is for that reason that some tribunals can conciliate a dispute (for example, the Human Rights Commission) but if conciliation fails, the tribunal then issues a certificate saying that conciliation is at an end, allowing the parties to file more formally in the Federal Court or the Federal Circuit Court.

In the States, there are a variety of approaches, but in essence, the States will each have a Supreme Court, of unlimited jurisdiction subject to the Australian Constitution, with both civil and criminal jurisdictions, together with a separate Division of the Court that functions as a Court of Appeal (and sometimes a separate Court of Criminal Appeal). Under that will be intermediate courts (District or County Courts), with a monetary cap on the claims that can be awarded, again exercising both civil and criminal jurisdiction. Under that are Local or Magistrates Courts, where large numbers of smaller matters are dealt with. Each of these levels can deal with some employment aspects: for example, unpaid wages or breach of contract claims could be taken at each level (though there are monetary limits to consider on a practical level).

Also, the States traditionally have had their own industrial tribunals, and often (because the separation between administrative bodies and judicial was not a requirement under State law) the functions of industrial tribunal and industrial court were combined in the one body (though only those qualified for appointment as a judge sat when the tribunal was constituted as a court). Traditionally, these State systems were very influential in the national system of industrial relations, but with the transfer of industrial power to the Commonwealth, the importance has declined. Thus, for example, in New South Wales, there is the Industrial Relations Commission of New South Wales, whose judicial members alone constitute the Industrial Court of New South Wales. In Queensland, the Queensland Industrial Relations Commission has jurisdiction under the *Industrial Relations Act 1999* (Qld) in relation to industrial matters. These matters can be heard on appeal in the Industrial Court of Queensland. The Industrial Court of Queensland also has jurisdiction to hear appeals from the Industrial Registrar or Industrial Magistrates. In Western Australia, the Western Australia Industrial Relations Commission hears matters under the Industrial relations Act 1979 (WA) by arbitration or conciliation.

The decisions from this Commission may be heard on appeal in the Western Australian Industrial Appeal Court.

The States also have tribunals that can deal, inter alia, with discrimination claims. In most cases these are along the lines of the Civil and Administrative Appeals Tribunal. In some cases, there is something like an Anti-Discrimination Board or an Equal Opportunity Commission which will deal with complaints in a similar way to the Human Rights Commission at the Federal level, with powers of referral or appeal to the Administrative Tribunal.

e. Alternative Dispute Resolution (ADR)

Alternative forms of resolution are actively encouraged in virtually all forms of employment and industrial litigation. In the Fair Work Commission, for example, conciliation is a compulsory process and often the first step (for example, an application for relief from unfair dismissal will be referred to a conciliator before the matter is listed for hearing or even directions). Under court rules that apply to most of the courts discussed above, the Court can direct parties into mediation. Typical of the provisions is section 26 of the New South Wales *Civil Procedure Act 2005*, which provides that if it considers appropriate, a court may refer any proceedings for mediation, whether or not the parties consent. Section 27 provides that it is the duty of the parties to participate in the proceedings in good faith. Federally (under the *Civil Disputes Resolution Act 2011*, for most proceedings (but not for proceedings under the *Fair Work Act*, presumably

because firstly, the limitation periods can be too short to allow such steps, and because there is already conciliation as part of the Commission's standard way of dealing with matters) it is necessary to file with the initiating documents a "genuine steps statement", which must set out "the steps that have been taken to try to resolve the issues in dispute between the applicant and the respondent in the proceedings", or if no steps have been taken, the reasons for that inaction.

The industrial tribunals in particular have a long history of resolution of industrial issues by conciliation, with a well-developed and well-understood system of referral to a conciliator at an early stage of the case.

As a matter of practice, even where there are no rules mandating conciliation, courts will often steer parties towards a form of alternative dispute resolution should the court come to a view that there may be a better outcome for all through such a process. Thus, in the Federal Court, the Registrars are trained mediators and the Judges will frequently require parties to take part in what is a well-regarded, and frequently successful, mediation process.

In addition to anything that the courts may direct, it is common, and increasingly so, for parties to seek assistance from an independent mediator as an alternative to litigation.

II. The Litigation Process

a. Typical Case

Given the complexity of the systems available to parties in the industrial and employment arena, it is not possible to give a single description to the litigation process. While there may be similarities between litigation in the Supreme Court of a State and the Federal Court, for example, there will also be differences, flowing from different legislation and court rules, and different ways of approaching litigation in each court. It is possible to give a general overview, but it will be necessary to refer to specific court rules in every case if running actual litigation.

It should also be noted that the procedure for say, an application for recovery of a civil penalty will differ significantly from the process adopted in an award review matter. Prosecutions will have no discovery process. For example, there will be no mediation or conciliation, and the rules of evidence will be strictly applied.

Further, it is true, but an oversimplification, to say that the process is simplified in the industrial tribunals. An extreme example is notifying an industrial dispute under the New South Wales system, where a simple phone call to the Industrial Registrar can commence a complex series of compulsory conferences aimed at settling the dispute. Outside of that, form and procedural requirements in the Fair Work Commission will be less onerous than the requirements, for example, the Supreme Court of a State, or the High Court. Even within a single Court, the process can differ depending on the subject matter. Thus, a matter in the Commercial List of the Supreme Court of New South Wales will have different practices than say a restraint of trade injunction matter.

For those reasons, the description that follows will be general in nature and an oversimplification of what happens in practice.

i. Steps in the Process

- **Attempts to settle**: see Section (e) above. For jurisdictions that mandate attempts "to try to resolve the issues in dispute", the first step would be for the legal practitioner to make the client aware of the client's obligations under the law to

attempt to reach a settlement and require that the client take the necessary steps to do so.

- **Assessment of prospects of success**. Before litigation can be commenced, Australian legal practitioners must be able to certify that the proceedings have a reasonable prospect of success, based on available evidence.
- **Drafting and filing initiating process**. Process will vary from Court to Court, and from Tribunal to Tribunal. It could be a formal set of pleadings, with the cause of action, and the facts on which the applicant relies (but not the evidence) set out in a strict and formal way. It could be a simple form to complete. Some Court rules require both an Application and a Statement of Claim, and some require the documentation to be verified under oath (so by affidavit or statutory declaration).
- **Filing initiating process in the appropriate Court or Tribunal Registry**. There is usually a filing fee (some collective actions in the Fair Work Commission are an exception) unless waived on the grounds of hardship. Many actions have time limits: as short as 21 days in the case of an action for a remedy in relation to unfair dismissal, up to six years for contractual breach. Many courts and tribunals now allow for electronic filing.
- **Service of the initiating process**. This is usually the responsibility of the applicant party, but some tribunals will serve the application (again, usually restricted to industrial tribunals and then for certain matters only).
- **Filing of a Defence or Reply**. Some jurisdictions require a formal response from the other side. Similar to the application, this can be a formal document or a simple form, depending on the jurisdiction.
- **Initial directions hearing**. Practice here differs markedly from court to court. Some courts, such as the Federal Court, will have a "Docket Judge", to whom the matter is allocated at an early stage, with directions being given as to the steps to be taken to prepare the matter for hearing, including in some cases an early indication of hearing dates. In other jurisdictions, there will be a series of directions hearings, often before a Court Registrar, who will oversee the matter as it comes closer to hearing, with a final allocation to a judge with fixed hearing dates.
- **Interlocutory steps**. These also differ, depending on the Court and the type of matter. Typical steps include discovery (where each side discloses relevant documents to the other); issue of subpoenas to produce documents or notices to produce documents, arguments about pleadings, requests for further and better particulars, or steps to reduce or clarify the issues between the parties.
- **Preparation of evidence**. Some matters proceed by way of affidavit evidence, and the court will set a timetable for the filing and service of affidavits by all parties. If evidence is to be given in person, then all that is likely to be seen is the necessary subpoenas to give evidence or produce documents. However, ordinarily there will be discussions between the parties about who will be required to be available for cross-examination.
- **Preparation of expert evidence**. Where evidence will be required from experts, most jurisdictions will have special rules about how that is to be prepared and presented. Experts need to be shown Court Guidelines that in effect, require them to be independent and not advocates for their side. Rules may require experts on both sides to meet and to present a joint report indicating areas of agreement and disagreement, or to give evidence concurrently with the experts called by the other side.
- **Preparation of documentation, etc**. Depending on the jurisdiction, it may be necessary to prepare evidence in documentary form ahead of time, with the parties required to co-operate on what documents are relevant. These may be required to be in volumes numbered and organised in chronological order, or by witness. Matter is listed for hearing.
- **Hearing before the court or tribunal**. Typically, the applicant would commence by an introductory address, followed by the defendant's address, the applicant's witnesses, with cross-examination, then the defendant's witnesses followed by cross examination, the applicant's submission (written and oral) and the defendant's submissions and the applicant's submissions in reply.

- Judgment rendered.
- **Final formal orders made**.
- **Potential appeal**.

ii. Pretrial Proceedings

The various court rules make provision for various procedures, which have been briefly set out above. They include a number of steps designed to ensure evidence is ready and available, that all issues are identified and the parties are ready to proceed. As set out above, these include matters such as discovery, subpoenas, notices to produce, and the like. In other cases, other procedures may be relevant: for example, orders preserving assets if it seems likely that assets may be stripped or taken out of the jurisdiction, or orders in the nature of an injunction where delay would be fatal to the cause of action (for example, an injunction to prevent an employee misusing confidential information, or working for a competitor in the face of a restraint).

Where a party does not have sufficient knowledge of the identity of the party or cause of action, some jurisdictions provide for a form of preliminary discovery, limited to those issues.

iii. Role of Witnesses, Counsel and Court / Tribunal

Australia's court system is largely an adversarial one, that is, it is the function of the parties to present evidence and legal arguments to the Court, which acts as decision maker and not as not as an inquirer or investigator into the facts. In this system, the participants have the following roles:

- The parties: to put their respective cases forward, including evidence and arguments.
- Solicitors (see point vi below) prepare the process and paperwork, and instruct the advocates.
- The advocates (usually barristers, though there is no prohibition on solicitors acting as advocates (see point vi, below) present the evidence, whether documentary or oral, question the other parties' evidence, and make submissions about the evidence and the law.
- Judge or member (variously described): makes a decision based on the evidence and the law presented to him or her. It is not permissible in most Australian tribunals for the Judge to gather evidence on his or her own initiative. There are some exceptions, for example, the industry panel members in industrial tribunals can make inquiries and rely on their own knowledge of the industry.

iv. The Appeal Process

Following the making of a final decision at first instance, parties usually have a right of appeal (though not always). Some appeals will require leave, sometimes of the tribunal at first instance, but more usually of the appeal tribunal. Some appeals are open in the sense that they can challenge findings of both fact and law; others are restricted to appeals on questions of law only.

Appeals can take two essential forms: it can take the form of a rehearing, or it can be an appeal in the strict sense, with the appeal court limited to the matters before the tribunal at first instance. Some legislation allows additional evidence on appeal where it can be shown the evidence was not available at first instance, or on other special grounds only.

Appeals are commenced in a similar way to matters at first instance: there is appeal documentation (formal pleadings or a prescribed Form); filing of the documentation, service of the application, interlocutory steps to prepare the matter for hearing, the preparation of formal documentation (often quite detailed, with separate volumes being

required for transcript, affidavits, submissions, documents and exhibits, etc.), with the matter then being set down for appeal.

Appeals can be internal within the court (so to a bench of typically three or more members of the same body) or can be to a separate court (for example, an appeal from the Fair Work Commission to the Federal Court). Some matters have multiple levels of appeal (single member to full bench of the same tribunal, to superior tribunal, and then to the High Court (usually only with special leave).

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Costs

Legal costs in litigation in Australia are generally classified in two different ways. Firstly, there are costs between the lawyer and her or his client (so called solicitor client costs, though similar rules apply to costs levied by counsel). The level of these will be governed by the costs agreement between the lawyer and the client (or the other lawyer in the case of counsel instructed by solicitors) and by legislation. These costs are typically time based, or are based on particular tasks.

Secondly, where litigation has concluded, the courts will typically make an order for costs on what is referred to as a party/party basis. While costs are a matter of discretion by the court, the usual order is that a successful party will be awarded costs on a party/party basis. That basis sees the Court (but more frequently, an officer of the court or an independent assessor) award costs on the basis of what is reasonable for one side to pay to the other. This results in an order that usually ranges from approximately 60 to 85% of the solicitor client costs (for example, as between the lawyer and the client, the client may have wished to retain additional assistance, but the costs assessor may consider an additional lawyer not the responsibility of the losing party).

Where the losing party is in some sense "at fault" (for example, they did not accept a settlement offer and the result is the same or better than the offer, or was the cause of unnecessary costs in the proceedings), courts can award costs on an indemnity basis, that is, the successful party obtains all reasonable costs (so almost all costs, unless they are unreasonable, such as insisting on expensive copies of documents when photocopies were sufficient). This will usually give a successful party something in the range of 90 to 95% of actual costs.

There are three limits on being able to recover costs: (a) costs are an indemnity and so if the lawyer did not charge (for example, was acting pro bono) then costs cannot be recovered. This does not prevent deferred fees or conditional costs being recovered; (b) some courts have strict scales of costs (for example, $X for preparing an application) and where this applies, then that is the extent of costs that can be recovered from the other side; and (c) the *Fair Work Act* contains provisions that mean that a party cannot recover costs from the other side, unless the action (or defence) was unreasonable or frivolous or vexatious. This applies, for example, in relation to unfair dismissal cases. Thus, in such matters each party must pay their own costs, but do not face paying the other side's costs unless they are relevantly at fault.

Actual costs can vary enormously: a few thousand dollars for something like unfair dismissal conciliation, or well in excess of $1 million for a significant common law action extending over a number of days. Large cases can result in costs in the multiples of millions of dollars.

Remedies

Given the breadth of the causes of action, actual remedies will differ. They include damages, account of profit, injunction, declaration, reinstatement, compensation (limited to six months in the case of unfair dismissal actions) or orders in relation to industrial action or enterprise bargaining.

Time frames

It is difficult to narrow down considering the variety of matters. An unfair dismissal application can be listed for conciliation within a week of filing, but a Supreme Court breach of contract claim may take years to reach hearing. All courts and tribunals make a provision for urgency (so an application for an urgent injunction before the Supreme Court can be listed within a day or two of filing, though final hearing can be months away. Courts are conscious of delays and make efforts to reduce delays, though resources sometimes prevent this.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The process described above will also be applied in some sense to disputes with unions. Litigation is still seen primarily adversarial, though industrial tribunals have relaxed rules as to reception of evidence and can also inform themselves as they deem fit. Often members of industrial tribunals will have experience in their industry areas, and can draw on their own knowledge in coming to a decision. In general, for industrial litigation involving unions or workplace representatives there will be simplified forms to complete and simplified procedures adopted.

d. Specialized Litigation Bar

Typically in Australia, lawyers are admitted as "legal practitioners" and not to a specialised litigation bar. However, traditionally, lawyers choose to practice either as solicitors (responsible for all aspects of acting for their clients, including necessary documentation) or as barristers (specialising in advocacy and court work). However, there is nothing to prevent solicitors from also practicing as advocates, and solicitors have a general right of appearance (note though that in certain proceedings before the Fair Work Commission, a legal practitioner (barrister or solicitor) will need leave of the Commission to appear). Barristers have two levels of seniority. The bar recognises some members as having particular expertise and awards them the title of Senior Counsel (all others are known as Junior Counsel, whatever their length of practice). Senior Counsel will normally appear assisted by Junior Counsel. Barristers are no longer prevented from seeing clients directly, but the majority will still insist on being instructed by a solicitor.

Within the bar, there are a number of barristers who are known for practicing particularly in the employment and industrial areas, though they will accept other instructions within their areas of competence, and barristers who do not normally accept instructions in employment and industrial relations are free to work on industrial and employment matters. This can be advantageous at times: for example, if an employment matter involves issues of intellectual property, it can be useful to brief a barrister with expertise in that field.

III. Tips to Avoid Litigation

There are a number of "best practice" approaches that can either reduce the incidence of litigation or minimise its impact on an employer. Some are listed here.

Unfair dismissal and adverse action litigation

- Implement proper recruitment practices. Carry out checks with previous employers, ensure contracts are well drafted and signed, record answers given at interviews.
- Have proper policies and induct employees into those policies, recording their attendance at training.
- Have a probationary period in the contract of employment and regularly review suitability.
- Regularly review the contract of employment, and document any changes to the role, ensuring that notice periods are still valid.
- Bear in mind the Small Business Unfair Dismissal Code: even if the business is not a small business the steps outlined give an indication of what the Commission expects.
- Do not mix up performance and conduct: performance issues need a different approach to improper conduct by employees.
- Speak to employees about both performance and conduct and keep a record of what was said. Set deadlines for improvement of performance and review at regular intervals to ensure there is improvement.
- Ensure fair and consistent treatment of all staff.
- Keep records of all decisions that affect staff and the reasons for those decisions.

Sexual or other harassment or bullying

- Have proper policies and induct employees into those policies, recording their attendance at training.
- Have mechanisms for employees to report improper activity without fear of retribution.
- Lead from the top: senior management needs to demonstrate that harassment and bullying will not be tolerated and will have no place in the organisation. For example, management at whatever level should not let incidents of bullying pass as harmless jokes. In particular, management must not reward such behaviour simply because the person earns the business too much income or attracts too much business.
- Do whatever is necessary to change a culture that accepts such conduct as normal.

Breach of contract

- Have proper contracts in place and regularly review them.
- Be aware of other potential terms, particularly any that may flow from industrial instruments and because of implied terms (reasonable notice terms are often overlooked, so contracts should be reviewed whenever there is a change of role to ensure that there remain proper notice periods).
- Communicate with employees about their performance or conduct regularly, and communicate reasons for any decisions about their employment.
- Seek legal advice before any major termination.

Restraints of trade

- Have contracts drawn up with restraints for employees only when needed to protect the business. General restraints pose a substantial risk of being struck down as unreasonable.
- Consider restraints based on protection of confidential information rather than simple protection from competition.

- Make restraints as narrow as possible and for as short a period as possible, consistent with protection of the business. Where an employee poses a significant risk, ideally there should be a separate Deed drawn up.
- Act quickly. Courts will not grant injunctions where the moving party has sat on its rights.

Industrial issues

- Ensure compliance with all contractual and statutory terms, and any industrial instrument. Undertake an audit of those obligations for each employee.
- Ensure ongoing communication with staff, and if relevant, with unions.
- Ensure consultation obligations are maintained and met. This is particularly important where there is a need for change management (for example, because of structural change or technological change, where there are obligations under the *Fair Work Act*.
- Have a documented change management strategy.
- Seek early advice if there are signs of unrest or union activity.

IV. Trends and Specific Cases

a. New or Expected Developments

The *Fairer Paid Parental Leave Bill 2015*, which is currently before the federal Parliament, proposes to amend the *Paid Parental Leave Act 2010* by stipulating that parents entitled to employer-provided parental leave will not be entitled to receive parental leave pay from the government if the employer-provided payment exceeds that which the employee would otherwise be entitled to receive from the government.

Furthermore, there are several bills before Parliament proposing to make the following changes to the *Fair Work Act*:

- Remove restrictions on employees' rights to disclose information about their pay and earnings and prohibit employers from taking adverse action against employees for disclosing this information;
- Prohibit employers from taking adverse action against employees based upon where they live;
- Require employers to pay employees untaken annual leave on termination of employment in accordance with the governing industrial instrument;
- Require flexibility terms in modern awards and enterprise agreements to provide for unilateral termination of individual flexibility arrangements with 13 weeks' notice;
- Require flexibility terms in enterprise agreements to provide that individual flexibility arrangements may deal with when work is performed, overtime rates, penalty rates, allowances, and leave loading;
- Amend the right of entry to provide new eligibility criteria that determine when a permit holder may enter premises for certain purposes; and
- Remove the requirement for the Fair Work Commission to hold a hearing or conduct a conference in certain circumstances when determining whether to dismiss an unfair dismissal application.

On 3 December 2015 the Coalition (Liberal and National) Government introduced a bill proposing further amendments the *Fair Work Act*. The *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* ("the Bill") reintroduces the amendments which the Government initially proposed as part of the bill leading up to the *Fair Work Amendment Act 2015* (*"Fair Work Amendment Act"*), but which did not survive the law making process. The Bill addresses a number of important areas including Greenfields Agreements, union right of entry provisions, individual flexibility arrangements, and

annual leave loading. The Bill was introduced to the House of Representatives on 3 November 2015. It will need to be passed by both the House of Representatives and the Senate to become law.

b. Recent Amendments to the Law

Until 27 November 2015, when the *Fair Work Amendment Act 2015* came into force, there had been no significant amendments to the ***Fair Work Act*** for a considerable period of time. The ***Fair Work Amendment Act*** amended the ***Fair Work Act*** in the following ways:

- When bargaining for a Greenfields Agreement employers are now able to make an application to the Fair Work Commission for approval of a proposed Greenfields Agreement if a deal has not been reached between an employer(s) and a union(s) within a "negotiating period" of six months. This limits the potential for unions to stall major new projects;
- If an employer makes an application to the Fair Work Commission for approval of a proposed Greenfields Agreement, the Fair Work Commission must approve that agreement if, in addition to the factors already set out in the ***Fair Work Act***, it is satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work;
- A union will only be able to be a bargaining representative for a proposed Greenfields Agreement if an employer agrees to bargain with that particular union;
- Parties are only be able to commence industrial action once bargaining for a new enterprise agreement has commenced. One of the effects of this is that unions will only be able to pressure employers to reach agreement on an enterprise agreement if majority of the employees concerned support bargaining for an enterprise agreement, rather than majority of those employees who are union members;
- An employer will only be able to refuse a request for an extension of parental leave if the employer has given the employee concerned a reasonable opportunity to discuss the request; and
- The Fair Work Ombudsman will now be required to pay interest on certain amounts of unclaimed monies.

c. Recent cases

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46: This case overturned a full Federal Court decision and held that agreed penalties for violations of civil penalty provisions can be put forward to the courts by the prosecuting authorities (i.e. Fair Work Building and Construction and the Fair Work Ombudsman).

Fair Work Ombudsman v Que St Perth Holdings Pty Ltd [2015] HCA 45: It was held that section 357(1) of the ***Fair Work Act*** prohibits an employer misrepresenting to an employee that the employee performs work as an independent contractor under a contract for services with a third party. The purpose of the section is to protect an individual who is actually an employee from being misled by their employer about their employment status.

C v Commonwealth of Australia [2015] FCAFC 113: It was decided that Australian defence service members are not employees of the Commonwealth for the purposes of the *Fair Work Act*.

Romero v Farstad Shipping (Indian Pacific) Pty Ltd [2014] FCAFC 177: A company was found to have breached its contract with an employee by failing to comply with its discrimination and harassment policy. Notwithstanding that some of the policy provisions

were in aspirational language, the policy gave rise to contractual obligations because it gave rise to a mutual expectation of compliance, the policy was regularly enforced and the employee's letter of offer stipulated that company policies were to complied with at all times.

National Tertiary Education Industry Union v Swinburne University of Technology [2015] FCAFC 98: It was held that an employer had wrongfully included the votes of all casual and sessional employees it had engaged in the previous academic year in an enterprise agreement approval ballot. It was held that only those employees who were actually employed at the time of the ballot were eligible to have their votes counted.

Grant v BHP Coal Pty Ltd (No 2) [2015] FCA 1374: the Federal Court held that a direction given by an employer to attend an appointment with a nominated doctor to assess the employee's fitness to work was a lawful and reasonable direction, non-compliance with which entitled the employer to dismiss the employee for misconduct.

Re AKN Pty Ltd T/A Aitkin Crane Services [2015] FWCFB 1833: the Full Bench of the Fair Work Commission held that when determining whether an enterprise agreement is 'better off overall' by reference to a modern award, the Commission should take a 'global' approach rather than a 'line by line' approach.

V. Conclusion

The Australian industrial and employment system can be complex, and only an outline can be provided in a short publication. Employers are advised to obtain advice at any early stage whenever any issue is potentially heading towards litigation. Once a matter reaches the stage of litigation, it is likely that substantial costs will be involved.

AUSTRIA

I. Overview

a. Introduction

According to labor market statistics published in 2013, the number of employed persons (ILO definition) in Austria amounted to 4.175.200. Nearly nine out of ten of those persons (86.7 %) worked as employees. The meaning of employment law, and thus the mechanism of law enforcement, is of significant importance in Austria. According to the official yearbook 2015 of Statistics Austria, the labor and social courts of first instance handled around 18.900 cases in 2013.

b. Claims

The most relevant employment law matters dealt with by the labor and social courts are:

- **Any disputes arising between employers and employees in connection with the employment relationship and termination thereof - matters of individual labor law, for example**:
  - Pecuniary claims regarding all kinds of remuneration, benefits or damages
  - Claims in connection with an occupational accident or discrimination
  - Action against unfair dismissal on various grounds, including discrimination (targeted on the reinstatement of the employment)
  - Action to obtain judicial approval to terminate an employment with special protected employees (e.g. pregnant employees, employees working parental part-time, etc.)
- **Disputes between employees in connection with their work**
- **Disputes between works councils and employers regarding collective rights, for example**:
  - Disputes on co-determination rights
  - Disputes on the election of employee representatives, including European Works Council issues, SE Works Council and employee participation in the event of cross-border mergers
- **Collective Action**
  - As a peculiarity of employment law litigation, the law provides the possibility for employee representatives (on workplace but also on supra-company level) to initiate “collective action”. However, as decisions in such proceedings basically only have a binding character for the participating parties, the practical relevance remains quite moderate. Such proceedings may be initiated under the following circumstances:
    - A works council may bring legal action regarding a matter of individual labor law if the disputes concern at least two employees. Vice versa, the employer can litigate against the staff body. However, the court can only rule on whether a right exists or not (declaratory judgment). Only matters of individual labor law may be the subject of such proceedings. It has to be noted that this decision is not binding for subsequent claims between employer and employees.
    - Any employee or employers association capable of being a party to a collective bargaining agreement can file an application with the Supreme Court to seek a declaratory judgment on the existence or non-existence of rights or legal relationships concerning facts independent of specifically named persons. The application must concern a point of substantive labor law (individual as well as collective labor law), which is significant for at least three employers or employees. The decision is not binding for subsequent cases.
- **Aside from collective action**: If a works council has expressly objected to a dismissal, the works council is entitled to take legal action if the dismissal is socially unfair or had been issued on unlawful motives (this does not apply to

discrimination cases - discrimination claims can only be initiated by the individual employees themselves). However, usually the works council transfers the right to take legal action to the individual employee.

c. Administrative Agencies that Investigate or Adjudicate Claims

In various areas of individual and collective labor law there are responsibilities of administrative agencies. In this regard, it has to be mentioned that employee protection (statutes on the safety and health of employees) is a matter of public law, and generally falls under the competence of administrative authorities. Regarding matters of civil law, some of the most important administrative agencies are detailed below.

Conciliation Boards (*Schlichtungsstelle*)

A conciliation board has to be set up on application of works councils or employers, to decide on any dispute concerning the conclusion, amendment or cancellation of a shop agreement (*Betriebsvereinbarung*, i.e. agreements between works councils and employers on company level). However, this only applies to some shop agreements and not every topic which can be dealt with by a shop agreement can be subject to a proceeding before a conciliation board. The conciliation board's responsibility is to mediate between the parties, propose settlements and assist the parties in reaching an agreement. If no settlement can be reached, the conciliation board is required to make a binding decision on the disputed shop agreement. Most frequently, the conciliation board handles applications regarding the establishment of a social plan (this is a shop agreement on measures regarding the prevention, elimination, or alleviation of adverse effects in connection with the closure/or alteration of an establishment). The decision of the conciliation board has the legal quality of a shop agreement. The decision is not subject to legal remedy.

Equal Treatment Commission (*Gleichbehandlungskommission*)

The Equal Treatment Commission, which now consists of three senates, was set up to scrutinise matters relating to discrimination under the Equal Treatment Act. It is a special institution designed to support labor, social and civil courts. The Equal Treatment Commission consists of three senates. Each senate has ten to twelve members and a chairman. They comprise of representatives of ministries, as well as employers' and employees' associations. The Equal Treatment Commission reviews cases and issues an opinion about whether discrimination occurred in a specific case or not. An employee may initiate proceedings before the Equal Treatment Commission on his/her own or with the support of the Ombuds Office for Equal Treatment or another institution. The Equal Treatment Commission issues a written decision on the results of the examination, which is not legally binding, but which can be presented in court proceedings. The Equal Treatment Commission is not authorised to award damages. The decision is not subject to legal remedy.

Social Welfare Office (*Sozialministeriumsservice*)

Another important institution with regard to employment is the Social Welfare Office, which has nine regional offices (one in each of Austria's nine federal states – *Bundesländer*). This administrative agency is (inter alia) the competent body where employers apply to obtain approval to terminate the employment of a disabled employee, if such employee has the status of special protection. Moreover, the Social Welfare Office serves as a conciliation board for discrimination cases concerning discrimination due to a disability. Before a complaint can be filed with the labor and social court, an application for conciliation has to be made. If an agreement cannot be reached within a certain time-frame, the case can brought before the competent labor and social court (cf also below).

Competence Center against "Wage Dumping" (*Kompetenzzentrum für Lohndumping*)

In May 2011, anti-wage-dumping laws (*Lohn- und Sozialdumping-Bekämpfungsgesetz* – LSDBG) entered into force. The LSDBG was implemented to prevent employers from agreeing on wages, which are below the minimum standards of the applicable Collective Bargaining Agreement (CBA) or applicable statutory minimum salaries. In summary, this law makes it an administrative offence to infringe the minimum remuneration standards of a CBA and provides quite considerable administrative penalties for employers who agree to and pay wages, which are below the minimum remuneration standards of an applicable CBA or statutory provision on minimum salaries. The penalties range from € 1.000 to 10.000 per employee. As of 2015, not only the base salary, but also other parts of remuneration, which are subject to the regulations of a CBA, falls within the scope of these controls, which are carried out by the Competence Center against "Wage Dumping", which is part of the regional health insurance institution. As a result, the consequences of non-compliance with an applicable CBA are no longer limited to (typically manageable) potential lawsuits with individual employees. They can also lead to severe administrative fines.

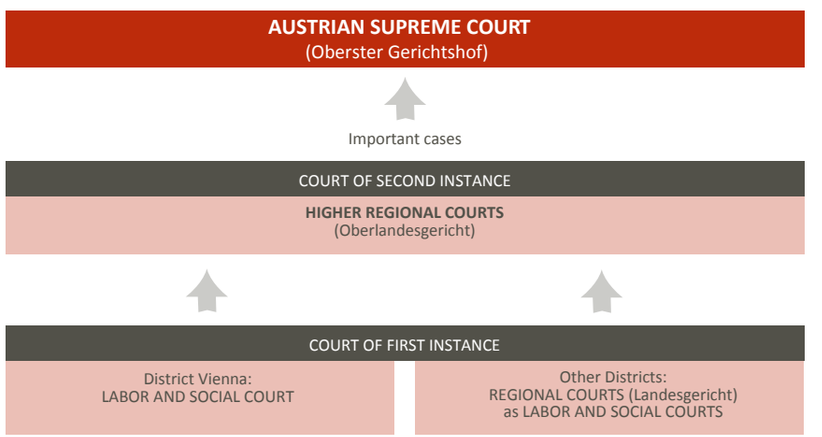
d. Court / Tribunal System

Austria's labor court system and procedural rules were subject to a major reform in 1986, implemented via the Act on Labor and Social Courts (*Arbeits- und Sozialgerichtsgesetz*), which entered into force in 1987. The labor and social courts became the main competent bodies to adjudicate disputes arising from labor law and social security. Prior to this reform, a number of different judicial and administrative authorities were competent for such disputes.

In general, employment law litigation follows the rules of Austrian civil procedural law. However, the Act on Labor and Social Courts provides for special rules and exemptions reflecting the special nature and needs of employment litigation.

Labor Courts rule in panels consisting of a professional judge as chairman, and two lay judges. The lay judges are appointed upon recommendation of statutory representative bodies of employers and employees. So both spheres are represented in the courtroom and also in the decision-making process.

THE AUSTRIAN COURT SYSTEM FOR EMPLOYMENT LAW



e. Alternative Dispute Resolution (ADR)

Compared to the established judicial mechanisms, alternative dispute resolution methods do not play an important role in the practice of individual dispute resolution in employment law matters.

Employment law matters are quite rarely subject to **arbitration** (i.e. the settlement of a dispute by referring the case to an arbitrator for a decision instead of judicial proceedings). The reasons can be found in the statutory restrictions on arbitration with regard to employment law. Arbitration is only available for an existing conflict between employer and employee (low practical relevance). Agreements to refer future disputes to an arbitrator are void.

Mediation creates the possibility for the disputing parties to reach a solution via a neutral third person (mediator). Mediation conducted by a qualified external mediator is a tool mainly used by employers to resolve and settle conflicts at the work place between employees (for example, harassment). The employer is not obliged to offer mediation. Also, the participation of employees is voluntary.

However, statutory law provides **formalized procedures of alternative dispute resolution** in the following cases:

- In the event of discrimination of employees on the ground of disability, the law provides for conciliation proceedings, which have to be complied with before a party can initiate judicial proceedings. The employee has to file an application for conciliation with the Federal Social Welfare Office (*Sozialministeriumsservice*). A special trained employee of this institution conducts the conciliation procedure. Alternatively, the parties can suggest a private mediator. Only if a settlement cannot be reached within a certain time frame (depends on the occasion of discrimination), can the case be brought before the competent labor court.
- If an employer aims to terminate an existing apprenticeship (unilaterally), the employer is obliged to initiate a mediation procedure. The employment may only be terminated if at least one meeting took place and a settlement could not be reached.

II. The Litigation Process

a. Typical Case

Austria has a system of lower courts (district courts) and subsequent appellate courts. For matters of general civil law, in principle, the district courts are the courts of first instance. However, in **employment law matters**, the **regional courts (*Landesgerichte*)** are the courts of first instance. In Vienna only, a separate, freestanding labor and social court is established. Outside Vienna, the regional courts serve as labor and social courts when they rule in employment law and social security matters (with specialised chambers). The **Higher Regional Courts (*Oberlandesgerichte*)** are the **Courts of Second Instance**. **There are 20 regional courts and four higher regional courts in Austria**. **The Supreme Court (*Oberster Gerichtshof*) rules in civil law matters (including labor law) as final instance**. The courts reach their decisions in panels consisting of professional judges and lay judges (upon recommendation of employers and employees associations).

i. Steps in the Process

Lawsuits are commenced by the filing of a statement of claim with the court. Since, for employment law matters, a person does not have to be represented by a lawyer for filing a statement of claim, a claimant may also initiate proceedings by way of oral submission put on record by the court. Attorneys, however, have to use a special electronic system provided by the government.

In general, the **statement of claim** should include the relevant facts on which the claim is based and should be supported by respective offers of proof. Legal arguments are recommended, but are not a mandatory part of a statement of claim. The claim is considered to be properly presented if it does not give grounds for immediate rejection or for correction by the court. In essence, the court verifies the competence of the court and the conclusiveness of the facts provided (on a very rough basis), and then submits the statement of claim to the defendant and sets a date for a first (preparatory) hearing.

A **simplified procedure** is in order for **pecuniary claims up to € 75,000.00**: Upon application by the claimant, the court makes a decision on the claim at issue ex parte, i.e. without any prior possibility for the defendant to participate. This decision is served on the defendant with an instruction to follow the order or to contest the claim within four weeks by raising an objection. In case no objection is raised, the payment order becomes effective. If an objection is raised within the given time frame, ordinary proceedings are initiated.

The parties may submit and **exchange written statements (briefs)** presenting all facts and offer evidence until one week before the first preparatory hearing. As a principle, the claimant has to assert (and subsequently prove) any facts that justify his claim, while the defendant must provide any facts, which justify its objections.

The **first hearing** is only of a preparatory nature and usually does not last longer than an hour. The judge discusses the different positions with the parties and determines a hearing schedule. Also, the judge evaluates and discusses possible **settlement options** with the parties. Usually, the parties discuss this option with their respective legal representative before the hearing and are prepared to make concrete suggestions. The role of the penal system in this proceeding is to mediate, rather than to suggest concrete settlement options and “numbers”. In proceedings before the labour and social court it has become common for the defendant (consequently, in most cases the employer) to start the negotiations with a first offer. A settlement does not have to be found in the first preparatory hearing, as this option remains open until the effective ending of the proceedings. Even during the appellate process a settlement can be agreed upon. However, if the parties are willing to settle, typically an agreement is reached during the early stages of a trial.

In the subsequent hearings, the court conducts the **taking of evidence**. The court hears the parties and witnesses, sometimes experts, and evaluates the other evidence provided (documents, etc.). When the taking of evidence is completed the panel formally closes the proceedings.

In almost every case the **decision is provided in writing** and is submitted to the parties usually within two to five months after the last hearing. Generally, the duration of proceedings strongly varies depending on the evidence that has to be taken, the working mode of the judge, the involvement of experts, etc. The average duration of first instance proceedings is one year, from the filing of the statement of claim until the court’s decision is submitted to the parties.

ii. Pretrial Proceedings

Austrian civil procedural law does not provide for specific mandatory pre-action procedures. Of course, a claimant usually takes legal action only after having tried to assert the claims out of court. Frequently, the Chamber of Labor intervenes on behalf of its members.

Also, Austrian civil procedural law does not provide for specific pretrial proceedings (e.g. pretrial-discovery). The pretrial stage (i.e. before first preparatory oral hearing) is limited to the exchange of written submissions (briefs).

iii. Role of Witnesses, Counsel and Court / Tribunal

As a peculiarity of employment litigation, the parties are able to represent themselves in first instance procedures – regardless of the value in dispute. The parties are also free to be represented by an attorney or be represented by any other so called "qualified person" (for example, staff members of statutory employers' or employees' associations or voluntary professional associations). A qualified person (not necessarily an attorney) may also represent a party before an appellate court. Before the Supreme Court, however, parties need to be represented by a qualified attorney.

In cases, both sides are represented by **qualified attorneys** (even before first instance courts). In Austria, attorneys admitted to one of the nine federal bar associations (*Rechtsanwaltskammern*) are authorized to represent parties before all courts in Austria, including the Supreme Court. There is no special litigation bar.

An important institution for all employees with regard to employment litigation is the **Chamber of Labor** (*Arbeiterkammer*), which is the statutory representative body of employees. The membership is compulsory for all employees. There are separate chambers in each of the nine federal states of Austria (*Bundesländer*). The Chambers of Labor provide information and cost-free advice on different issues, including, but not limited to, labor and social law. In employment law disputes between employees and employers, in many cases, the Chambers of Labor serve as the first-line of assistance for any queries regarding rights and duties in an employment relationship. The Chambers offer legal assistance, intervene with employers, and often provide cost-free representation of employees before the labor and social court. As outlined above, before the courts of first and second instance, the experts employed with the chamber of labor are authorised to represent employees. However, it is also very common that the Chamber of Labor "outsources" representation and engages an attorney. If representation is granted to the full extent, the pursuing of a lawsuit is basically riskless for the employees.

Also, **trade unions**, in their function as voluntary representative bodies, provide legal assistance to their members, including written and oral interventions or free representation before the courts. However, the role of the Chamber of Labor dominates in this regard.

The Austrian Code of Civil Procedure explicitly mentions five types of evidence: (1) documents, (2) witnesses, (3) the hearing of the parties, (4) experts, and (5) visual inspection. They all have the same probative value. Under Austrian civil procedural law, the principle of the free assessment of evidence (*freie Beweiswürdigung*) applies. The court freely evaluates the evidence provided by the parties. However, admissible evidence does not necessarily have to fit into these categories. The court may reject offers of proof if the court is of the opinion that the offered proof is not relevant to the case. Also, the right to question witnesses is of course limited to the relevant facts of a case.

Witnesses have to appear and testify before the court. Consequently, witness statements or affidavits are not accepted from Austrian courts. However, for the past few years, the questioning of a witness may be conducted via video conference (under certain circumstances). This is especially helpful and important if witnesses from abroad have to testify. Usually, the professional judge questions the witness first, then the lay judges may ask additional question. Finally, the parties have the right to ask questions. False testimony is a criminal offense.

iv. The Appeal Process

First instance judgments may be appealed on points of fact and law. In contrast to other civil proceedings, fewer restrictions apply regarding the grounds of the appeal in employment law cases. An appeal of fact and law may be lodged on the grounds

of invalidity or mistaken legal judgment, on the grounds of procedural errors or establishment of incorrect facts.

The **courts of second instance** are only called upon to **review the first instance judgment**. In employment law matters, these are the higher regional courts (*Oberlandesgerichte*). The courts of second instance can decide the case themselves and confirm or amend the judgment. Also, the courts of second instance may overturn the decision and order the court of first instance to retry the matter. However, as a fundamental principle, the decision of the court cannot be to the detriment of the party who filed the appeal. In approximately 99% of the cases, the appellate proceedings are limited to the exchange of written submissions (statement of appeal – response). The average duration of employment law matters before the court of second instance is roughly four to eight months.

Second-instance judgments may be challenged by means of an **appeal on points of law**. However, access to the Supreme Court is limited. In principle, the Supreme Court decides only on **legal issues of considerable importance**. If a disputed legal issue fulfills this requirement, it is decided by the Supreme Court as a preliminary question. In contrast to other civil proceedings, appeals on points of law to the Supreme Court in employment law matters are always permissible, regardless of the value in dispute (provided a legal issue of considerable importance is concerned). The **Supreme Court** is bound in its judgment by the facts previously established. The Supreme Court only decides on the legal questions of a case and, to a limited extent, may take up procedural errors. The facts previously established, however, cannot be subject to legal review. The Supreme Court may decide on the matter itself (confirm or amend the judgment) or overturn the previous decisions and instruct the courts of first instance to retry the matter.

Also, before the courts of second instance and the Supreme Courts, special chambers consisting of professional judges and lay judges are competent for labor law matters.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

There are generally two types of procedural costs: court fees and legal fees. The Austrian civil procedural law follows a system of cost reimbursement. This means the losing party has to reimburse the costs (court fees and legal fees) of the proceedings to the prevailing party. If a party prevails only to a certain extent, the costs to reimburse are correspondingly lower.

Court fees: Court fees have to be paid by the claimant before the proceedings. They are due once the statement of claim has been filed. They are subject to the Court Fees Act and their amount depends on the value in dispute. Austrian court fees are frequently criticized for being too high and impeding access to court. For example, a pecuniary claim with a value in dispute of € 70,000,00 causes the following court fees: 1st instance: € 1,389.00; 2nd instance: € 2,043.00; and 3rd instance: € 2,724.00. Value in dispute: 210.000,00: 1st instance: € 4.170,00; 2nd instance: € 6.131,00; and 3rd instance: € 8.175,00.

Legal fees: In principle, the costs of representation by an attorney are subject to agreement. The Austrian Civil Code places some restrictions on legal fees. For example, contingency/conditional fees are considered contra bonos mores, and therefore inadmissible. Conditional fees/contingency fees are calculated on the basis of a percentage share of the amount awarded by the court in a lawsuit. Attorneys regularly calculate their fees on the basis of the Autonomous Criteria for Legal Fees issued by the Austrian Bar Association. It is also very common to calculate fees on (flat) hourly rates, independent from the value in dispute. However, the costs which have to be reimbursed by the losing party are limited to necessary costs. With regard to attorneys' fees, the court is bound to the rates provided in the Austrian Attorneys' Fees Act. This Act defines fixed

rates for different steps and actions in the proceeding, depended on the value in dispute. Preparatory work (for example, research for written submission, correspondence with the client etc.) is covered by the fixed rates and is not reimbursed separately.

Example: If a claimant prevails (100%) the following legal fees have to be reimbursed by defendant:

Value in dispute €70.000,00

Statement of claim	1518,00
Further submission (brief)	1139,25
1st preparatory hearing	1139,25
2nd hearing (two hours)	1708,80
3rd hearing (two hours)	1708,80
total incl VAT (20%)	**8656,92**

There are **special rules** with regard to costs and fees for lawsuits before the **labor and social courts**. These exemptions facilitate easier access to court for employees. An important exemption applies to the most common kind of unfair dismissal lawsuits – on the grounds of a dismissal being socially unfair or on unlawful motives (both are based on the sec 105 of the Labor Constitution Act). In these proceedings (except before the Supreme Court), both parties have to bear their own costs regardless of the outcome of the proceedings. Moreover, for these proceedings court fees do not apply. In general, non-pecuniary claims (for example, reinstatement of employment, ineffectiveness of a transfer, right to work parental part-time, etc.) are also not subject to court fees – even before the Supreme Court.

III. Tips to Avoid Litigation

The central pillars to avoid litigation or minimise the impact of litigation on the employer's business are: knowledge of the applicable legal sources which affect the individual employment relationship, a clear contractual basis for the individual agreements, efficient dispute-management and documentation. The following aspects seem to be especially crucial in this regard:

Determination of the applicable Collective Bargaining Agreement (CBA)

A Collective Bargaining Agreement covers more than 90% of employment relationships in Austria. These agreements regulate (mandatory) working conditions between employers and employees; they contain industry-wide minimum salaries, rules on the remuneration of overtime, statutes on working time, regulations on termination of employment, etc. For the individual agreement, the legal standards provided in CBAs may neither be revoked nor restricted by an individual employment agreement, and apply automatically. If an employer has memberships in different employers' associations or in the event an employer changes its field of business, the determination of the applicable CBA can be a complicated task and requires a thorough legal review. As the application of the wrong CBA affects the entire workforce, the consequences of errors in this regard are severe.

Proper Contract Drafting

The most important step to avoid litigation or minimise the impact of litigation has to be taken before the employment relationship commences: it is the task of providing a clear and secure written basis for the employment relationship. Sometimes employers, instead of setting up an employment contract, only provide a written statement of terms of the employment (*Dienstzettel*). Such a document is usually not signed by the employees and thus is only of declarative nature. This approach is not advisable because it means that important provisions of the "contract" are not enforceable.

Some of the most frequent, but avoidable, mistakes that can be found in employment contracts, and which can trigger expensive consequences, are the following:

Term: Sometimes contracts on a fixed term basis or an initial fixed term basis do not provide sufficient clauses allowing the employer to give ordinary notice of termination during the fixed period. If an employer terminates the contract, despite the contract not providing for this right, the employee may claim damages reflecting the entire remaining duration of the term.

Collective Bargaining Agreements: Employment contracts must refer to applicable Collective Bargaining Agreements. However, the language should clearly indicate that this reference is only of declarative nature, and does not mean that the parties agree on a special CBA. Otherwise, it could become problematic for the employer if the applicable and the "agreed" CBA differ (for example, because of a change of field of operation). In such cases, the rules of the two CBAs will have to be considered for each issue covered by the CBAs. It is also important to note that sometimes CBAs exclude certain groups of employees from their scope of application. This is frequently the case for managing directors, and sometimes even for senior executive employees. Their contracts should not refer to the CBA.

Shop agreements: (i.e. agreements on plant level between employers and works councils) do not have to be mentioned in an employment agreement. However, the relevant provisions have to be taken into account when drafting the employment contract (this task is particularly important in large enterprises where different shop agreements apply to different groups of employees).

Working Time: A great number of employment lawsuits concern working time issues. Very often these time and cost-intensive disputes are caused by unclear and insufficient provisions on working time in the employment contract. For example, in Austria, so called all-in-agreements (all overtime is covered by the agreed salary) are admissible if, firstly, they do not result in an infringement of minimum salary standards of a CBA (or statutory minimum salaries) and, secondly, only insofar as the contract makes clear which part of the remuneration covers the normal working hours. An all-in agreement may not be enforceable if these conditions are not met. Also, in some enterprises, employers operate flexible working time schemes but ignore, however, the fact that implementing flexible working time requires the conclusion of a shop agreement (if a works council is established) or a written individual agreement. The lack of a sufficient agreement may result in a huge amount of overtime, which is subject to surcharges.

Variable remuneration: With regard to variable remuneration, like bonus or stock options, contracts frequently refer to annual side-letters containing the details of such payments, including targets, etc. Sometimes, however, employers forget to provide such agreements for each period. This creates a very difficult position for the employer if it decides that the employee did not perform well enough for the bonus.

Post-contractual non-compete: These clauses, which restrict competitive activities of employees, in practice seem to be more easily enforceable if competing companies are explicitly mentioned in the contract (this, of course, only applies if the situation of competing companies is sufficiently clear and predictable). Also, employers have to consider that if a penalty (liquidated damages) had been agreed upon, it is not possible to bring an action for injunction or claim further damages. On the other hand, if non-compliance with the non-compete clause is subject to a penalty, the employer does not have to furnish proof as to the amount of the actual damage. Therefore, employers need to consider carefully how their non-compete clauses are safeguarded, instead of using the same model-clause for all employees.

Forfeiture/Limitation clause: These clauses require employees to make any claims arising from the employment relationship, regardless of their legal basis, within a certain period after they arise in writing (three months is considered to be the minimum), otherwise the claims are forfeited. Generally, such clauses are enforceable (and extremely helpful) if, and so far as, statutory law or CBAs do not provide for more favourable standards (for example, longer periods for certain claims). These clauses essentially help to minimise the impact of potential claims for past periods.

Dispute management during and after employment

The majority of employment law disputes are brought before the court after the employment has been terminated. However, many of them have already appeared before the end of the employment, and some of them could have been prevented with a timely and sufficient intervention/reaction. An important factor concerns the **employer's duty to take care** of its employees' interests and to provide safe and healthy working conditions. If an employee complains about discrimination or harassment in the workplace, or reports other instances that negatively affect the working conditions, the employer is obliged to investigate and take all necessary and reasonable steps to restore a discrimination and harassment free, healthy and safe work-environment. The employer is free to choose the measures it finds reasonable for the situation at hand. However, its duty is not limited to initiating such proceedings (usually starting with personal meetings with the persons involved, up to engaging an external mediator). If no other measure seems to be appropriate, the employer has to consider removing the discriminating and/or harassing superiors or colleagues from the workplace. The employer has to make sure that the measures taken have the desired effect. Pre-defined policies and strategies to tackle such problems have proven to be helpful in order to be able to react in an appropriate and timely manner. The employer needs to document its efforts carefully to be able to show in a potential lawsuit that it was fully compliant with its duties (cf below).

Another aspect of dispute management concerns the handling of **out of court interventions** of employees or employee representative bodies (for example, The Chamber of Labor). Such written or oral demands are the customary pre-trial process before an employee files a claim with the court. In this regard, it has to be taken into account that even lawsuits, which can be successfully completed for the employer, tie up resources of the employer/HR department, etc. In order to avoid litigation, employers should even take unjustified demands seriously and explain its point of view and provide clarifying information, if necessary.

Austrian law, termination is not restricted to specific reasons (if the employee is not specially protected from termination, for example, works-council members, disabled employees with a special status). However, employees may challenge a termination before the court on different grounds (for being socially unfair, for being discriminatory, etc.). Before terminating an employee unilaterally, the employer should evaluate the risks of a potential lawsuit and consider **offering an agreement** on the mutual termination of the employment, as this form of termination is usually not challenged

before a court. A mutual termination agreement is also available after notice of termination has already been issued, and even after an employee had been terminated with immediate effect for cause. Especially in the latter case, a mutual termination agreement can avoid lengthy proceedings with an unpredictable outcome.

Documentation

Written documentation is a crucial factor in successful employment litigation. Below are examples where written documentation is especially important.

As outlined above, employees may challenge a dismissal before the labor courts on the grounds of social unfairness. The majority of unfair dismissal cases are based on these grounds. The employer may defend the termination if it can prove that there are either business requirements (for example, restructuring) or special facts connected to the respective employee (for example, breach of duties, incapacity to fulfil the duties at the workplace, etc.) that may justify the intention to terminate the employment. In practice, it appears that courts tend to be more inclined to follow the position of the employer if factors like breach of duties and subsequent warnings have been documented in writing.

Written Documentation is also especially important to avoid claims that arise from so called **"company practice"**. If an employer decides to render voluntary benefits to an employee without being obliged to do so, it is important to expressly declare these payments or benefits in kind as voluntary benefits, which cannot establish a right to future benefits. Many lawsuits are based on claims arising from company practice, because the necessary reservations have not been made or cannot be proven.

Moreover, a frequent contentious issue is remuneration of over-time. In general, the employer is obliged to keep a record of actual daily working times and breaks. Failure to do so can result, on the one hand, in administrative penalties. Even more importantly, the court tends to rely on any records provided by the employee in cases of disputes, so the employer's means to invalidate this evidence are low. Also, lack of sufficient working time records negatively affect forfeiture clauses.

IV. Trends and Specific Cases

The Act on Wage and Social Dumping ("Lohn- und Sozialdumping-Bekämpfungsgesetz" or "LSDB-G"), which was introduced in 2011, has been amended with effect from January 1st, 2015. The law was originally implemented in order to prevent wage and social dumping due to the opening of the Austrian labor market for employees and employers from new eastern and central European Member States. The Act on Wage and Social Dumping contains provisions for foreign employers, but also Austrian employers. The most important provisions, and, in particular, those concerning the underpayment of employees, apply to both types of employers. Employers are obliged, by the Austrian law amending labor contract law ("Arbeitsvertragsrechts-Anpassungsgesetz" or "AVRAG"), to pay the remuneration to which an employee is entitled to by law, regulations or the applicable collective bargaining agreement.

From 2015, not only is the employer's failure to pay the basic rate of pay against the law and, as a consequence, subject to fines, but the failure to pay any part of the employee's remuneration set out by the applicable collective bargaining agreement. The basic rate of pay does not include parts of the employee's compensation like holiday and Christmas bonuses or overtime premiums. Since 2015, the correct payment of nearly all wage elements has been under scrutiny by the authorities. However, underpayment of remuneration, which is only agreed upon in an employment contract or a shop agreement, does not fall under these provisions.

Pursuant to this recent amendment, the underpayment of employees is now considered a matter of administrative law. Before 2015, civil courts were tasked with assessing whether an employee was paid the correct amount of remuneration pursuant to the applicable collective bargaining agreement. In case of underpayment, the employer only had to pay the difference in pay to the affected employee. Now, the employer also faces high administrative fines, and the authorities can take legal action against an employer irrespective of the intentions of the affected employees.

If an employer pays an employee less remuneration than required by a collective bargaining agreement, administrative authorities and their respective courts can impose fines varying between € 1,000 and 10,000, for every affected employee. Furthermore, in cases of recurrence, or if more than three employees were underpaid, fines between € 2,000 and 20,000 apply. In cases of recurrence with more than three affected employees, fines between € 4,000 and 50,000 for every underpaid employee can be imposed. These fines also apply if an employer does not keep up-to-date documents on wages and salaries in German, or if the employer does not cooperate with the authorities when audited.

If the employer exercises "active repentance" ("tätige Reue"), the authorities will refrain from imposing a fine. To do this, the employer must pay the difference between the employee's reduced remuneration and the remuneration the employee is actually entitled to receive in advance of a review by the competent authority. Such discretion will only be exercised if the underpayment is minor and not the result of s deliberate action or serious negligence.

V. Conclusion

In general, employment law litigation follows the rules of Austrian civil procedural law. However, the law provides for special rules and exemptions reflecting the special nature and needs of employment litigation. For example, elements of the simplified proceedings provided for the district court level apply regardless of the value in dispute. Parties can also be represented before the labor courts not only by attorneys, but also by other so called qualified persons (for example, members of representative bodies). Some lawsuits do not trigger court fees and are also cost-neutral with regard to attorneys' fees (each party has to bear their own costs). In special matters, some decisions become provisionally enforceable even if the losing party files an appeal (claims on outstanding salary payments). Another important feature of employment litigation is that fewer restrictions apply on the review of decisions by appellate courts. For example, regardless of the value in dispute, decisions of first instance courts may be appealed to second instance courts, and those decisions can be appealed to the Supreme Court. Employment law cases are also heard by special labor courts, which consist of professional judges and lay judges.

One of the most important players on the employees' side with regard to employment law litigation is the Chamber of Labor, the statutory representative body for employees. In many cases, the Chamber of Labor covers the costs of proceedings and thus facilitates easy and risk free access to the courts for its members. Employers usually bear the full risk of litigation. Therefore, employers tend to try to avoid employment litigation.

Efficient ways to avoid litigation, or at least minimise the impact of litigation on the employer's business, have been proven to be, first of all, awareness of the applicable legal sources which affect the individual employment relationships (for example, determination of the applicable collective agreements, like collective bargaining agreements or shop agreements). Moreover, a clear contractual basis for all individual agreements and efficient dispute-management (already during the employment) can help to prevent expensive and time consuming proceedings before the labor courts. However, in case litigation cannot be avoided, the employer should be prepared and have sufficient written documentation to have a strong basis of evidence supporting the employer's position.

BELGIUM

I. Overview

a. Introduction

Belgium has a specialized jurisdiction for labor conflicts, namely the labor tribunals (*"Tribunal du Travail/Arbeidsrechtbank"*), sentencing in the first instance, and the labor courts of appeals (*"Cour du Travail/Arbeidshof"*), sentencing in the degree of appeal, hereafter jointly referred to as "the labor courts".

Procedures before the labor courts are regulated by the Judicial Code, as is the case for all civil and commercial procedures in Belgium. There are only a few rules that are specific to the labor courts, namely:

- the possibility for a trade union representative to represent the employee in court;
- the unlimited possibility of appeal (a judgment of a labor tribunal can always be appealed, irrespective of the value of the claim); and
- the presence of a specific public prosecutor in certain social matters ("the labor prosecutor").

Belgian employment litigation is based on a system of civil law. In principle, case law precedents have no legally binding force. Yet, in practice, decisions of the highest courts have strong persuasive authority, especially when confirmed repeatedly.

It should be noted, that employment law and employment litigation does not cover civil servants who are not bound to their employer by a contract, but, rather, by statute. Disputes arising from the latter working relationship are, in principle, brought before the Council of State, which is the Belgian administrative court. However, certain disputes, including subjective rights (for example, salary, legal responsibility, etc.), can be brought before the civil courts (the court of first instance and in the case of an appeal, the court of appeal). The procedure before the Council of State exceeds the scope of this contribution and will therefore not be addressed.

b. Claims

Individual labor disputes

The labor courts have jurisdiction with regard to all individual labor disputes, i.e. disputes arising from the individual relationship between the employer and the employee. The Belgian labor courts often treat the following subjects:

- Termination of the employment contract, wrongful dismissal, constructive dismissal, etc.;
- Salary and fringe benefits;
- Equal treatment, equal pay and discrimination;
- Violence, moral and sexual harassment;
- Unfair competition, non-compete clauses, confidentiality, etc.;
- Re-characterization of a contract on a self-employed basis into an employment contract;
- Working time, overtime hours and overtime pay, etc.;
- Extra-legal pension plans;
- Well-being at work; and
- Allowances payable in the event of industrial accidents or occupational illnesses.

*The above list is of course not exhaustive.

Collective labor law conflicts

In principle, the labor courts have no jurisdiction with regard to collective labor law conflicts - i.e. conflicts that go beyond the individual employer-employee relationship - such as a strike or lock-out.

Also, collective disputes that arise between the employer and the employees as a result of conflicting interests when renegotiating a collective bargaining agreement (CBA), for example, disagreement over the determination of the employment conditions, cannot be brought before the labor courts, as they constitute a "conflict of interest" and not a "dispute of rights".

The Belgian legislature preferred that these disputes would be solved by means of negotiations (the 'social dialogue' between employers and unions), and if that fails, by means of conciliation and mediation, which takes place within the conciliation committee of the joint committee[11] competent for the concerned undertaking or within the office of mediators created by the Social Dialogue Department of the Federal Public Service for Employment, to assist with solving collective labor disputes (see the section *Alternative Dispute Resolution (ADR) - Collective labor law* hereunder).

However, when subjective rights are violated, courts may be asked to intervene in collective conflicts to end certain activist behavior, for instance, with regard to strikes. The right to strike is a fundamental social right, which cannot be infringed. Yet, depending on the circumstances, some courts accept claims against strikes based on the subjective rights of others, such as, for example, the right to work (affected when non-strikers are denied access to the company) or the freedom to conduct business and the property right of the employer (affected when the employer is denied access to his company or when the trucks of suppliers are blocked). Other courts are more reluctant to end a strike based on a violation of these subjective rights. However, when picketing is accompanied by acts of violence against individuals or property, it becomes illegal. In that case, the employer can refer to the president of the court of first instance (the civil court, and not the labor tribunal) in order to obtain an injunction against these acts of violence. Such a procedure will be conducted as an interim procedure.

Yet, the labor courts do have jurisdiction to sentence in the following situations of a "collective nature" where "disputes of rights" are concerned:

- In the case of an individual dispute that arises in the context of a collective dispute (for example, was the dismissal of an employee who participated in the strike legitimate?);
- In the case of claims with regard to the installing and functioning of the Works Council and the Committee for Prevention and Protection at Work (for example, claims with regard to the social elections of these bodies and the termination of its members and candidates who are protected against dismissal);
- In cases where the competence of the joint committee chosen by the employer is disputed;
- Disputes with regard to collective lay-offs and closing; and
- All claims initiated by the employee(s) or union(s) with regard to disputes relating to the rights set out within collective bargaining agreements (for example, if the employer does not respect its obligations under a CBA to pay a certain premium or ensure certain working conditions).

[1] A joint committee is a body established per sector of industry in which the social partners (the unions and the employers' organizations) are represented. In these joint committees, collective bargaining agreements including wages and working conditions per sector of industry are entered into.

Social security issues

The labor courts are also competent for all claims relating to social security issues involving employers (for example, the payment of social security contributions), employees (for example, unemployment benefits) or self-employed workers (for example, disability benefits), as well as for all social assistance matters.

Social penal law

As numerous employment laws include criminal sanctions in the case of non-compliance, employment law litigation can also be conducted before a criminal court. This is the so-called social penal law.

An employee who is the victim of a penal act committed by the employer who violated an employment law that is criminally sanctioned (for example, the non-payment of salary), can either bring a civil action (claim for damages) in penal proceedings or initiate a proceeding before the labor courts.

Miscellaneous

A stranger in the midst is the jurisdiction regarding consumer over-indebtedness cases. This competence shifted in 2006 from the courts of first instance (judge of seizure) to the labor courts. The assignment of this specific competence to the labor courts is an arbitrary shift of caseload.

c. Administrative Agencies that Investigate or Adjudicate Claims

Both in the framework of "civil" labor law and social penal law, there are a number of administrative agencies that either investigate a claim or pronounce a ruling. We list the most important ones.

"Civil" labor law

The joint committee needs to recognize an economical or technical reason in order for an employee representative to be dismissed

Employee representatives within the Works Council and the Committee for Prevention and Protection at Work and non-elected candidates are protected against dismissal.

If the employer wants to dismiss such protected employees, it can only do so for serious cause with prior approval of the president of the labor tribunal, or for an economical or technical reason.

Such economical or technical reason needs to be recognized by the competent joint committee. Therefore, the employer needs to comply with a specific procedure before this administrative body, installed within each sector of industry and composed of representatives of unions and employers' organizations.

A Social Ruling Commission can classify the nature of a working relationship

If parties qualify their working relationship as a self-employed collaboration, but in practice a link of subordination exists between the principal and the self-employed worker, this situation is qualified as 'bogus self-employment' and the service contract can be re-characterized as an employment contract with important financial consequences.

It can sometimes be difficult to assess whether or not a link of subordination exists. Therefore, parties in a self-employed relationship who wish to obtain legal certainty with respect to the exact nature of their relationship can request a social ruling from an administrative commission, the "Social Ruling Commission", either before the commencement of the relationship or, at the latest, within one year of the commencement of the collaboration. This Commission is presided over by a magistrate and is composed of personnel from the different social security authorities. It became operational as of mid-2013.

Social penal law

Investigation by the social inspectorate

The social inspectorate is responsible for the surveillance of employment and social security legislation.

There are inspection services within the Federal Public Service for Employment (one for the supervision of labor legislation and one for the supervision of well-being at work) and inspection services, which come under the Federal Public Service for Social Security.

The social inspectors may proceed with an investigation to make sure that the employment and social security legislation is complied with.

An employee or any third party may lodge a complaint with the social inspectorate if he/she is of the opinion that a labor or social security law, that is criminally sanctioned, has been violated by the employer (for example, the failure to respect wage scales, maximum working time, etc.). An investigation can also take place at the initiative of the social inspectorate.

If the social inspector discovers infringements, the inspector may issue a warning to the employer and propose a deadline by which a regularization should take place. If the employer does not regularize the situation, or in cases of a serious and/or repeated violation of the law, the inspector will draw up a formal report that will be transmitted to the public prosecutor (the labor prosecutor).

This may lead to judicial prosecution (before the criminal court) for more serious violations or to administrative fines for less serious violations.

Administrative prosecution by the Administrative Fines Office within the Federal Public Service for Employment

Less serious violations of employment and social security laws cannot be subject to criminal prosecution. For these violations, it will be an administrative body, namely the Administrative Fines Office within the Federal Public Service for Employment, that will decide whether a procedure for the issuing of an administrative fine will be initiated, or the infringement will be left without further action.

For more serious violations, the labor prosecutor will decide whether or not to bring the case before a criminal court. If the case is not brought before a criminal court, the Administrative Fines Office can then decide whether or not to apply an administrative fine.

d. Court /Tribunal System

Jurisdiction

Belgium has a specialized jurisdiction for labor conflicts, namely the labor tribunals (*"Tribunal du Travail/Arbeidsrechtbank"*) and labor courts of appeals (*"Cour du Travail/ Arbeidshof"*).

There are five labor courts of appeals, each covering a judicial area, including Brussels, Antwerp, Ghent, Liège and Mons.

Until mid-2014, there were 27 judicial districts, each having a labor tribunal sentencing in first instance.

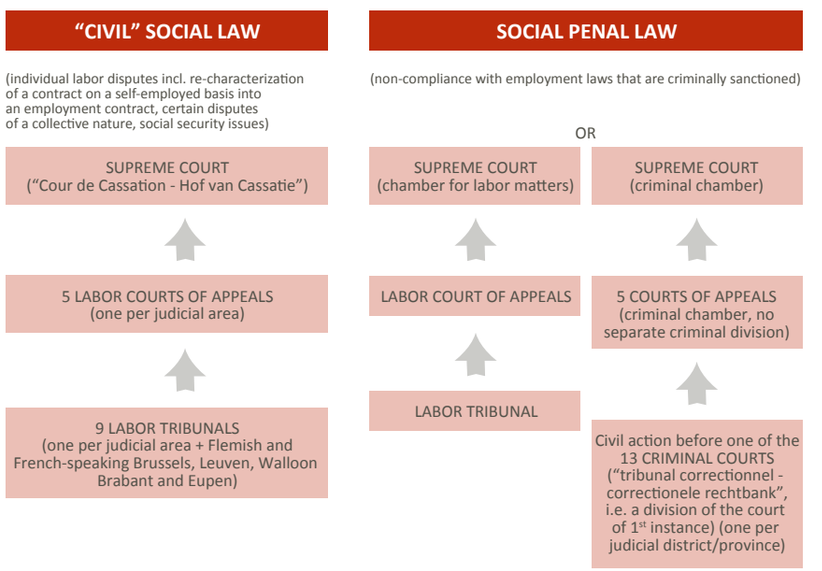
However, in 2014, the Belgian judiciary was reformed. The labor tribunals are not organized on a district level anymore. Instead, the tribunals are now organized on the level of a judicial area, just like the labor courts of appeals, with an exception for Brussels (which has a Flemish and a French-speaking labor tribunal), Leuven, Walloon Brabant and Eupen.

Yet, the former seats of the labor tribunals are maintained as local divisions, so that nothing changes, in practice, for parties seeking justice. Parties are still able to attend the same courthouse.

The core idea of the reform is that all court divisions offer basic judicial services and that specialized cases can be assigned exclusively to one division for the whole area.

Moreover, the new reform introduces the concept of judicial mobility, meaning, for instance, that a judge who is appointed in a specific labor tribunal can be asked to work in another labor tribunal, or even in the labor court of appeals.

THE BELGIAN COURT SYSTEM WITH REGARD TO EMPLOYMENT LITIGATION



Language

Proceedings conducted in the Flemish region take place in Dutch, while proceedings in the Walloon region are conducted in French, and proceedings in the German-speaking region (Eupen) are conducted in German. In the Brussels region, the claimant may choose to initiate proceedings either in Dutch or in French, but the defendant may ask - under certain conditions - to have the proceedings transferred to the court of another language.

Chair

In principle, the labor tribunals and labor courts of appeals are presided over by a professional judge assisted by two so-called lay judges (*"juges sociaux/rechters in sociale zaken"*), one of whom is an employer representative and the other a union representative or a representative of the self-employed. The latter two are non-professional judges, nominated by their representative organizations. The social partners thus participate in employment justice in order to complete the legal knowledge of the professional judge with practical experience.

Moreover, both the labor tribunals and labor courts of appeals include a labor prosecutor (*"auditeur du travail/arbeidsauditeur"*), who represents the public interest. The labor prosecutor's role is to provide verbal or written opinions. For some cases brought before the labor courts, especially for social security matters and discrimination and mobbing cases, the labor prosecutor is obliged by law to present an opinion, while for others, no such obligation exists.

The highest court is the Supreme Court (*"Cour de Cassation/ Hof van Cassatie"*), which is composed of three chambers, including a chamber for labor matters and one for criminal matters.

The Supreme Court does not reconsider the facts of the case, but only reviews the legality of the decision rendered by the labor court of appeals. If it upholds an appeal, this renders the original decision null and void, and the case is referred back to another labor court of appeals for retrial.

Representation

The parties may appear in person before the labor tribunals and labor courts of appeals and present their own written pleadings and arguments. If not, they can be represented by an attorney, but also by a spouse or parent, or by a delegate of a representative employee organization (a union), the latter being a particularity for Belgian employment litigation.

For civil (employment) proceedings before the Supreme Court, a party must be represented by an attorney appointed to the Supreme Court. In criminal cases, each attorney is allowed to represent his/her client before the Supreme Court.

e. Alternative Dispute Resolution (ADR)

Contrary to the Anglo-Saxon "all to the judge'' model, in Belgium, collective labor disputes are resolved through mediation and conciliation (see *Claims - Collective labor law conflicts* above), which is aimed at defusing a conflict before the decision to take collective action is made.

Alternative dispute resolution procedures were not often used in the past to resolve individual labor disputes. However, the interest for these procedures has increased in recent years.

Collective labor law

With regard to collective disputes, conciliation is provided for at different levels: first of all within the undertaking, and if no solution can be reached, within the joint committee.

The trade union delegation[2] within the company has the right to be heard by the employer in relation to each actual or potential collective conflict. Moreover, every employee has the right to be assisted by a trade union delegate if he/she has an individual grievance. If the employer and the trade union delegation cannot settle the dispute, they may call upon the secretary of the unions.

If there is still no solution, the matter can be referred to the so-called conciliation committee of the joint committee. This conciliation committee is composed of the chairman of the joint committee (which is a civil servant) and members appointed on an equal basis between employers' organizations and trade unions.

Yet, conciliation before the joint committee will always be on a voluntary basis. Parties cannot be forced to reconcile a dispute.

The purpose of the conciliation procedure is to bring the parties together to reach an agreement. The conciliator does not issue a judgment, nor suggest a solution, but rather, works with the parties to find an acceptable outcome.

When there is unanimity within the conciliation committee, this committee will work out a recommendation. This recommendation does not bind the disputing parties, but has strong moral value, so that, in practice, the parties often execute it.

When no unanimity can be reached, the procedure is brought to an end with a record of "non conciliation". In that case, the parties regain full liberty of action (for example, the notification of a strike).

Another option is to invoke the aid of the Social Dialogue Department of the Federal Public Service for Employment, which has created an office of mediators to help resolve collective labor disputes. The mediator goes a step further and makes suggestions to the parties on a possible solution.

The above-indicated conciliation and mediation procedures, organized by the Belgian State, are free of cost for the parties involved.

There is no arbitration procedure for collective labor disputes.

Individual labor law

For a long time, and although incorporated in the Judicial Code, alternative dispute resolution procedures were not used in Belgium to resolve individual labor conflicts. However, in 2005, a new law reorganized alternative ways to resolve these conflicts (namely, conciliation and mediation).

Arbitration is another alternative to litigation through the courts.

Details of all three variants of ADR (conciliation, mediation and arbitration) are set out below.

[2] A trade union delegation must be established, at the request of the unions, in companies employing a minimum number of workers.

Conciliation

Conciliation is organized by the court. Either party can ask the court to start a conciliation procedure. Such a request can be made before the procedure in court has started or at any time during court proceedings up until the oral pleadings. A judge can also propose conciliation to the parties, rather than a trial. It is then up to the parties to agree to proceed with a conciliation or not. Conciliation is free of cost. However, it is rarely used.

Mediation

This is where an impartial third party, the mediator, helps two or more parties in dispute attempt to reach an agreement.

There are two types of mediation: namely, (i) a voluntary mediation, which is not linked to existing legal proceedings, or (ii) a court-instigated mediation, which takes place within the framework of existing legal proceedings, but only with the parties' consent.

The parties will jointly choose the mediator. Mediators are accredited by the Federal Public Service for Justice and most of the time they are lawyers.

The successful outcome of a mediation results in a settlement agreement that is binding on the parties.

However, unlike an arbitral award, this agreement is not enforceable, nor is it appealable. If enforcement of the agreement becomes necessary, the party needs to go to court to seek judicial ratification.

All documents or communications used in a mediation procedure remain confidential and may not be used in the labor court. The mediator has a duty of secrecy.

A mediation procedure has the advantage of avoiding an antagonistic confrontation, which is particularly useful where the employer and the employee have to maintain their working relationship. Mediation is also more rapid than a "normal" judicial proceeding before a court, which means that the dispute may be settled in a short period of time.

Moreover, if mediation is successful, it is generally more efficient and timely and therefore cheaper than a trial. The costs linked to mediation correspond to the fees and expenses of the mediator.

Over the past few years, there has been an increase in the utilization of mediation in individual labor disputes.

In the region of Brussels, the courts and the social partners reached an agreement that encourages the use of mediation. The Brussels labor courts now systematically propose mediation to the parties by sending them a letter explaining this possibility. Other labor courts also began following this initiative.

Arbitration

As a general rule, any dispute, which can be terminated by a settlement agreement (and thus no dispute with regard to public order provisions), may be submitted to arbitration.

In principle, the employer and the employee can only decide to resort to arbitration after the dispute has arisen. In other words, it is not possible to enter into an arbitration clause beforehand (e.g. within the employment contract) indicating that in the case of a conflict, the matter will be presented to an arbitrator instead of the labor court.

There is one exception to this rule: an arbitral clause can be inserted within the employment contract for employees earning at least 66.441 € gross per year (inclusive of benefits; figure in 2016, yearly indexed), entrusted with high management responsibilities.

An arbitral award is final and binding on the parties. It is not possible to appeal an arbitral award before a court.

The most important arbitration institute in Belgium is the CEPANI-CEPINA (Belgian Center for National and International Arbitration) based in Brussels. Its administration is efficient and its rules are modern and effective. Other ad hoc arbitrations may also be conducted in Belgium.

Arbitration is rather expensive, as the fees of a specialized (panel of) arbitrator(s) are elevated. In Belgium, few employment law cases are presented to arbitrators.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

Contrary to most other proceedings, which must be initiated by a writ of summons (served by a bailiff), most litigation before the labor courts can be initiated by a petition (*"requête/verzoekschrift"*), which does not attract any costs.

The petition (or the writ of summons if the more expensive option is chosen) must be entered into the register of cases, which is kept at the court registry and which is a public document.

The petition or the writ of summons must set out the claimant's case and the date and location of an introductory court hearing. This introductory hearing will take place within a short period of time (at least 8 days, and in general a maximum of a few weeks following the delivery of the writ or petition) at a date appointed by the court's clerk.

Cases that only require limited debate (i.e. simple cases) may be decided upon at this introductory hearing or at a hearing fixed shortly thereafter.

In cases that require a more extensive exchange of arguments, which is the vast majority of the cases, a calendar will be agreed upon between parties or set by the court, including the dates that written pleadings, with each party's arguments, and evidence must be submitted. If the written pleadings or the documentary evidence is submitted after the expiration of the fixed time limit, the court can refuse to take these documents into account.

The claimant must first send his/her documentary evidence to the defendant.

Each party must provide the other party with all of the documents on which it relies.

As part of a recent judicial law reform (the so-called *"Potpourri Act"*), written pleadings now need to be drafted in accordance with a predetermined structure. Moreover, all elements of the written pleadings (an overview of the facts, a description of the claim(s), a numbered overview of the different arguments that are invoked, etc.) need to appear in a specific order. If the predetermined structure is not followed, the court will not need to respond to such written pleadings.

After the exchange of written pleadings and documentary evidence, parties are then required to plead their case during the oral hearings, which take place at a date fixed by the court.

The timing of the hearing date will depend on the court's caseload and the time required to plead the case. In general, it takes several months after the filing of the last written pleadings before the court can hear the case.

Parties may plead in person or can be represented by an attorney or a representative of the unions.

In theory, before starting the oral pleadings the court must try to conciliate the parties. In practice, however, this is just a formality and no real attempt to reach a settlement is made at that stage. The judge just asks if settlement is possible and the clerk records that the answer is negative, which is mentioned in the judgment.

It is the professional magistrate that will conduct the hearing. Although they can ask questions, the lay judges often stay passive during the hearing and rely on the professional magistrate.

After the oral pleadings, the court will deliberate and will render a decision in the form of a written judgment. It will be the professional magistrate that will write the judgment; the lay judges only take part in the deliberation.

Normally, the judgment must be rendered within one month and no later than 3 months following the oral pleadings. In practice, however, it sometimes takes longer.

The court will first check compliance with formal requirements for proceedings (for example, has the claim been filed in time, did the party have the capacity to sue, etc.). The court will only consider the merits of the case if the formal procedural requirements have been met.

If, in the judge's preparation of the judgment, the judge finds that there is insufficient information to issue a judgment, he/she can invite the parties to provide additional explanations, or to express their opinion on a specific matter in the frame of additional written pleadings. The judge will then render an interim judgment ordering the re-opening of the debates and inviting the parties to submit the additional information.

Until recently, the general rule was that an appeal or opposition suspended the execution of a court ruling, unless the ruling was declared "provisionally enforceable" (*"exécutoire par provision/uitvoerbaar bij voorraad"*), in which case the winning party could immediately force the losing party to pay even if the latter had lodged an appeal (or opposition). The provisionally enforceable judgment was, however, the exception (for example, rendered in cases where there is an imminent danger of insolvency of the debtor). Yet, due to a reform of the Belgian judicial system, the provisionally enforceable judgment has now become the rule for claims introduced as of November 1, 2015.

ii. Pretrial Proceedings

No compulsory pretrial proceedings exist in Belgium.

iii. Role of Witnesses, Counsel and Court/ Tribunal

As in most civil law countries, documentary evidence is the most important type of evidence in employment matters in Belgium.

Documentary evidence can include all written documents, plans, pictures, objects, etc. A party can choose the documentary evidence that it wishes to submit to the court, and has no obligation to disclose harmful documents. However, when a party is shown to hold a document, which could prove or disprove a fact that is relevant to the case, the court can order that party to submit the document.

Contrary to other civil proceedings in Belgium (besides commercial cases), in labor cases the court can always allow witnesses to testify, irrespective of the amount at stake and even if there is also written evidence to support a claim.

Although allowed, oral testimonies are not often used as (i) most of the time written evidence will be sufficient, and (ii) a specific procedure needs to be complied with.

In order to avoid having to revert to time-consuming oral testimonies, the legislature introduced new rules relating to written testimonies in 2012. These rules allow witnesses to submit their testimonies in writing to the court, provided that a number of formalities, guaranteeing their authenticity, are complied with. The evidentiary force attributed to such testimonies is limited to a presumption that can be rebutted by proof to the contrary.

In technically complex cases, the court can order an expert survey upon the request of one of the parties or at its own initiative. The expert can only advise on technical matters (for example, if the dispute concerns the question whether the employee has become permanently physically incapable to do his/her job, the court can assign a medical practitioner to examine the employee, in the case of an evaluation of the value of stock options, etc.).

iv. The Appeal Process

When a decision has been reached by default (i.e. the defendant failed to appear), the case may be brought back to the court and a new decision may be requested. This is called "opposition".

If both parties appeared and a decision is rendered in first instance, the losing party can lodge an appeal before the labor court of appeals.

Unlike decisions with regard to some other civil claims below a certain amount, decisions of the labor tribunal are always appealable[3].

The appeal must be lodged within a period of one month following the notification of the decision by the winning party's bailiff, with the exception of social security cases in which the term to lodge an appeal starts running as of the sending of the judgment by the court's clerk. Appeals that are filed late will be dismissed by the labor court of appeals.

The procedure before the labor court of appeals is similar to the procedure in first instance. In fact, the case is tried again and is left to the appreciation of a higher court.

A party can decide to bring a decision of the labor court of appeals before the Supreme Court. The time to file such a petition is three months from the notification of the appeal decision. However, the Supreme Court will not re-examine the merits of the case, but will only pronounce a decision on the questions of law. If it upholds an appeal, this renders the original decision null and void, and the case is referred back to another labor court of appeals for retrial.

[3]With the exception of some judgments of the labor tribunal in the frame of social elections.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, ...

The "role fee" (*"droit de rôle/rolrecht"*)

Any petition or writ of summons needs to be entered into the register of cases at the court registry (the "court role").

Up until recently, and unlike other civil proceedings, no "role fee" was required in labor cases. The "role fees" are taxes to be paid upon the inscription of a case on the court's role.

However, the system has recently been reformed. As of June 1, 2015, a "role fee" must also be paid for cases introduced before the labor courts and tribunals, but only if the value of the claim exceeds an amount of 250.000€.

The "role fees" to be paid, are as follows:

Court	Value of the claim	Amount of the "role fee"
Labor tribunal	As of 250.000,01€ up to 500.000€	300€
	More than 500.000€	500€
Labor court of appeals	As of 250.000,01€ up to 500.000€	600€
	More than 500.000€	800€
Supreme Court	As of 250.000,01€ up to 500.000€	800€
	More than 500.000€	1.200€

The evaluation of the value of the claim needs to be undertaken by the plaintiff in a so-called *"pro fisco declaration"*, which is an obligatory document. If the document is missing, the court may not treat the case until the situation is rectified.

The "compensation for legal proceedings"
(*"indemnitée de procedure/rechtsplegingsvergoeding"*)

The winning party in the case is awarded a so-called "compensation for legal proceedings" (*"indemnitée de procedure/rechtsplegingsvergoeding"*), which is - as of 2007 - a lump sum allowance for attorney costs and fees. Before 2007, this compensation only covered the expenses of the judicial procedure, but not the attorney's fees.

This lump sum amount means that the actual fees are not recoverable, but are limited to a fixed amount related to the amount of the claim. The higher the amount of the claim, the higher the compensation.

The Royal Decree determining these lump sum amounts distinguishes between a basic amount, a maximum amount and a minimum amount for each range of claims.

In principle, it will be the basic amount that will be attributed. However, at the request of a party, the judge can decide to only grant the minimum amount in cases where the losing party is in a precarious financial situation. Amongst other reasons, if the case was very complex, the judge can decide to grant the maximum amount.

The basic amount ranges between 165€ (for claims up to 250€) and 16.500€ (for claims which exceed 1.000.000€). For claims related to industrial accidents and professional diseases, the basic amounts are much lower (they range between 40,11€ and 320,65€).

This compensation for legal proceedings is only paid to parties, which are assisted and/or represented by an attorney. Hence, a party which defends its own legal interest during a trial, or which is assisted by another person (for example, a trade union representative), is not entitled to this compensation.

If both parties are considered as "partly losing parties", the judge can divide the compensation for legal proceedings.

A major exception applies to judicial proceedings with regard to social security, initiated by or against a citizen receiving social security benefits. In such proceedings, independent of who is the claimant or the defendant and independent of the result, the compensation for legal proceedings (as well as other court fees) is lower and taken at charge by the Social Security Institutions (the Belgian State).

Finally, the compensation for legal proceedings is awarded per instance, meaning that if a judgment of the first instance is being reformed or annulled in the degree of appeal, the 'losing' party will be sentenced to compensation for legal proceedings for both instances.

Attorney's fees

No party can be obliged to pay additional compensation for the attorney's intervention of the other (winning) party above the amount of the compensation for legal proceedings. If the attorney's fees are higher, the difference will be borne by the winning party itself.

The losing party always pays its own attorney's fees.

Attorney's fees are not regulated in Belgium. Attorneys set them freely and they may be negotiated between client and attorney, with the understanding that attorneys must set them within suitably restrained limits.

The lawyers' association may check that attorneys do not exceed these limits.

Several calculation methods are possible: an hourly fee; a fee for each service provided; a fee according to the value of the case (percentage of the amount involved in the proceedings); etc. However, a fee agreement solely linked to the outcome of the action is prohibited in Belgium.

Since 2014, attorneys' fees are subject to VAT in Belgium (21%).

Registration duties

Each condemnation with regard to money debts will be subject to tax charges. These tax charges are up to 3% of the amount of the money debt, which is declared by the court. However, if the amount of the condemnation does not exceed 12.500€, no tax charges will be levied.

Bailiff costs

Most litigation before the labor courts can be initiated by a petition, which does not attract any costs. Should a party opt to initiate the proceedings by a writ of summons, this writ will have to be served by a bailiff and will attract bailiff costs. Also, the notification of the judgment to the losing party (necessary to have the term to lodge an appeal begin) must be done by a bailiff and will attract bailiff costs. In general, such bailiff costs are borne by the losing party.

Legal aid

Persons who do not dispose of sufficient income can be fully or partially discharged of judicial expenses (for example, costs of bailiff). They can also be represented by a so-called pro bono-attorney (partly) free of charge.

The pro bono-attorney receives compensation from the State. There is a list of attorneys who present themselves in order to act as a *pro bono*-attorney. All trainees (i.e. attorneys during their first three years of professional experience) are obliged to accept *pro bono*-cases.

Damages

In labor cases, the losing party will, in principle, be sentenced to pay compensatory damages.

The amount of damages will generally be determined by law. However, in some limited cases, the employer and the employee can agree upon the scope of indemnification within the employment contract (for example, a non-competition indemnity must at least equal half of the gross remuneration corresponding to the duration of the non-competition clause, but the duration of the clause can - within certain limits - be agreed upon by the parties).

A penalty clause, where a party promises to pay a fixed sum if he/she fails to perform the contract or breaches a specific obligation, is rather exceptional in employment contracts and subject to article 18 of the Act of 3 July 1978 on Employment Contracts, which stipulates that an employee can only be held liable for acts of fraud, a serious fault, or a frequently occurring minor fault. An example is a penalty clause in cases of breach of a confidentiality obligation after termination of the employment contract. However, if the amount to be paid by the breaching party is manifestly higher than the potential damages, which the parties could foresee at the time of entering into the contract, such a clause will be null and void.

Other judicial remedies besides damages

Interim measures before the president of the court - summary proceedings

An urgent matter may require interim measures, which can be granted in the frame of summary proceedings that are conducted in a very brief time period.

An application for interim measures is made to the president of the labor tribunal.

The request must be urgent and the claimant must face a threat of imminent damages if no measures are taken. The president of the court may only declare a temporary provisional decision and may not decide on the merits of the case.

The decision of the president is immediately enforceable. However, it is not binding for the judge who will hear the case on the merits and issue a final judgment.

In extremely urgent cases, one party petitioning the court can initiate proceedings.

Below are some examples of measures in employment cases that can be ordered in summary proceedings:

- prohibiting an employee from using or disclosing confidential documents of his/her ex-employer;
- suspending an employer's unilateral modification of an essential element of an employee's employment conditions (for example, the function, place of work or salary); and
- prohibiting an employee from violating a non-competition clause.

Cessation order

The president of the labor tribunal can also grant a cessation order to prevent a party from carrying on an illegitimate practice.

There is no requirement for urgency.

Formally, these proceedings are conducted as summary proceedings, but the president of the court will decide on the merits of the case.

The president may also impose a fine on a defendant for any violation of a cessation order.

The typical example of a cessation order in employment matters involves the cessation order in the frame of discrimination cases.

Indeed, Belgian anti-discrimination laws provide for actions for injunctions to stop discriminatory acts (for example, discriminatory employment conditions). These actions can be introduced by the employee-victim, the representative employers' and employees' organizations, the labor prosecutor or the governmental Centre for the Equality of Chances and Opposition to Racism, which assists victims of discrimination through advice, legal support, mediation and legal action.

Also, in mobbing cases, a cessation order can be issued to stop acts of violence and moral and sexual harassment.

Timeframe

The average duration of a case before the labor tribunal (from the filing of the petition to the judgment) varies, but is generally between 12 and 18 months, depending on the complexity of the matter, the number of written pleadings that have been exchanged, and the caseload of the court.

The appeal procedure often takes a bit longer than the procedure in first instance, although employment cases in the degree of appeal are handled within a relatively short time compared to other civil proceedings (which in some cases can take a few years).

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The Works Council, the Committee for Prevention and Protection at Work (CPPW) and the Trade Union Delegation

Enterprises employing at least 100 employees on average must install a Works Council. The Works Council mainly has information and consultation rights on economic and social issues.

A Committee for Prevention and Protection at Work (CPPW) must be set up in enterprises normally employing an average of at least 50 employees. The CPPW is competent for health and safety matters.

The employee representatives within both the Works Council and the CPPW are union members, nominated by their union and elected within the frame of social elections, which must be held every four years.

A Trade Union Delegation must be established at the request of the unions in enterprises employing a minimum number of workers determined by a CBA. The Trade Union Delegation can present and discuss individual and collective grievances and supervises the observing of employment legislation and of CBA's within an undertaking.

Trade union delegates are employees of the enterprise who are either appointed by the unions or elected by the other (unionized) employees (although not in the frame of social elections).

If disputes arise with regard to (the installation of) the Trade Union Delegation or the (election of) the Works Council or the CPPW, the unions that have nominated the employee representatives, not these bodies, will be engaged in litigation proceedings against the employer (see the section on *The standing in justice of the unions*).

The unions

Belgian trade unions have no formal legal status or corporate capacity. This implies that:

- except in cases explicitly provided for by law (see hereunder), they cannot stand in justice;
- they cannot be sued to pay damages, nor for violation of the so-called "social peace obligation" (see the section below).

The standing in justice of the unions

Belgian law only grants representative trade unions the right to stand in justice regarding the circumstances noted below.

Disputes regarding the legislation on collective bargaining agreements

In Belgium, employment regulations are not only embedded in laws, but also, amongst others, in CBAs.

CBAs are entered into either on an industry level, between unions and employer organizations, or on a company level, between the unions and an individual employer.

CBAs include provisions with regard to wages and working conditions, which need to be respected by the employer, and provisions with regard to the relations between the unions and the employer.

In order to defend the rights of union members as provided for within CBAs, unions have the capacity to sue an employer not respecting its obligations within a CBA.

Disputes regarding the legislation on Works Councils and CPPW's (mainly disputes with regard to social elections)

If disputes arise in the frame of the social election process, unions have the capacity to sue and be sued.

Possible disputes between the employer and the unions can relate to:

- The determination of what is considered by the employer to be the technical operation unit, i.e. the level on which the Works Council and the CPPW must be established. The technical operation unit is defined on the basis of so-called economic and social criteria and does not necessarily coincide with the legal entity.
- The defining of the functions of high management staff (employees pertaining to the category of high management staff cannot stand as a candidate for the social elections).
- The list of candidates established by the unions.

The procedure with regard to the dismissal of elected employee representatives and candidates to the elections

Employee representatives within the Works Council and the CPPW, as well as non-elected candidates are protected against dismissal.

If an employer wishes to dismiss such protected employees, it can only do so for serious cause and with the prior approval of the president of the labor tribunal (or for an economical or technical reason that needs to be recognized by the competent joint committee: see the section on "Civil" labor law above).

The unions will be party to the judicial proceedings initiated by the employer to obtain this prior approval from the court.

Other disputes

- the maximum age of workers in case of selection and hiring;
- the European Works Councils;
- equal treatment of men and women;
- the protection from violence and moral and sexual harassment; and
- discrimination.

In principle, trade unions cannot be sued to pay damages, nor for violation of the "social peace obligation"

Another consequence of the lack of legal status of the unions is that they cannot be sentenced to pay damages, nor can they be sued for violation of the so-called "social peace obligation".

The "social peace obligation" is a commitment from the unions, included within most CBAs, to refrain from all claims during the lifetime of a CBA, not to strike, and not to undertake any action which conflicts with the agreed CBA.

As it cannot be enforced, the "social peace obligation" is more of a moral engagement.

III. Tips to Avoid Litigation

Defending a lawsuit can be time consuming and expensive. Therefore, it is important to avoid litigation, or to minimize its impact on a business.

The following "best practices" are recommended in this respect to the employer:

- keep open lines of communication with employees and let them - to the extent possible - participate in decisions that affect them;
- invest in social dialogue with the Works Council, the CPPW, the Trade Union Delegation and unions, so as to avoid collective labor disputes or to have them settled promptly;
- draw-up accurate and detailed employment policies, have them reviewed by an attorney, and update them on a regular basis so that they are in line with applicable legislation;
- draft complete and precise contracts;
- document shortcomings, build up a file with written evidence, and implement evaluation procedures;
- seek legal advice at an early stage of a conflict, or even before a problem arises;
- keep apprised of applicable employment laws; and
- evaluate whether or not it may be preferable to settle a case out-of-court by means of a settlement agreement (in this respect, all negotiations between the attorneys of both parties are confidential).

IV. Trends and Specific Cases

a. New or Expected Developments

Until 2014, the notice periods for white-collar workers earning more than 32.254€ (figure in 2013, yearly indexed) were not fixed by law, but needed to be negotiated between parties or decided upon by a judge. Therefore, many disputes with regard to the duration of the notice period (or the amount of the indemnity in lieu of notice) were brought before the labor courts.

As part of the recent Belgian labor law reform, this rule no longer exists.

As from January 1, 2014, the labor law determines all notice periods.

Therefore, we expect that this part of litigation will disappear (with the exception of disputes with regard to the wage elements to be taken into account to calculate the indemnity in lieu of notice).

On the other hand, we expect that a new type of litigation will become more important.

Indeed, and also as part of the labor law reform, a CBA on the motivation of dismissal was entered into at a national level. This CBA entered into force on April 1, 2014 and applies to dismissals implemented or notified as from that date.

All workers now have the right to ask for the specific reasons that led to their dismissal.

Moreover, workers hired for an indefinite period may seek damages if it appears that they have been dismissed on "manifestly unreasonable grounds", i.e. for reasons which do not relate to their capability or conduct or to the operational requirements of the company, and which would never have been decided by a 'normal and reasonable' employer.

If the court finds that the dismissal was manifestly unreasonable, the employer owes damages for an amount ranging between 3 and 17 weeks of salary (benefits are inclusive).

It will be up to the labor courts to evaluate whether or not a dismissal was manifestly unreasonable, without assessing the opportunity of the employer's decision to dismiss.

As the legal framework on the motivation of a dismissal is relatively new, to date, there is little case law interpreting and defining this notion of a "manifestly unreasonable dismissal".

Recently, the labor tribunal of Leuven held that the termination of a manager based on (i) his multiple absences which had a negative impact on the good functioning of the undertaking, (ii) his non-compliance with the co-operation principles of the employer, and (iii) complaints of customers about that employee, could not be regarded as a manifestly unreasonable dismissal (ruling of October 8, 2015).

It is expected that case law on the issue will take form in the months and years to come.

b. Recent Amendments to the Law

Three recent amendments can be highlighted:

- As of January 1, 2014, services provided by attorneys are subject to VAT (21%).
- In 2014, the Belgian judiciary was reformed in two ways.
  - Firstly, the labor tribunals, sentencing in first instance, are no longer organized on district level. They are now organized on the level of a larger judicial area. However, in practice, little has changed, as the former seats of the labor tribunals have been maintained as local divisions.
  - Secondly, the new reform introduces the concept of judicial mobility, meaning, for instance, that a judge who is appointed in a specific labor tribunal can be asked to work in another labor tribunal, or even in the labor court of appeals.
- As previosuly mentioned above (*Typical Case – Steps in the Process*), On November 1, 2015, a number of relevant provisions of the so-called "Potpourri Act", reforming Belgian judicial law, entered into force. Written pleadings now need to be drafted on the basis of a predetermined structure. Moreover, as a rule, judgments will be provisionally enforceable (*"exécutoire par provision/uitvoerbaar bij voorraad"*), meaning that their execution will not be suspended by an appeal or opposition.

V. Conclusion

The Belgian legislature has undertaken efforts to make the labor tribunals and labor courts of appeals as accessible as possible for the parties:

- a trade union representative can represent an employee in court;
- there is an unlimited possibility of appeal, irrespective of the value of the claim;
- cases are handled within a relatively short period of time; and
- a labor prosecutor will be present in social security matters, discrimination and mobbing cases to provide a verbal or written opinion.

The overall position with regard to the handling of employment litigation cases is rather positive.

Over the past few years, there seems to be a tendency towards a decrease in the number of cases that are brought before the labor courts. A possible explanation could be the increase of the 'compensation for legal proceedings' (*"indemniteé de procedure/ rechtsplegingsvergoeding"*).

BRAZIL

I. Overview

a. Introduction

In Brazil, labor relations are a matter of Federal law, so the States and Municipalities have no power to legislate over labor matters. Therefore, labor rights are nationally standardized, and the same labor costs and consequences will apply regardless of an employer's place of business or place of incorporation.

The basic principles concerning labor relations in Brazil are contained in the Labor Code, the so-called "CLT" (Consolidação das Leis do Trabalho), enacted on May 1st, 1943. Although it has been complemented, altered and amended over the years by scattered statutes, and also by the Federal Constitution of 1988, the Labor Code is outdated in several points as it was enacted under a very different social and economic reality. From time to time, the idea of a major review of the Labor Code is raised at a political level, but a concrete step toward such a review is still pending. Although there are other laws regulating labor rights, the main concepts and limits are stated in the Labor Code.

Given that, in essence, no significant changes have been made to the original Labor Code, its application has been strongly influenced by the interpretation developed over the years by Brazilian Labor Courts. There are courts specialized in labor matters and they are competent to judge any dispute related to work relationships.

b. Claims

The most relevant labor rights are briefly described below. They are applicable solely for individuals hired as employees, and may be complemented by the applicable collective bargaining agreement.

Compensation

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

In Brazil, employees' monthly salary is used as a base for the calculation of all applicable labor and social security charges. Such charges apply not only over the salary, but also on the overall compensation, which comprises any other amount or benefit granted to the employee, such as commissions, bonuses, fringe benefits (for example, personal or family benefits) and living expenses. The only exceptions are some benefits expressly exempted by law from labor and social security charges, such as payments connected with profit and/or results sharing plans (see item 9.2 below), transportation vouchers, meal vouchers, health care and education, provided that certain specific requirements applicable to each exception are complied with.

Collective bargaining agreements often set mandatory rates for annual salary increases, which are be applied for all employees - including managers, directors and executives hired as employees. Such rates are generally defined based on the accumulated inflation rates of the preceding 12-month period.

Profits and/or result sharing

In addition to regular compensation, workers are guaranteed a share in the profits or results of the employer's activities.

Although profit/result sharing rules are extremely flexible and do not establish any kind of limit, such payments must be governed by a plan previously discussed with an elected committee of employees, with the participation of the relevant Union or directly with Union representatives.

Certain requirements that must be observed in the profit/result sharing plan include the indication of clear and objective rules/targets/goals, and the prohibition of more than two payments per year.

Provided that the applicable rules are complied with, profit/result sharing payments are exempt from labor and social security contributions and indeed are an important tool used by Brazilian companies to compose employees' global compensation.

Working hours

All companies with more than 10 employees must control the work shifts of their employees. Certain exceptions include employees holding managerial positions and employees working outside of company facilities. Such employees are not required to have their work hours controlled and are not entitled to overtime payments.

Ordinary working hours shall not exceed eight hours per day and/or 44 hours per week.

Any overtime worked must be remunerated with an additional fifty percent (50%) of the hourly rate, and hours worked on Sundays or holidays must be remunerated with an additional one hundred (100%) percent. Collective bargaining agreements may establish higher rates for overtime payments. Provided that there is Union authorization, overtime worked on a day may be offset by a reduction in hours worked on another day, without any additional overtime payment.

Vacation

After each 12-month working period, an employee is entitled to a 30-day vacation, which must be taken within the subsequent period of 12 months. The remuneration paid with respect to the vacation month must be added by one-third of the employees' regular monthly compensation.

Severance pay fund (FGTS)

On a monthly basis, employers must deposit eight percent (8%) of each employee's salary into an account opened on their behalf and administered by an official federal financial institution (FGTS account). Funds deposited into such accounts may be withdrawn in the case of a dismissal without cause, retirement, purchase of real estate and death, among others.

Whenever an employee is terminated without cause, the employer must pay an indemnification equivalent to (forty percent (40%) of the balance of the employee's FGTS account (40% is paid to the employee and 10% to the Government).

Termination of employment

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

As a general rule, the termination of an employment contract with an indefinite term requires 30 to 90 days prior notice, which, however, may be converted into a payment in lieu of notice. In either case, mandatory severance applies.

The severance entitlement in the case of termination without cause is directly connected to the terminated employee's length of service.

In the event of employee misconduct, the employment may be terminated with cause, with no need for prior notice and with a significant reduction of the mandatory severance.

Health and safety measures

Health and Safety is a sensitive matter in Brazil. There are several regulations providing for strict rules concerning mandatory periodical medical examinations, medical examinations upon admission and termination, medical records, environmental risks prevention, creation and maintenance of an Internal Commission for Accident Prevention (CIPA), health-hazard and dangerous activities and the corresponding allowances and ergonomics, among others.

c. Administrative Agencies that Investigate or Adjudicate Claims

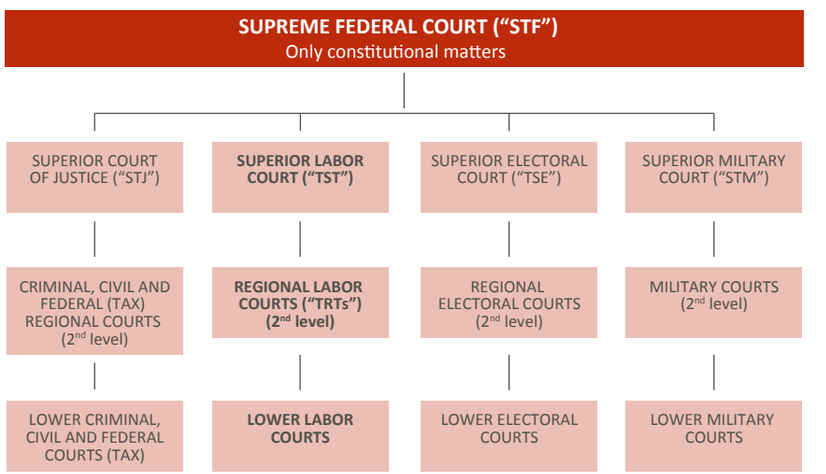
The Ministry of Labor is part of the Federal Government and it is the main labor authority in Brazil. The Ministry issues administrative regulations and proceeds with labor inspections.

The Labor Public Prosecutor's Office - "MPT" - is part of the Federal Public Prosecutor's office and its main activity is the protection of Brazilian labor law and its fulfillment by the employers. The "MPT" investigates the compliance with labor regulations and has full autonomy to investigate companies in order to guarantee compliance with labor regulations. Whenever the Public Prosecutor is unable to reach an amicable solution in the investigation, the outcome of their conclusions is the filing of a public civil action to protect the collective interests of the workers.

d. Court / Tribunal System

Brazil is a Federal Republic governed by 3 powers, Executive, Legislative and Judiciary; the Federal Constitution establishes their powers and duties.

BRAZILIAN JUDICIAL SYSTEM



The Federal Constitution grants the Labor Court jurisdiction to decide all matters arising from labor relationships, including material and moral damage indemnifications.

The Superior Labor Court is the highest Labor Court. However, the Supreme Federal Court may decide some relevant labor disputes involving constitutional matters.

There are 24 Regional Labor Courts spread throughout the country. The Regional Courts are the courts of second instance. There are hundreds of lower labor courts (first instance) throughout the cities. Some cities in the metropolitan areas (*for example, São Paulo and Rio de Janeiro*) have dozens of lower labor courts.

e. Alternative Dispute Resolution (ADR)

Except for collective negotiations between Employees' Unions and Employers' Unions, arbitration is not valid in Brazil. Case law invalidates decisions rendered in arbitrations involving the discussion of individual labor agreements.

Mediation is also not a common practice in Brazil, except for situations in which the Ministry of Labor is involved in collective discussions involving Unions or negotiations between Employers and Unions.

In general, extrajudicial settlements are not binding and do not prevent employees from filing a labor claim. However, if the labor claim leads to a negative outcome for the defendant, the amounts paid under the same subject in the settlement can be set off.

The only binding extrajudicial settlements are those conducted before chambers created by Unions and employers, a "conciliation committee". The majority case law holds that a release given by the employee is full and broad, except if the employee includes a disclaimer regarding specific monies he/she may be entitled to request later.

II. The Litigation Process

a. Typical Case

A labor lawsuit in Brazil is basically comprised of three phases: (i) evidentiary phase, (ii) appeal/revision phase, and (iii) foreclosure phase.

The first (evidentiary) phase takes place when the lower judge analyzes the requests of the plaintiff, the arguments of the defendant and the evidence brought by the parties in view of the law governing the subjects involved in the labor claim. In this phase, hearings with the parties and witnesses are held and all evidence is presented. The phase concludes when the Lower Labor Court judge renders a decision. The parties are then are able to appeal the decision. Although there are different sequences of procedural acts, most of cases are filed under ordinary sequence, in which parties are able to obtain the depositions of up to three witnesses.

Although attorneys can interview witnesses before the hearing, they can never interfere in the content of their testimonies. During the hearings, the attorney does not ask the questions directly to the witnesses. The questions are first presented to the judge, and if the judge considers the question relevant the question will be put to the witness.

Documents must be presented with the complaint and with the defense. Although some judges allow the presentation of documents until the closing of the evidentiary phase, the majority of case law holds that documents not filed with the case records along with the complaint/defense will not be considered. Of course, new documents - documents that did not exist before - can be attached at any time.

After the first instance decision is rendered, the case may be submitted for revision by the Regional/Superior Courts, initiating the second (appeal/revision) phase. The first (evidentiary phase) takes approximately six to 12 months.

If any party appeals the Lower Court's decision, the second (appeal/revision) phase begins. The Regional Labor Court takes approximately six to 12 months to reach a judgment. Should the Regional Court's decision not be favorable, the parties may file another appeal, this time before the Superior Labor Court. However, this second appeal may only be filed if the Regional Court's decision violates the provisions of the Federal Constitution or of any Federal Law, or diverges from the consolidated case law. Therefore, such appeals are often not applicable. The Superior Labor Court currently takes approximately 12 to 24 months to reach a judgment. In very few situations another type of appeal, filed before the Brazilian Supreme Court, is used.

After the final and non-appealable decision is rendered by the Regional Labor Court, or, when applicable, by the Superior Labor Court or by the Supreme Court, the foreclosure phase begins.

At this stage, the parties, and sometimes a court appointed accounting expert, have to ascertain the entitlements and amounts granted to the plaintiff by the final decision. In this phase, only criteria of calculation may be discussed. Depending on the discussions regarding the calculations presented by both parties, it takes approximately six to 12 months from the ascertainment of the amount involved to the payment of the debit. After the debt is ascertained, the Social Security Authorities can question some criteria used for the calculation of the Social Security Contributions, which may also occur in the case of settlement, thus possibly delaying the foreclosure phase by several more months. It is important to note that once the first Lower Court judgment is rendered (first phase), the plaintiff can immediately initiate the ascertainment of the entitlements and amounts granted in such stage, even when a final decision is pending in view of appeals filed before the Regional or Superior Courts. In such cases, considering that the foreclosed decision is not final yet, this foreclosure is provisory and it will end with the escrow of the debit when the final decision is rendered and the foreclosure becomes definitive. The parties may settle an agreement at any time, thus immediately closing the case[1].

Finally, in recent years the Labor Court has implemented the Digital Electronic Lawsuit, through which parties and the Court submit digital files. Although still in a transition period, the electronic lawsuits tend to expedite the labor claims, reducing the time from the filing date until the closing of the case.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, ...

It is free for employees to file labor claims. The only requirement to be granted with the benefit of free judicial costs is to present a letter declaring that the employee cannot afford litigation costs.

Most of attorneys that assist plaintiffs are remunerated through success fees. Protective labor law, no judicial costs and no attorney's fees stimulate employees to file labor claims in Brazil. Usually, attorneys receive 30% of the amount awarded.

In the case of an unfavorable ruling for the defendant, there will be judicial costs to be paid in the amount of 2% over the value awarded by the decision rendered.

[1] Although in some cases, it may take months for the Court to adopt all bureaucratic procedures and definitively archive the claim after the settlement is agreed, paid and the Social Contributions Authority has not contested the amounts.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Trade unions in Brazil

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

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

Collective bargaining agreements are agreement executed between the unions representing employers and employees, or between the employees' union and a specific company, which establish general and normative rules that govern the relationship of a given category of employers and employees. Collective bargaining agreements are of mandatory observation for all of its parties and/or the companies/employees of the respective category who are based within the territory where the relevant union has authority.

Collective lawsuits in Brazil

Public civil action is a type of lawsuit established by the Brazilian Federal Constitution and it is the judicial remedy for the protection of collective interests, such as environmental, social and labor issues.

Labor Public Civil Actions can be filed by prosecutors and several other governmental entities (for example, Federal, State and Municipal Governments; Unions; Bar Association; etc.). In the last fifteen to twenty years, Labor Public Civil Actions have become very common and are frequently filed whenever one of the entities mentioned above becomes aware of employers that do not comply with labor regulations. Additionally, the Federal Government has made huge investments in the last years improving the structure of the Labor Ministry Prosecutor's Office. This has led to a more active performance by that office.

Labor prosecutors have been requesting million dollar moral damages indemnifications, with a view to pressure companies into accepting conduct adjustment agreements. Two main relevant elements are used in the calculation of moral damages indemnifications: (i) the graveness and intensity of the labor violations; and (ii) the wealth of the company being sued.

So far, the courts have been ruling in a balanced way. The majority of Labor Public Civil Actions has led to condemnations of a few hundred thousand Reais, instead of the millions requested by labor prosecutors. When a case involves severe violations condemnations reach millions of Brazilian Reais.

d. Specialized Litigation Bar

There is no specialized litigation bar. However, proceedings and the sequence of acts are significantly different when comparing a labor lawsuit to a civil or a tax claim. Therefore, it is very common to have attorneys specialized in labor, civil or tax litigation.

III. Tips to Avoid Litigation

As highlighted above, the number of labor claims in Brazil is significant. Therefore, it is important for employers to be proactive in creating a good workplace environment.

Having an efficient and competent Human Resources Department assists in decreasing litigation levels. Persons working in the Human Resources Department must be close to the workforce and to leaders and managers. It is also helpful is employers conduct interviews and conversations during the employment relationship, and at its termination, so as to ensure that employers are aware of the expectations and complaints of its employees.

It is also important to note that compliance with the law is not enough to avoid litigation. To reduce litigation, it is important that employers demonstrate to its employees that the company is committed to maintaining a safe and healthy working environment, and that compliance with labor law is an important value of the company.

Demonstrating concern about an employee's needs and concerns during the employment relationship, and in the termination interview, can influence an employee's decision whether or not to sue the company.

IV. Trends and Specific Cases

In recent years there has been a significant increase in the number of companies that have implemented compliance programs, which bind companies and its employees to certain ethical standards.

Periodic internal investigations are mandated by such compliance programs and it is during these internal investigations that employers often face complex situations, as an employee's misconduct can come into question.

Deciding how to punish an employee without creating a labor liability is a key challenge for employers, especially given that most employees who are terminated with cause proceed to sue their employer, requesting a reversal of the termination in addition to moral damages indemnification.

Having Compliance, Human Resources and Legal departments acting closely in decisions about employee breaches of compliance rules is the key to mitigating risks when dealing with such situations.

CANADA

"Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect."[1]

- Dickson, C.J., the Supreme Court of Canada

I. Overview

a. Introduction

Over the past decades Canadian workplaces have become increasingly complex with increased regulations of the workplace by the Government and the Courts.

The stakes for parties involved in workplace litigation have grown significantly, in terms of cost, potential damage awards, fines and other remedies, and reputational risks. There have been a number of employment cases in Canada in recent years that have attracted significant media attention.

As the quote above illustrates, Canadian courts are protective of employees. Legislation that regulates the workplace is remedial and the normal canon of interpretation is that a remedial statute receives liberal construction while a penal statute, such as the Criminal Code, calls for strict construction. In the case of remedial statutes, if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted.

b. Claims

Wrongful dismissal cases are typical employment claims that employers face following the termination of employment of non-union employees. Although they are predominantly founded on the common law concerning employment contracts, they may also arise out of violations of various statutory schemes designed to protect the rights of workers or Canadians generally.

Provincial and federal governments provide mandatory protections to employees under various employment statutes. Workplace parties cannot contract out of these minimum standards. Consequently, contravention of these minimum standards, regardless of any contrary contractual provisions or settlements, could provide the foundation for a cause of action for wrongful dismissal. In addition to court actions for wrongful dismissal and related claims, there are statutory complaint procedures available to disgruntled employees. In some cases, an employee need not even initiate a complaint: a government agency may initiate enforcement procedures of its own volition. Alternatively, and sometimes as well, employees could follow one of various statutory complaint procedures. It is important for employers to understand how these different facets of the law relate to wrongful dismissal so they can effectively avoid problems when terminating employment or at least limit their exposure to liability.

Most workplaces are regulated by provincial legislation in regard to workplace law. Each province and territory (to some extent) has its own laws dealing with five major areas of employment, and employees can make claims in any of these areas:

[1] *Reference Re Public Service Employee Relations Act (Alta.), [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 at para. 91 – this was actually part of a dissent.*

Employment standards: The standards set out in the Employment Standards Acts establish minimum statutory standards that must be met by employers who do business in Canada.

Labour relations or trade union law: This legislation lays out the process of trade union organizing and certification, which permits unions to act as the sole and exclusive bargaining agents for groups of employees. Furthermore, the legislation sets out the framework that governs the relationship and obligations that exist between the employer and the certified union and employees.

Human rights: This area of workplace law prohibits discrimination of employees based on certain characteristics such as race, gender and disability in regard to hiring and throughout the employment relationship. It also protects employees from workplace harassment based on protected grounds. Some jurisdictions also have pay equity legislation and employment equity legislation. Human rights cases are an area of frequent litigation and so this is a developing area of the law. Further, new protected grounds have been added in some jurisdictions[2].

Occupational health and safety: There is a system in Canada that places a duty on various players in the workplace to cooperate to maintain a safe and healthy work environment. This duty is fulfilled by employers through the authorization of worker representatives and health and safety committees who investigate and bring unsafe or unhealthy working conditions to the attention of the employer.

Workers compensation: This is an insurance system run by various provincial governments that supplies a complex array of benefits to workers who become ill or injured due to workplace accidents. In return, workers are denied the right to sue their employers for creating an unsafe or unhealthy work environment or for allowing such an environment to persist.

Despite the primacy of provincial jurisdiction in employment and labour law, there are some workplaces that are not covered by provincial employment legislation because under the Canadian constitution they are federally regulated. Persons employed by the federal government and federal Crown corporations are covered by federal legislation. Federal employment legislation also applies to employers in the areas of banking, international or inter-provincial transportation, broadcasting, and telecommunications to name a few. Claims by federally regulated employees can be made under any of the five major areas of employment law described above.

c. Administrative Agencies that Investigate or Adjudicate Claims

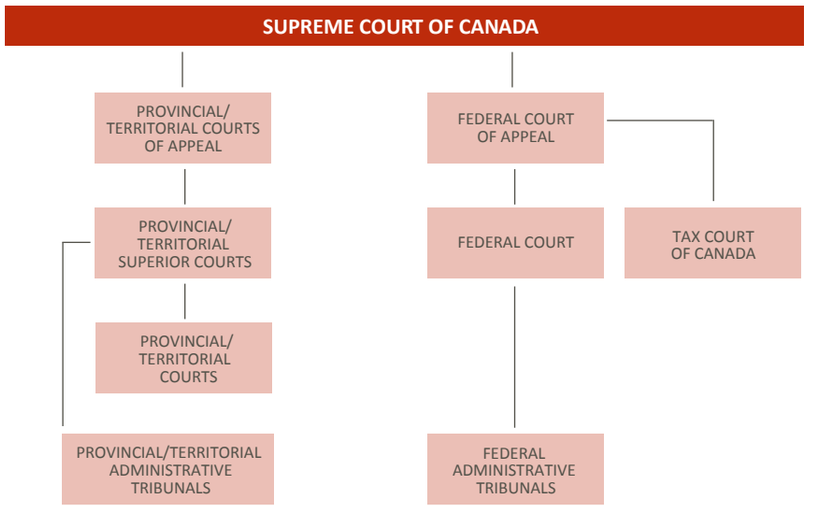
While an exhaustive review of the administrative agencies that investigate and/or adjudicate each of the various types of employment claims in each province and territory of Canada is beyond the scope of this paper, it is generally the case that each of the areas of employment law described above has a specialized agency that administers that area of the law and investigates and/or adjudicates claims made under the relevant legislation. Included, is a general overview of the legislation in each of the five areas of employment law identified above and the agencies responsible for administering and overseeing the legislation in each province and territory.

[2]On June 13, 2012, the Ontario Human Rights Code was amended to add both gender expression and gender identity as prohibited grounds of discrimination. One day later, the Manitoba Human Rights Code was also amended to add gender identity as a prohibited ground. At the Federal level, 2012, Bill C-279 passed second reading in Parliament and in June 2014 was referred to the Standing Senate Committee on Legal and Constitutional Affairs. The Bill amends the Canadian Human Rights Act to add "gender identity" to its list of prohibited grounds of discrimination. It also would alter the Criminal Code, adding gender expression and identity as distinguishing characteristics protected under hate propaganda laws, and making discrimination against transsexuals an aggravating factor in sentencing.

As a practical matter, what this means is that, for an area of employment law such as occupational health and safety, there are fourteen jurisdictions (one federal, ten provincial and three territories[3]) all of which have their own agencies that are responsible for investigating and/or adjudicating claims made under the relevant legislation.

d. Court / Tribunal System

CANADA'S COURT SYSTEM



Overview

There are basically four levels of court in Canada. First, there are provincial/territorial courts. Second are the provincial/territorial superior courts. On the same level, but responsible for different issues, is the Federal Court. At the next level are the provincial/territorial courts of appeal and the Federal Court of Appeal, while the Supreme Court of Canada occupies the highest level.

Provincial/Territorial Courts

Each province and territory, with the exception of Nunavut, has a provincial/territorial court, and these courts hear cases involving either federal or provincial/territorial laws. (In Nunavut, there is no territorial court – matters that would normally be heard at that level are heard by the Nunavut Court of Justice, which is a superior court.) The names and divisions of these courts may vary from place to place, but their role is the same. Besides certain criminal and family law matters, provincial/territorial courts deal with provincial/territorial regulatory offences (such as prosecutions under occupational health and safety legislation), and claims involving money, up to a certain amount (set by the jurisdiction in question). Private disputes involving limited sums of money may also be dealt with at this level in Small Claims courts.

[3]Although they are separate territories, Nunavut and the Northwest Territory share administrative agencies.

Provincial/Territorial Superior Courts

Each province and territory has superior courts. These courts are known by various names, including Superior Court of Justice, Supreme Court (not to be confused with the Supreme Court of Canada), and Court of Queen's Bench. While the names may differ, the court system is essentially the same across the country, with the exception, again, of Nunavut, where the Nunavut Court of Justice deals with both territorial and superior court matters.

The superior courts have "inherent jurisdiction," which means that they can hear cases in any area except those that are specifically limited to another level of court. In the employment law context, superior courts try cases over a set monetary limit, which varies across the country.

Although superior courts are administered by the provinces and territories, the judges are appointed and paid by the federal government.

Courts of Appeal

Each province and territory has a court of appeal or appellate division that hears appeals from decisions of the superior courts and provincial/territorial courts. The number of judges on these courts may vary from one jurisdiction to another, but a court of appeal usually sits as a panel of three. The courts of appeal also hear constitutional questions that may be raised in appeals involving individuals, governments, or governmental agencies.

The Federal Courts

The Federal Court and Federal Court of Appeal are essentially superior courts with civil jurisdiction. However, since the Courts were created by an Act of Parliament, they can only deal with matters specified in federal statutes. In contrast, provincial and territorial superior courts have jurisdiction in all matters except those specifically excluded by a statute.

The Federal Court is the trial-level court; appeals from it are heard by the Federal Court of Appeal. While based in Ottawa, the judges of both Courts conduct hearings across the country. The Courts' jurisdiction includes interprovincial and federal-provincial disputes, intellectual property proceedings (e.g. copyright), citizenship appeals, Competition Act cases, and cases involving Crown corporations or departments of the Government of Canada. Only these Courts have jurisdiction to review decisions, orders and other administrative actions of federal boards, commissions and tribunals. These bodies may refer any question of law, jurisdiction or practice to one of the Courts at any stage of a proceeding.

The Supreme Court of Canada

The Supreme Court of Canada is the final court of appeal from all other Canadian courts. The Supreme Court has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and civil law.

The Court consists of a Chief Justice and eight other judges, all appointed by the federal government. The Supreme Court Act requires that at least three judges must come from Quebec. Traditionally, of the other six judges, three come from Ontario, two from western Canada, and one from the Atlantic provinces. The Supreme Court sits in Ottawa for three sessions a year – winter, spring and fall.

Before a case can reach the Supreme Court of Canada, it must have used up all available appeals at other levels of court. Even then, the Court must grant permission or "leave" to appeal before it will hear the case. Leave applications are usually made in writing and reviewed by three members of the Court, who then grant or deny the request without providing reasons for the decision. Leave to appeal is not given routinely – it is granted only if the case involves a question of public importance; if it raises an important issue of law or mixed law and fact; or if the matter is, for any other reason, significant enough to be considered by the country's Supreme Court. In limited situations, the right to appeal is automatic.

e. Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution ("ADR") is frequently used to resolve employment litigation. Mediation is generally encouraged and in many court and tribunal processes it is mandated. Parties frequently mediate wrongful dismissal cases before they are commenced. Arbitration is also utilized, at times in conjunction with mediation, and has been used successfully as part of a process to resolve class action employment litigation. Many employers and unions have successfully crafted mediation and expedited arbitration procedures to enable fast and inexpensive resolution of workplace disputes.

II. The Litigation Process

a. Typical Case

Each of the common law provinces has its own set of court rules, which govern court proceedings in that province and so it is critical to consult and follow the rules in the applicable jurisdiction. Quebec, which is the one civil law province, has its own rules, although its courts, like the common law courts, are ultimately subordinate to the Supreme Court of Canada.

i. Steps in the Process

Statement of Claim

Most wrongful dismissal cases are brought by way of an action. The statement of claim is the pleading that typically begins the litigation process. It gives the plaintiff the opportunity to set out his or her claim for relief.

It should be noted that once the statement of claim has been issued, certain time limits will begin to run with respect to filing a statement of defence, among other things.

In Ontario, the statement of claim must be served on all parties within six months of being issued. This is subject to Rule 78.06, which states that in certain circumstances the registrar can dismiss the action as being abandoned[4]. Personal service on the defendant is required. In practice, as a matter of courtesy, the defendant's counsel might accept service on behalf of his or her client if he or she is authorized to do so.

Statement of Defence

Once the defendant has been properly served with the originating process, it is the defendant's responsibility to serve and file a statement of defence within the time frame prescribed by the applicable court rules.

[4]See Rule 14.08 of the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

Reply

The reply is the plaintiff's opportunity to respond within the applicable time limitations to any new issues raised by the employer in the statement of defence. If a defendant issues a counterclaim against the plaintiff, the plaintiff also has the opportunity to respond to the counterclaim. If the plaintiff makes a reply, he or she must respond to the counterclaim in the same document. This pleading is called a reply and defence to counterclaim. It should be remembered that a reply is appropriate only where the plaintiff intends to prove a version of the facts different from that pleaded in the statement of defence (and not already pleaded in the statement of claim) or where the plaintiff intends to reply on any matter that might take the defendant by surprise if not pleaded.

Discovery

The court rules typically provide for a discovery process to ensure the exchange of relevant information and documents between the parties.

Discovery of documents from parties is generally a two-step procedure. The first step, disclosure, involves the preparation and service of an affidavit of documents. The rules regarding what documents need to be produced and when vary according to the jurisdiction; however, in general every document relating to any matter at issue in an action that is or has been in the possession, control or power of a party to the action must be disclosed, whether or not privilege is claimed in respect of the document. Documents are broadly defined to include photographs, videotapes, plans, surveys, maps and computer-stored data and information. The second step involves production for inspection. Each party is entitled to inspect every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action, unless privilege is claimed in respect of the document.

Following documentary discovery, and depending on the nature of the proceeding, there may be examinations for discovery, in which each party to an action is entitled to examine the opposing party.

Offers to Settle

A party may serve on any other party a written offer to settle any or all of the claims in a proceeding on the terms set out in the offer. A written offer to settle can be made at any time before or during the proceeding. The cost system under the rules of civil procedure in Ontario is designed to encourage parties to make early and reasonable settlement offers.

Mediation

Some provinces and certain regions within provinces now require mediation as part of the litigation process. The purpose of mandatory mediation is to reduce the costs and delays in litigation and facilitate the early and fair resolution of disputes.

ii. Pretrial Proceedings

Depending on the jurisdiction and the nature of the proceeding, a pre-trial conference may be required. A pretrial conference is a meeting of the parties and counsel, and is usually held before a judge.

All pre-trial conferences address two issues: case management and resolutions. Case management includes how the trial will be conducted. Pre-trial conferences are intended to promote a fair and expeditious trial, where it is not possible to resolve a case. The pre-

trial judge will identify whether there are issues that are not in dispute, how to simplify the issues that remain in dispute, the possibility of obtaining admissions and agreements on evidence to be introduced, and the estimated duration of the proceedings.

Any discussions that occur during the pre-trial stage cannot be repeated at trial, unless all parties agree.

The judge presiding at the pre-trial conference cannot preside at the trial without the agreement of the parties, although he or she will prepare a report to the trial judge. The report cannot make any reference to resolution discussions.

iii. Role of Witnesses, Counsel and Court / Tribunal

Civility and professionalism are extremely important in Canadian courtrooms. As summarized in the Canadian Bar Association's Code of Professional Conduct:

> *Civility amongst those entrusted with the administration of justice is central to its effectiveness and to the public's confidence in that system. Civility ensures matters before the Court are resolved in an orderly way and helps preserve the role of Counsel in the justice system as an honourable one.*
>
> *Litigation, however, whether before a Court or tribunal is not a "tea party". Counsel is bound to vigorously advance their client's case, fairly and honourably. Accordingly, Counsel's role is openly and necessarily partisan and nothing which follows is intended to undermine those principles. But Counsel can disagree, even vigorously, without being disagreeable. Whether among Counsel or before the Courts, antagonistic or acrimonious behaviour is not conducive to effective advocacy. Rather, civility is the hallmark of our best Counsel.*

A hallmark – and point of pride – of the Canadian Labour and Employment Bar is its collegiality and the high degree of civility exercised by lawyers practicing in this area.

Witnesses

Depending on the proceeding and the jurisdiction, a party may be required to disclose the names and addresses of all persons who may have relevant information, and who could therefore be called as a witness at trial by a party.

iv. The Appeal Process

To interfere with a trial judge's decision, there must be a palpable and overriding error. An appellate court will intervene only where "the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it"[5]. This standard of review outlined by the Supreme Court of Canada has been applied to the wrongful dismissal context.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Litigation is expensive and Canadian courts and tribunals are no exception. Litigation should only be undertaken after informal methods of resolving the issue are considered. One feature of the Canadian court system is that the losing party is typically required to pay a portion of the successful party's costs in addition to his or her own. In Ontario, a party can seek to mitigate the risk of a costs award by making an early and reasonable

[5]Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] S.C.J. No. 4, [1994] 1 S.C.R. 114 at 121 and 122.

settlement offer, based on a careful assessment of the likely outcome of the case if it were to be decided by a court. It should be noted, however, that this system of costs does not apply to proceedings before administrative tribunals.

In terms of damages in the employment law context, the common law framework that governs wrongful dismissal can be divided into three basic components. First, the relationship that exists between employer and employee is contractual in nature, whether or not a written agreement actually exists. The basic contractual law principle that is implied into most employment contracts provides that every employee is entitled to receive reasonable notice of termination (statutory notice is included within reasonable notice), or pay in lieu thereof, where just cause for summary dismissal does not exist, the contract is not frustrated or the express provisions of the contract do not provide for a pre-negotiated amount of notice in lieu of reasonable notice.

The factors that courts generally consider when determining the amount of reasonable notice were established in the seminal decision in *Bardal v. The Globe and Mail Ltd.* [1960] O.W.N. 253 (H.C.), and resulted in the development of the so-called "Bardal factors", which are described in the passage below:

> *There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.*

This judgment makes it clear that the appropriate notice period in wrongful dismissal cases is determined on a case-by-case basis, with all of the above factors to be considered. The only exception to this implied provision of reasonable notice of termination is ifthe parties expressly provide for an alternative arrangement within the employment contract, provided the terms of the agreement do not contravene the relevant legislation.

The second component is found in tort law, which governs the relationship between employer and employee as well as exchanges between the employee and his or her fellow co-workers. While the tort liabilities that can arise in the context of the employment relationship are unrelated to the notice period for termination, they usually relate to actions taken by either the employer or a colleague of the employee during the course of the employee's employment, especially at the point of dismissal. Examples of tort claims that often arise in the context of a dismissal include: defamation, intentional infliction of mental suffering, negligent misrepresentation, interference with contractual relations and conspiracy.

The third common law component that governs the employment relationship is found in the damages that are related to, but are separate from, the elements of the claim arising under the law of contract or torts.

The Supreme Court of Canada plainly set out that punitive damages for bad faith dismissal are only available in the case of wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. Punitive damages are rare, given the high threshold for awarding such damages. Notably, in a recent Ontario case where punitive damages of $1 million dollars was awarded by a jury, the Court of Appeal reduced the award to $100,000 on the grounds that the award was not rationally required to denounce or punish the employer and that the company's misconduct fell

well short of the standard required to justify such a large award[6].

The legal principles underlying mental distress or aggravated damages were summarized as[7]:

- Employment contracts are not "peace of mind" contracts. Accordingly, it is within the parties' contemplation that psychological damage to the employee, including "normal distress and hurt feelings" will arise from the termination of employment. These are not compensable.
- However, bad faith conduct i.e. conduct that is untruthful, misleading or unduly insensitive may give rise to compensable damages.
- It is within the reasonable expectation of employees and employers that employers must be "candid, reasonable, honest and forthright with their employees" in the course of dismissing them. A breach of this expectation may be compensable.
- A compensable breach of this reasonable expectation is treated as a separate head of damages and not as an extension of the notice period.

As a practical matter, although mental distress claims may frequently be plead, the twin thresholds of bad faith behaviour by the employer plus actual proof of damage (i.e. medical evidence) means that aggravated damages are difficult to prove. Even when awarded, the amounts awarded generally have been modest although employers are cautioned that there have been exceptions.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Every collective agreement is required to have an arbitration process that provides for final and binding resolution of disputes under the collective agreement. The parties to a collective agreement have latitude to develop a process that works for them, as long as it meets certain minimum requirements. Some of the arbitration options available include three (3) member arbitration boards, or a sole arbitrator. Some parties have a rotating panel of agreed arbitrators, while others agree on an arbitrator on a case-by-case basis, and in some cases (i.e. where the parties cannot agree on an arbitrator) the Minister of Labour may be asked to appoint an arbitrator.

Labour arbitrations are less formal than court; however, for the most part the standard rules of evidence apply and the procedure for introducing evidence is similar to that followed in court. Labour arbitrators are empowered under the various provincial labour statutes to make interim orders concerning procedural matters; require a party to produce particulars or documents; summon and enforce the attendance of witnesses and to accept the oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not.

Labour arbitrators are also able to interpret and apply employment related statutes, and under certain employment statutes, unionized employees must argue their claims through the grievance and arbitration procedure in a collective agreement as opposed to through a statutory tribunal.

The Supreme Court of Canada considered the extent to which a unionized employee can have access to the courts – as opposed to arbitration – to pursue a claim against the employer. The Court opted for an "exclusive jurisdiction" model, which denies access to the courts if the essential character of the dispute arises from the interpretation, application, administration or violation of the collective agreement. However, some courts have held that, even if a matter does arise under a collective agreement, courts

[6] *Boucher v. Wal-Mart Canada Canada Corp., 2014 ONCA 419.*
[7] *Honda v. Keays, supra.*

retain a residual jurisdiction that may be exercised if there is no adequate remedy available from arbitration.

The decisions of labour arbitrators are accorded a high degree of deference in Canada. In 2011, the Court noted that an arbitrator's mandate is unique, informed by the particular context of labour relations, and that arbitrators are not required to apply legal principles as a court would. The Court's analysis emphasized the broad discretion that labour arbitrators are granted by their governing statutes and by the nature of the Canadian labour relations regime, which the Court held requires flexibility in crafting remedies in light of the ongoing relationship between the employer and the bargaining agent.

III. Tips to Avoid Litigation

The best practices that can assist in the avoidance of litigation are relatively straightforward. Well-drafted and clear employment contracts entered into before employment starts are critical for avoiding litigation. Performance and conduct expectations should be made clear to prospective employees and employees. It is helpful to have well drafted and clear employment policies that are updated on a regular basis and provided to employees. Documenting an employee's performance and providing fair and well-documented warnings to employees whose performance is not meeting communicated expectations is also critical for avoiding litigation.

If a dispute does arise, it is recommended that employers look for opportunities to resolve the dispute on a reasonable basis as soon as possible.

IV. Trends and Specific Cases

The Right to Strike is Constitutionally Protected in Canada

On January 30, 2015, the Supreme Court of Canada released its decision in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, further expanding the content of freedom of association under section 2(d) of the *Charter* in the labour relations context by finding that the right to strike is constitutionally protected. This decision follows on the heels of two other decisions addressing the scope of section 2(d) that were released on January 16, 2015: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 and *Meredith v. Canada (Attorney General)*, 2015 SCC 2.The Supreme Court of Canada had been asked to consider the constitutionality of two pieces of Saskatchewan legislation that came into effect in 2008: *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 ("PSESA") and *The Trade Union Amendment Act*, 2008, S.S. 2008, c. 26 ("TUAA"). The *PSESA* prohibited workers designated by the government as "essential service employees" from engaging in strike activity. The *TUAA* made changes to the union certification process.

Several unions challenged the constitutionality of both the *PSESA* and the *TUAA*. The trial judge found that the changes to the certification process set out in the *TUAA* did not breach the freedom of association guarantee in section 2(d) of the *Charter*. However, the trial judge determined that the right to strike is protected by section 2(d) of the *Charter*, such that the prohibition on the right to strike in the *PSESA* substantially interfered with the employees' section 2(d) rights. The *PSESA* was not saved by section 1 of the *Charter* because the ban on the right to strike was not minimally impairing or proportionate. The government's appeal to the Saskatchewan Court of Appeal regarding the *PSESA* was allowed.

A majority of the Supreme Court of Canada allowed the unions' appeal regarding the *PSESA* and held that its prohibition on strike activity violated section 2(d) of the *Charter*. The Supreme Court of Canada held that the right to strike is "an indispensable component" of collective bargaining that is constitutionally protected. The majority

noted the importance of the ability to strike to the promotion of equality between employees and the employer in the collective bargaining process. The prohibition on the right to strike in the *PSESA* was held to be a substantial interference with the right to freedom of association and therefore breached section 2(d) of the *Charter*.

The majority also held that the means that the government had chosen to restrict strike activity under the *PSESA* were not minimally impairing because the legislation permitted public sector employers to unilaterally determine which employees must continue to work during a work stoppage, even if their responsibilities were not solely the provision of essential services. The Court was also concerned with the legislation's failure to include an alternative dispute resolution process to adjudicate such issues, such as arbitration. As a result, the *PSESA* was held not to be saved by section 1 of the *Charter* and was consequently declared unconstitutional.

On the other hand, the *TUAA* was not held to violate section 2(d) of the *Charter* because the changes to union processes that it contained did not substantially interfere with the guarantee of freedom of association.

Constructive Dismissal

In *Potter v. New Brunswick Legal Aid Services*, 2015 SCC 10 (CanLII), the plaintiff was the former executive director of Legal Aid New Brunswick. The terms of his employment were defined, in part, by the province's *Legal Aid Act*. The statute also granted authority to the Board of Directors of the New Brunswick Legal Aid Commission to manage the employment relationship. After four years of employment, the plaintiff went on an extended medical leave of absence. Prior to the commencement of the leave, the parties had been negotiating a deal that would have resulted in the plaintiff resigning from his position in exchange for a separation payment. When negotiations stalled, the Board of Directors informed the plaintiff that he was being placed on a paid suspension. Unbeknownst to the plaintiff, the Board of Directors also sought to have him dismissed for cause on the basis of a number of allegations including the mismanagement of public funds. After eight weeks on paid suspension, the plaintiff brought an action alleging constructive dismissal. Upon receipt of the claim, the Board of Directors stopped the plaintiff's salary and benefits and took the position that the plaintiff had resigned from his employment.

The trial court and the New Brunswick Court of Appeal both found that the suspension of the plaintiff did not amount to a constructive dismissal; rather, the lower courts held that the Board of Directors was within its rights to suspend the plaintiff. The lower courts also found that it was the plaintiff's allegation of wrongful dismissal that constituted a repudiation of the employment contract.

Writing for the majority, Justice Wagner overturned the decisions of both lower courts. In doing so, the Supreme Court of Canada provided insight into when a constructive dismissal will arise and under what circumstances an employer is able to place an employee on an administrative suspension without being found to have repudiated the employment relationship.

Justice Wagner clarified that the test for constructive dismissal has two steps. The first step is to determine if an express or implied term of the employment contract has been breached by the employer. A breach can occur when there has been a single unilateral act that is contrary to an essential term of the employment contract, or when there has been a series of acts that are demonstrative of an intention to no longer be bound by the employment contract. The second step in the test requires an analysis of whether a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed.

With respect to whether an administrative suspension could amount to constructive dismissal, Justice Wagner held that unless there is an express power granted within the contract of employment, the authority to place an employee on an administrative suspension is subject to the condition that the suspension be reasonable and justified. The factors that may be considered when determining if an administrative suspension is reasonable and justified are non-specific, and depend on the nature and circumstances of the suspension. However, an administrative suspension will not be found to be justified without a minimum level of communication to the employee with respect to the reason for the suspension and without a legitimate business reason for requiring that the employee refrain from attending work.

Justice Wagner held that an administrative suspension that is not authorized by the contract and not demonstrated to be reasonable and justified will almost always result in a finding that there has been a substantial change to the contract of employment that amounts to a constructive dismissal.

With respect to the burden of proof, the Supreme Court of Canada held that in most cases where constructive dismissal is alleged, the employee must first demonstrate that there has been a breach of the employment contract. However, once it has been established that there has been an administrative suspension, the burden of proof will shift to the employer to show that the suspension was reasonable or justified.

With respect to the plaintiff's allegation of constructive dismissal, the Court found that the administrative suspension issued by the Board of Directors was neither reasonable nor justified because it was of an indefinite nature and the plaintiff was given no reason for the suspension.

Based on the foregoing, employers in Canada must ensure that they act in a reasonable and justified manner when issuing an administrative suspension to a non-unionized employee. To meet this test, employers should communicate the rationale for the suspension, have a legitimate business reason for taking the action, and should take steps to minimize the duration of the suspension to the extent possible. Employers should also avoid taking other steps that suggest an intention to terminate the employment relationship, such as cutting the employee's pay and benefits.

Record Award for Discrimination

The Human Rights Tribunal of Ontario (the "Tribunal") recently ordered the highest damage award in its history for injury to dignity, feelings and self-respect. In *OPT v Presteve Foods Ltd*, 2015 HRTO 675, two workers employed through a temporary foreign worker program brought a human rights application against both an individual and a corporate respondent alleging discrimination on the basis of sex, and claiming that they had been sexually harassed, subject to sexual solicitation and advances, and had been reprised against. The Respondents were ordered to pay $200,000 in damages.

The Applicants, two sisters from Mexico, were subject to very serious misconduct at the hands of the personal respondent. The personal respondent was the owner and principal of a fish processing plant where the Applicants worked. The personal respondent's misconduct included sexual solicitations followed by threats that the Applicants would be sent back to Mexico if they did not comply with his requests. The personal respondent also exhibited controlling behaviour over the Applicants. For example, the Applicants were only able to visit a doctor if the personal respondent drove them there himself.

The allegations against the personal respondent were set out in detail by the Tribunal. The Tribunal found that the following incidents had occurred with respect to the first Applicant, O.P.T.:

- the personal respondent invited O.P.T. out to eat dinner with him alone on many occasions and yelled at her and threatened to send her back to Mexico when she advised she did not want to go;
- the personal respondent touched O.P.T. inappropriately;
- the personal respondent required O.P.T. to perform sexual acts on him; and
- the personal respondent required O.P.T. to have sexual intercourse with him.

The Tribunal also found that after O.P.T. returned to Mexico, the personal respondent contacted her on multiple occasions and also offered to visit her in Mexico.
Further, the Tribunal found that the following incidents had occurred with respect to the second Applicant, M.P.T.:

- the personal respondent had touched M.P.T. inappropriately; and
- the personal respondent sexually propositioned M.P.T. on multiple occasions.

M.P.T. was fired and sent back to Mexico after an incident where she went out to get a coffee one evening against the personal respondent's wishes and refused to tell the personal respondent where O.P.T. was.

Criminal charges were also laid against the personal respondent with respect to the conduct at issue before the Tribunal.

The Tribunal began by rejecting the Respondents' argument with respect to the timeliness of the Application. The Tribunal found that the Respondents' actions constituted a "series of incidents" pursuant to the *Human Rights Code* (the *"Code"*) and that the last incident in the series had occurred within one year of the application date. Further, the Tribunal noted that the Applicants did not know of their rights under the Code due to their lack of familiarity with Canadian law and the language barrier and, therefore, if there was any delay, it had been incurred in good faith.

The Tribunal also rejected an argument advanced by the respondents that the Applicants had fabricated their allegations against the Respondents to advance their immigration status and remain in the country.

After reviewing the evidence, and drawing a negative inference from the fact that the personal respondent did not testify, the Tribunal found that the Applicants were credible. The Tribunal concluded that the personal respondent had engaged in a "persistent and ongoing pattern of sexual solicitation and advances" towards both applicants during their employment. The Tribunal found that the personal respondent knew or ought to have known that his conduct was unwelcome, which constituted a violation of section 7(3)(a) of the *Code*. The Tribunal also found that the personal respondent had sexually harassed both applicants in contravention of section 7(2) of the *Code*. The Tribunal further found that incidents that occurred outside of work could be regarded as "in the workplace" because the personal respondent threatened to send the applicants back to Mexico and this conduct detrimentally affected the Applicants' work environment. The Tribunal also found that the Applicants had been subjected to a sexually poisoned work environment, contrary to section 5(1) of the *Code*.

While the Tribunal rejected M.P.T.'s claim of reprisal in relation to being sent back to Mexico, the Tribunal found that the act of returning M.P.T. to Mexico constituted discrimination on the basis of sex because it was associated with her failure to tell the personal respondent of O.P.T.'s whereabouts, which was linked to the personal respondent's persistent attempts to have a sexual relationship with O.P.T.

The Tribunal found that the personal respondent and corporate respondent were jointly and severally liable for all of the damages owed to the Applicants, including the claims of sexual harassment, as the personal respondent was the "directing mind" of the corporate respondent.

The Tribunal noted that the seriousness of the conduct experienced by O.P.T. was unprecedented in the Tribunal's previous decisions. The Tribunal further noted that O.P.T. was deserving of a significant monetary award because of her vulnerability as a migrant worker and because she was put in a position of being "totally reliant upon her employer".

The Tribunal awarded $150,000 for injury to dignity, feelings and self-respect to O.P.T. The Tribunal also awarded a further $50,000 for injury to dignity, feelings and self-respect to M.P.T. The Tribunal further advised the corporate respondent that it was required to provide all workers from a temporary foreign worker program with human rights information and training in the worker's native language.

Prison Sentence for Safety Violation

For the first time in Ontario, an individual charged under the Bill C-45 provisions of the *Criminal Code* (the *"Code"*) has been sentenced to serve time in prison for criminal negligence. Vadim Kazenelson, the Metron Construction Corporation ("Metron") project manager who was responsible for overseeing a construction crew involved in a fatal accident on December 24, 2009, was convicted of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm and sentenced to 3.5 years in prison.

The accident that led to Mr. Kazenelson's conviction occurred when a swing stage (also referred to as suspended scaffolding) being used on a construction project collapsed. When the swing stage collapsed, four workers who were not tied to lifelines fell 13 stories to their deaths. A fifth worker sustained serious injuries in the accident.

The evidence established that Mr. Kazenelson had been aware that fall protection was not in place, which was required under the relevant Construction Project Regulation to the *Occupational Health and Safety Act* (the *"OHSA"*). The Court noted that Mr. Kazenelson had taken training courses offered by the Construction Safety Association of Ontario (CSAO), which made it clear that a fundamental rule for worker safety was that every worker on a swing stage had to be protected by a fall arrest system at all times. At the time of the collapse, the swing stage, which was equipped with only two lifelines, had seven people on it, only one of whom was properly tied to a lifeline.

The Court found that Mr. Kazenelson had allowed the workers to continue to work in dangerous conditions because Metron was behind schedule in completing repairs to the concrete balconies of an apartment building, and was attempting to complete the project by the end of the year. The Court found that Mr. Kazenelson's failure to take reasonable steps to protect the workers under his supervision after becoming aware that insufficient lifelines were available on the swing stage showed wanton and reckless disregard for the lives and safety of the workers. The Court noted that a seriously aggravating circumstance in relation to the moral blameworthiness of Mr. Kazenelson's conduct was that he had been aware of the risk to the workers' safety, and had apparently weighed that risk against Metron's interest in continuing work before deciding to "take a chance".

The Court determined that a significant term of imprisonment was necessary in order to adequately denounce Mr. Kazenelson's conduct and deter persons in positions of authority from engaging in similar conduct.

The President and director of Metron, Mr. Swartz, had previously pleaded guilty to four charges under the *OHSA* and was personally fined $90,000. Metron also pleaded guilty to one charge of criminal negligence under the *Code*, becoming the first Ontario company in history to plead guilty to charges of criminal negligence causing death. The company's $200,000 fine was raised to $750,000 on appeal, as the Court of Appeal found that criminal negligence was a different and more serious offence than those found under the *OHSA*, and should be punished accordingly.

The Metron case serves as a stark example of the serious consequences that could occur when health and safety policies are not followed. Employers should ensure that all workers are aware that health and safety considerations must always take precedence over production targets or deadlines.

Although criminal charges under the *Code* have been laid in only eight cases since the Bill C-45 amendments came into effect in 2004, the increased risk of criminal liability – as well as financial liability and the responsibility for the safety of employees – should make every employer all the more vigilant in promoting safe work practices and enforcing health and safety policies in their workplace.

CHINA

I. Overview

a. Introduction

The incidence of labor disputes in China boomed after the promulgation and enactment of the Labor Contract Law of the People's Republic of China ("**PRC**") on 1 January 2008. According to data published by the National Bureau of Statistics of China, the number of labor dispute cases accepted in 2007 was 350,182. That number grew in subsequent years and in 2013, the total number of accepted labordispute cases was 665,760. Given the volume of disputes, many specific and detailed issues were not adequately covered and resolved by existing national laws, such as the Labor Law and the Labor Contract Law. Therefore, in recent years a large number of national and local regulations, as well as judicial interpretations, have been released to fill this legal void. Local regulations and practical rules often vary by region and court, and are sometimes even inconsistent with national laws and regulations. These discrepancies greatly increase the complexity of labor disputes and create many challenges for the lawyers handling them.

In addition, although the Labor Contract Law protects the rights and interests of both employers and employees, and aims to establish harmonious and stable employment relationships, it tends to favor employees. This means it is very difficult for an employer to completely prevail in a labor dispute. Therefore, employers in China usually seek the advice of specialists in labor law when dealing with employment relationships and resolving labor disputes.

b. Claims

In China, there are two types of labor disputes: individual labor disputes arising out of an employment relationship and collective labor disputes. Collective labor disputes can be divided into three main types: (1) disputes between in-house trade unions (or employee representatives) and their employers concerning the performance of collective contracts; (2) disputes between groups of more than ten employees with the same claims and their employers; and (3) disputes concerning collective actions, such as strikes.

In practice, labor disputes typically are between an individual and his or her employer and usually involve the following claims:

- Claims arising from the confirmation of an employment relationship;
- Claims arising from the execution, performance, amendment, termination, or ending of an employment contract;
- Claims arising from expulsion, dismissal, resignation or separation;
- Claims arising from working hours, rest time and vacation, social insurance, benefits, training and occupational safety; and
- Claims arising from labor remuneration, medical expenses for a work-related injury, severance or compensatory damages, etc.

In China, the most common claim by employees in labor disputes concerns the payment of labor remuneration, such as salary, overtime, bonuses, or other parts of remuneration. These claims constitute more than one-third of the labor lawsuits filed with Chinese labor arbitration commissions and courts. The second most common claim by employees relates to social insurance contributions, which constitutes one-fourth of all labor disputes. Another common claim by employees is over termination of employment contracts, which constitutes about a one-fifth to one-quarter of all labor disputes.

c. Administrative Agencies that Investigate or Adjudicate Claims

In China, labor and social security ("labor and security") administrations at all levels have the authority and duty to supervise and inspect employers' compliance with labor and security laws, as well as regulations and rules that protect employees' legitimate rights and interests. The Labor Inspection Team, a public institution affiliated with the labor and security administrations, is specifically responsible for this supervision and inspection.

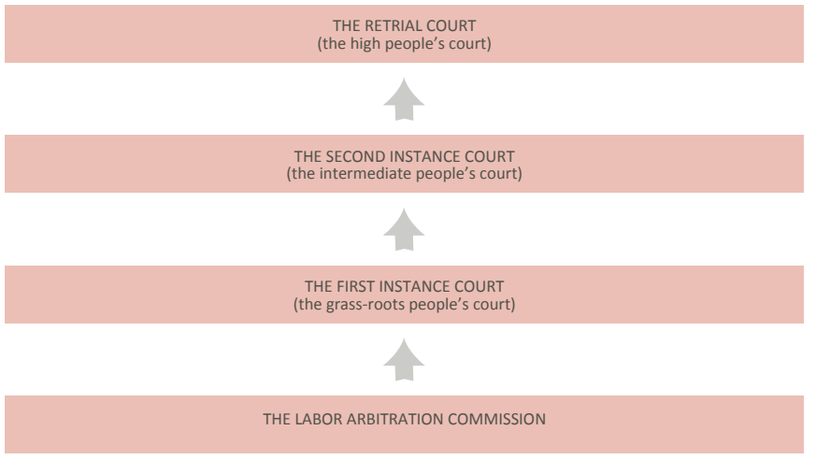
The scope of authority held by the labor and security administrations, for labor and security supervision, includes the following:

- Inspecting employers' establishment of internal labor and security rules and regulations;
- Inspecting employers' proper execution of employment contracts;
- Inspecting employers' compliance with child labor laws and regulations;
- Inspecting employers' compliance with special labor protection laws for female employees and minors;
- Inspecting employers' compliance with regulations on working hours, rest periods, and vacations;
- Inspecting employers' proper payment of employees' salaries and compliance with minimum wage standards;
- Inspecting employers' participation in various social insurance programs and payment of social insurance premiums; and
- Other matters as specified by laws and regulations.

Employees and any other persons have the right to report or complain to labor and security administrations about employers' non-compliance with labor and security laws or regulations and rules. Labor and security administrations are required to investigate any reports of illegal acts which fall within the above scope within 60 working days of accepting the case (or within 90 working days for complicated cases approved by the head of the administrations). During an investigation, labor and security administrations may not only require employers to provide relevant documents and explanations, but also to conduct on-site inspections. If an investigation determines that an employer has violated relevant labor and security laws, or other regulations or rules, the labor and security administrations may order the employer to rectify their illegal acts, and impose a fine or other penalties.

d. Court / Tribunal System

CHINESE LABOR ARBITRATION AND COURT SYSTEM IN EMPLOYMENT LAW MATTERS



In China, when a labor dispute occurs, each party to the dispute may apply to the labor arbitration commission for arbitration. Except in very limited cases, a labor arbitration commission must first hear a labor dispute before it can be brought to a people's court. Jurisdiction for the dispute is governed by where the employment contract is performed or where the employer is located. In either jurisdiction, the proper venue is a labor arbitration commission. If an employer is located in a different jurisdiction to where the employment contract is performed, and there are labor arbitration filings in both jurisdictions, the labor dispute will be subject to the jurisdiction where the employment contract is performed. The limitation period for filing a labor arbitration is one year from the date a party knows, or should have known, of an infringement of his or her rights. However, if a labor dispute arises from a default in payment of labor remuneration, the employee may apply for labor arbitration anytime during the existence of the employment relationship, and for one year following the termination of the employment relationship.

If a party disagrees with an arbitration award, that party may file a lawsuit with a people's court within 15 days from the date it receives the arbitration award. However, for the following labor disputes, the arbitration award shall be final, and be effective from the date the award is issued, unless the employee disagrees with the award and brings a lawsuit to the court or the award is revoked by an intermediate people's court:

- Disputes concerning payment of labor remuneration, medical expenses for work-related injuries, severancem or compensatory damages, with amounts in controversy of less than 12 times the local monthly minimum wage; and
- Disputes arising from working hours, rest periods and vacations, and social insurance, etc., in the course of implementing the national labor standards.

If a party disagrees with a first instance judgment by a local people's court, that party may appeal that judgment to the immediate superior people's court within 15 days (30 days for foreign employees) of the written judgment having been served. If a party disagrees with a first instance ruling made by a local people's court, that party may appeal that

ruling to the immediate superior people's court within ten days of the written ruling having been served. The judgments and/or rulings by the people's court of the second instance shall be final. However, any party that considers a legally effective judgment or ruling to be erroneous may apply for a "retrial" with the original people's court which issued the final judgment or ruling or its immediate superior people's court. Any such "retrial" will be heard by the superior people's court to the original people's court, which issued the final judgment or ruling.

e. Alternative Dispute Resolution (ADR)

In China, labor disputes can also be settled by consultation and mediation, which are optional and may or may not be utilized by parties to a labor dispute prior to labor arbitration. Consultation is an informal and voluntary step. If parties cannot settle their dispute through consultation, they may proceed to mediation or labor arbitration directly.

Where a labor dispute arises, the parties may apply for mediation to the following mediation institutions:

- Enterprises' labor dispute mediation commissions ("**ELDMC**");
- People's mediation institutions at the local level, established in accordance with law; and
- Organizations that specialize in labor-dispute mediation, established in townships or neighborhoods.

ELDMCs are comprised of employee representatives and enterprise representatives. The number of representatives from both parties must be equal. The employee representatives must be members of the trade union commission or nominated and elected by all the employees of the enterprise. The enterprise's representatives must be designated by the person-in-charge of the enterprise. The chairman of the mediation commission must be a member of the trade union commission or a person nominated by both parties.

In the event of a labor dispute, a party may submit a verbal or written application for mediation to the ELDMC. The ELDMC will assign a mediator or a mediation team to conduct the mediation in accordance with the circumstances of the case. Alternatively, with the consent of the parties concerned, the ELDMC may invite relevant unit(s) and individual(s) to assist in the mediation.

Where the parties concerned reach a settlement following mediation, the mediation commission shall prepare a settlement agreement. A valid settlement agreement shall be binding upon the parties concerned and its obligations must be performed by those parties.

Both parties may jointly submit an application for arbitration and examination to the labor arbitration commission within 15 days from the date the settlement agreement takes effect. Where both parties concerned fail to submit an application for arbitration and examination, and one party fails to perform the settlement agreement, the other party may apply for labor arbitration pursuant to law. If the settlement agreement is legitimate and valid and does not harm the public interest or the legitimate rights and interests of any third party, the arbitration commission may issue an arbitral award based on the settlement agreement, provided that no new evidence challenging the validity of the settlement agreement has surfaced.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

In China, the labor arbitration process is generally similar to the process for a first instance trial, so it will not be discussed in here. First instance labor dispute proceedings are normally tried by a collegiate bench (formed by three persons, with at least one judge and a maximum of two jurors). However, if the case is simple with clear facts, rights, and obligations, and is a non-major dispute, it can be tried by only one judge through simplified procedures. The following are typical steps in a first instance proceeding tried through normal procedures.

Step 1: Claimant files a lawsuit

In China, most labor and employment lawsuits are initiated by employees. The plaintiff submits a statement of claims (which includes basic information of the plaintiff and defendant, the claims, facts, and arguments) and preliminary evidence to the competent court. Generally, the statement of claims must be filed in writing. Where there is genuine difficulty in submitting a written statement of claims, a plaintiff may file that claim verbally, and the people's court will keep the written record and notify the defendant of the lawsuit. For disputes between employers and their employees, the plaintiff must produce evidence of the employment relationship, namely the employment contract. If there is no written employment contract, the plaintiff (i.e. typically, the employee) must produce evidence to prove that there is a de facto employment relationship, such as the employee's card or service card provided by the employer, evidence of remuneration, records of social insurance contributions, etc.

Step 2: Court acceptance of the lawsuit

After receiving and reviewing the statement of claims and relevant evidence, the people's court will decide whether to accept the lawsuit or not. The court will accept the lawsuit, docket the case, and notify the litigants within seven days if the lawsuit satisfies the prosecution criteria. Where the criteria are not satisfied, the court may issue a ruling letter on non-acceptance of lawsuit within seven days. The plaintiff may appeal against the ruling.

Step 3: Pre-trial preparation

The court will send a copy of the indictment to the defendant within five days of the date of docketing the case. The defendant will submit a statement of defense within 15 days of receiving the indictment. The court will send a copy of the statement of defense to the plaintiff within five days of receiving the statement of defense. Nevertheless, failure of a defendant to submit a statement of defense will not affect trial of the lawsuit by the people's court.

In this stage, the court will also determine the time frame for the parties to produce and submit evidence. This time frame can be negotiated between the parties and then approved by the court. The time frame confirmed by the court will be at least 15 days for first instance proceedings. The parties are permitted to apply for an extension before its expiration. After the time frame expires, if the parties desire to provide further evidence, the court may re-confirm the time frame at its sole discretion.

Step 4: Hearing

The court often arranges for an optional mediation before the formal hearing. If an agreement is reached through mediation, the court will prepare a mediation letter, which is binding on both parties. If the mediation fails, the court will schedule a formal hearing for the case and notify the parties at least three days in advance. In the hearing, the parties are required to present their respective statements, produce and cross-examine evidence, and debate key issues. The court will again encourage the parties to settle before the end of the hearing.

Step 5: Judgment

If no settlement is reached at the hearing, the court will render a judgment. Judgment can be rendered immediately at the end of the hearing, or at a later date set by the court. The latter is more common. In an effort to persuade the court to support their claims, the parties may also submit a follow-up statement to the court after the hearing and before the judgment is rendered to express their opinions more clearly and in detail.

ii. Role of Witnesses, Counsel and Court /Tribunal

As a general procedural rule, courts hear cases according to the claims presented by the parties, and will not independently review or decide any claims beyond those presented by the parties. For example, if a wrongfully terminated employee seeks reinstatement and back pay, but the court finds this remedy impossible or impractical, the court may explain this to the employee and encourage the employee to change the remedy. If the employee does not change his or her original claims, the court will not require the employer to pay double severance as compensatory damages for the wrongful termination.

Parties must provide evidence to support their assertions. However, if an employee is unable to produce certain evidence that is in the custody or control of the employer, the court may require the employer to produce such evidence. If the employer fails to do so within the specified period, the employer will bear the relevant adverse consequences. The people's court may investigate and gather certain evidence that a party is unable to collect on its own for objective reasons. The court may also exercise this power for other evidence that it deems necessary for trial.

Evidence in a labor dispute may include the parties' statements, documentary evidence, physical evidence, audio-visual materials, electronic data, witness testimony, expert testimony, and inquest records. In practice, documentary evidence is the most important, while witness testimony is uncommon. Witnesses are required to testify in court upon notice from a court. In special circumstances where a witness is unable to be present in court, upon consent by the court, that witness may testify by way of written testimony, audio-visual methods, or audio-visual materials, etc.

A party may apply to the people's court for the examination of specialized issues pertaining to the ascertainment of facts. Where a party disagrees with the examination opinion or if the people's court deems it necessary for the examiner to be present in court, the examiner shall testify in court. Upon notification by the people's court, if the examiner refuses to testify in court, the examination opinion may not be used as a basis for the ascertainment of facts. In such cases, the party that paid the examination expenses may obtain a refund of the examination expenses. A party may also apply to the people's court to notify a person with special expertise to be present in court to give testimony on the examination opinion or a specialized issue of the examiner.

iii. The Appeal Process

As discussed above, if a party disagrees with a first instance judgment, that party may appeal the judgment to the competent immediate superior people's court within 15 days (30 days for foreign employees) from the date on which the written judgment is served. If a party disagrees with a first instance ruling, that party may appeal the ruling to the competent immediate superior people's court within ten days from the date on which the written ruling is served.

Appeals require the submission of a petition for appeal, filed through the first instance court that originally heard the case. If a party directly files an appeal with the court of second instance, within five days of receiving the appeal the court of second instance will forward the petition for appeal to the first instance court that originally heard the case. Within five days of receipt of the petition for appeal, the first instance court will serve copies of the petition for appeal on the appellee. The appellee must then submit a pleading within 15 days from the date of receipt. The court will serve a copy of the pleading on the appellant within five days of the date of receipt of the pleading. Failure to submit a pleading by the appellee will not affect trial of the petition by the court.

Within five days of receipt of the petition for appeal, the first instance court that originally heard the case will submit a petition for appeal, together with all case files and evidence, to the court of second instance. The court of second instance will examine the relevant facts and applicable laws pursuant to the appeal request(s). If any party finds new evidence, the court will determine a time limit for production of such evidence, which will be at least ten days. The court of second instance may hear the appeal in its court, at the place where the case occurred, or at the court which originally heard the case. The court of second instance may also arrange a mediation during the appeal. The judgment or ruling of the court of second instance will be final and binding on both parties.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The typical types of costs incurred in labor law arbitration and litigation includes court fees, costs for investigation (such as notarization fees), and attorneys' fees. Labor arbitration is free, and the court fee for labor litigation (including in the first and the second instance) is only RMB 10 for proceeding. These nominal costs are a major reason why employees in China file labor arbitration and litigation to resolve disputes. Attorneys' fees depend on many factors, including the complexity of the dispute, the budgets of the parties, and the expertise of the attorneys.

As mentioned above, one of the most common labor proceedings involves employees seeking protection from the unilateral termination of their employment relationship. In such proceedings, the employer must produce very compelling evidence establishing the legitimacy of the termination, such as establishing the employee's serious violation of the employer's internal policies, or other serious misconduct in the case of termination for cause. In addition, the employer must establish that the policy allegedly violated by the employee is a valid internal policy (for example, whether the policy has undergone a "democratic procedure" and has been published to all staff, or provided to the employee concerned). Failure to establish these matters will result in a finding of wrongful termination. If an employer is found to have committed a wrongful termination, the employee may demand either double severance or reinstatement and back pay. As the employee's monthly salary is capped at three times the local average monthly salary when calculating the double severance, and senior employees' monthly salary is usually much higher than the cap, senior employees usually prefer the remedy of reinstatement and back pay. In practice, employees may not actually want reinstatement, but will use that remedy as leverage in negotiating a favorable severance package for a settlement.

Labor disputes typically last for about one year. The labor arbitration commission will render an award within 45 days of accepting an arbitration application. Subject to approval of the head of the labor arbitration commission, this period may be extended if the case is found to be complex. Any extension will not exceed 15 days. First instance proceedings are typically completed within six months of the date of docketing. However, an additional six months may be granted upon approval of the president of the court. Where there is a need for further extension, approval of the higher-level people's court is required. If simplified procedures apply, the proceeding can be completed within three months of the date of docketing. Hearings for appeals against a judgment are typically completed within three months (or 30 days for appeals against a ruling) of the date of docketing. Any extension for special circumstances requires the approval of the president of the court.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

In China, all trade unions must be affiliated with the All-China Federation of Trade Union ("**ACFTU**"). Therefore, there are no independent trade unions at present. The ACFTU is a national-level organization that reports directly to the Chinese Communist Party, and has branches at the provincial, city, and district levels. The trade union is the executive organ of the employee congress and the employee representatives' congress ("**EC/ERC**"), and is responsible for performing its routine activities. In China, state-owned enterprises must establish a trade union and EC/ERC. Private businesses are also encouraged by the government to establish trade unions and EC/ERC. In practice, private businesses, if they would like to have a trade union, usually establish a trade union and organize an EC/ERC only when necessary.

The fundamental responsibility of the trade unions and EC/ERCs are to safeguard the legal rights and interests of employees. For example, employers must inform their trade unions in advance if they intend to unilaterally terminate an employee. If the employer fails to notify and fails to correct the procedure before a lawsuit is filed, the termination will be wrongful. In addition, when creating or revising internal policies or making other decisions on major matters that directly affect employees' vital interests (for example, issues related to remuneration, working hours, rest and vacations, work safety and health, insurance and welfare, staff training, labor discipline, etc.) employers should consult with the ERC or all its staff. Employees should be given the opportunity to make proposals and provide their opinions during such a process, and the employer should arrange fair negotiations with trade unions or employee representatives before finalizing any decision. Any internal policies that do not undergo such "democratic procedures" will be invalid and unenforceable. As a corollary, any unilateral termination based on such policies would be deemed wrongful.

d. Specialized Litigation Bar

There is no specialized litigation bar in China. Anyone licensed to practice law in the PRC may represent clients in labor and employment law cases, both in and out of court.

III. Tips to Avoid Litigation

Labor disputes may arise in the course of the establishment, performance, and termination of employment relationships. In order to reduce the risk of labor disputes, we suggest employers take the following measures in their daily management:

- Comply with labor laws and regulations, especially in respect of labor standards, such as minimum wage, safety and hygiene, and rest and holidays;
- Establish and improve internal policies on HR management, such as the employee handbook, attendance policy, overtime policy, and leave policy, and strictly implement such policies;

- Strengthen the management of recruitment, execution of employment contracts, performance reviews, and termination of employment contracts, and seek legal advice from professional labor lawyers, especially before terminating employees; and
- Strengthen the preservation and management of HR records (for example, employment contracts, training and service agreements, and non-competition agreements), and employees' personal information, as well as any updates thereof.

IV. Trends and Specific Cases

a. New or Expected Developments

Establishment of Harmonious Employment Relationships

In 2015, the State Council issued the Opinion on Building Harmonious Employment Relations (the "Opinion"), which not only emphasizes certain existing rules, but also proposes new policies to safeguard employees' basic rights and improve the coordination of labor relations. The Opinion specifically highlights the implementation of collective bargaining and collective contracts, i.e. encouraging employers to participate in collective negotiations and execute collective contracts on important employment terms such as salary, working conditions, work quotas, special protection for female employees, etc. It is expected that the Opinion will cause local governments to revise their rules on collective contracts to adapt to the future needs of collective negotiation and collective contracts. In fact, in some places (for example, Shanghai and Guangdong) Collective Contract Regulations have already been updated.

New Development on Employment Discrimination

Since 2007, employees have been able to sue employers for employment discrimination. Although there is no independent cause of action for employment discrimination, judges have been able to accept cases based on infringements of general personality rights. However, there are still very few employment discrimination cases. For example, 2013 saw the first gender-based employment discrimination case. The second gender discrimination case was not until 2015, and resulted in the employer paying mental damages in an amount far below the damages sought by the plaintiff. Nevertheless, this judgment was consistent with the law and was viewed as a warning for employers. Employment discrimination issues continue to languish in China, given the evidentiary challenges faced by employees and the lack of comprehensive remedies and policies.

b. Recent Amendments to the Law

Recently, the national government promulgated many new policies on the vacation system, as well as the Two-Child policy. The State Council encourages companies to implement "Friday afternoon plus weekends", as a mini-vacation. The State Council has also requested that companies implement paid leave rules. Soon afterwards, the Hebei province, Jiangxi province, Chongqing municipality, and other regions, responded by encouraging mini-vacations consisting of "Friday afternoon plus weekends", by including it in their local governmental policies.

The communiqué of the Fifth Plenary Session of the 18th Central Committee of Communist Party of China (**CPC**) announced that China will allow all couples to have two children. The draft amendment of the Population and Family Planning Law of the PRC also explicitly provides all couples will be allowed to have two children. Meanwhile, it also adjusts many supporting measures. It is thought that relevant labor laws and regulations and their local enforcement regulations will be subject to adjustment and amendments.

In addition, the 2008 Labor Contract Law does not provide equal protection between employers and employees, which has resulted in arbitrary terminations of labor contracts by employees. Generally speaking, employees are the weaker party in employment relationships, but instituting too many employee protections creates great pressure on employers. During a period of economic decline in China, many foreign companies may pull out of the Chinese market. Recently, both academic circles and those in industry have been promoting an amendment to the Labor Contract Law.

V. Conclusion

Labor arbitration and litigation in China is easy to access, and the court fees are very low. Therefore, employees often do not hesitate to resort to labor arbitration and litigation, especially when they are terminated. As employers bear a very heavy burden of proof in labor arbitration and litigation proceedings, and PRC labor laws and regulations are generally pro-employee, it is difficult for employers to win a case. Therefore, it is very important for employers to refine their internal policies and strengthen HR management to reduce the risks of labor disputes. Employers should try to resolve conflicts with employees through friendly consultations and avoid labor arbitration and litigation. Given new trends and developments in the area of Chinese labor laws and practice, employers should improve their HR management capacity to adapt to anticipated changes.

COLOMBIA

I. Overview

a. Introduction

The employment situation in Colombia is very sensitive due to the fact that historically the unemployment rate has been high. In September 2015, the unemployment rate was of 9%, as recorded by Colombia's national statistics administrative department ("DANE" in Spanish). The government is constantly promoting programs and creating laws to provide incentives for companies to employ personnel.

Labor law in Colombia includes regulations regarding social security matters. The General Social Security System in Colombia has coverage for health, pensions, and labor risks. Every employer in Colombia must enroll its employees with the General Social Security System. In addition, independent workers (self-employed) also have the obligation of registering themselves and making contributions to the General Social Security System.

Given the complexity of employment and social security disputes in Colombia, such matters are resolved by a specialized justice through an autonomous procedure. The labor judge is the competent authority for settling employment and social security disputes.

Colombian labor laws and Labor Courts are very protective of employees. In most cases when there is a dispute, it is enough for the employee to allege a situation and the employer will then have the burden of demonstrating its compliance with the law.

b. Claims

The most relevant employment law matters dealt with by the Labor Courts are:

- Disputes arising between employers and employees in connection with the employment relationship and termination thereof (individual labor law matters). For example:
  - Claims regarding payment of salaries, fringe benefits, and/or indemnification for termination without cause.
  - Claims regarding damages in connection with a labor related accident or illness.
  - Actions against unfair dismissal on various grounds, including discrimination with respect to the reinstatement of employees.
  - Claims regarding assistance benefits and /or economic benefits derived from the social security system (pension, health, and labor risks).
  - Claims of contractor's employees alleging that the company that benefited from the service is jointly and severally liable for labor and social security debts owed by the contractor.
- Disputes between unions and/or unionized employees and employers regarding collective rights. For example:
  - Actions to obtain judicial approval to terminate or transfer a union leader or a unionized employee with a stability right.
  - Claims initiated by a union alleging non-compliance with labor laws or the collective bargaining agreement.
  - Annulment of arbitral awards.

Labor claims in Colombia are made up of two types of claims: (i) ordinary labor procedures and (ii) special labor procedures created for specific cases, such as labor executive procedures, procedures for ceasing of union protection, special procedures for the cancelation of unions, arbitral procedures, and special procedures regarding labor harassment sanctions.

When the law does not provide a special procedure for a dispute, the ordinary labor procedure is to be followed. The general ordinary procedure is divided into unique instance procedure and first instance procedure.

- Unique instance procedure: if the amount of the claim does not exceed ten (10) legal minimum monthly salaries (LMMS), the result of the procedure will be definitive and not subject to an appeal. For 2015, the LMMS in Colombia was COP$644.350 (approximately USD$215). Such claims may be filed by the plaintiff without the representation from a lawyer and may be filed verbally. Under this procedure, there is only one hearing and at the conclusion of the hearing the judge makes a decision.
- First instance procedure: when the amount of the claim exceeds ten (10) LMMS the dispute will follow a first instance procedure and the resulting decision can be appealed. In this type of procedure, the plaintiff must be represented by a lawyer. The claim must be filed in a written form, which complies with certain stipulations provided by law. The defendant has ten (10) days to answer the petition. The procedure shall be resolved in no more than two hearings.

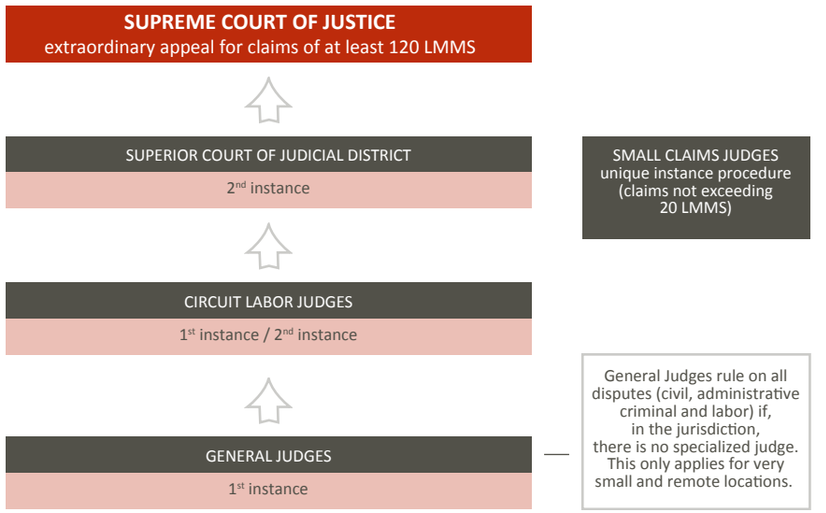
c. Administrative Agencies that Investigate or Adjudicate Claims

The following are the national administrative agencies in Colombia, which are involved in labor and social security claims:

- The Ministry of Labor is a national administrative entity in charge of the surveillance and control regarding compliance of the labor and social security regulations. The Ministry of Labor has regional offices with the intention of being present in the entire Colombian territory. In addition to surveillance and control functions, the Ministry of Labor is in charge of adopting, coordinating, leading, and monitoring the social policies regarding labor and social security matters. In the exercise of its auditing functions, the Ministry jurisdiction to impose fines that range between one (1) and five thousand (5.000) LMMS. Both employers and employees can request the Ministry of Labor to set up a hearing to resolve a dispute, in order to avoid initiating a judicial procedure. Under this scenario, the Ministry of Labor will act as a mediator, encouraging the parties to reach an agreement about the resolution of their conflict. However, the Ministry of Labor does not exercise judicial functions when acting in such capacity.
- The National Health Superintendency is an administrative entity responsible for the surveillance and control of the General Health Social Security System. The Superintendence may exercise jurisdictional functions over conflicts between actors of the system, for example, regarding coverage of medical procedures and economic benefits from the health system.
- The entity of pensions and payroll contributions (UGPP in Spanish) is a special administrative entity responsible for the surveillance of the social security and payroll contributions of employers. The main functions of the UGPP include auditing employers' payments to social security and payroll contributions and, in the event of a finding of inconsistences, the UGPP will request that the relevant employers pay a corresponding contribution, plus default interests. It may also impose fines.

d. Court / Tribunal System

COLOMBIAN COURT SYSTEM IN EMPLOYMENT AND SOCIAL SECURITY MATTERS



e. Alternative Dispute Resolution (ADR)

Colombian labor law provides alternative dispute resolution methods in order to assist employers and employees voluntarily settle a dispute without involving the jurisdictional authorities. In Colombia, most labor judicial proceedings include a first stage denominated conciliation in which the labor judge encourages the parties to settle their differences.

A Labor Conciliation hearing is a formal hearing in which a third party acts as a mediator in attempt to assist the parties in resolving a dispute. The three parties to the hearing enter into a conciliation minute, which invokes the principle of res judicata for that dispute. For labor matters, only uncertain and disputable rights can be subject to a settlement. To the contrary, certain and unwaivable rights must be complied with. A labor conciliation may take place as part of a judicial procedure or during a non-judicial procedure. A number of administrative authorities can act as labor conciliators (for example, labor inspectors, agents of the Public Ministry, delegates of the People's Defendants, labor judges, and, in exceptional circumstances, civil judges).

Labor Arbitration is a formal procedure in which a third party acting as an arbitrator is responsible for settling a labor dispute. The arbitrator acts with jurisdictional functions. There are two types of labor disputes that may be settled by an arbitration court: legal conflicts and economic conflicts. Legal conflicts involve the application of an existing rule, whereas economic conflicts seek to modify an existing right or create a new right.

A Labor Settlement Agreement is a private agreement reached between the parties in a labor dispute, without the intervention of a third party. For the settlement to be valid, it is mandatory for the parties to grant mutual rights. As in the case of the labor conciliation, only uncertain and disputable rights may be negotiated in a labor settlement agreement. If the settlement agreement is entered in accordance with the law, it will invoke the principle of res judicata.

II. The Litigation Process

a. Typical Case

Labor legal proceedings are special, and are governed by specific principles, which are different from civil, administrative, and criminal procedures. However, if there is a procedural matter not regulated by the labor procedural laws, the relevant civil procedural laws will apply.

The principles that govern the Colombian labor judicial procedure can be summarized as follows:

- **Orality and Publicity**: as a general rule, every stage of a labor legal proceeding is undertaken verbally and takes place via a public hearing.
- **Free assessment of evidence**: whenever evidence in a labor legal proceeding complies with the relevant legal requirements, the judge must evaluate the evidence without any pressure and should express the reasons of his/her assessment.
- **Gratuity**: access to justice regarding labor matters is almost free.
- **Unofficial boost**: labor legal proceedings cannot be initiated by a judge, however, once it is initiated by a plaintiff it is mandatory for the labor court to carry on the proceeding even if the parties abandon or lose interest in the proceeding.
- **Immediacy**: labor judges must interact with the parties, witnesses, and relevant experts before making a decision.
- **Concentration of the evidence**: from the outset of a matter (either in the plaintiff's statement of claim or in the defendant's defense) parties must include a list of evidence which they will present during the proceedings.
- **Procedural loyalty**: parties must act in good faith and not use the labor legal proceeding for committing fraudulent acts.
- **Rulings over claims not requested or in a higher amount than that which was claimed**: labor judges are allowed to impose claims not requested in a plaintiff's statement or in a higher amount than that which was claimed if during the proceeding those claims or amounts were discussed and proven.
- **Settlement**: labor judges should urge the parties in a labor legal proceeding to reach an amicable agreement that terminates the dispute.

i. Steps in the Process

Labor legal proceedings begin with a formal statement of claims. In a unique instance procedure, the statement of claims may be submitted verbally. For any other procedure, the statement of claims should be submitted in a written form. Taking into consideration that most labor claims are solved through an ordinary procedure, such a procedure is set out below.

The statement of claims must comply with a list of requirements for the judge to be able to accept it and initiate the proceeding. Those requirements are: (i) submitting the statement before the competent judge and mentioning the type of court; (ii) including information that properly identifies the parties (plaintiff and defendant) and their contact information; (iii) including information regarding the identify and contact details for the plaintiff's lawyer; (iv) mentioning the type of legal procedure; (v) expressing claims in a

clear and concise way; (vi) including a summary of the pertinent facts, expressed in a numbered list; (vii) mentioning the legal grounds of the claims, (viii) listing all evidence that will be used during the proceeding; and (ix) mentioning the amounts of the claims.

The statement of claims must be accompanied by the relevant addenda, which includes (i) a power of attorney, (ii) copies of the statement of claims for notification purposes, (iii) all documents that will be used as evidence, and (iv) certificates of incorporation if any of the parties are a corporate entity.

In an ordinary procedure, the statement of claims is submitted before a Circuit Labor Court. Once the Court receives the statement of claims, it must verify if it complies with the legal requirements, in which case the statement is accepted. If the judge determines that the statement does not fulfill the legal requirements then it will not be accepted and the plaintiff will have five (5) days to amend the statement so that it complies with the legal requirements.

If the statement of claims is submitted before a non-competent judge or court, the statement will be rejected. If the competent court is part of the same jurisdiction (that is the labor jurisdiction), the statement of claims will be forwarded to the competent court. If the competent is not part of the same jurisdiction, the statement will be returned to the plaintiff.

After the statement of claims is accepted, the judge will make an order for the personal notification of the defendant. The defendant will then be ordered to appear before the Court within the five (5) days following the receipt of the notice if the defendant is domiciled in the same city. However, if the defendant is domiciled in a different city, the Court will grant ten (10) days for the defendant to appear before the Court and thirty (30) days if the defendant is domiciled abroad. If the defendant does not attend the Court the defendant will be notified through a certified courier and a copy of the statement of claims will be send to the defendant. The notification is understood to be concluded on the business day following the date on which the defendant received the statement. It is very important for the Court to obtain proof of the date on which the notice was served, so that it is able to determine the period in which the defendant can file its arguments in defense.

Once the defendant has been notified of the statement of claims, the defendant must submit its arguments in defense within the ten (10) business days of such notice. The arguments in defense must be set out in a formal document that which must comply with some minimum requirements to be accepted by the Court. The statement of defense must include (i) information that identifies the defendant and its lawyer, and their contact information; (ii) answers to each of the claims included in the statement of claims; (iii) answers to each of the facts (whether they are true or not); (iv) reasons and legal grounds of the defense; (v) a list of the evidence that will be relied on during the proceeding; and (vi) any exceptions that will be argued. The statement of defense must be accompanied by the relevant addenda: (i) power of attorney and (ii) all the documental evidence that will be relied on in the proceeding.

The Court may reject the statement of defense if it does not fulfill the relevant legal requirements, however, the defendant will be able to amend its statement of defense within five (5) days following the judge's order of the rejection of the defense.

It is important to note that the plaintiff may amend the statement of claims once within five (5) days following the date of expiration of the term for the defendant to present its statement of defense.

After the acceptance of the statement of defense, the Court will issue an order scheduling the first hearing. The first part of the first hearing acts as a conciliation, during which the parties are able to settle their differences. However, if the parties do not settle

their differences, the judge will continue with the proceeding and will make decisions regarding exceptions, remedies, and the dispute. Also in the same hearing, the judge will order and admit the evidence that will be considered during the procedure. The judge may even make a decision during the first hearing if he/she considers it possible with the evidence on hand.

Certain decisions during the proceeding can be attacked with a revocation and/or appeal recourse. If the decision is attacked with a revocation recourse, the same judge that issued the order is the one who will review the decision and decide whether or not to modify or complement it. If the revocation recourse was issued during a hearing, the revocation recourse must be presented and decided during that same hearing. If the decision attacked by the revocation recourse was issued and notified outside of a hearing, there is a two-day term to present the recourse in a written form and the judge will issue his/her decision in writing or during the hearing.

The appeal recourse is only available with respect to decisions concerning the following: (i) the rejection of the statement of claims or its amendment; (ii) a decision establishing that no statement of defense was submitted; (iii) an order of payment in executive proceedings; (iv) a decision rejecting the representation of the parties or the intervention of third parties; (v) a decision about previous defense exceptions or exceptions in the executive proceeding; (vi) a decision denying evidence; (vii) a decision regarding incidents; (viii) a decision regarding procedural invalidations; (ix) a decision regarding preventive measures; (x) a decision regarding the liquidation of a debt in executive proceedings; and (xi) a decision about court fees, if any.

At the termination of the first hearing, the judge must schedule the second hearing. At the second hearing the judge will evacuate all pending evidence and the parties will have an opportunity to submit their final arguments. Afterwards, the judge will communicate the final decision. Once the decision is presented to the parties, and if a party wishes to do so, it should submit a formal appeal at the same hearing, together with the basic arguments supporting the appeal.

The judge must decide in that same hearing if the appeal is accepted or not. If the appeal is accepted, the judge must make an order that the file should be sent to the Superior Court of Judicial District. The acceptance of the appeal will suspended the first instance ruling until the appeal is concluded.

ii. Pretrial Proceedings

Under Colombian labor legal procedural laws there are no pretrial proceedings to be fulfilled prior to submitting a claim. Nevertheless, it is very common for employees to try to reach an agreement with the defendant before the Ministry of Labor before initiating a judicial claim, since it will reduce time and attorney fees.

iii. Role of Witnesses, Counsel and Court / Tribunal

As mentioned above, in unique instance labor legal procedures the parties do not have to be represented by an attorney, they may represent themselves. However, in first instance procedures it is mandatory for parties to be represented by an attorney. Under Colombian labor procedural laws, all types of evidence are admissible in labor proceedings. Evidence usually includes documents, witnesses, judicial inspections, declarations, affidavits, and experts' opinions. The judge considers all admitted evidence before issuing a ruling. The judge must freely evaluate all evidence in order to make a decision.

iv. The Appeal Process

The appeal is initially presented before the same judge that issued the first instance ruling and if accepted it is sent to the Second Instance Court. Once the appeal is presented, the effects of the appealed decision are suspended. The Second Instance Court must first make a decision about whether or not to accept the appeal and, if accepted, set up a date for a hearing, and the tendering of evidence if the court considers it necessary. During the hearing the court will hear the parties' final arguments and issue a decision. Rulings of the Second Instance Court may be subject to an extraordinary recourse before the Supreme Court of Justice. This will not constitute a third instance since the Supreme Court will not evaluate the core of the claims. Instead, the Supreme Court will assess whether the previous decisions were compliant with law. In exception circumstances, the Court will review facts and evidence. The purpose of the extraordinary recourse is to unify national case law. Only claims exceeding 120 LMMS may be subject to the extraordinary recourse (Casación in Spanish).

There are two possible outcomes of an extraordinary appeal before the Supreme Court of Justice:

- **First ground**: if the decision is violating any substantial law by means of direct violation (lack of application), improper application or wrongful interpretation. It is not applicable to procedural laws. The violation may be direct or indirect. The violation is direct if the decision contains dispositions against the alleged violated law. In this scenario there is no evidence exam. The wrongful appreciation of the evidence, which causes a violation of the substantial law, derives in what is known as indirect violation of the substantial law.
- **Second ground**: when the second instance decision worsens the situation of the unique appellant. It is not necessary to allege the violation of laws.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Even though access to the justice system in Colombia is free of charge, there are procedural fees that should be paid. Judges determine who should pay for those fees and it usually is the losing party. Some examples include copies, notifications, expert's fees, and transportation costs.

Attorney's fees are subject to the agreement entered into by the attorney and the client. However, the national attorneys' college has established a reference guide for appropriate fees. Usually attorney's fees are agreed in LMMS, and, as a matter of example, in an ordinary labor legal process attorney's fees may range between 10 and 100 LMMS, depending on the complexity of the proceeding.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

In Colombia, work councils and other employee representative bodies cannot be involved in labor legal proceedings. However, if a plaintiff is a union member, the union can be part of the proceeding. Unions may also initiate labor claims.

d. Specialized Litigation Bar

In Colombia, specialized labor judges solve most disputes regarding labor and social security matters. Civil, criminal, and administrative courts do not hear labor and social security matters, except when a constitutional claim is presented or in small locations where there is only a general judge.

III. Tips to Avoid Litigation

In most cases, litigation in Colombia is the result of poor management of labor relations and the lack of internal and external audits regarding compliance with labor, social security, and health and safety rules. In order to avoid claims, employers should audit, on a frequent basis, its compliance with labor and social security matters and implement process that guarantee adequate management of employment relations. It is also advisable to establish employment conditions and practices in accordance with Colombian laws and common standards in the country.

If a termination without cause is carried out, employers must pay an indemnification for termination without cause. It is recommended that parties enter into settlement documents at the termination of the employment contract to prevent labor claims.

IV. Trends and Specific Cases

a. New or Expected Developments

A general procedure code was expedited through law 1564 of 2012, and has been gradually applied since January 1st, 2014. For the region of Bogota (the capital of Columbia), the general procedure code will be applicable from January 1st, 2016. The purpose of the code is to unify legal proceedings before Colombian courts. This code is also applicable to labor legal proceedings. The major change brought about by this code is to oral hearings; however, the change is not new to labor legal proceedings as oral hearings have been in place in labor proceedings since 2007.

b. Recent Amendments to the Law

After the introduction of Law 1149, 2007, labor legal proceeding became an oral procedure, which had the effect of significantly expediting proceedings. Before the introduction of the law, labor legal proceedings were a combination of oral and written acts, and could last up to ten (10) years, including the extraordinary appeal. The average proceeding now takes up to five (5) years.

V. Conclusion

Colombian law, from a labor and social security stand point, is rich and clear about the rights and conditions to which employees are entitled. However, due to the costs associated with compliance with the various labor laws, a number of employers chose not to comply with those obligations, and others are simply unaware. In addition, access to court is free and without obstacles, i.e. no prerequisites or procedures apply. As a consequence, litigation regarding labor and social security matters in Colombia is very common.

Moreover, labor judges are employee oriented and protective of employees' rights. Therefore, employees are very much supported by the law and the labor authorities in general, including, not only judges, but also administrative authorities, such as labor inspectors.

It is also important to note that due to free trade agreements and other international treaties entered into between Colombia and other countries, in the last two years the Government has implemented a plan to encourage companies to comply with labor and social security matters. The Government has also restructured the Ministry of Labor, with the purpose of strictly auditing labor compliance. As a result, there have been a number of audits in the different economy sectors.

DENMARK

I. Overview

a. Introduction

The Kingdom of Denmark formally includes Greenland and the Faroe Islands. Whilst Greenland has maintained extensive independence and autonomy since 2008, including with respect to its control of law enforcement, the justice system, and legislative actions, the Faroe Islands' independence is more restricted. However, the Faroe Islands still acts as an autonomous country within the Danish Kingdom, which is why legislation by the Danish Parliament neither applies to Greenland nor the Faroe Islands. Accordingly, the following overview does not include a description of employment litigation in Greenland and the Faroe Islands.

Employment litigation in Denmark takes a variety of forms due to the very unusual way in which the Danish employment market is regulated. To fully understand litigation regarding Danish employment issues, it is first necessary to understand how the Danish employment market operates and the so-called "Danish Model".

There is currently no codifying legislation in Denmark governing all individual and collective aspects of employment law. This means that there are many statutes, regulations and other statutory orders dealing with many different issues.

Trade union membership is extremely strong in Denmark, and, as a result, employment relationships are frequently governed by terms that have been agreed collectively. The two main interest groups in the private sector labour market are the Danish Confederation of Trade Unions (Landsorganisationen i Danmark (LO)) and the Danish Employers' Confederation (Dansk Arbejdsgiverforening (DA)). The main collective agreements are entered into between members of these confederations. Collective agreements are binding on employer and employee associations and their respective members.

Whilst legislation remains at the top of the hierarchy of Danish employment law, collective agreements and individual employment agreements, together with precedent, custom and practice, play a key role in determining employment relationships and the rules that govern them. In circumstances where there are no statutory or contractual rules governing the specific dispute in question, the Danish courts are likely to resolve the matter in accordance with the custom and practice applicable to the industry in question.

In contrast to most European constitutions, the Danish Constitution does not play an important part in the practical aspects of employment law. There are a few relevant provisions, among which are the right to join a union, the freedom of speech and the right to protest (freedom of assembly), but these are rarely quoted as applicable legal authority when applying employment law.

Collective bargaining agreements usually apply to the work performed by employees. As a consequence, union membership is not decisive when deciding on entitlements under a collective agreement. However, only the parties to the collective bargaining agreement may litigate a breach of the collective agreement. If the collective agreement in question has been breached, the litigation may, however, include an interpretation of the individual entitlement under the collective agreement. For example, it may be necessary to interpret the provisions on overtime payment in order to establish whether a collective agreement's provision on overtime payments has been breached. The litigation procedures in connection with a breach, and the interpretation, of a collective agreement follow two different paths.

The Danish Labour Court has jurisdiction on sanctions in connection with a breach of the collective obligations, but does not have jurisdiction on the interpretation of the

provision in question. This must be established beforehand by an industrial arbitration tribunal (faglig voldgift).

Cases involving employment under the Civil Servants Act and the municipal public servants' regulations are dealt with by the respective authorities and, in the final instance, by the ordinary courts of law. However, matters concerning collective neglect of the special duties incumbent upon civil servants, for instance, related to work stoppages, contravention and interpretation of certain agreements on wages and terms of employment, are brought before a Governmental or Municipal and Regional Public Servants Court, respectively, in accordance with the Civil Servants Act and a special act.

The ordinary courts will have jurisdiction on claims under individual contracts and on the Danish employment legislation.

EU legislation that is to apply in Denmark may be implemented through collective agreements supplemented by a legislative implementation, applicable to employees not already subject to a relevant collective implementation.

When determining the relevant litigation procedures, it is thus imperative to establish whether the issue is related to i) an individual right related to a collective agreement, ii) the collective aspects of the collective agreement, ii) the individual employment contract, and/or iii) the few general applicable legislative acts that apply to the employment relationship. Such enquiries may show that litigation may be undertaken before numerous courts and/or tribunals and may be governed by both collective agreements and legislation. The result may thus include a confusing number of causes of action and choices of venue, including a variety of partially established amicable tribunals, as well as government established special tribunals. To add to the complexity, some courts may exercise jurisdiction in collective disputes and amicable tribunals may exercise jurisdiction in claims based on statutory legislation.

b. Claims

First of all, it must be noted that many claims may overlap and can be brought before various venues and that a single claim may involve different allegations. For example, claims for the underpayment of wages, a breach of collective obligations and discrimination claim could partly be brought before the ordinary Danish courts, an established amicable tribunal, the Danish Labour Court, or even the Tribunal on Equal Treatment (Ligebehandlingsnævnet).

The following non-exhaustive list sets out the main venue for different types of claims.

Employment disputes based on legislation

The ordinary Danish Courts have jurisdiction in all matters concerning the interpretation of Danish legislation and in the implementation of EU legislation.

Breach of collective agreements

The Labour Court has jurisdiction over determinations of sanctions for breaches of collective obligations. Breach of collective obligations typically include conduct such as initiating strikes, lockouts or other industrial action. Industrial action is usually considered to be a breach of the so-called obligation of peace during the period that a collective agreement applies. Industrial action is only legal in connection with the termination of a collective agreement or in connection with claims for collective covenants for companies not subject to collective obligations.

Interpretation of collective agreements

Pursuant to a special negotiation procedure, disputes regarding the interpretation of collective agreements are brought before the industrial arbitration tribunals, set up by the parties themselves. The special negotiation procedures are established in the Danish Labour Court Act, which legalizes a more than 100-year-old negotiation procedure, the Rules for the Hearing of Industrial Disputes ("The Norm") or similar provisions.

c. Administrative Agencies that Investigate or Adjudicate Claims

Administrative agencies that investigate employment law matters include the Board on Equal Treatment and the Danish Working Environment Authority.

The Board on Equal Treatment

The Board on Equal Treatment has jurisdiction over all claims related to discrimination, as defined in the existing EU-directives. The Board has quasi-judicial powers on claims subject to its jurisdiction. Any claimant may bring matters before the Board, but procedures before the Board are only based on written correspondence. If the claim requires the hearing of witnesses, the claim will be rejected from the Board to the ordinary courts. Rulings by the Board are not enforceable. If a defendant chooses not to abide by the ruling, the Board must bring the matter before the ordinary court on behalf of the claimant and support the claimant with legal aid.

The Danish Working Environment Authority

The Danish Working Environment Authority ("WEA") is based on the Working Environment Act and related Executive Orders, and works to promote health and safety at Danish workplaces. This is done by:

- carrying out inspections of companies
- drawing up rules on health and safety at work
- providing information on health and safety at work

The WEA may issue penalties and administrative fines in cases of non-compliance with the working environment rules. In cases of extreme danger, the WEA may also order the work to be suspended. The Danish Working Environment Authority is an agency under the Ministry of Employment.

d. Court / Tribunal System

The ordinary Danish courts of law relevant to employment litigation are the 24 district courts, including a Maritime & Commercial High Court, 2 regional high courts and the Supreme Court. Pursuant to the provisions of to the Danish Administration of Justice Act, most cases are heard by a district court in the first instance. In most cases, decisions may only be appealed once.

The Supreme Court

The Supreme Court, situated in Copenhagen, is the final court of appeal (third tier) in Denmark. The Supreme Court reviews judgments and orders delivered by the High Court of Eastern Denmark, the High Court of Western Denmark and the Copenhagen Maritime and Commercial Court. The right to appeal to the Supreme Court is restricted. Only in exceptional cases a right of appeal to the Supreme Court (third tier) exists. If a case is initially heard at the high court level or by the Maritime and Commercial High Court, both parties have the right to appeal the case to the Supreme Court. However,

if a case was initially heard at the district court level and then appealed to a high court, an application must be submitted to the Appeals Permission Board for leave to bring the case before the Supreme Court. Being the highest tier, the Supreme Court, through its rulings, determines what the legal position should be, and lays down guidelines on how judges in the district courts and the high courts should decide similar cases in the future. Given the Supreme Court is responsible for creating clarity as to how Denmark's courts of law should interpret the law, the Supreme Court most often hears precedent-setting cases. Supreme Court cases are normally heard by five judges.

The High Courts

There are two high courts in Denmark: the High Court of Western Denmark in Viborg, which hears cases from Jutland, and the High Court of Eastern Denmark in Copenhagen, which hears cases from the rest of the country. The high courts primarily hear cases of appeal from the district courts. High court cases are normally heard by three judges. In criminal cases, lay judges may also be involved.

The Maritime and Commercial High Court

The Maritime and Commercial High Court hears cases concerning the Danish Trademarks Act, the Design Act, the Marketing Practices Act, the Competition Act, cases concerning international trade conditions and various other commercial matters.

District courts

As a general rule, all court cases start in one of the district courts (first tier). Civil cases are cases in which one party seeks the court's assistance in pursuing a claim against another party or an authority (for example, a local authority). Cases before the district courts are normally heard by one judge, but a few cases are heard by three judges. In criminal cases in which the prosecution claims punishment by imprisonment, lay judges are also involved. The bailiff's courts are divisions under the district courts. Bailiff's courts help enforce claims (for example, claims for payment according to a court ruling or an instrument of debt).

In special cases, the district court can refer a civil case to a high court if the case concerns principles of general interest or the value of the matter is above a specific value. District court appeals are to one of the high courts (second tier).

The Labour Court

Denmark has just one Labour Court. It is not part of the ordinary judicial system, but acts as a special court of law. The Court is seated in Copenhagen, but has jurisdiction over the entire country. Pursuant to the Labour Court Act, the Labour Court has exclusive jurisdiction to deal with:

- Breaches, and the interpretation, of general agreements between the Employers' Confederation and the Federation of Trade Unions, and/or corresponding general agreements and settlements.
- Breaches of collective agreements on wages and working conditions, including strikes.
- The lawfulness of a warned collective industrial action or the notices issued in connection.
- The existence of collective agreements.
- Agreements on industrial arbitration and the interpretation of such agreements.
- Refusals of the consideration of matters by industrial arbitration.
- Disputes over the competence of official conciliators.

Cases on the above subjects cannot be dealt with by the ordinary courts of law.

The Labour Court is made up of 49 members: a president, 5 vice-presidents (the Presidium), 6 ordinary and 14 substitute members appointed on recommendation by private employers, organisations and public employers and 6 ordinary and 17 substitute members appointed on recommendation by employees' organisations. Substitute members are appointed by the Minister of Employment and serve for a period of 5 years. Normally the President and vice presidents are judges from the Danish Supreme Court; whereas the other members of the Court are chairmen of trade unions or heads of rather large companies, employers' organisations or public authorities.

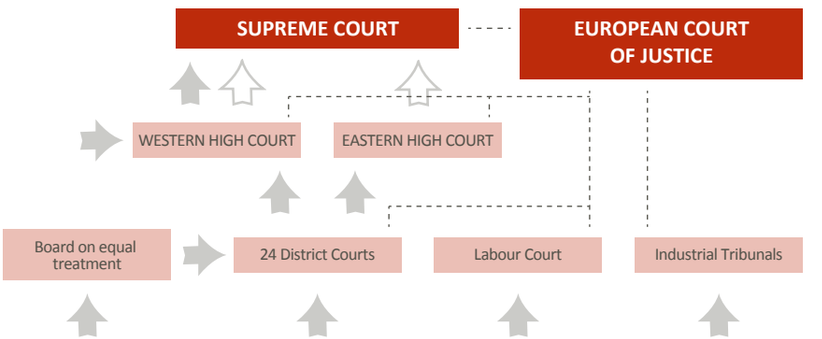
No member is assigned to the Labour Court on a full-time basis.

The Danish Institute of Arbitration

The statutes of the Danish Institute of Arbitration stipulate the Institute's objective is the promotion of arbitration in accordance with the Rules of Arbitration Procedure. The Institute handles disputes, which parties submit to the Institute, either through contractual agreements or through ad hoc decisions. Arbitrators are appointed by the Institute, taking into account the required competences and ensuring an independent and impartial arbitrator.

The Institute is often appointed as the relevant venue for disputes in connection with executive service contracts.

THE DANISH COURT SYSTEM AS RELATED TO INDUSTRIAL RELATIONS AND EMPLOYMENT



II. The Litigation Process

a. Typical Case

i. Steps in the Process

Cases involving individual employment contracts are heard by the ordinary courts of law or by arbitration pursuant to the Danish Arbitration Act. However, cases concerning employment according to collective agreements may also be heard in the ordinary system of law courts. Thus, if a case relates to the interpretation of a statutory provision which does not exclusively, or mainly, concern areas that come under the jurisdiction of the Labour Court, each of the parties are deemed to be entitled to demand that the matter be dismissed by the Labour Court or postponed pending a decision of the ordinary courts of law.

Labour Court

Individual employees cannot institute proceedings before the Labour Court. Only collective parties can institute such proceedings.

If an employee is not a member of the relevant union or if the relevant union refuses to institute proceedings before the Labour Court on behalf of the employee, the individual employee may be able to bring their claim before the ordinary courts.

Before a matter is brought before the Labour Court, settlement attempts will usually have been made in accordance with the Rules for the Hearing of Industrial Disputes or the relevant collective agreement. Questions of interpretation may be decided by industrial arbitration.

As a rule, in order to impose a fine for breach of a collective agreement, a joint meeting must have been held before the case is brought before the Labour Court.

Strikes or lockout proceedings

The Danish Labour Court Act provides that strikes or lockouts in contravention of a collective agreement must immediately be reported to the relevant party/organisation to the collective agreement, and a joint meeting attended by the organisation must be held the day after the beginning of a strike or lockout.

When current industrial action is brought to the Labour Court, the case will be considered as a matter of urgency. The preliminary meeting will be conducted within a week, usually the following Monday or Thursday. At the preliminary meeting, the defendant will usually admit that the industrial action in question is in contravention of the collective agreement, and the representative of the defendant will promise to direct the members of the organisation, who are taking part in the industrial action, to bring the action to an end. As a rule, the judge will request the members of the organisation to comply with the appeal of their organisation. If the members of the organisation do not comply with such a request immediately, the applicable fines will increase considerably.

If the defendant does not admit to the industrial action being in contravention of the collective agreement, in the face of the opposite party insisting that it is, a full-court hearing will be fixed. Typically this will occur within 14 days of the preliminary meeting. If the Court cannot deal with all the issues in the case immediately, at the end of the hearing it can issue an interlocutory order declaring the industrial action in contravention of the collective agreement. The final decision will normally be released 2-3 weeks later.

If the industrial action is no longer ongoing when the case is brought back to the Court, the case will be handled as a non-urgent case.

Ordinary courts

In cases where the ordinary courts have jurisdiction, the first step in the proceedings is normally to correspond with the opposite party and discuss any prospects of settlement. This steps is not required by law, but as court proceedings generally are costly and the value of employment matters not excessive, employment disputes are often settled out of court.

If an employment dispute is brought before the courts, the first step for the plaintiff is to file a writ and institute proceedings before the relevant district court, or, in special circumstances, one of the high courts. The court will then order the defendant to submit their points of defence. However, the parties may continue to exchange pleadings – typically 2 to 3 pleadings are submitted by each party. The objective is to establish

the factual circumstances and present the evidence and each parties' arguments. New evidence may be presented up until a certain date that is set by the court. A court may ask the parties to obtain further statements or information, and the case may, if necessary, be postponed, setting a later date for a hearing. The procedure includes an investigation of a possible amicable solution, and, in a vast majority of cases, the parties manage to reach a settlement.

At the date of the hearing, the representative for the plaintiff presents the plaintiff's case to the court in an objective manner, including with reference to documents. The representative of the defendant may then add their observations on the presentation. After the presentation, the examination of possible witnesses takes place. The witnesses are instructed to be truthful and they they may face criminal penalties if they are not. The representatives of both parties and the Court may put questions to the witnesses. After examining the witnesses, the representatives of the parties deliver their closing statements and the hearing is declared closed by the presiding judge, and a date is set for the final ruling.

Rulings or decisions of the courts consist of an exposition of the parties' claims, an account of the facts of the case as they have been presented to the Court, a short record of the statements made by the witnesses, the closing arguments made by the representatives, the legal rules and principles on which the decision is based, the grounds for the decision and the court's conclusion.

Except in the case of decisions of the Labour Court, any dissenting opinions will be mentioned in the decision or ruling.

Industrial arbitration tribunals and the Danish Institute of Arbitration

Parties to a dispute are free to agree on the relevant steps in connection with proceedings before the industrial arbitration tribunals and the Danish Institute of Arbitration, whether or not the agreed steps follow the principles stipulated in the Danish Administration of Justice Act, some other regime or even the parties' own protocols.

European Court of Justice

Both the ordinary courts and the Labour Court can refer cases and legal disputes to the European Court of Justice. Industrial arbitration tribunals can also refer cases to the European Court of Justice.

Considering the number of significant Danish matters ,which have been before the European Court of Justice, it is apparent that Danish courts and attorneys see the European Court of Justice as an integrated part of the Danish judicial system. Rulings of the European Court of Justice have had a significant and direct impact on Danish legislative amendments and interpretation.

ii. Pre-trial Proceedings

Consultations or settlement discussions may be requested by parties before matters are brought before the court. Collective agreements may also require the parties to undertake certain discussions prior to the commencement of proceedings.

In general, consultation and settlement negotiations are evident in Danish employment litigation and reflect the 100-year old Danish Model of negotiating terms and conditions on the Danish labour market.

iii. Role of Witnesses, Counsel and Court / Tribunal

Standard court procedures for civil litigation apply to the ordinary courts, including the Labour Court. This means that it is up to the parties and their legal representatives to present their case before the court. The courts are prohibited from taking any claim or objection into account that has not been invoked by a party before the court. Consequently, all oral and written evidence must be presented by the parties at the hearing. Evidence may consist of the presentation of relevant documents, but may also be by oral evidence through examination of parties and witnesses. Examination of witnesses are undertaken by the parties, however, the court may also ask questions for clarification purposes.

iv. The Appeal Process

Labour Court and Industrial Arbitration Tribunals

It is not possible to appeal rulings and decisions of the Labour Court and the Industrial Arbitration Tribunals. That said, Labour Court judges are also judges of the Supreme Court and the chairpersons of Industrial Arbitration Tribunals are often judges of the Labour Court/Supreme Court, the high courts and the Maritime and Commercial High Court. The parties are also required to agree on the chairperson for Industrial Arbitration Tribunals.

Ordinary Courts

As a general rule, all cases before the ordinary courts start in one of the district courts (first tier).

In special cases, the district court can refer a civil case to the high court if the case in questions concerns principles of general interest or if the value of the matter is above a specific value.

Decisions of the district courts can be appealed one of the high courts (second tier).

The right to appeal to the Supreme Court is restricted. If a case is initially heard by a high court level or by the Maritime and Commercial High Court, both parties have the right to appeal to the Supreme Court. However, if a case was initially heard at district court level, and then appealed to the high court, an application must be submitted to the Appeals Permission Board for permission to bring the case before the Supreme Court.

The Appeals Permission Board considers petitions for leave to appeal to the Supreme Court. The cases that are granted leave are test cases (for example, cases that may have implications to rulings in other cases) or cases of special interest to the public. Certain case types require permission by the Appeals Permission Board in order to be brought before a superior court (second tier grant).

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The court costs are first and foremost financed by the Ministry of Justice/Employment.

When a writ is filed before the ordinary courts, a filing fee must be submitted. If the case concerns claims for damages/money, the fee is established as a minimum fee of DKK 500. If the value of the matter exceeds DKK 50,000, the additional filing fee is DKK 250 + (([value of the matter] – 50,000) x 0,012). The filing fee may never exceed DKK 75,000. When the case is ready for hearing, an admission fee must be paid. This fee is equivalent is to the filing fee.

Pursuant to the Danish Administration of Justice Act, an unsuccessful party may be ordered to contribute to the successful party's legal costs. However, such amounts are typically modest, and will rarely cover all legal costs related to the matter. The Labour Court may make an order for the unsuccessful party to pay a modest administration fee, but not the successful party's legal costs.

Proceedings before the ordinary courts in Denmark are typically lengthy. If a case is judged by two institutions (two tiers), the present average timing of the proceedings is 2 years from the date that the writ is filed with the district court. This may be longer depending on the complexity of the matter.

The average duration of non-urgent proceedings before the Labour Court is 1 year. However, this depends on the complexity of the matter.

Sanctions decided by the Labour Court for breaches of an agreement invariably take the form of penalties payable to the aggrieved organisation. In cases involving failure to pay a set fine, the penalty may include additional payment of the shortfall.

Penalties are determined on the basis of all of the facts of the case and with due regard to the degree to which the breach of agreement was excusable.

Very brief strikes are normally exempt from penalties. Participants of a work stoppage who resume work before a joint meeting is held, or who follow a recommendation from the joint meeting to return to work, are only fined a penalty if there is clearly no reasonable justification for the work stoppage or the stoppage is deemed to be part of a pattern.

Currently the penalty for participation in work stoppages in contravention of collective agreements is DKK 35.00 per hour of the strike for an unskilled worker and DKK 40.00 per hour for a skilled worker. If a work stoppage continues after the judge at a preparatory meeting in the Labour Court has endorsed the organisation's mandate for the strikers to resume work, the penalty is raised by DKK 30.00 per hour.
The penalties imposed by the Labour Court in other cases frequently amount to DKK 500,000.00.

Penalties may also be imposed on an organisation if it has been party to a breach of an agreement. In serious cases, the penalty imposed may be very considerable. To date, the largest penalty imposed on an organisation is DKK 20,000,000.00.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Trade unions are the primary employee bodies involved in employment litigation. However, the Board of Equal Treatment may also represent employees before the ordinary courts. The Danish employment model requires employees (typically represented by trade unions) and employers to negotiate terms and conditions applicable to the relevant work. Trade unions are parties to the collective bargaining agreements and thus involved in matters concerning breaches, or the interpretation, of collective bargaining agreements, and may claim sanctions or punitive damages in such proceedings.

Trade unions typically also provide free legal aid to their members when filing employment cases before the ordinary courts to support individual contractual disputes. Trade unions may employ attorneys themselves or hire attorneys to argue the case in court.

It is only mandatory to have attorney representation before the ordinary courts, except when the party represents himself/herself.

d. Specialized Litigation Bar

Attorneys authorised to practice law and argue cases in the ordinary courts must be registered with the Danish Bar and Law Society. Hearings will be performed in Danish, which is why the attorney must be able to speak Danish; however, the courts usually accept witness statements, documents and other evidence in English.

A number of attorneys are specialized in labour and employment law. These attorneys work at trade unions and employers' associations, and also at law firms who have dedicated labour and employment teams or operate as a boutique labour and employment law firm. A significant number of employment lawyers are members of the Danish Employment Lawyers Association (Ansættelsesadvokater), established under the Association of Danish Law Firms (Danske Advokater).

III. Tips to Avoid Litigation

Considering the historic development of the labour market in Denmark, and the significant and fundamental regulation through collective bargaining agreements and the Danish Model, it is advisable for employers to acknowledge the importance of cooperating with trade unions. This may include mandatory consultation procedures or information obligations through established works councils, however, employers not subject to collective bargaining agreement should also strive towards a mediating approach.

Trade unions are able to effectively disrupt production if a collective bargaining agreement is not entered into, which is why any aggressive or confrontational action should be avoided. This is also reflected in the litigation process, where an amicable solution is preferred, in circumstances where litigation often has a detrimental impact on costs, managerial time, commercial interests and productivity.

Mandatory mediation procedures within collective bargaining agreements must usually be adhered to, with the firm objective of facilitating settlement negotiations.

Further, it is advisable to have proper policies, for example, on fair termination procedures, bullying and harassments, and continuous training of managers and executives.

Employment contracts should reflect specific agreements and commercial considerations and should be reviewed regularly, and especially in connection with the introduction of new roles and restructures.

Employers should also ensure that they maintain regular communication with their employees regarding their performance or conduct.

IV. Trends and Specific Cases

a. New or Expected Developments

The Ministry of Employment has set up a working group to investigate the introduction of a new holiday system. The impetus behind this initiative is the stipulation in EU case law which requires employees to be entitled to a minimum of 20 days of paid holidays per year. Although the Danish Holiday Act presently entitles employees to 25 days of paid holidays per year, the difference between the accrual year (the calendar year) and the holiday year (30 April to 1 May) means that in certain situations employees may not be entitled to paid holidays until they have been employed for a full calendar year.

The Act on part time workers is also currently being amended, with the aim of compliance with the EU Directive on part time workers and the obligation not to discriminate against

part time workers in comparison to full time workers. The amendments are expected to come into force on 1 March 2016.

Matters and claims based on protected discriminatory considerations, like age and disability, continue to be q focus of employees and trade unions.

b. Recent Amendments to the Law

The legislation on restrictive covenants has been amended with effect from 1 January 2016. Until then, only employees subject to the Danish Salaried Employees Act have been covered by regulations on restrictive covenants, which include the requirement for employers to pay employees an amount for the imposition of restrictive covenants. The new act applies to all employees, both salaried employees (white collar) and non-salaried employees (blue collar). The amendments apply to restrictive clauses agreed as from 1 January 2016. Restrictive clauses agreed prior to this date continue to be enforceable, even if the clauses fail to comply with the new mandatory requirements.

V. Conclusion

The Danish labour market is complex, so this publication can only introduce an outline hereof. Within Europe, however, Denmark is praised for its so-called flexicurity model, which is characterised by a special mix of labour market flexibility and social security. The purpose of flexicurity is to combine various kinds of flexibilities with different degrees of security.

In Denmark, the main focus is on security in employment and income, combined with flexibility in relation to the hiring and firing of workers. In other words, the Danish flexicurity model makes it – especially in a Nordic perspective – surprisingly easy to hire and fire employees. This puts employers in a position where they are willing to take risks and invest in new production, including hiring employees who may otherwise have difficulties in obtaining employment. Further, the mobility of workers is considered a fundamental condition for an innovative and sound business development.

FRANCE

I. Overview

a. Introduction

Employment law in France is primarily subject to a special jurisdiction: the Conseil de Prud'hommes (the "Labor Court"), which has exclusive jurisdiction over individual employee/employer matters.

The Conseil de Prud'hommes is comprised of an even split of elected employers and employees, rather than professional judges.

There is no limit on the cases that may be brought before the Conseil de Prud'hommes, other than that they must concern individual litigation arising from a contract of employment.

As such, the Conseil de Prud'hommes does not adjudicate collective litigation, which is instead dealt with by traditional civil or administrative courts.

Disputes in relation to social security contributions, occupational diseases and work accidents are dealt with by the Tribunal des Affaires de Securite Sociale.

Litigation in relation to the election of staff representative bodies is dealt with by the Tribunal d'instance.

b. Claims

There is no prior filter to a claim before the Conseil de Prud'hommes. Hence, all claims may be recognized. The most common claims are the following:

Wrongful dismissal

Dismissals may be based on personal reasons (misconduct, lack of performance, etc.) or economic reasons (redundancy).

In both cases, the dismissal should rely on a real and serious cause. That is to say, it should be based on precise and objective reasons, which may be demonstrated in Court. Its cause should be sufficient to discontinue the employee's employment. Failure to demonstrate the real and serious cause of the dismissal will allow the employee to claim damages before the Labor Courts.

Discrimination

Under the principle of non-discrimination, no person may be denied recruitment, and no employee may be sanctioned, dismissed or subjected to direct or indirect discriminatory measures, for example, in terms of remuneration, qualifications or promotions, for any of the following reasons: origin, sex, values, sexual orientation, age, family situation, pregnancy, genetic characteristics, ethnicity (real or supposed), nationality, race, political opinions, syndical activity, legal exercise of the right to strike, religious convictions, physical appearance, name, state of health or handicap. A law adding the place of residence to this list has recently been passed.

Discrimination is considered to be direct when a person is treated in a less favorable fashion than another is, has or would be treated in a comparable situation. Discrimination is considered to be indirect when a provision, criterion or practice, neutral in appearance, entails a particular disadvantage for certain persons in relation to others, unless justified by a legitimate goal and by necessary and appropriate means.

The court may find a dismissal to be null and void where a fundamental liberty of the employee concerned has been violated. Cases where dismissal may be found null and void include discriminatory dismissal. In such cases, the employee concerned is entitled to request their reintegration within the company or to proceed with the termination of the employment contract whilst claiming related indemnities and the reparation of the prejudice suffered.

Wage/hour

Minimum wage

As of 1 January 2015, the minimum gross monthly wage is EUR 1457,52 for a 35-hour week. All employees who are employed under an ordinary employment contract (either indefinite or fixed term) are entitled to the minimum wage.

Collective bargaining agreements also frequently provide minimum wages (which depend on job categories).

Failure to respect the minimum wage requirements may result in a claim by the employee, which may be brought before the Labor Courts through a summary procedure, as well as a fine.

Working time

When the work contract does not have any specific provision on working time, employees work a 35-hour week. In such a case, any work over 35 hours a week is payable as overtime (although there is no entitlement to additional days off).

In any event, employees should 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 collective bargaining agreements)

Litigation may arise regarding the payment of overtime, as well as the non-respect of provisions regarding minimal rest. Recently, specific provisions on working time, mainly the agreements regarding annual pay based on the number of days worked ("forfaitjours"), have been challenged in court for not respecting the health and safety (in particular times of rest) of the employees subject to "forfait jours" agreements.

Failure to respect the maximum working time requirements may also result in fines.

The employment contract from employee perspective (mainly requalification and constructive dismissal)

Specific contracts (part time, fixed term, etc.) should be in writing before the commencement of work. The absence of such provisions in writing will result in the contract being recognized as a regular full time, indefinite term contract.

Corporate mandates or freelance contracts may also be requalified as regular full time, indefinite term work contracts where the corporate officer or freelancer appears to be subordinate to the company or co-contractor.

During the performance of the contract, the employee may claim constructive dismissal before the Courts (with immediate effect ("prise d'octe") or at the date of the judgment by the Court ["resiliation judiciaire"]).

Claims by Works Councils and other representative bodies

The claims of Works Councils or other representative bodies, based on the breach of any collective agreement or applicable law, will be brought before the traditional Civil Courts, such as the Tribunal de Grande Instance, as they do not have a relationship based on an employment contract.

However, Trade Unions may assist an employee in his/her claim and request damages before the Labor Courts on his/her behalf. The recent Macron Bill created a specific status of Union defendant ("defenseur syndical"), whose mission is to assist or represent an employee or employer before Courts in Labor Law matters.

c. Administrative Agencies that Investigate or Adjudicate Claims

The Labor Authority: the Direccte

Each region in France has a Labor Authority, called the Direccte. The Labor Inspector depends on the Direccte.

Powers of the Labor Authority

The Labor Inspector controls the application of Labor Law, including reporting violations regarding discrimination and sexual and moral harassment, amongst other things. The Labor Inspector has the power to investigate the premises of companies without notice and to conduct investigations, including interviewing employees and demanding the production of documents.

The investigations of the Labor Inspector may lead, inter alia, to a formal notice to comply with the applicable rules and regulations or a decision, for example, to remove an illegal clause in the interior regulation of the company.

Further, the employer is required to provide the Labor Inspector with material such as the Internal Rules of the Company, Company agreements, etc. The Labor Inspector is also competent to authorize the dismissal of protected employees.

The Direccte also plays an important role in the event of a collective redundancy, where it will control the procedure and elements, such as the measures provided for by the job preservation plan, according to the documents provided by the employer.

d. Court / Tribunal System

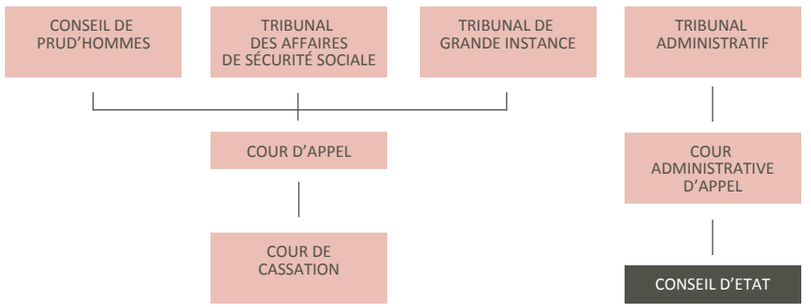
The standard court system in individual employment law matters, that of the Conseil de Prud'hommes, is as follows:

- **Cour de cassation**: applies on a national level, the equivalent of the Supreme Court.
- **Cour d'Appel**: applies on a regional level.
- **Conseil de Prud'hommes** (along with the Tribunal des Affaires de Securite Sociale and the Tribunal d'Instance): applies in each city or at the level of some "districts", on a first instance level.

Notwithstanding this, it is necessary to note that the following traditional jurisdictions also play a role in adjudicating employment law issues at first instance: the Tribunal de

Grande Instance, which adjudicates collective litigation concerning employment law; and the Administrative Courts, which adjudicate litigation concerning protected employees when recourse to the administration proves to be insufficient. Since the law dated 14 June 2013, the Administrative Courts also have jurisdiction to adjudicate litigation in relation to any decision in which the Direccte may have taken to approve or refuse the implementation of a job preservation plan in the case of collective redundancy.

The court hierarchy, including all these judicial bodies, can be depicted as follows:



e. Alternative Dispute Resolution (ADR)

Mediation

The judge has the power, with the consent of both parties, to designate a mediator to mediate the dispute and to attempt to reach an agreement. Due to court congestion, in practice, mediation is often proposed by the Courts of Appeal.

The mediation is confidential and takes place before an independent, impartial mediator, who guides the parties as they play the primary role in attempting to find a solution to their dispute.

After mediation, the matter returns to the judge: if mediation is successful, for the judge to rule the discontinuance of proceedings; or if the mediation is not successful, for adjudication.

Arbitration

Arbitration is rarely used in employment law in France, with the Cour de Cassation holding that alternative dispute resolution clauses are only enforceable with the employee's express consent when litigation arises.

However, the recent creation of a National Labor Arbitration Center ("Centre National d'Arbitrage du Travail - or CNATI" at Hubert Flichy's initiative) aims to develop this alternative method of dispute resolution. This will involve the submission of the parties to the binding decision of an arbitrator, likely a former lawyer or magistrate with expertise in employment law aims to develop this alternative method of dispute resolution. This would involve the submission of the parties to the binding decision of an arbitrator, most likely a former lawyer or magistrate with expertise in employment law.

II. The Litigation Process

a. Typical Case

i. Steps in the process

Seizing the court

The proceedings before the Conseil de Prud'hommes begin with a written or oral claim being submitted to the Labor Court by the party, which in practice, are written submissions detailing the nature of the claims and their monetary evaluation, which are registered by the clerk of the Conseil de Prud'hommes. There is no requirement of representation by a lawyer before the Conseil de Prud'hommes.

Upon receipt of the submission, the Labor Court invites the Parties to a conciliation hearing.

Conciliation hearing

During this hearing, the labor court is generally composed of 2 employee representatives and 2 employer representatives. If the parties agree, in matters of dismissal or constructive dismissal the labor court may be composed in a restricted formation of 1 employee representative and 1 employer representative .The Court usually grants each party between approximately 15 and 45 minutes to plead their case (depending on the difficulty of the case and the legal questions at stake). As the procedure is oral, the hearing is very important, as the judges will not have analyzed the case before the hearing.

If no agreement is reached pursuant to the conciliation hearing, the court fixes a date for the hearing, as well as a timetable (indicative, not obligatory) for the exchange of documents and submissions, in order to respect the rule of audi alteram partem (i.e. the right to a fair trial where both parties disclose in due time their evidence and legal arguments).

The Macron Bill allows the Labor Court to immediately hear the case where a party fails to appear, personally or represented at a conciliatory hearing.

Hearing

The day of the hearing, the labor court is composed of 2 employee representatives and 2 employer representatives. The Court usually grants each party between approximately 15 and 45 minutes to plead their case (depending on the difficulty of the case and the legal questions at stake). As the procedure is oral, the hearing is very important, as the judges will not have analyzed the case before the hearing.

ii. Role of Witnesses, Counsel and Court / Tribunal

Witnesses have little direct participation in the trial process before the Conseil de Prud'hommes: their primary role is to produce witness statements. This is because almost the entire process is based on written documents, with little oral testimony.

The role of the Conseil de Prud'hommes is solely confined to the hearing itself: the judges have no power of investigation before the hearing. However, a party may request that the Conciliatory Bureau render a Court Order for claims that are not challengeable (such as the payment of base salary).

A party may also request the President of the Tribunal de Grande Instance, who is the guardian of civil liberties, to grant the assistance of a bailiff to conserve evidence before the trial (art. 145 of the civil code).

In practice, the bailiff will seize documents necessary to prove elements of the causes of action being adjudicated in the trial. However, this measure is seldom requested, as the burden of the proof is very low before the Labor Courts.

iii. The Appeal Process

Where the amount of the dispute before the Conseil de Prud'hommes is less than or equal to 4 000 euros, it is considered to be a decision of last resort and cannot be appealed. However, where it is over 4 000 euros, it is considered to be a decision of first resort and may be subject to appeal. For the Labor Courts, the appeal process is described below.

In procedures before the High Courts ("Cour de cassation" and Conseil d'État) lawyers prepare the written documents for the case.

Appeal ("Cour d'appel" regrouped on a regional level)

- Where it is not a decision of last resort
- The deadline to appeal is a maximum of 1 month after the written decision at first instance is handed down
- Declaration of appeal at the registry of the Cour d'appel
- No assistance by a lawyer is required

Quashing ("Cour de cassation", High Court of Justice in France)

- Where it is a decision of last resort
- Appeal introduced to challenge the legal grounds of a decision (the factual elements of the case will not be reviewed by the Cour de Cassation).
- The appeal may be introduced for one of the following, limited, reasons:
  - Violation of the law
  - Excess of power
  - Lack of competence
  - Lack of legal grounds
  - Procedural error
  - Insufficient reasons
- The deadline to appeal is a maximum of 2 months after the first instance decision, where a decision of last resort or the written appeal decision is handed down
- Written declaration delivered personally or by registered mail with an acknowledgment of receipt at the registry of the Cour de Cassation
- Before the Cour de Cassation, representation is compulsory. The parties should be represented by a specific lawyer registered before the Cour de Cassation.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

There is no filing fee before the Conseil de Prud'hommes. The parties are also required to pay a number of accessory costs throughout the course of proceedings, including legal fees, bailiff's fees and expert's fees, where applicable. Article 700 of the Code of Civil Procedure provides that the judge may, at their discretion, require that the losing party has to pay a determined amount to the other party to compensate for these costs. This specific indemnity rarely exceeds 2 000 euros and is also rarely ordered against the employee should he/she be the losing party.

Legal fees

Legal fees will depend on the length of the procedure.

Remedies and damages

In France, there is no scheme providing for a specific amount in remedy or damages which are evaluated at the discretion of the Labor Courts (providing the minimum of 6 months' salary described below).

This being said, an indemnity is provided by the Labor Code, which varies according to the function and seniority of the employee:

Seniority	Amounts
Less than 2 years	2 months' salary
2 to 8 years	4 months' salary
8 to less than 15 years	8 months' salary
15 to 25 years	10 months' salary
More than 25 years	14 months' salary

Generally, compensation awarded by the Labor Courts is based on the number of months of salary. Reintegration of an employee into a given company is rare, as it is only possible when accepted by both parties, and is often converted into damages. However, reintegration may be ordered against the former employer's will in the case that the dismissal is null and void.

Where a dismissal is considered unfair, the Labor Courts will grant an employee, who has served for more than 2 years within a company of more than 11 employees, a minimum of 6 months' salary and depending on the prejudice suffered by the employee (length of service, age, etc.). The company would also be required to reimburse the unemployment agency for the allowances the dismissed employee may have received after his/her dismissal within a limit of 6 months.

When the employee has less than 2 years of service or the company has less than 11 employees, the damages awarded will depend on the prejudice that is demonstrated by the employee.

In any case, punitive damages do not exist in France. Maximum compensation would be around the range of 24 months' of salary.

Timeframe

Waiting times are very lengthy in the Paris region. A matter may take 6 months or more to be heard by the Labor Court and the appeal hearing at least 6 months after the appeal is lodged. Hence, the overall procedure may take approximately 3 years before a definitive appeal decision is made.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The litigation process conducted by the employee representatives and unions involve collective litigation, which is brought before the traditional civil or administrative courts.

The litigation may regard obstruction ("délit d'entrave"), which is a misdemeanor brought before the criminal courts, or the challenging of an administrative decision, which is brought before the administrative courts.

In contrast with the procedure of the Labor courts, which is primarily oral, the procedure before traditional civil and administrative Courts (i.e. Tribunal de Grande Instance and Tribunal Administratif) is largely written:

- The party must be represented by a lawyer.
- The seizing of the traditional civil court is by means of a written summons delivered by a bailiff, by which the complainant summons the opposing party before the courts and which must comply with formal requirements. The president of the tribunal will then fix the date and hour of the first hearing.
- The exchange of documents, expert reports, evidence, etc. and of written submissions are conducted by the parties' representatives.
- The pleadings at the hearing are usually limited to observations by the parties' representatives on points, which remain unclear to the judge.

d. Specialized Litigation Bar

There is no specialized litigation bar, however, in practice, there are lawyers specialized in Labor Law.

III. Tips to Avoid Litigation

Complying with all aspects of French employment law is furthermore not easy as it is constantly evolving.

Good practice consists in taking enough time to review the legal framework and assess all potential difficulties before implementing any important decision. Some employer's unions at a sectorial level may provide guidance on day-to-day matters and may be of great support for their members. Lawyers may of course provide counsel before any litigation.

However, due to the fact that litigation before the Conseil de prud'hommes does not require assistance, nor does it involve major costs for the employee, litigation is frequent after a dismissal.

In France, it is not possible to simply terminate the employment contract of an employee and waive all their claims in relation to that termination by paying them a certain amount of compensation that they are entitled to under law (for example for the notice period, mandatory severance payments, etc.).

Rather, if an employer hopes to avoid conflict arising from the dismissal of an employee, they may:

Enter into a contractual termination with the employee ("rupture conventionnelle"), which will require an approval (that may be implicit) by the Direccte. Claims made by the employee after such contractual terminations are rare, although the employee may claim breaches of the execution of this contract.
Dismiss the employee and pay him/her the required compensation and then engage in a settlement agreement ("transaction"). The settlement agreement is a contract following which the dismissed employee waives all claims that he/she may have in relation to the execution and the termination of the employment contract, in exchange for a specified amount negotiated with the former employer.

IV. Trends and Specific Cases

French labor law is constantly evolving. Numerous laws and decrees, administrative regulations, as well as agreements (on a national, branch or company level), enter into force every year. Case law plays a strong role and is also in constant evolution.

The review of case law shows a proliferation of litigation in relation to the protection of employees' health, for example through litigation in relation to the validity of agreements implementing annual pay, based on the monitoring of working time in days, not in hours.

a. New or Expected Developments

The implementation of recent reforms (i.e. the Macron law and the Rebsamen law) necessitates decrees of application, which for some are yet to be published. The next reforms under discussion aim to simplify French Labor Law and further develop company agreements.

Matters before the labor courts are also likely to be adjudicated faster in order to reduce the congestion of the courts.

Finally, the government attempted to include in the Macron law the indemnity scheme to render it compulsory, but this provision was declared unconstitutional. Further developments are likely in this matter.

b. Recent Amendments to the Law

Since the election of François Hollande in May 2012, many reforms have occurred (and remain ongoing) which aim to increase employment flexibility, whilst encouraging the conclusion of company collective agreements and also granting new rights to employees.

The most important reform was included in the Law dated 14 June 2013, which was entered into pursuant to negotiations conducted at a national level.

This law contains many new rights for employees (for example part time work cannot be less than 24 hours a week except under certain circumstances; there is an obligation for companies to set up a complementary health insurance plan as of January 2016) and certain measures to promote the staff representative bodies' knowledge of the company's functions and strategy. Also, it fundamentally changes the proceedings to be followed in the case of collective redundancy, by providing stricter time frames and conferring sole jurisdiction over this matter on the labor authority. The law also contains many other new provisions, including the possibility of entering into company collective agreements to preserve employment and encourage internal mobility, etc.

2014 has also proved to be an active year of reform, in particular with the law on professional training, which was voted in on 5 March 2014, and aims to improve the efficiency of the system in order to facilitate access to professional training to all individuals, whether under an employment contract or seeking employment.''

Another example is the law dated March 29th 2014 called "Loi Florange" which imposes a duty to search for a buyer before closing a site in order to avoid a collective redundancy plan. In the same line of thought, another law dated July 31st 2014 ("Loi Hamon") creates a duty to inform each employee in the case that the owner of the company wishes it to be sold or to sell its business assets.

In 2015, the Macron law dated 6 August 2015 and Rebsamen law dated 17 August 2015 brought numerous modifications to various aspects of French Labor Law.

Notably, the Macron Law deals with dominical work, redundancies, covers the labor administration, paid vacations for student employees, the fight against fraud in construction and more generally, illegal work or professional elections.

The Rebsamen law deals with the regrouping of the staff representatives in one representative body, information and consultation of the works council company.

GERMANY

I. Overview

a. Introduction

In Germany, approximately 38 million people are engaged as employees. More than 400,000 lawsuits are filed with the German labour courts each year. Labour jurisdiction is an independent branch of the civil jurisdiction. For example, the labour courts hear disputes between employers and employees regarding the termination of the employment relationship, as they have exclusive jurisdiction in labour matters. These matters are listed in the Labour Court Act (ArbGG). With some exceptions, the procedural rules governing labour court proceedings are the same as for regular civil proceedings. The specific regulations within the Labour Court Act mainly allow for a faster procedure. The principle of urgency is particularly important in German labour law proceedings.

German employment law is governed by many separate laws and to a large extent by case-law. There is no unified law regulating the relationship between an employer and an employee, but, rather, separate laws for particular issues - i.e. the Federal Vacation Act (BUrlG), the Hours of Employment Act (ArbZG) and the Maternity Protection Act (MuSchG). Most provisions in German employment law require interpretation when applied to a specific case. The labour courts perform such interpretation and sometimes even establish general principles not expressly included in statutory law. Case-law is therefore of very high importance. As German employment law mainly serves the purpose of protecting employees, the interpretation of the labour courts is mostly employee-friendly. It is generally assumed that the employee is in need of legal protection, as he/she is economically and socially weaker than the employer. The German Federal Labour Court (Bundesarbeitsgericht), the highest labour court in Germany, also views the work performance of an employee as an expression of his/her personality. The right to free development of personality is protected by the German Constitution. This confirms the importance of employment law and, therefore, also of employment litigation in Germany.

b. Claims

German labour law proceedings are divided into two main areas: proceedings concerning individual claims arising out of an employment relationship and proceedings concerning the relationship between the employer and employee representatives (for example, the works council). This distinction is important, as different procedural rules apply to each type of proceeding. Court proceedings concerning employment relationships, and therefore individual employment law, are by far more frequent in Germany than proceedings regarding collective labour law, which concerns the relationship between the employer and employee representatives, such as the works council. These disputes are often solved internally or in front of special bodies and institutions, such as the conciliation board (Einigungsstelle).

German employment law recognizes a variety of claims. The most common lawsuit in German labour courts is the claim of an employee that a termination issued to him/her was unlawful and therefore not conducted in a legally effective way. Such lawsuits, seeking protection against dismissal (Kündigungsschutzklage), make up more than one third of the lawsuits filed with German labour courts. Lawsuits of employees claiming payment (for example, of salary, bonuses, or other parts of remuneration) are also common. Since a minimum wage of 8.50 Euros per hour was introduced in Germany with effect as of January 1, 2015, there has been an increase in the number of lawsuits regarding this minimum wage. Since the General Equal Treatment Act (AGG) was introduced in August 2006, lawsuits regarding claims for damages due to discrimination have also increased. Among other regulations, the General Equal Treatment Act expressly provides that candidates who apply for a position, but are refused for discriminatory reasons, can claim compensation for material and non-material damages.

As mentioned above, court proceedings regarding collective labour law issues are less frequent in Germany. The most common court proceeding regarding collective labour law involves employers and the works council. Under German law, the works council has a variety of co-determination rights. If an employer and the works council do not reach an agreement about whether a specific measure is subject to a co-determination right, the works council may file a lawsuit with the competent labour court seeking a formal declaration of its rights.

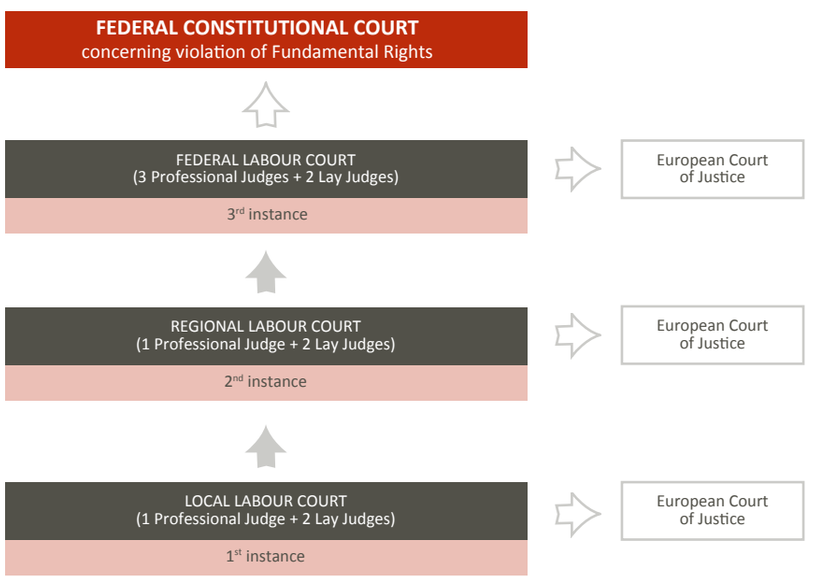
c. Administrative Agencies that Investigate or Adjudicate Claims

There is no administrative agency in Germany that investigates or adjudicates claims related to employment law. Some state agencies supervise the implementation of an employer's statutory obligations in particular areas (for example, occupational health and safety regulations and obligations with regard to the special rights of severely disabled people). Such agencies do not, however, investigate or adjudicate individual claims of employees.

Within the employer's organization, it is in principle the task of the works council to supervise whether the employer complies with statutory requirements. The works council shall furthermore ensure the implementation of the laws, regulations, safety regulations, collective bargaining agreements and works agreements concluded for the benefit of the employees. However, if the employer does not fulfill its statutory obligations, the works council has no competence to investigate or adjudicate claims of individual employees. It may only claim its own right of supervision and may, upon request, provide representation to employees who wish to submit individual claims to the labour court.

d. Court / Tribunal System

THE GERMAN COURT SYSTEM IN EMPLOYMENT LAW MATTERS



The courts for labour matters are organized into three levels in Germany. The court of the first instance is the local labour court (Arbeitsgericht). It has exclusive subject-matter jurisdiction over all disputes arising from the employment relationship, regardless of the value of the matter in dispute. The decisions of the labour court can always be appealed when the existence or continuance of the employment relationship is disputed. In all other cases, an appeal is only permissible when the value of the matter in dispute exceeds 600 Euros or the labour court expressly allows for the possibility to appeal. When a decision of the labour court is appealed, the case goes to the competent higher labour court (Landesarbeitsgericht). There are 18 higher labour courts in Germany. The decisions of a higher labour court can generally not be appealed, unless the judgment expressly provides for the possibility to appeal. If the judgment does not provide for this possibility, the defeated party can still apply for the admission of an appeal. This is, however, rarely granted (approximately 3%). Upon appeal, the case goes to a third instance, the Federal Labour Court (Bundesarbeitsgericht). This court serves as the final court of appeal.

The labour courts in all three instances are composed of both professional and lay judges, to improve the acceptance of court decisions within society. The lay judges are nominated by trade unions and employers' associations. The tribunals of the labour courts and the higher labour courts are each composed of one professional judge and two lay judges, one from the employees' side and one from the employers' side. The senates of the Federal Labour Court are each composed of three professional judges and two lay judges, one from the employees' side and one from the employers' side. The powers and rights of the lay judges are in principle the same as of the professional judges. However, the professional judge leads the proceedings and is in most cases the decisive party.

e. Alternative Dispute Resolution (ADR)

A conciliation hearing is mandatory in Germany in a labour court proceeding concerning individual employment law. Thus, when a lawsuit is filed with a labour court, the court must first schedule a hearing to attempt an amicable resolution. The conciliation hearing is presided over by the professional judge only; the lay judges are not present at this stage. In the course of the conciliation hearing, the judge discusses the factual and legal situation regarding the claim with the parties. at this stage the judge often expresses, or at least indicates, his/her view on the validity of the claim. This can motivate the parties to pursue a settlement. The court may also propose a settlement to the parties. It is possible for the parties to agree on a settlement during the conciliation hearing, but to provide for a right of revocation for one or both parties within a certain timeframe (for example, one week). Due to these diverse possibilities, and the legal security provided by a court settlement, more than half of the proceedings in front of German labour courts each year end by way of court settlement.

Other means of ADR are therefore of lesser significance in labour law disputes. In some areas, arbitration boards can be used to settle a dispute. Such procedures, for example, exist for disputes between apprentices and their employer regarding claims arising out of an apprenticeship or for disputes between the parties of a collective bargaining agreement, to avoid industrial action. There is, however, no general arbitration board for labour law disputes in Germany.

It is also generally possible to settle labour law disputes by means of mediation. During such a procedure, an independent third party acts as a mediator between the contesting parties, in an effort to assist the parties in reaching an amicable resolution to the dispute. However, the mediator has no legal authority. Due to this, and the fact that lawsuits are often subject to short prescription periods, mediation has to date had low practical relevance in labour law disputes.

However, a new regulation was included in the German Labour Court Act in July 2012 to increase the meaning of mediation once a lawsuit is pending with a labour court. Pursuant to this new regulation, the court may suggest that the parties pursue mediation or another form of ADR. This can happen in both the first and the second instance of a labour court proceeding. If the parties are willing to attempt mediation, the court orders that the case shall rest for three months, unless one party requests the continuance of the case during this period. After three months, the court resumes the proceeding, unless both parties declare that they are still in the process of dispute resolution. In practice, however, the new regulation has not yet led to a significant increase in the use of ADR procedures.

II. The Litigation Process

a. Typical case

i. Steps in the process

Step 1: Claimant files a lawsuit

A proceeding in front of a German labour court involving an employee and an employer starts by the claimant filing a lawsuit with the court. In Germany, more than 90% of the lawsuits regarding individual employment law are filed by employees. The statement of claim must be filed in writing with the competent labour court or orally at the legal application office (Rechtsantragsstelle) of the court, which then records the claim in writing. It is also possible to file a lawsuit by fax, as long as the original is sent to the court in due course. In practice, this possibility is used frequently, in particular when a deadline must be observed.

Step 2: Court delivers statement of claim to defendant and schedules conciliation hearing

Once the statement of claim has been submitted as described above, the labour court delivers it to the defendant named in the statement. At the same time, the court schedules the mandatory conciliation hearing and informs both parties of the date and of other instructions, if any. Often the court orders the personal appearance of the parties, so that a settlement can be discussed effectively during the conciliation hearing.

Step 3: Conciliation hearing

As stated above, a conciliation hearing is mandatory in German labour court proceedings. The sole purpose of this hearing is for the parties to attempt to reach a settlement. As this is often successful, many court proceedings do not continue beyond this point. The defendant may submit a written statement before the conciliation hearing to explain its position in the case, but this is generally a requirement.

Step 4: Main hearing

If the conciliation hearing is not successful, the court schedules a main hearing and issues further instructions to the parties. The defendant is then required to submit a statement of defense. Usually, the court also grants the claimant time to reply to such a statement before the main hearing takes place. This serves the purpose of clarifying any ambiguities in the parties' statements and establishing which factual circumstances are disputed. The parties must submit their evidence with the statements, i.e. they must attach any relevant documents that shall serve as evidence and name possible witnesses. If the court decides hearing a particular witness is necessary, it will give notice to the parties and the witness to attend the main hearing.

During the main hearing, the factual and legal situation regarding the claim is discussed with the parties based on their written statements and the submitted evidence. The court will also again inquire about the possibility for the parties to achieve an amicable settlement.

Step 5: Judgment

If no settlement is reached during the main hearing, the labour court will issue a judgment. This can either be issued immediately upon the conclusion of the main hearing, after the end of the last court session on the same day, or at a later date to be set by the court. Pursuant to the Labour Court Act, judgments should generally be issued immediately following the main hearing, however, in more complex cases the court usually sets a later date for the judgment, so as to be able to further review the written statements and the events of the main hearing.

ii. Pretrial proceedings

For disputes between an employee and an employer concerning claims arising out of the employment relationship, there is no obligation to attempt an amicable settlement or to observe any other form of pretrial proceeding before bringing the case to court. The consultation of an arbitration board is only mandatory for disputes between apprentices and employers regarding claims arising out of an existing apprenticeship.

When an employer is in dispute with the works council regarding the latter's co-determination rights, the dispute is generally resolved through a conciliation board (Einigungsstelle). Generally, the employer will bear the costs incurred by the conciliation board. Prior to establishing such board, the parties must attempt to reach an amicable settlement. However, this is more of a formality, as either party may at any time declare the negotiations failed.

All co-determination rights of the works council are regulated by the Works Constitution Act (BetrVG). They have different levels of intensity. In some cases, the works council can only claim to be informed or heard on a certain issue, while in others, the proposed measures of the employer require the prior consent of the works council in order to be legally valid. For certain co-determination rights, the Works Constitution Act provides that the decision of the conciliation board shall replace a mandatory agreement between the employer and the works council. In such cases, the employer or the works council may then unilaterally call upon a conciliation board. In all other cases, a conciliation board may only be appealed by both parties together.

The conciliation board has an impartial chairperson upon whom the employer and the works council must agree. In cases where no agreement is reached, the labour court will appoint the chairperson. The employer and the works council then each appoint an equal number of additional board members. Usually, each side can appoint between one and three board members, depending on the complexity of the matter in dispute. If no agreement is reached on the number of board members each side may appoint, the labour court will decide.

In the conciliation board, negotiations are held with the help of the chairperson in order to find a mutual agreement. Mostly, such agreement is eventually found. Only if this is not possible does the board decide by majority vote. As the works council and the employer each appoint half of the board members, the decisive vote generally lies with the impartial chairman. In matters where the decision of the conciliation board replaces an agreement between the employer and the works council, the decision of the board is binding for the parties. They may, however, seek a review of the decision by the labour court. Such review is limited to determining whether the conciliation board was competent to rule on the disputed issue and whether its decision was within the limits

of its discretion. In all other matters, where the decision of the conciliation board does not replace an agreement between the employer and the works council, the decision of the board is only binding if the employer and the works council both declare they agree to be bound by the decision. This can occur either before or after the decision is issued.

iii. Role of Witnesses, Counsel, and Court / Tribunal

In court cases, the procedural rules governing regular civil proceedings apply. In particular, the parties exercise sole control over the proceeding. A court proceeding in front of a labour court therefore only begins when a lawsuit has been filed and ends when the claimant withdraws the claim or the parties decide to end the dispute amicably. When issuing its decision, the court is bound by the submitted claim.

As an example, if an employee claims payment of 500 Euros, the court is not entitled to order the employer to pay more than 500 Euros, even if the employee could claim a higher payment from a legal point of view.

In the first instance of a labour court proceeding, each party can decide to argue their case by themselves or to be represented by a lawyer, a union, or an employers' association. The parties are generally responsible for presenting their case to the court. The court is only obligated to investigate the facts of the case on its own if the proceeding concerns disputes between the employer and the works council. In all other labour court proceedings, the court may only consider the facts and evidence presented by the parties in its decision. For example, it cannot decide to question a witness that has not been named by either party. Therefore, the main task of the labour court is to formally guide the proceedings and to legally assess the facts presented by the parties.

As a general rule, each party must prove the assertions, which are beneficial for them. There are, however, many exceptions to this rule, which have mainly been established by case-law. In particular, the burden of proof is often lightened for the employee if he/she cannot prove circumstances that occurred in the sphere of the employer. For example, when an employee claims he/she was discriminated against, he/she only needs to provide evidence that indicates a certain behavior of the employer was based on discriminatory motives. The employer must then prove that it did not discriminate against the employee or that an unequal treatment was reasonably justified.

An assertion can be proven through documents, witnesses, the interrogation of a party, the assessment of certified experts, or onsite inspections. In practice, documents and witnesses are the most important form of evidence. To serve as a witness, the person must not be a party in the court proceeding. The legal representatives of the employer can therefore not be questioned as witnesses. The interrogation of a party by the court is generally only permissible if the opposing party agrees. This is rarely the case. Without such agreement, the court can only conduct an informative hearing. The results of such hearings do not serve as evidence, but the court may still consider them in its decision-making process.

iv. The Appeal process

Decisions of the labour court can be appealed to the competent higher labour court if:

- the existence or continuance of the employment relationship is disputed (for example, if an employer terminated the employment relationship and the employee challenges the validity of the termination);
- the value of the matter in dispute exceeds 600 Euros; or
- the labour court expressly allows for the possibility to appeal.

The appeal must be submitted within a month after the written judgment of the labour court was delivered to the appealing party and must be supported by a written statement filed within two months after the delivery of the judgment. In the second instance of a labour court proceeding, the parties must be represented by a lawyer. Only a lawyer is authorized to appeal the judgment of the labour court.

The higher labour court reviews both the facts and the legal accuracy of the labour court judgment. The parties can again present their case to the court and provide relevant evidence. New facts and evidence may only be presented where it will not delay the court proceedings.

The decisions of the higher labour courts can generally not be appealed, unless the judgment of the higher labour court expressly provides for the possibility to appeal. The judgment must provide for this possibility if:

- the case has fundamental legal relevance (for example, because it raises legal issues that will potentially be relevant for a large number of other cases);
- the judgment of the higher labour court significantly deviates from a judgment of one of the highest courts in Germany, or if the Federal Labour Court has not yet ruled on the issue, from the judgment of another higher labour court; or
- the right to be heard in court or basic procedural rules were violated (for example, the court was not composed correctly or a biased judge was involved).

If the judgment of the higher labour court does not provide for the possibility to appeal, the defeated party can apply for the admission of an appeal. This, however, is rarely granted, as the claiming party must demonstrate that one of the requirements listed above is fulfilled.

Where an appeal is possible, it must be submitted to the Federal Labour Court (Bundesarbeitsgericht) within a month after the judgment of the higher labour court was delivered to the appealing party and it must be supported by a written statement filed within two months after the delivery of the judgment.

Unlike the higher labour court, the Federal Labour Court does not review the facts of the case. It is bound by the facts established in the judgment of the higher labour court. The Federal Labour Court only reviews whether the judgment of the higher labour court is in line with German employment law and existing case-law. It serves as the final court of appeal.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, ...

The typical costs incurred in labour law litigation are court fees and the costs for legal representation. In a regular civil proceeding, the defeated party has to reimburse the other party for its costs, including the costs for legal representation. However, in the first instance of a labour court proceeding, the other party cannot claim reimbursement for the costs of their legal representation from the defeated party. The reasoning is that employees might otherwise be prevented from pursuing their rights, for fear of high costs should they not win.

Court fees depend on the value of the matter in dispute, which is determined by the court according to the statutory regulations. The fees are generally lower than in regular civil proceedings. Furthermore, if the proceeding is ended by way of court settlement, the parties do not have to pay any court fees. In court proceedings between the employer and the works council, no court fees are incurred.

The most common proceedings in front of German labour courts involve employees seeking protection against a termination of their employment relationship. Under German law, such claims are directed towards reinstatement of the employee, i.e. the continuance of the employment relationship. There are therefore no statutory regulations on severance payments. However, in practice the parties often agree upon a severance payment by way of court settlement. The amount of such severance is a matter of negotiation. The position of each party also depends on the legal risks it faces regarding the lawsuit. As a rule of thumb, a severance payment is often calculated at 0.5 times an employee's monthly salary per year of service.

A labour court proceeding is usually completed faster than regular civil proceedings. The provisions of the Labour Court Act are aimed at a fast procedure. For example, when a proceeding concerns the existence or continuation of an employment relationship, the conciliation hearing shall take place within two weeks after the lawsuit has been filed. A main hearing shall be prepared in a way that allows for a complete assessment of the case, so that in principle no second hearing will be required. Furthermore, labour court proceedings are often ended by way of settlement in the course of, or shortly after, the conciliation hearing. Approximately 70% of labour court proceedings are therefore completed within three months from the date that the claim was filed. Appeal proceedings before a higher labour court take approximately 6-12 months from the submission of the appeal to judgment. The duration of a third instance proceeding before the Federal Labour Court is difficult to predict, as the length of these proceedings is subject to great variations. On average, such proceedings take approximately 12 months.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Labour court proceedings between an employer and a union generally follow the procedural rules outlined above for proceedings between an employer and an employee. In particular, a conciliation hearing takes place and the parties are responsible for presenting their case to the court.

For court proceedings between the employer and the works council, or other employee representation bodies within the employer's entity, different procedural rules apply. The employer and the works council shall work together in a spirit of mutual trust and cooperation for the benefit of both the employees and the business. Any trial endangers this relationship. Special procedural rules help alleviate the negative effects such court proceedings usually have on the relationship between the employer and the works council. In a court proceeding between the employer and the works council, the court must itself investigate the facts of the case. This ensures that the actual facts are determined by an impartial institution. The court also has the competence to gather evidence on its own. It may, for example, question a witness which neither the employer nor the works council has named in their written statements. A conciliation hearing does not take place. If the employer and the works council agree, it is also possible to not hold a main hearing, but to conclude the entire proceeding in writing. This can help keep emotions and personal aversions out of the proceeding.

d. Specialized Litigation Bar

There is no specialized litigation bar in Germany. Anyone who is admitted to practice as an attorney in Germany may represent clients in employment law cases both in and out of court. Attorneys have the possibility to obtain the title "certified employment law specialist" ("Fachanwalt für Arbeitsrecht"), which indicates their expertise in this area.

III. Tips to Avoid Litigation

Regarding the relationship between an employer and an employee, litigation can, in particular, be reduced by carefully drafting the employment contract and including valid prescription periods. Clear and comprehensive wording can often avoid disputes. Effective HR management is also significant. Decisions regarding employment relationships should be as coherent and comprehensible as possible. Employers should also be thorough regarding documentation. As the parties in a labour court proceeding are responsible of presenting their case to the court, this can be crucial. In particular, any disciplinary measures against an individual employee should be carefully documented. This, for example, includes filenotes of conversations held with the employee regarding certain conduct or a situation, written warnings, documentation of practical measures (for example, a performance plan), etc.

While these measures can help to reduce litigation, litigation is still an integral part of German employment law, in particular in termination scenarios. Employees who receive a notice of termination typically file a lawsuit to challenge the validity of the termination. This is easy to do and it does not involve high costs, as court fees are lower for such proceedings than for regular civil proceedings. There is no obligation to be represented by a lawyer in front of the local labour court. Furthermore, employees whose employment was terminated at their own fault (for example, for reasons of conduct) risk being excluded from state unemployment benefits for a period of up to twelve weeks. This motivates employees to challenge a termination.

Regarding the relationship between the employer and the works council, disputes and litigation can often be avoided by observing the rights of the works council. The Works Constitution Act grants the works council a variety of co-determination rights. Where the employer acknowledges that such rights exist due to statutory regulations, the requirements should be fulfilled thoroughly and in a timely manner. The Works Constitution Act also stipulates the principle that the works council and the employer shall work together in a spirit of mutual trust and cooperation. Employers should aim to uphold this principle beyond its statutory obligations.

IV. Trends and Specific Cases

a. New or Expected Developments

Due to the implementation of a minimum wage in Germany (see below), there is an increase in litigation regarding such issues. Also, due to an increase in strikes, more litigation was initiated with the aim of prohibiting such strikes.

b. Recent Amendments to the Law

On January 1, 2015, a statutory minimum wage of 8.50 Euros per hour was introduced in Germany. The corresponding legislation applies to all employees with only few exceptions, for example, for trainees or employees under 18. As the practical application of this law is not clear in all aspects, there has been an increase in litigation in this area.

New legislation is planned on the leasing of employees.

V. Conclusion

Employment law litigation in Germany is easy to access, court proceedings are reasonably fast, and court fees are moderate. Litigation therefore plays a significant role in German employment law. In particular, employees often do not hesitate to resort to the labour court system, especially when the continuance of the employment relationship is at stake. From an employer's point of view, it would be desirable if there were statutory regulations regarding the procedure in termination scenarios, aside from procedural rules for court proceedings. As this is not the case, and since ADR methods are rarely applied in practice, employers often have to deal with labour court proceedings initiated by employees. A change of the litigation practice is not likely to occur in the near future.

INDIA

I. Overview

a. Introduction

The history of disputes over employment/labour issues in India dates back many centuries. However, it was only from the beginning of 19th century onwards that labour laws came to be codified, which paved the way for litigation involving employment disputes. The labour laws in India are intended to be socially beneficial in nature and their main objective is generally to protect employees. It is pertinent to note here that the courts in India, in employment disputes, have always been employee-friendly. With the advent of new legislations addressing modern workplace issues such as sexual harassment or workplace conduct, there has been an upward trend in the number of cases reaching the labour courts in India. Recent landmark litigation in employment law has been in the areas of dismissal, redundancy, determination of the employer-employee relationship, and bonus and pension claims. Specifically, a number of key decisions of the courts in India in the recent few years have pronounced rules relating to applicable tests to determine the existence of an employer-employee relationship, the correctness of the punishment/penalty awarded for acts of misconduct by employees, the reduction of back-wages on account of losses faced by an employer, the importance of evidence and proof in establishing employee misconduct, the opportunity for employees to be heard by their employer before levying interest for a provident fund, and the nature and intent of beneficial legislation.

The Constitution of India (the **"Constitution"**) sets out the principal framework within which all laws in India, including all laws relating to labour and employment, must operate. One of the guiding principles in the Constitution, which has also been emphasised by the highest court of the country on many occasions, is "social justice" and empowerment of weaker sections of society. The Constitution guarantees all citizens of India fundamental rights, such as equality before the law and the prohibition of discrimination in education and employment on the basis of religion, sect, gender, and membership of social communities. Further, the Constitution provides certain "directive principles" to guide the legislature towards achieving social and economic goals.

In an operational sense, the Constitution provides for a division of legislative powers between the Parliament (federal legislature) and State Assemblies (state legislatures). Labour and employment laws are listed under the Concurrent List, which means that the Parliament and State Legislatures have co-equal powers to enact laws relating to all labour and employment laws in India. Having said that, three categories of labour legislation exists in the country and they are: (i) labour laws enacted and enforced by the federal government; (ii) labour laws enacted by the federal government and enforced by both the federal and state governments; and (iii) labour laws enacted by the federal government, but enforced by the state governments.

The courts of first instance, or "trial courts", are created by federal or state legislation. In the specific context of employment laws, the courts of first instance are either (i) administrative or quasi-judicial agencies in the form of Labour Commissioners or Conciliation Officers designated to adjudicate upon matters under the statute, or (ii) the Labour Court or Industrial Tribunal or the National Tribunal, all of which are constituted by the Industrial Disputes Act. Next in the hierarchy, are the High Courts of various states (the **"High Courts"**). As per the Constitution, High Courts are courts of record; hence, each High Court has precedential value within the state in which it is located. The highest court in the country is the Supreme Court of India (the **"Supreme Court"**), which is the ultimate adjudicator on all legal and constitutional issues. The Supreme Court is a court of record, and its judgements have a precedential value across the country. The Supreme Court and High Courts are designated as Constitutional Courts since they have the power of judicial review, i.e. the jurisdiction to adjudicate upon the adherence of legislation with the Constitution.

b. Claims

The Indian labour and employment law recognises various types of claims. The following is a list of various types of labour claims in India. However, this is not an exhaustive list of all labour claims in India.

Constitutional Claims

The Constitution provides for equality before law. It means that all persons under similar circumstances should be treated alike, both in the privileges conferred and liabilities imposed by the law. Equal law should be applied to all in the same situation, and there should be no discrimination between one person and another. However, it is important to note that Fundamental Rights guaranteed under the Constitution are enforceable only against the State – either by way of judicial review of legislation or its provisions, or by passing orders against authorities constituted under labour legislations. The courts have been extremely cautious in entertaining claims of Fundamental Rights violations against private entities, especially since existing legislation is considered sufficient to address claims against private employers. Additionally, certain workplace issues, especially those in which probable Fundamental Rights issues exist and where the existing statutes do not provide sufficient mechanisms, may be taken up before the Supreme Court and the High Courts through the vehicle of "public interest litigation". Such issues may include the extension of rights under labour laws to those classes of workers who aren't included under such laws (such as migrant daily-wage construction workers and part-time residential domestic servants/workers), right to a reasonable "sustenance wage" during the pendency of a disciplinary enquiry, the right to a fair hearing where the employer's policies denied the same, the prevention of forced labour or being forced to work for less than minimum wages, the prevention of discrimination against married or pregnant women, and the application of the norms laid down in international conventions or treaties to employees in India.

Statutory claims

Various laws relating to labour and employment matters create a number of rights and obligations for both employers and employees. These laws provide for a mechanism for such rights and obligations to be enforced.

Under the Employees Provident Fund Act, which creates a social security fund called "provident fund" for employees, employees may approach the statutory authority where employers have failed to contribute towards such fund, to dispute the amount of contribution made, or to claim the full fund after fulfilling the requisite criteria specified under the Act. Similarly, employers may also approach the authority to challenge the calculation of their contribution, or to make an application to not remit contributions in favour of certain classes of employees who are not entitled to the benefits under the Act.

Under the various State-specific Shops and Commercial Establishments Acts, an employee may file claims before the statutory authority on matters such as regulation of working hours, payment of overtime wages, enforcement of correct shift timings, availing of requisite number of leaves, and wrongful termination from employment. However, there may be an overlap of some of these types of claims with those made under the Industrial Disputes Act, in which case these claims must be brought before the authorities specified under the Industrial Disputes Act.

Under the Employees Compensation Act, the statutory authority deals with claims for compensation relating to injuries or accidents suffered at the workplace. In the event of the death of an employee at the workplace, the legal heirs of the deceased employee may file a claim before the appointed authority.

Under the Payment of Wages Act and the Minimum Wages Act, employees may institute claims to be paid the correct amount of wages at regular intervals of time, as specified under the Acts and as per notifications made by the relevant state government.

Under the Employees State Insurance Act, the statutory authority manages a network of hospitals and dispensaries, as well as administering claims for compensation. Therefore, an employee may approach the authority to challenge the quality of treatment made available at any hospital, or to seek adequate compensation from the employer. Further, employees may approach the authority where employers have failed to contribute towards the insurance fund, or to dispute the amount of contribution or compensation.

Apart from the above, the most important legislation relating to disputes and claims is the Industrial Disputes Act, whose stated purpose is to regulate and settle disputes in industries. Any claims or disputes relating to service conditions or terms of employment may be brought before the tribunals or special courts created under this legislation; the list of such types of claims is provided below. Further, the tribunals and courts created under this Act are empowered to deal with claims made by individual employees as well as claims made by a group of employees or by trade unions. The tribunals and courts instituted under this Act have greater powers than the authorities created under other labour laws; hence, the scope of claims that are brought before such tribunals and courts is much wider.

The types of claims, which may be brought before the **Labour Courts** instituted under the Industrial Disputes Act, are:

- The propriety or legality of an order passed by an employer under the standing orders/internal service regulations;
- The application and interpretation of standing orders/ internal service regulations;
- Discharge or dismissal of workmen, including reinstatement of, or grant of relief to, workmen wrongfully dismissed;
- Withdrawal of any customary concession or privilege;
- Illegality, or otherwise, of a strike or lock-out; and
- All matters other than those that are under the jurisdiction of the Industrial Tribunals (as stated below).

The types of claims, which may be brought before the **Industrial Tribunals** instituted under the Industrial Disputes Act, are:

- Wages, including the period and mode of payment;
- Compensatory and other allowances;
- Hours of work and rest intervals;
- Leave with wages and holidays;
- Bonus, profit sharing, provident fund and gratuity;
- Shift working otherwise than in accordance with standing orders;
- Classification by grades;
- Rules of discipline;
- Rationalization; and
- Retrenchment of workmen and closure of establishment.

c. Administrative Agencies that Investigate or Adjudicate Claims

There are several laws relating to labour matters, under which a mechanism to raise claims has been specified. Typically, claims under labour laws are not taken up before ordinary civil courts, since there are specialised forums to address claims under these laws. A number of these forums may be quasi-judicial or administrative bodies consisting of civil servants reporting to the State Government – for example, the authorities created under

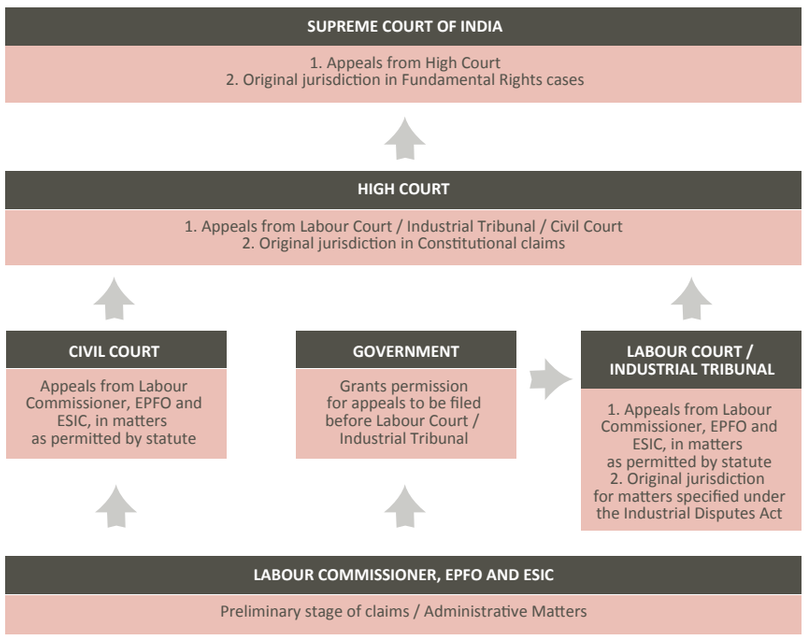
the Employees Provident Fund Act, the Employees State Insurance Act, the Minimum Wages Act, and the various State-specific Shops and Commercial Establishments Acts.

Under most labour laws that are administered by the state governments, the principal administrative and claims officer for labour and employment in a district is the Labour Commissioner, who is assisted by several Joint Labour Commissioners and Assistant Labour Commissioners. Typically, a Joint Labour Commissioner or, in some cases, an Assistant Labour Commissioner is tasked with handling the administrative duties under each legislation, with the Labour Commissioner performing a supervisory function.

Certain laws create and specify special administrative hierarchies to manage various duties under such laws. Under the Employees' Provident Fund Act, the Employees' Provident Fund Organization (EPFO) has been created to manage the accounts of all employees receiving provident fund, and to handle claims raised by employees or employers. The EPFO in each state is headed by a Chief Provident Fund Commissioner, who is assisted by several Provident Fund Commissioners and several Assistant Provident Fund Commissioners. Under the Employees State Insurance Act, the Employees State Insurance Corporation (ESIC) has been created to manage all administrative functions under the Act. Further, the Act specifies several Councils or Boards to manage the network of ESIC hospitals and dispensaries.

d. Court / Tribunal System

HIERARCHY OF INDIAN COURTS FOR EMPLOYMENT LAW DISPUTES



e. Alternative Dispute Resolution (ADR)

The Industrial Disputes Act was one of the first pieces of legislation in India to formally recognize alternative dispute resolution (ADR) mechanisms as part of the mainstream. The Act not only recognizes ADR, but also goes on to create a statutory officer called the Conciliation Officer, who is empowered to manage negotiations or conciliations between the parties to an industrial dispute. The provisions in the Act make it attractive for disputing parties to settle disputes by negotiation, failing which, through conciliation by an officer appointed by the government, before resorting to litigation. This mechanism helps to provide a speedy, inexpensive, informal, and uncomplicated dispute resolution mechanism, especially for employees. The Act recognizes two forms of conciliation – mandatory, where the parties are directed by the state government to attend a conciliation, and non-mandatory, where the parties voluntary submit to conciliation. In the case of mandatory conciliation, the parties are bound to accept the negotiated award, whereas in non-mandatory conciliation, the parties may either accept the negotiated award or take up the case to litigation through a labour court. Further, in the event that either party is unhappy with the conciliation proceedings, such party may refer the dispute for litigation through a labour court, even before the conciliation proceedings conclude.

Apart from the formal ADR mechanism of statutory conciliation, employers and employees have for long utilised the method of collective bargaining, not only to negotiate working conditions and service terms but also to resolve and settle disputes. While an employer is not legally bound to recognise a trade union or encourage collective bargaining, a registered trade union can enter into collective bargaining agreements with the employer for better wage and service conditions, and such agreements are considered binding upon both parties. The Industrial Disputes Act provides that memorandum of settlements entered into between employees represented by trade unions and employers are binding upon the parties in relation to the following matters: (i) Wages, benefits, allowances, working hours, overtime etc.; (ii) Conditions related to strikes and lockouts by trade unions and employers respectively; (iii) Employees' obligations; (iv) Employers' obligations; (v) Penalties; (vi) Resolution of Disputes; and (vii) Other miscellaneous clauses.

II. The Litigation Process

a. Typical Case

i. Steps in the process

Filing a complaint before the Labour Commissioner/Conciliation officer

A written complaint detailing the nature of the claim, along with the compensation claimed, is to be presented before such officer as appointed in that behalf. The Commissioner to whom the complaint is represented will issue a notice to the respondent/the party against whom the complaint is filed. Thereafter, both parties are given an opportunity to be heard and if the Commissioner is of the view that there is no possibility of an amicable settlement between the parties, then the Commissioner will refer the matter to the appropriate government, and where the appropriate Government is of the opinion that a dispute exists or is apprehended, the Government will refer the matter to Labour Court or Industrial Tribunal or National Tribunal. Where any dispute exists, or is apprehended, and the employer and the workmen agree to refer the dispute to arbitration, they may, at any time before the dispute has been referred to Labour Court or Industrial Tribunal or National Tribunal, by a written agreement, refer the dispute to arbitration.

Institution of a suit before the Labour Court

Filing of an application: Every suit is to be instituted by presentation of a written document detailing the nature of the claim, along with the compensation claimed. The court to which the application is represented may accept the application, reject the application, or it may even return the application to the applicant.

Summons: The next step after admission of the application is for the court to issue summons to the respondent.

Filing of objections: After the summons has been served on the respondent, the respondent can file objections to the application, if any.

Interlocutory applications: Interlocutory applications can be filed before the court to amend pleadings, reframe the issues, produce additional evidence, call for a witness, return or reject the application, or implead or strike out the parties from the suit.

Interrogatories: Every party to a suit is entitled to know the nature of his or her opponent's case, so that he/she will know beforehand of the case that has to be met. Parties to a suit are also entitled to obtain admissions from their opponent to facilitate the proof of their own case. An applicant may administer interrogatories to the respondent and the respondent may administer interrogatories to the applicant.

Framing of issues: After reading the application and the objections, if any, the court will ascertain the material propositions of fact or law, which are in dispute, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

Evidence: Once the issues are framed, the parties have a right to lead evidence, summon witnesses, and cross-examine the other party and their witnesses. The applicant will lead evidence first by filing affidavit evidence, thereafter the documents produced by the applicant will be taken on record, and once the documents produced by the applicant are taken on record, the respondent will have the opportunity to cross-examine the applicant and their witnesses. The same procedure is then followed by the respondent.

Arguments: Upon completion of evidence, the parties are given an opportunity to be heard. The parties to suit will argue the case, reiterating the facts of the case, the evidence produced, the affidavit evidence, and the cross-examination, in a logical manner to arrive at one conclusion.

Judgement: After the case has been heard, the court may pronounce judgement immediately or it may take time to consider its judgement.

Decree: After the judgement is pronounced, it is the responsibility of the successful party to make an application to the court to draw up a decree.

Execution of decree: All proceedings in execution are to be commenced by an application for execution. The application for execution is to be made by the successful party.

Appeal: A person aggrieved by a decree is not entitled as of right to appeal from decree. The right to appeal must be given by statute.

ii. Pre-trial proceedings

Trial in India is said to begin when the suit is at the stage of evidence. Before the trial begins, the laws in India require the court to ask the parties for their preferred methods

of ADR, and to refer the case to one of these methods: arbitration, conciliation, judicial settlement, Lok Adalat, or mediation. When referring a case to a particular method of ADR, the court will consider the requests of the parties and the suitability of the case to particular methods of ADR. This will occur after the completion of pleadings, and before the framing of the issues. If, for any reason, the court does not refer the case to ADR before the framing of issues, nothing prevents the court from considering referring the case to ADR at a later stage.

Mediation is a dynamic process, in which the mediator assists the parties negotiate a settlement for the resolution of their dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision, or in any other way impair or interfere with the parties' right of self-determination.

Before the trial begins, the judge will refer the suit to mediation so that the parties to the suit can explore the possibility of an amicable settlement. During mediation the mediator uses the four functional stages of mediation, namely; (i) Introduction and Opening Statement, (ii) Joint Session, (iii) Separate Session, and (iv) Closing Session.

Upon completion of mediation, the case is referred back to the court. If the dispute between the parties is settled, then the terms and conditions of settlement will be sent to the court, however, if the dispute is not settled, the case will be sent back stating that mediation has failed. If the dispute is settled through mediation, as per rules, the court fee will be refunded.

iii. Role of Witnesses, Counsel and Court/Tribunal

It is pertinent to note that witnesses are necessary and they hold a very important role in law. With the help of evidence and witnesses the judge reaches a verdict. The evidence heard by the court is the most important factor in determining whether the judgment will be in favour of the applicant or respondent. When a case reaches a stage where a witness is required to prove the case, parties are able to apply to court for a witness summons. Once the court is satisfied that a witness should be summoned to prove a case, the applicant, or respondent, must serve a summons on the witness in the same manner as summons are required to be served on respondents. The same procedure will be applicable for a witness to lead evidence.

Counsels are officers of the court. They assists the parties in putting forward their case, lead evidence, draft all the interlocutory applications, advance arguments, and assist the court in arriving at a judgement.

The judge interprets the law, and has authority to return/reject a suit, assess the evidence presented and decide which documents produced as evidence should be taken on record, hear the arguments advanced by the counsels, and decide various interlocutory applications filed by both parties. While passing judgment, the judge undertakes an impartial and independent assessment of the facts and applicability of law to the facts, and thereafter pronounces the judgement.

iv. The Appeal Process

In some enactments appeals are provided from those authorities to the concerned district courts, tribunals, and in some cases to the High Court, either by way of revision or as an appeal. An appeal can be preferred wherever a substantial question of law arises, to the High Court and further appeal from the order of single judge of the High Court is provided for by way of appeal to a division bench of the High Court and thereafter, the appeal lies to Supreme Court.

An appeal is a continuation of suit proceedings. The appellate court can re-examine the questions of fact and law and may even re-appreciate evidence. The powers of first appellate court are co-extensive with those of the civil courts of original jurisdiction. However, there may be certain self-imposed restraints in the exercise of such powers. But they are discretionary and do not fetter the jurisdiction of courts. Unlike revision, where limited grounds of interference are available, the appellate proceedings offer a much wider scope in decisions about the correctness of the judgement of sub-ordinate courts.

An appeal of a judgement, decree, or final order of a High Court will be heard by the Supreme Court if the High Court considers the case to involve substantial questions of law of general importance, which, in the opinion of the High Court, need to be decided by the Supreme Court.

On the day fixed for hearing, the appellant will be heard in support of the appeal. The court may then dismiss the appeal at once without calling upon the respondent for a reply. If this is not done, the respondent will be heard against the appeal and then the appellant will be entitled to respond to the reply. After hearing the appellant and the respondent, the appellate court may:

- Determine the case finally;
- Remand the case;
- Frame issues and refer them for trial to the court whose decree the appeal is preferred; and
- Take additional evidence or require such evidence to be taken from the court whose decree the appeal is preferred.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, ...

For matters relating to litigation in India, attorneys' fees may include fees for advice, drafting of pleadings/supplementary pleadings, and appearances before the court. The remedies awarded by the Labour Court generally are back pay, compensation for loss of benefits, injunctive reliefs, compensation for any mental agony suffered by the employee, punitive damages, attorneys' cost, and other out of pocket expenses incurred. It is very difficult to predict a time frame within which litigation in India will be completed, from the filing of the suit until the appellate stages are over. However, a well thought out strategy can assist with the predictability of litigation in India.

c. Trade Unions, Works Councils and Other Employee Representative Bodies

Disputes may be concerned with an individual worker or workers as a body, trade union, or works council. It is common for trade unions to represent workers in various matters. In large industrial establishments, even individual grievances are taken up by unions, for negotiations with the management, for settlements. Apart from unions dealing with individual grievances, provisions have been made to enable individual workers to approach management themselves. For instance, if management terminates the service of a worker for certain acts of misconduct, the individual worker can raise an industrial dispute before the conciliation machinery individually or through the trade unions available in that establishment. If the dispute is not settled at the conciliation level, the dispute can be taken up before the Labour Court, and then the Labour Court will adjudicate the dispute following the above-mentioned procedure.

d. Specialized Litigation Bar

It is pertinent to note that there is no specialized litigation bar in India. However, there are attorneys who practice exclusively in labour and employment law and specialise in that field.

III. Tips to Avoid Litigation

- The employment contract should be in writing and the terms and conditions of the agreement should be carefully drafted.
- Any changes to the employment contract should be bilateral and the same should be recorded in writing.
- It is a good practice to be aware of all the latest amendments in labour and employment related laws.
- Ensure policies are written and are compliant with the laws. Well-drafted policies create a perfect foundation for compliance.
- Train employees regarding existing policies, in order to enable them to be compliant with law. Employee training is absolutely necessary. It serves a two-fold purpose: prevention and protection. Employers, of course, cannot control the behaviours of all employees. However, when employees act outside the bounds of decency or company policies, employers who provide regular, quality training to management and non-management employees can point to their good faith efforts to comply with the law.
- Laws governing the workplace change frequently, especially for employers with multistate operations. Accordingly, at least an annual review of all employment policies is recommended.
- The employer should analyse the company's historic performance to determine what activities typically result in litigation.
- Employers should have a well-publicized, specific procedure for employees to express their complaints without fear of retaliation. Employees need to believe that they are being heard and that their opinions matter.
- Maintain thorough records of all the disciplinary and performance issues. Note that poor documentation may actually be worse than no documentation at all.
- There should be proper process for recruitment. It is good practice to always obtain a background check on employees, which the company intends on hiring. Hiring the right people can avoid having to discipline or terminate bad hires. Getting the right people begins with using the right process of recruitment.
- Communication with employees is very important. Employees should be informed about their conduct and performance and it is recommended to always give unbiased, but honest, feedback to employees, and to give them an opportunity to improve their performance when they fail to meet expectations. Periodic performance evaluations provide an occasion for an employer to make finer adjustments in an employee's performance without waiting for a more serious event to occur. When everyone receives a performance evaluation, it also gives the employer a reason to talk constructively to those employees who may not be performing as well as others.
- The employer should ensure compliance with all statutory and contractual terms. It is always better to conduct an internal audit to check if the company is in compliance with all relevant laws.

IV. Trends and Specific Cases

a. New or Expected Developments

The Factories Act (Amendment) Bill has been introduced in Parliament and is intended to amend certain provisions, including those relating to an increase in leave entitlements and safety requirements for employees in factories.

The Government is also planning to introduce the Small Factory (Regulation of Employment and Conditions of Services) Bill, which seeks to exempt units employing less than 40 workers from various labour laws, including the Factories Act, subject to certain specific conditions.

The Government has also proposed the Labour Code on Wages Bill to merge the following four pieces of legislation: Minimum Wages Act, Payment of Wages Act, Payment of Bonus Act, and the Equal Remuneration Act. Significant changes proposed are:

- Restricting the power of the state governments to fix minimum wages; and
- Prohibiting discrimination among male, female, and transgender employees on the ground of sex in the matter of wages for similar work.

The Government has commenced the consolidation of 44 labour laws into 4 codes broadly dealing with industrial relations, wages, social security, and working conditions and safety. The Labour Code on Industrial Relations Bill seeks to integrate three labour laws: Industrial Disputes Act, Trade Unions, Act and Industrial Employment (Standing Orders) Act. The significant changes that have been proposed are:

- Termination of employment of workers in certain circumstances without Government permission in the case of lay-offs, redundancies and site closures;
- Restrictions on the formation of trade unions; and
- Increase in the redundancy compensation to 45 days' average pay from the currently prevailing 15 days' average pay.

b. Recent Amendments to the Law

Federal

Wage ceiling, under Employee Provident Fund Act and Employee State Insurance Act, were both increased to INR 15,000/- – all employees earning a basic wage of INR 15,000/- per month or less, will necessarily be covered by the Employee Provident Fund Act and Employee State Insurance Act.

Employer Provident Fund (Central) Rules amended in order to permit "International Workers" to become members of the EPFO and receive provident fund benefits – applicable to Indian citizens working abroad, and to foreign citizens working in India.

Definition of "employee" under Payment of Gratuity Act amended in order to include municipal workers (street sweepers, garbage collectors, etc.) employed by a Municipal Corporation under the scope of gratuity.

Amendments to several statutes (Minimum Wages Act, Factories Act, Payment of Wages Act, Weekly Holiday Act, Payment of Bonus Act, Contract Labour Regulation Act, Equal Remuneration Act, etc.) – the requirements of filing annual returns and maintaining registers have been simplified for "small establishments" (i.e. employing between 11 and 40 workers) and "very small establishments" (i.e. employing 10 or less workers).

Amendments to Apprentices Act – (i) mandatory job offers to be made to at least 50% of apprentices engaged in an industry; (ii) scope of apprenticeship expanded to include non-engineering occupations; and (iii) apprentices can be engaged in any trade, subject to minimum and maximum percentage of the total worker strength in an industry.

Introduction of *"Shram Suvidha Portal"* ("Labour Facilitation Portal") – common registration under 5 federal employment statutes (Employee Provident Fund Act, Employee State Insurance Act, Contract Labour Regulation Act, Building & Other Construction Workers Act, and Inter-State Migrant Workmen Act) – for registration under the Acts, filing of online returns, single-window system for claiming benefits.

Selection of industrial units/establishments for inspection and audit by the Labour Department to be determined by computerised "draw of lots", similar to how it is done

for Income Tax inspections. However, workers will retain the right to move the Labour Courts to demand an inspection/audit in case of gross violation of labour laws.

States

Rajasthan: (i) Industrial Disputes Act amended such that only those establishments that employ 300 or more workers need to approach the Government to obtain permission for layoffs or closure of establishment (raised from 100 workers) – to balance this, the employer must provide for at least 3 months' notice and pay 3 months' "layoff compensation" apart from existing compensation prescribed under the Act; (ii) Contract Labour Regulation Act amended such that applicability of the Act is only to establishments engaging 50 or more contract workers in a 12-month period (raised from 20 workers); and (iii) Factories Act amended such that applicability of the Act is only to factories employing 20 or more workers (in factories that use power) and 40 or more workers (in factories that don't use power) – raised from 10 and 20 respectively.

Gujarat: Gujarat Labour Laws (Amendment) Act provides for changes cutting across various labour legislations: (i) workers who have been dismissed or discharged have only 1 year to challenge dismissal/discharge in court (reduced from 3 years); (ii) Definition of "contractor" under Contract Labour Regulation Act has been changed to include "outsourcing agencies"; (iii) In workplace accident cases where the victim or victim's family does not seek compensation within 90 days, the Government will have the power to negotiate settlement directly with employer, and Government gets to keep 25% of the compensation; (iv) Government to be empowered to prohibit strikes by workers in public utility services; (v) Labour disputes can be settled out of court by the worker(s) and employer, and in such cases, a "compounding fee" has to be paid to the Government; (vi) Penalty (fine) payable by employer in the event of violation of any of Industrial Disputes Act, Factories Act, Minimum Wages Act or Contract Labour Regulation Act raised to INR 21,000/- per instance (increased from INR 100/- or INR 500/- as the case may be); (vii) Definition of "wages" under various Acts amended to include salaries received through staffing agencies/outsourcing agencies; (viii) Payment of wages under all shops and commercial establishments employing 20 or more workers to be made by cheque or bank transfer only; and (ix) All employers to file self-certified annual reports showing compliance with Minimum Wages Act.

Karnataka: Introduction of an online portal for registration of establishments under the Shops & Establishment Commercial Act; includes online filing for amendments and extensions of registrations; registration certificates to be issued within 15 days.

Tamil Nadu: The Contract Labour Regulation Act has been amended to make changes to the form of register to be maintained by principal employers in relation to the contract workers engaged by them – the muster roll will now double up as the register for contract workers.

V. Conclusion

Employment litigation in India, generally speaking, is subject to similar rules of procedure as other civil litigation in India. However, there are a number of specialized tribunals, courts, and administrative agencies that have been created to address claims and disputes arising under different labour laws. In practice, these courts and tribunals have, by and large, aided the quick resolution of disputes, but owing to these courts being answerable to the Government, their decisions have swung along with changing political tides. This has resulted in clear "generations" of Indian labour jurisprudence, between the welfare state-idealist era of the 1960s and 70s, to the liberal capitalist pro-employer era since the early 2000s. The increasing movement of Indian society and economy towards Western models has had its effect on labour jurisprudence and the status of labour claims in India. While a substantial part of the legislation is still archaic, in its socialist ideals, the proposed reforms will no doubt take Indian labour laws to an altogether different level, similar to global standards.

ITALY

I. Overview

a. Introduction

Employment litigation is very common in Italy and has been increasing since the global economic downturn of 2008. Employment claims are dealt with by employment courts, separate from the civil courts, and are heard in the first instance by one professionally trained employment law judge.

The Italian employment judicial system reflects the Italian Constitutional principles regarding the employment relationship.

The general principle of Italian law regarding legal fees and court expenses paid by the unsuccessful party is usually not applied when that party is the employee.

b. Claims

According to article 409 of the Italian Civil Procedural Code, the Employment Courts are responsible for all claims regarding the employment relationship: for example, dismissal, resignation, mutual termination, temporary agency work, company transfer, working time, place of work, trial period, holidays, duties and tasks, career development, bullying, discrimination, Union rights, salary, indemnities, benefits, non-competition agreements, waivers and settlements.

The Employment Courts also have jurisdiction over all claims related to commercial agency, agricultural, coordinated and continuous collaboration (so-called "co.co.co") and other kinds of self-employment contracts.

The Employment Courts are responsible for all claims regarding public sector employment.

The Employment Courts also hear claims related to national insurance, accidents at work, occupational illness, family allowance and any other matters related to social security contributions (article 442 of the Italian Civil Procedural Code).

Should the employer prevent employees from exercising their union rights and freedoms, the relevant Unions at national or company level shall be entitled to take the employer to Court, on behalf of their members.

c. Administrative Agencies that Investigate or Adjudicate Claims

The main agencies or bodies that investigate claims are:

- the **Italian social security body** ("Istituto Nazionale di Previdenza Sociale" or "INPS")
- the **Italian Institute of Insurance for Occupational Accidents and Diseases** ("Instituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro" or "INAIL").
- the **Labour Inspector** ("Ispettore del Lavoro"), who works within the regional ("Direzione Regionale del Lavoro" or "DRL") or local ("Direzione Territoriale del Lavoro" or "DTL") office of the Italian Labour Minister. Within the DTL there are two administrative bodies:
  - the **ordinary surveillance operating unit** ("Unità Operativa di Vigilanza Ordinaria" or "UOVO") which supervises and monitors, through the ordinary labour inspectors, all business sectors; and
  - the t**echnical surveillance operating unit** ("Unità Operativa di Vigilanza Tecnica" or "UOVT") which supervises and monitors, through labour inspectors with specific expertise, health and safety in the workplace for specific business sectors provided by Legislative Decree 81/2008, such as the construction and railway sectors, (for example, working in tunnels over ground and underground or underwater).

With regard to the Italian social security body and the Italian Institute of Insurance for Occupational Accidents and Diseases, it is fairly common to file claims for alleged violations of the law in order to scale back unpaid social security contributions.

With regard to the Labour Inspector, this body has an important role in monitoring compliance with the civil, administrative and criminal laws regarding the employment relationship, as well as adherence with the provisions of the applicable National Collective Bargaining Agreements. The Labour Inspectors are able to inspect company sites without any specific authorization, collect information and issue administrative sanctions for all the violations discovered. The Labour Inspectors are also able to take out injunctions and report suspected crimes to the public prosecutor's office.

d. Court / Tribunal System

THE ITALIAN COURT SYSTEM AS RELATED TO INDUSTRIAL RELATIONS AND EMPLOYMENT

SUPREME COURT OF CASSATION Employment section (5 Judges sitting)
3rd instance
APPEAL COURT in the role of Employment Judge (3 judges sitting)
2nd instance
EMPLOYMENT TRIBUNAL (1 judge sitting)
1st instance - Ordinary trial
EMPLOYMENT TRIBUNAL (1 judge sitting)
1st instance - Summary trial (if possible)

The ordinary employment judicial process is based on 3 levels of judgment:

- 1st instance judgment before the **Employment Tribunal**
- 2nd instance judgment before the **Employment Appeal Court**
- 3rd instance Judgment before the **Supreme Court**

The Tribunal is made up of a single presiding Judge, whereas the Appeal Court and the Supreme Court are collegial bodies.

The first two instances are based on claims regarding the facts, the so-called judgment on the merits, whereas the third instance is based on legal aspects of the trial (jurisdiction, procedure, witnesses and so on), the so called judgment on legitimacy of the procedure.

Law 92/2012 has established a new procedure in the case of claims for unfair dismissal aimed at granting the claimant a swift remedy by way of shorter summary proceedings.

This special summary procedure applies only to claims for wrongful dismissal against employers with a headcount of more than 15 per production site (or over 60 employees overall) or, irrespective of the number of employees, in the case of discriminatory dismissals – for example, based on sexual, religious, ethnic, health and political grounds and unlawful dismissal grounds (i.e. coinciding with maternity/paternity/marriage leave) – and oral dismissals – i.e. failure to dismiss in writing.

Along with a claim for wrongful termination, an employee may also bring a claim concerning the nature of the working relationship (i.e. employment, consultancy or autonomous). This is a faster process than the ordinary process and provides 4 levels of judgment:

- 1st instance judgment before the **Tribunal – injunction (summary trial)**
- 1st instance judgment before the **Tribunal – ordinary trial**
- 2nd instance judgment before the **Appeal Court**
- 3rd instance judgment before the **Supreme Court**

Please note that this new summary procedure does not apply to those employees hired under the Legislative Decree no. 23/2015, which came into force on 7 March 2015.

e. Alternative Dispute Resolution (ADR)

Law no. 92 of June 28, 2012, in respect of the dismissal procedure that is applied, has amended the regulation of individual dismissals for economic business reasons.

Under the new system, a dismissal for justified objective reasons made by an employer with more than 15 employees per production site/municipality (or more than 60 employees in total) must be preceded by a pre-emptive mandatory procedure.

Before serving the letter of termination, the employer is required to make a preliminary attempt at settlement in front of the competent local Employment Office by sending a letter (with the employee in cc) detailing the reasons for the dismissal and the possible measures that the employer is considering (for example, job placement services).

Having received the pre-emptive communication from an employer, the local Employment Office may open the settlement procedure within a period of seven days. Should the administrative office fail to summon the parties within this period, the employer is entitled to either dismiss the employee or wait for the summons (for example, should the employer be interested in the employee's waiver to possible claims he or she may have, in the form of a settlement and release agreement which needs to be formalized before the administrative authority).

Once the settlement procedure is opened, it may last for a maximum period of 20 days. However, this period may be suspended for a maximum period of 15 days if the employee is unavailable (for example, in case of sickness). Hence, the overall maximum duration of the pre-emptive procedure is, in theory, 42 days. However, this term may be increased by agreement between the parties.

If there is no agreement between the parties, or if the term of the procedure lapses, an employer is entitled to serve the letter of termination. The dismissal letter can be served even during the employee's unavailability, regardless of the reason for it. Hence, even if the employee is sick, the letter of termination will be effective, provided that the abovementioned 15-day suspension period has been complied with.

Under the Fornero Reform, the dismissal is effective as of the date that the pre-emptive communication is delivered to the Employment Office, i.e. when the dismissal procedure is commenced.

Please note that the above mentioned pre-emptive procedure is not required in case of dismissal for economic reasons of employees hired under the Legislative Decree no. 23/2015, which came into force on 7 March 2015, providing the so called "employment agreement with increasing protections" ("Contratto a tutele crescenti").

The use of arbitration in employment disputes in Italy is not very common as it is expensive. It is often used in cases involving executives (dirigenti), where there is a specific provision in the employment contract itself, or the applicable National Collective Bargaining Agreement.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

1st Instance

Regardless of the value of the case, the jurisdiction is where:

- the employment relationship is performed;
- the offices of the company or branch which employs the employee; or
- the offices of the company or branch in which the employee used to work before the termination of the relationship.

As regards to claims dealing with commercial agency and other types of collaboration, the jurisdiction is where the agent or worker has his/her own domicile.

The plaintiff files a claim called "Ricorso" with the clerk of court in the competent jurisdiction, which must indicate:

- the Tribunal;
- the plaintiff's personal details (name, surname, tax code, residence or domicile elected within the district of the Tribunal). If the plaintiff is a company, the claim must include the company name and headquarters;
- the defendant's personal details (name, surname, tax code, residence or domicile). If the defendant is a company, the claim must include the company name and headquarters;
- the subject of the claim;
- the basis of the claim, both de jure and de facto;
- evidence and documents exhibited;
- signature and indication of any power of attorney; and
- value of the lawsuit for tax purposes.

As from June 2015, the Ricorso may be filed electronically.

The plaintiff must file along with the claim an administrative document called "Nota di iscrizione a ruolo".

Within 5 days, the Judge issues an order setting the date of the hearing. Between the filing of the claim and the above hearing, no more than 60 days (80 days if the defendant is not in Italy) can elapse. In the 10 days following the issuing of the Judge's order setting the date of the hearing, the plaintiff must serve the claim (and notify the date of the hearing) on the defendant. Between the notification to the defendant and the date of the hearing, at least 30 days has to elapse (40 days if the defendant is not in Italy).

The defendant must file his/her defences at least 10 days before the hearing. The defences must:

- include a stand in relation to all the allegations;
- narrate all defences, de facto and de jure;
- indicate all the evidence and documents to be exhibited;
- formulate any counter-claims;
- list witnesses to be cited; and
- oppose all the objections not opposable directly by the Judge (so called "obiezioni in senso stretto").

As from June 2015, the defences may be filed electronically.

Please note that the defendant may also file the defences late, i.e. on the day of hearing. In this case, the plaintiff will no longer be able to formulate counter-claims, indicate evidence and oppose the objection "in senso stretto".

Should the defendant file a counter-claim, the Judge must schedule a new hearing to allow the plaintiff the opportunity to reply to the counter-claim. The plaintiff must be notified of the new hearing date within 10 days, and 50 days must elapse between the counterclaim and the new hearing.

At the first hearing, the Judge is required to attempt to settle the dispute, and this attempt ends with a formal settlement proposal that the parties are free to accept, modify or reject, and the Judge will take into account this behaviour during the lawsuit.

If the parties reach an agreement, it is recorded and signed by the Judge and immediately enforceable.

If the parties do not reach an agreement, the case continues and the Judge decides on the admission of the evidence. The admission should take place in the same hearing, but, generally, the Judge schedules another hearing.

This is the enquiry phase of the process.

Please note that the Judge has extensive investigative powers and may:

- admit any kind of evidence;
- order the exhibition of documents;
- summon as a witness persons who are not able to testify according to civil law, such as the legal representative or the administrator of the company-employer;
- decide which is the most suitable means of evidence;
- ask his/her own questions to witnesses;
- ask for information from the Unions mentioned by the parties; and
- point out to the parties errors in the documents, which may be corrected within a certain period of time.

Admissible types of evidence include:

- Act in public form;
- Private deed;
- Confession;
- Extrajudicial declarations;
- Oral Testimony;
- Testimony in writing;
- Expert witnesses;
- etc.

At the end of the enquiry phase, if requested or necessary, the Judge can give the parties a further 10 days to file additional defences, usually 10 days before the trial hearing. At the trial hearing, the Judge listens to the lawyers' arguments, then decides and gives his/her ruling.

Please note that, according to case law, the Judge may also schedule another hearing to give his/her ruling.

The Judgment (ruling plus reasons) must be filed before the Chancellor's office within 15 days and then the term to appeal the sentence begins running. Within the sentence, the Judge decides on the legal costs. The sentence is immediately enforceable.

2nd Instance

The judgment in the first instance may be appealed:

- 30 days from the notification (40 days if the notification is made outside Italy), so called short term; or
- 6 months from the publication of the sentence if the notification did not occur at all, so called long term.

The appeal must be filed before the competent Appeal Court. The President then appoints the reporting Judge within 5 days and schedules the hearing within 60 days.

The appellant notifies the counterparty within 10 days. Between the notification to the defendant and the date of the hearing, at least 25 days has to elapse.

As from June 2015, the Appeal may be filed electronically.

The appeal must set out:

- the relevant appeal Court;
- the parties;
- a brief indication of the facts and specific reasons of appeal;
- the subject of the appeal;
- the specific parts of the sentence that the appellant wants to appeal;
- the specific parts of the Tribunal's reconstruction of the facts that the appellant deems wrong; and
- the reasons of the breach of the law.

During the appeal process, the appellate is not allowed:

- to change the original claim;
- to make new requests or objections; or
- to submit new evidence or documents, unless the party proves that such delay does not depend on him/her (apart from expert witnesses).

The following, however, is allowed:

- free examination and cross examination between the parties;
- evaluating sworn statements;
- deciding sworn statements; and
- supplying sworn statements.

The defendant must file his/her defences before the relevant Appeal Court chancellor's office at least 10 days before the hearing.

Starting from June 2015, the first defences may be filed electronically.

At the first hearing, the parties discuss the case and the Court decides and reads the ruling, then drafts and files the sentence within the following 15 days.

The Appeal Court may also deem the appeal claim as inadmissible at the first hearing, in the following circumstances:

- the appeal has no reasonable prospect of success; or
- the appeal does not indicate the parties or the facts and the specific reasons for the appeal.

3rd Instance

The above sentence may be appealed before the Supreme Court within:

- 60 days from the notification (so-called ***short term***); or
- 6 months from the publication of the sentence if the notification did not occur (so-called ***long term***).

An appeal before the Supreme Court may be for the following reasons:

- geographical jurisdiction;
- competence of the jurisdiction;
- violation or bogus application of laws, agreements or National Collective Bargaining Agreements;
- sentence or procedure void; or
- omission of examination of a relevant fact which had been discussed during the process.

The relevant claim must indicate:

- parties;
- sentence appealed;
- brief description of the facts;
- reasons for appeal;
- proxy; and
- specifically indicate the trial brief, documents, contracts or National Collective Bargaining Agreements as the basis of the claim.

The Supreme Court appeal does not prevent the enforceability of the appealed sentence unless the Court, on specific request, suspends its effectiveness on grounds that it could cause serious damage.
The defendant may file a counterclaim or merely attend the oral discussion hearing.

Should the defendant file a counterclaim, the appellant may file defences in reply to the counterclaim. The Supreme Court may either reject or accept the appeal. In the latter case, the Court may decide the dispute or may appoint a different Court of Appeal for a new 2nd instance consideration of the same matter.

Rito Fornero

As from 18 July 2014, all employment disputes related to dismissals, which would entail the application of Article 18 of the Workers' Statute (remedy of reinstatement) to the employment relationship, are subject to a new process called the "Rito Fornero" (as described above).

The plaintiff files the claim before the competent Tribunal chancellor's office, which must detail:

- the Tribunal;
- the plaintiff's personal details. If the plaintiff is a company, the claim must detail the company's name and headquarters;
- the defendant's personal details. If the defendant is a company, the claim must details the company's name and headquarters;
- the subject of the claim, which cannot be different to the above mentioned reason;
- both reasons de jure and de facto as the basis of the claim;
- evidence and documents exhibited (please note that the documents must be attached in duplicate copies); and
- signature and indication of the proxy.

Within 40 days following the filing of the claim, the Judge (i) schedules the first appearance hearing, (ii) fixes the term to notify the claim at least 25 days before the hearing and (iii) establishes the term for the defendant to file the defences at least 5 days before the hearing.

This first phase summarizes the claim and is informal: the Judge hears the parties, admits the evidence deemed necessary (if any) and issues an Order ("Ordinanza"), which is immediately effective.

The above Order may be appealed before the same Tribunal (it has been argued that this provision does not comply with the principles of the Italian Constitution and that the appeal should be filed before a different Tribunal, but a recent decision of the Constitutional Court has declared that such a provision does not breach any constitutional principle).

ii. The Appeal Process

Appeal of the Order

The appeal must be filed within 30 days following the notification of the Order and cannot include new claims. The Judge schedules the date for the Trial within 60 days and the defendant has to file defences 10 days before the hearing. At the hearing, the Judge listens to the parties, admits the evidence deemed necessary and makes a decision regarding the case.

The Judgment must be filed with the Chancellor's Office within 10 days of the hearing. The Judgment is temporarily enforceable and may be appealed before the Appeal Court.

Appeal of the Judgment

The appeal must be filed within 30 days following the communication of the Judgment.

New evidence or documents are not allowed, unless deemed essential by the Court or the party proves that it was not possible to provide such documents earlier.

The Court schedules the hearing within 60 days and establishes a term in which to file the defences (at least 10 days before the hearing).

All parties must be notified of the appeal and the hearing date. The defendant must be notified through certified email ("PEC") at least 30 days before the deadline for the filing of defences.

At the hearing the Judge may suspend the enforceability of the sentence if there are serious reasons. The Judge will also hear to the parties, admit the evidence deemed necessary and make a decision regarding the case. The Judge may also decide to grant the parties 10 days before the trial to file defences. The sentence must be filed before the Court Chancellor's office within 10 days of the Trial hearing.

Supreme Court Appeal

A Supreme Court appeal must be filed within 60 days from the communication of a judgment. The suspension of the enforceability of a judgment must be requested to the Appeal Court and the trial hearing shall be scheduled within 6 months.

As highlighted above, please note that the "Rito Fornero" is not applicable in cases of dismissal of employees hired under the new Legislative Decree no. 23/2015, which came into force on 7 March 2015.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The party who files the claim must pay court fees ("contributo unificato") as follows:

Value of the claim	1st instance	2nd instance	Appeal
Up to EUR 1.100,00	EUR 21,5	EUR 32.25	EUR 86
From EUR 1.100,00 up to EUR 5.200,00	EUR 49	EUR 73,5	EUR 196
From EUR 5.200,00 up to EUR 26.000,00	EUR 118,5	EUR 177,75	EUR 474
From EUR 26.000,00 up to EUR 52.000,00	EUR 259	EUR 388,5	EUR 1.036
From EUR 52.000,00 up to EUR 260.000,00	EUR 379.5	EUR 569,25	EUR 1.518
From EUR 260.000,00 up to EUR 520.000,00	EUR 607	EUR 910,5	EUR 2.428
More than EUR 520.000,00	EUR 843	EUR 1.264,5	EUR 3.372
Value not calculable	EUR 259	EUR 388,5	EUR 1.036

In the 1st and 2nd instance, if the plaintiff is an employee, the above court fees are due only if his/her own taxable income is higher than EUR 34.585,23.

Fees: Apart from the so called Contributo unificato in the table above and the reimbursement of expenses, average fees range from €7,500 to €15,000 for litigation in the first instance. Matters in the Second instance would be more or less the same, whereas an appeal would be in the region of €15,000 to €25,000.

Remedies: If the employee sues the employer and wins, he/she is entitled to different remedies depending on the type of 'fault' by the employer and on the number of employees: The remedy of reinstatement is available in very specific cases, otherwise the remedy is damages.

Damages: In the range of 12 to 24 months' salary for employers with a headcount of more than 15+ per production site/municipality (or 60+ overall); 2 months' salary for each year of service in the company (minimum 4 months maximum 24 months) for those employees hired after 7 March 2015, under Legislative Decree no. 23/2015, by employers with a headcount of more than 15+ per production site/municipality (or 60+ overall); in the range of 2.5 to 6 (or 10 months, depending on the employee's length of service) for employers with a headcount of less than 15 per production site/municipality (or less than 60 employees overall).

Timeframe: Statistics show that the average duration of an employment claim from start to finish in the first and second instance is 949 days, but there is a wide variation: 320 days in the Milan courts to 1,303 days in Catanzaro (southern Italy), whereas an Appeal could take up to 2-3 years to have the first (and only) hearing.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Anti-Union Behavior

In the event that the employer takes actions intended to limit the exercise of trade union freedom and activity, including the right to strike, article 28 of Law no. 300/1970 entitles Trade Unions to sue the employer before the Labor Court with a specific and expedited proceeding (injunctive relief).

The Employment Court fixes a hearing within two days from the date the plaintiff files the action. If the anti-union behavior is proven, the court will issue an injunction to desist against the employer. The Injunction, which takes immediate effect, can be appealed within 15 days.

d. Specialized Litigation Bar

All lawyers may appear before the Employment Tribunals. However, to appear before the Supreme Court, a lawyer must be enrolled in the Supreme Court Bar. This requires a certain number of years of practice and the successful completion of an exam.

III. Tips to Avoid Litigation

In order to avoid litigation, or minimize the impact of litigation on the employer's business, good HR practices are fundamental. For example:

- Choosing the right advisers (lawyers, accountants, payroll providers, etc.) who know your business and can offer you proactive and practical solutions to undertaking business in Italy;
- Choosing a specialist employment law firm to manage and provide day-to-day advice and support in handling all workplace matters;
- Choosing the correct type of employment contract (in Italy there are many);
- Distinguishing between employees and independent contractors from the beginning and being aware of how the relationship is conducted in practice;
- Putting in place necessary and appropriate company policies;
- Running training courses for local HR;
- Putting in place correct disciplinary processes;
- Undertaking performance management; and
- Establishing a good working relationship with the unions (if any) and the local employers' association.

IV. Trends and Specific Cases

Italy has always been a litigious jurisdiction when it comes to employment law claims. Italy is generally considered an "employee-friendly" jurisdiction, particularly in the areas where we see high unemployment.

In recent years, employment law reforms have been one of the most important items on the Government's Agenda. Examples are noted below.

In 2012, we had the Fornero Reform, which was a step in the right direction in attempting to loosen the restraints on companies when hiring and firing. However, the reform failed to go as far as was needed in order to enliven the job market.

We now have the Jobs Act (the name being taken from U.S President Obama's American Jobs Act 2011) – another important attempt to make the Italian labour market more flexible.

Under this ongoing project of reform, the Italian Parliament has:

- issued Legislative Decree no. 23/2015, which provides a different set of remedies in the event of a successful unfair dismissal claim by an employee hired on an open-ended contract after 7 March 2015. In the majority of cases the remedy is damages; reinstatement has now become the exception rather than the rule;
- amended article 2103 of the Italian Civil Code to provide that starting from 25 June 2015, in certain cases, employers may unilaterally change an employee's duties and tasks to such duties corresponding to a lower job qualification; and
- provided a very important law reform, which came into force on 24 September 2015, allowing employers to access the contents of the devices given to employees to perform their job (for example, smart phone, personal computer, tablet). Such contents may be utilized to impose disciplinary sanctions.
- This represents a very important change in Italian employment law, but there is a real risk that by applying this new law, employers may face Court claims.

For the first time, executives (dirigenti) will be included in the collective redundancy process. Dirigenti are top-level employees, who historically have enjoyed fewer protections than other employees. However, pursuant to a decision of the European Court of Justice in February 2014 and the ensuing European Law 161/2014, dirigente have to be included in the calculation that triggers a collective redundancy (i.e. where a company with more than 15 employees dismisses at least 5 of them within a period of 120 days).

Previously, executives had been excluded from the whole collective redundancy process (i.e. information and consultation with the unions and the application of the legal selection criteria [technical/organisational needs of the company, family dependents and length of service]). With the reform, companies will need to set up a separate negotiating table with the executives' unions and apply the selection criteria.

In the event of a defect in the procedure, the Executives would be entitled to damages of up to 24 months' salary, thus effectively providing them with protections previously enjoyed only by lower level employees.

In 2015 Lablaw acted for a high profile client in restructuring its Italian operations, and in the context of a collective redundancy procedure, signed one of the first collective agreements in Italy with the Dirigenti unions, before the Minister of Labour Law in Rome.

V. Conclusion

Italy is going through important political, social and legal changes at the moment and employment lawyers are at the forefront; seeing first-hand how all of this impacts businesses and their Italian workforce. Italy is a work in progress and the end product will hopefully be worthy of the prestigious label: “Made in Italy”.

JAPAN

I. Overview

a. Introduction

Disputes between employees and employers regarding employment issues generally are governed by the Civil Procedures Code of Japan, which largely mirror the procedures prescribed for other civil disputes. There are, however, some major differences, which are set out below.

Labor Tribunal Proceedings

Introduced in 2006, this process has fast become the most common method for an employee to initiate a legal proceeding against an employer. This is due to the expeditious nature of the procedure (approximately 80% of cases end in settlement or order by the Labor Tribunal Committee, issued within 2.5 to 3 months of the initiating the process) and the flexibility of the types of resolution that can be reached. If the parties do not settle, the Labor Tribunal Committee will issue a decision. If one or both of the parties are unsatisfied with the decision, they may lodge an appeal within 2 weeks of the decision. In the case of an appeal, the dispute automatically moves to a normal court procedure.

Divisions that Handle Employment Cases

The two largest District Courts, Tokyo and Osaka, have divisions which exclusively handle labor and employment disputes. Such divisions are called “employment concentrated divisions” (roudou shuuchuu bu), which are the 11th, 19th and 36th divisions of the Civil Court Divisions at the Tokyo District Court.

b. Claims

In Japan, the most common employment litigation claims include the following:

- Wrongful Termination and Confirmation of Status as an Employee
  - The current remedy available for employees who dispute their dismissal is reinstatement, on the basis that the dismissal was invalid. While majority of proceedings concerning wrongful termination end in a settlement, if the parties cannot reach an agreement, and if the court finds that the dismissal does not meet the requirements for a valid dismissal, the relevant award is reinstatement with the back payment of salary (plus statutory late fees). Employees are rarely awarded other damages (such as, attorneys’ fees and solatium for emotional damage), as back payment of salary is typically viewed as sufficient compensation.
- Claim for Unpaid Wages (increased allowance for overtime work is the most common type of wage claimed)
- Claim for Damages due to Work-Caused Mental Sickness (the most serious case being suicide due to mental illness)
- Discrimination/ Harassment (typical types of issues: gender discrimination, sexual harassment, maternity harassment, and power harassment (bullying))

c. Administrative Agencies that Investigate or Adjudicate Claims

The main types of administrative procedures available for employees and employers are detailed below.

Labor Bureau

The Labor Bureau (which exists within each prefecture) provides several processes for resolving employment related disputes. The most utilized process is mediation carried out by the Dispute Accommodation Committee (Funsou Chosei Iinkai). When a party initiates a mediation before the Dispute Accommodation Committee, the counter-party is not obligated to participate in the mediation, and any findings made will not be binding unless both parties accept the findings.

The Labor Bureau is in charge of handling laws such as the Equal Employment Opportunities Act, Worker Dispatch Act, and Employment Security Act (laws concerning outsource of workforce), and is the administrative organization that employees with issues concerning such matters can consult.

Labor Standards Inspection Office ("LSIO")

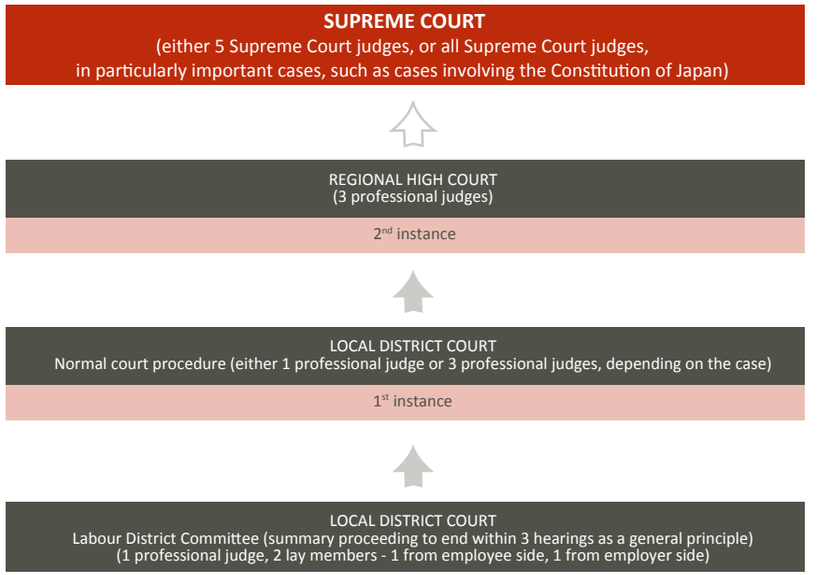
The LSIO does not adjudicate individual claims; rather, it carries out investigations when it receives tip-offs from employees about alleged violations of the Labor Standards Act, such as violations regarding the payment of wages and maximum working hours. The LSIO has the power to initiate and carry out criminal investigations (as many provisions of the Labor Standards Act have criminal penalties for violations), however, the typical procedure is for the LSIO to issue a "recommendation" for the correction of a situation which is not compliant with the Labor Standards Act before the matter is handled as a criminal case.

Labor Relations Commission

The Labor Relations Commission provides a mediation/settlement/arbitration service for disputes between individual employees and their employer. It also provides services in disputes between unions and employers regarding unfair labor practices.

d. Court / Tribunal System

THE JAPANESE COURT SYSTEM IN EMPLOYMENT LAW MATTERS



*A process may start without Labor Tribunal proceedings, but when it starts with the Labor Tribunal, either party may object to a decision made by the Labor Tribunal Committee, which will automatically start the process of a normal court procedure at the District Court.

*A party can use the Summary Court for a claim worth JPY1.4 million or less, and can use the small claims process (an expedited process which ends with one hearing) for claims worth 600,000 or less, or a civil mediation carried out at the Summary Court, although both parties will need to agree to accept any decision made in a civil mediation process. When a case that starts at the Summary Court is appealed, it will move to the District Court (2nd instance), then the High Court (3rd instance).

e. Alternative Dispute Resolution (ADR)

In addition to the ADR processes available at local administrative offices, as explained at 1 c above, employers and employees can utilize the arbitration system. However, the current Arbitration Act stipulates that any agreement to resolve future disputes through arbitration is invalid. The purpose of this stipulation is to prevent an employer from using its bargaining power to set out rules, which are favourable to it, but difficult for the employee to accept.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

Step 1: Plaintiff files a lawsuit

The Plaintiff needs to submit a written "claim" to initiate a lawsuit.

Step 2: The court delivers the Claim to the Defendant and arranges a hearing date

Courts in Tokyo will typically request preferences for hearing dates for the first hearing from the parties, as well as confirmation about whether there have been any attempts at settlement prior to the litigation.

Step 3: The Defendant Submits a Response

The Defendant can choose to either submit a full rebuttal by, or on, the first hearing date, or to submit a short document simply stating "we seek the claims be dismissed, and that the litigation fees be borne by the Plaintiff", and submit the full defense at the following hearing, since Defendants often have less time to prepare compared to the Plaintiff, who can choose when to bring a claim.

Step 4: Further Briefs, Evidence is submitted from Both Parties

Typically, a court will start a "preparatory oral hearing" procedure, where the parties leave the court room open to the public, and discuss/ submit briefs and evidence in a closed room in an effort to sort out the points of dispute.

Step 5: Mediation by the Court

In a typical case, the court will try to mediate a settlement at some point in exchanging briefs – the settlement negotiation process could take place at any time as long as both parties are willing. So, even if settlement negotiations are closed, they may be resumed at a later point in the proceeding.

Step 6: Oral Questioning (of the parties, witnesses)

If the parties are unable to reach a settlement, and the court is of the view that the arguments/ submission of evidence are exhausted, the typical next step is to enter into oral questioning, first by having the person who will appear in the questioning submit a written "statement", then appear before the court in an open court room to be questioned by both parties, in addition to the court.

Step 7: Judgement

ii. Pretrial Proceedings

There are no compulsory pretrial proceedings, however, Labor Tribunal Proceedings sometimes function as a pretrial procedure.

iii. Role of Witnesses, Counsel and Court / Tribunal

The Japanese courts are more likely to call witnesses in an employment dispute, as compared to other civil disputes. This is because employment issues often require

detailed background information to provide the necessary context to understand whether something was legal or illegal. For example, in a poor performance dismissal case the question as to whether an employee's performance was poor can be demonstrated by information about the content of the work and what kind of feedback/ support the employee had been provided from the employer, which often requires a detailed explanation from someone with strong knowledge of the particular work performed by the employee in question.

iv. The Appeal Process

The appeal process for a decision of the labor tribunal is to initiate a normal court proceeding. A party must appeal a decision of the District Court within 2 weeks of receipt of the judgment (not counting the date of receipt). Since the parties typically enquire with the court clerk about a judgment, and then the non-prevailing party typically chooses to receive the judgement via post rather than by attending the relevant court, the prevailing party will usually confirm with the court when the other party has received the judgement. There is no additional requirement for an appeal.

A party may appeal a decision of the High Court to the Supreme Court if the criteria set out by the Supreme Court for such appeals is met.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

"Litigation fees" in a Japanese litigation means the fees submitted to the court (mostly by the Plaintiff for initiating the litigation), such as for postage, stamp duty (the court's charge, which depends on the amount and type of the claim), and travel cost for any witness, expert witness, and translator. The court has the discretion to decide which party bears the litigation fees, or if it decides that they should be split, the percentage for each party to bear. When the judgment is that one party completely prevails/ loses, the ration is often 10 to 0. In case of settlement, typically each party bears the litigation fees that they bore, do not claim an amount against the other party.

Attorney's fees are normally borne by each party, and cannot be claimed by the prevailing party against the non-prevailing party. The Japanese courts, however, do award attorney's fees in cases of tort, and sometimes in breach of contract cases if the case is complex, but even in such cases only 10% of the actual amount of attorney's fees is typically awarded.

A normal first instance court proceeding typically takes anywhere from 6 months (if the parties reach a settlement), to 2 years (if there is no settlement and a judgment is necessary), although it could be shorter or longer.

A labor tribunal process typically takes 3-4 months, regardless of whether the parties reach a settlement or not.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Union membership in Japan was at its peak in 1949, at an estimated 55.8%, but has since steadily declined, with approximately 17.7% of workers in Japan being unionized as of June 30, 2013 (including membership of public servants). However, one type of union called "godo roso" (joint union) has been increasing in size, which is a type of union formed by employees of different employers/ industries, as opposed to traditional unions, which are "internal" to a particular company, or a group companies.

There are no Work Councils in Japan.

d. Specialized Litigation Bar

There is no specialized litigation bar in Japan.

While lawyers are the only persons who may represent third parties in most legal disputes (representing yourself/ your own company is fine, but representing third parties in a dispute with a view to receive compensation would be in violation of the Attorneys Act, subject to a criminal penalty of either imprisonment of 2 years or less, or a criminal fine of JPY3million or less), social insurance labor consultants who reach a certain qualification level (a "specific social insurance labor consultant") may represent employees in a certain scope of employment disputes in ADR procedures.

Further, judicial scriveners can represent parties in claims before the Summary Court worth JPY1.4 million or less.

III. Tips to Avoid Litigation

- Transparency in employment related policies, and communication to ensure that employees understand the employer's rules regarding the terms and conditions of employment are key factors in preventing employment related disputes.
- With respect to changes in workplace rules, particularly those that are unfavourable to employees, in determining the reasonableness (and thus the validity) of the change Japanese courts consider whether sufficient discussion/ consultation took place regarding the change. Therefore the process of discussing/ consulting with employees is a key step to follow in any employment situation.
- Fair treatment of employees.
- Prompt responses to any request/ questions from employees.
- Accurate feedback is key – while being honest (and thus strict) in evaluation may cause some conflicts, in the long run, it is a very important step to take to both communicate better and, in the case of a poor performance dismissal, to have evidence of the poor performance.
- Understand Japan-specific rules. For example, keeping a record of work hours is mandatory (although there are exceptions) and even if an employee in a managerial position can be viewed as "exempt" from receiving overtime work pay and holiday work pay, they will not be exempt from receiving late night work pay (late night meaning 10pm to 5am).

IV. Trends and Specific Cases

a. New or Expected Developments

A proposed amendment to the Labor Standards Act, which was submitted to the Diet in 2015, has not been enacted due to delays in the discussion at the Diet. The proposed amendment will be considered again sometime in 2016. The following are some of the more discussed features of the proposed amendment.

Currently, the overtime allowance is 125% of the average hourly wage. It is proposed that this allowance is increases to 150% when the number of overtime hours exceeds 60 hours in a month. However, there is an exemption for smaller companies (different criteria applies for different industries, as shown in the chart below).

The proposed amendment includes exemptions for the following companies:

Industry	Capital or Amount of Investment	Number of Employees Constantly Employed
Service	JPY 50 million or less	50
Retail	JPY 50 million or less	100
Wholesale	JPY 100 million or less	100
Other	JPY 300 million or less	300

Establishing a new system for workers with a high level of professional skills and expected level of performance ("High Level Professional System").

This is a proposal for a new system by which employees with a clear job scope, a certain level of compensation (at least JPY10million annual), and an expectation of a high level of professional skill, will be exempt from rules regarding work hours, days off, and payment of allowance for late night work (work between 10pm to 5am.

If an employer is to apply such an exemption it will need to provide health protection measures to the relevant employee, it will need the consent of the employee, and the decision must be made by the relevant internal committee, established within the employer. Further, if the relevant employee's work hours exceed a certain amount, the employer must have the employee consult a doctor for guidance on how protect their health.

b. Recent Amendments to the Law

Stress Check System

In December 2015, an annual "stress test check" became mandatory for all employers, in an attempt to prevent mental sickness at the workplace, which has become more prevalent. For the time being, this new obligation will only apply in workplaces with 50 or more employees – smaller workplaces are encouraged, but not obliged, to carry out such tests.

Change to the Worker Dispatch Act

A change to the Worker Dispatch Act was implemented on 30 September 2015. Major features of the amendment are as follows:

- Abolishment of the "26 types of work" – previously there was a cap on the length of worker dispatch – 1 year, which can be extended to 3 years by obtaining the opinion of the representative of the employees, – but for the "26 types of work" there was no cap. This led to many ambiguities surrounding whether a certain position genuinely fell within the 26 types.
- The obligation to offer permanent employment to a worker dispatched to a particular recipient for a maximum period of 3 years applied regardless of whether the individual dispatched worker remained the same or not (for example, if worker A was at a certain workplace for 1.5 years and that worker was replaced by worker B who also worked for 1.5 years, even though worker B was only there for 1.5 years, since in aggregate a service was provided by a dispatched worker for 3 years, the recipient will need to take measures to offer direct employment to the dispatched worker).

- The amended law now simplifies the rules so that a cap of 3 years applies to all dispatched workers, regardless of the type of work/ position held. So as long as the individual providing the service changes every 3 years, there is no limit to the period a recipient can utilize dispatched workers.
- The 3-year rule does not apply to dispatched workers who are permanent employees (as opposed to fixed term employees) of the worker dispatch agency they are sent from.

V. Conclusion

Japanese employment law has been subject to many changes in recent years to reflect the growing need to address different work styles, as well as workplace problems such as mental health issues at the workplace. Employers' obligations to take measures to protect the health of employees has intensified (for example, efforts have been made to reduce overtime work and the duty to carry out annual medical check-ups of employees has been imposed on employers.

The increasing number of amendments to labor law in Japan has resulted in an increase in the number of employment related disputes.

Therefore, it has become imperative for employers to acquire accurate knowledge of its legal obligations, and to take steps such as those explained above as tips to avoid litigation, in order to ensure that their business is not hindered by time consuming disputes.

MEXICO

I. Overview

a. Introduction

Every society needs to have a body of law establishing the provisions by which individuals must abide in order to provide security to the community that lives together in a given territory.

Mexico's Labor Law is one of the governing axes of the Constitution, because it was the workers who triggered the Mexican Revolution, and for this reason our Labor Law protects the rights of the workers.

Enterprises in Mexico must therefore seek the advice of specialists in labor law, in order to be aware of all the legal requirements and conditions they must fulfill in employment relations, as well as all the provisions to be observed in the workplace; otherwise they can be penalized by the labor authority, which may even lead to closing the establishment. In fact, individuals who are unaware of the legal provisions applicable to employment relationships may conduct themselves in a way that is not sanctioned by the legal ordinances and regulations, such as not having a safe provision of services that complies with the law.

b. Claims

Below are the most common claims handled in the Mexican labor courts.

We have divided the conflicts based on subject, classified as individual and collective. Individual conflicts are those that affect a single worker and collective conflicts a given community of workers.

Individual

- **Unjustified Dismissal**: Workers who consider the separation from their employment as unjustified may file a claim before the Conciliation and Arbitration Board, to sue the employer, demanding:
  - Reinstatement
  - Payment of an indemnification
- **Termination of the Employment Relationship**: Action by which the employer or the worker demands the justified termination of the employment relationship.

Collective

- **Strike**: The temporary suspension of work carried out by a coalition of workers, normally used in order to have the employer acknowledge certain rights of the workers.
- **Conflict of an Economic Nature**: Those where formulation is intended to modify or implement new employment conditions.
- **Signing a Collective Bargaining Agreement (CBA)**

c. Administrative Agencies that Investigate or Adjudicate Claims

In Mexico, application of employment norms falls into different jurisdictions.

The Workers' Advocacy Agency: Advises employees in conflicts or controversies with employers in an administrative department or advises employees before the Conciliation and Arbitration Boards.

Ministry of Labor and Social Welfare: Through inspections of employers, it verifies that companies duly fulfill the labor laws and the technical norms the employer must meet in the workplace, and may impose penalties for the employer's failure to comply. The Ministry of the Treasury, using its verification capabilities, audits and requires employers to present proof of due payment of the worker's share in the company's profits.

The Federal Conciliation and Arbitration Board: Settles controversies between employers and workers at the federal level. Likewise, within its valid jurisdiction, they validate and authorize special individual and collective acts of the employers and the workers.

The Local Conciliation and Arbitration Boards: Settles controversies between employers and workers at the local level. Likewise, within their valid jurisdiction, they validate and authorize special individual and collective acts of the employers and the workers.

The Labor Authorities are Administrative Federal and Local Authorities.

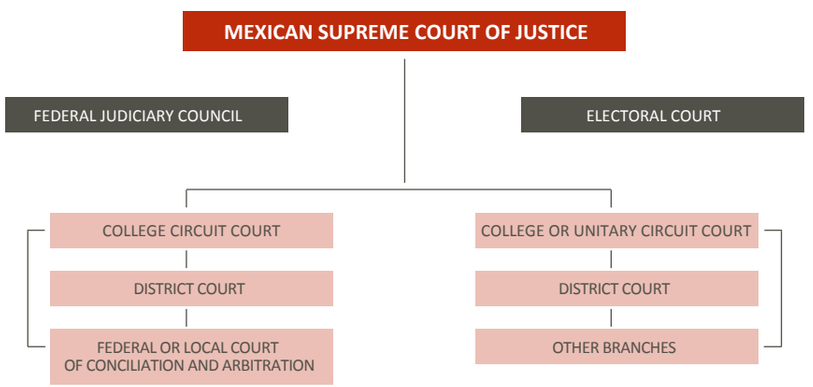
d. Court / Tribunal System

According to Mexico's Constitution, article 123, item XX, conflicts between employers and employees shall be subject to the decision of a Conciliation and Arbitration Board, formed by an equal number of workers' and employers' representatives and one Government representative.

Mexico's Conciliation and Arbitration Boards are in charge of hearings and decide on disputes arising between workers and companies; they were created to seek agreement between the parties. When a lawsuit is filed, there is a prior mandatory conciliation stage and if this objective is not reached, the boards must issue an award solving the claims of the parties. If any of the two parties do not agree with the award, they can file appeals (amparo proceedings) before the competent courts.

The secretaries of the boards have a similar stability to that of judges. Like the courts, the boards are autonomous and independent. However, even though they belong to the executive power, they are a jurisdictional organ and therefore they are required to apply the court precedents issued by the Supreme Court of Justice and by the Circuit Collegiate Courts, according to articles 192 and 193 of the Amparo Law.

MEXICAN COURT SYSTEM



e. Alternative Dispute Resolution (ADR)

The Conciliation and Arbitration Boards are responsible for conciliation. The Law provides its active intervention, exhorting the parties to agreement and proposing solution alternatives, applicable for any procedure filed before these jurisdictional organizations.

II. The Litigation Process

a. Typical Case

The legal framework is set out in articles 870 to 891 of the Federal Labor Law and is divided into two phases: the Instruction Phase and the Resolution Stage.

Instruction Phase

First: Includes presentation of a written petition, reception, order to proceed, notifications and service of process.

Second: The initial hearing of conciliation, petition and exceptions, offering and admission of evidence is held.

Third: Stage of presentation of evidence, made based on the evidence offered by the parties.

Fourth: Close of the proceedings, after ensuring there is no pending evidence to be presented.

Resolution Stage

First: Refers to formulating the project forward.

Second: Refers to discussion and voting of the award project.

Third: Approval and signature of the award, and notification to the parties; the procedure is concluded.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Settlement: the amount paid to the worker upon termination of the employment relationship, including the concepts of benefits to which the worker is entitled, and, if applicable, includes indemnification provided by the Federal Labor Law.

Settlement is estimated with reference to the base salary earned in cash, which is used to calculate the proportional parts of the amounts corresponding to the payment of employment benefits that the worker is paid. For each day worked for the employer, workers must be paid the proportional payment of benefits: Christmas bonus, vacation leave, vacation bonus, wages pending to be paid, as well as benefits and/or extra-legal benefits.

Severance pay (indemnification): is an amount the employer is obliged to pay based on three months' integrated wages, which is paid in case of unjustified dismissal. The worker may request to comply with the employment agreement or payment of indemnification. This indemnification also applies in case the worker terminates the employment agreement for causes attributable to the employer.

Attorney Fees: in Mexico, in case of a lawsuit, attorneys usually receive a quota litigation payment for the amount of the matter, or a retainer fee for attending to the matter, plus expenses when appearing before the Labor Boards. Attorneys do not usually charge

hourly fees in labor actions or a retainer for attending to it, plus the expenses for trying the case before the courts. It is unusual for attorneys in a labor trial to charge hourly service fees.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Claims seeking modification of a Collective Bargaining Agreement and collective suspension of employment relations are regulated by articles 900 to 919 of the Federal Labor Law, and have the following characteristics:

- **Lawfulness**: Businesses and employers use this procedure, but these approaches may also be requested by unions who hold a CBA or by the majority of workers in a company or establishment, if it affects the greater professional interest.
- **Requirements**: This procedure must be initiated in writing and must contain the name and address of the person who is promoting it, who must also prove his/her capacity. The document presented must explain the history, facts and causes that led to the conflict, as well as the claims of the petitioner.

The writing must be presented along with:

- Public or private documents to prove the economic standing of the company or establishment and the reason why said measures are requested;
- The list of the workers providing their services to the company or establishment, providing their names, last names, jobs performed, wages and length-of-service in the company;
- An expert's opinion about the economic status of the company or establishment;
- Evidence the petitioner considers appropriate to accredit this; and
- The required number of copies of the claim and its attachments to summon the other party.

Immediately after receiving the claim, the Board shall summon the parties to a hearing within five days. The experts are authorized to conduct investigations and studies that they consider appropriate.

The Labor Boards have the broadest powers to practice the diligences they deem appropriate.

After the evidence has been presented, the Board will allow the parties a term of 72 hours to formulate their arguments. Once the term has concluded, the Assistant shall declare the Instruction closed, and within 15 days shall issue an opinion.

III. Tips to Avoid Litigation

The legal aspects to consider include regulations that clearly reflect internal policies, a file of all staff, including the incidents of the worker's life in the company, precise disciplinary systems and sanction regimes, as well as management of labor conflicts when they occur.

In the field of Human Resources, the measures to reduce the possibility of conflict are: remuneration, development opportunities, positive feedback, stability and security in payments.

In the opinion of experts in the field, the way to avoid labor disputes is by preventing them from the time of recruitment. In this case, it is recommended for companies to sign an individual employment agreement that allows them to clearly state the employee's responsibilities and obligations in the position hired and to document any type of incident.

IV. Trends and Specific Cases

a. New or Expected Developments

Rather than waiting for further reforms in workplace legislation, Mexico is developing an effective implementation of the legislative changes made from 2012 to date.

i. First Chamber of the Supreme Court of Justice recently issued several opinions regarding age discrimination during the recruiting and selection processes for a job offer.

The Court resolved that some elements that may determine that a job offer is discriminatory are the title or name given to the position, the assignment of tasks and the determination of salaries for categories having the same value or level of responsibility.

ii. The 2012 labor reform established conditions for the sub-hiring of personnel, and sanctions for the deceitful practice of this act, prohibiting the transfer of workers from an original company (contractor) to an outsourcing company (subcontractor) for the purpose of reducing employment benefits.

Almost three years later, the Second Chamber of the Supreme Court of Justice finally issued its opinion on the subcontracting of personnel, according to which:

- Article 15-A of the Federal Labor Law does not breach the principle of legal certainty by establishing the contractor's faculty to fix the subcontractor's activities and supervise them as the subcontractor keeps the right to supervise and assign its employees' tasks.
- Articles 15-A, 15-B, 15-C and 15-D do not infringe on the right to freedom of work, they only contain a special regulation for the development of the contractors' and subcontractors' productive activities, but, when doing so, they must comply with certain minimum conditions that allow the protection of workers' labor rights.

iii. The Second Chamber of the Supreme Court of Justice issued a binding opinion where the action of nullity raised by a former employee against a termination agreement previously approved by the Labor Board shall be deemed unsupported with respect to the facts and benefits that have already been resolved by the authority. The facts, amounts and clauses contained in the agreement shall have a legal effect and, thus, are binding on the parties.

iv. It is expected that the Second Chamber of the Supreme Court of Justice resolves on the constitutionality of Article 48 of the Federal Labor Law, which was amended on November 2012 and provides that those employees dismissed without cause are entitled to back wages pay, calculated from the termination and up to 12 months; afterwards, the employee will receive 2% as interests generated over 15 months' salary, to be capitalized at the time of payment.

v. On October 23, 2015 the Senate approved, with modifications, a constitutional reform that will allow deindexation of the minimum wage. This means that the minimum wage will no longer be used as an index, unit, base, measure or reference for purposes different from its labor nature.

Due to the changes, the bill was returned to the Chamber of Deputies for analysis and passed on to the Tax Commission for its opinion before going to a vote.

vi. Finally, plans to install 66 rooms for oral hearings on labor matters in the country by 2016, with the purpose of expediting the judicial process and modernizing the facilities of the Federal Conciliation and Arbitration Board, remains.

A labor trial currently takes an average of a year and a half to be resolved, and it is estimated that by introducing new rooms for oral trials this will be reduced to an average of 90 days.

b. Recent Amendments to the Law

i. On June 12, 2015 a reform to several Articles of the Federal Labor Law regarding the minimum age for work was published in the Official Gazette, which came into force the following day. According to this reform:

- Work of minors younger than 15 years is forbidden.
- Minors between 15 and 18 years who have not finished their mandatory basic education are not permitted to work unless the corresponding labor authority considers there is compatibility between studies and work; they obtain a medical certification confirming their aptitude for work; and they undergo medical examinations periodically, as ordered by the labor authority.
- Minors younger than 18 years should not perform hazardous or unhealthy activities, and should not work overtime. They are also prohibited from working on Sundays or on mandatory days off.
- Minors younger than 18 years shall enjoy an annual vacation period of at least 18 days.
- Finally, workers older than 15 years may become union members.

ii. On September 30, 2015 a resolution issued by the Council of Representatives of the National Minimum Wage Commission (CONASAMI) was published in the Official Gazette, which determined that for purposes of applying minimum wages there will only be one geographical zone in the Mexican Republic, which will be integrated by all municipalities in the country and territorial demarcations in Mexico City.

V. Conclusion

While the labor environment in Mexico has improved compared to previous years, it is still necessary to seek professional advice prior to setting up a workplace in order to attend to individual, collective and technical aspects that companies must consider and to avoid the impact of calls to strike, closures or suspension of activities by the authorities, or by labor actions from workers, who can unfairly benefit when a company begins operations in the country.

Likewise, proper advice can help create and maintain comprehensive coaching for workers and a sense of belonging, which will result in efficient services and improved results.

For this reason, by implementing a preventive integral strategy, a company can prevent conflicts within the organization and achieve greater competitiveness in national and international markets. Mexico has become a world logistics center that works as an international stepping stone to companies' operations, because of its proximity to the United States of America, and has a wide range of international free trade agreements that permit improved transportation and creation of goods with added value, which can make the difference in the worldwide success of an organization.

THE NETHERLANDS

Dutch procedural employment law and the law on dismissal have undergone substantial amendments. This is a presentation of the new procedural employment law that was introduced on 1 July 2015. However, a reservation is made with regard to the new legislation. Certain aspects of the new Act are still unclear and subject to amendment (remedial legislation) and there is also some debate regarding the interpretation of various sections of the Act. It is not entirely clear how the courts or the Employee Insurance Agency (UWV) will interpret and apply the new legislation. It will become clearer during 2016 how employment law practice will develop in the Netherlands.

I. Overview

a. Introduction

Dutch procedural employment law can be divided into two parts:

- Employment procedural law relating to claims based on, or arising from, the employment contract; and
- Laws of dismissal.

As set out above, the new procedural employment law and law of dismissal entered into force on 1 July 2015. The new legislation introduces significant changes to employment law practice. Before 1 July 2015 a request to terminate an employment contract was submitted by way of petition to the subdistrict court. All other employment law issues were submitted by summons to the subdistrict court.

This has changed as from 1 July 2015: the summons procedure is making way for the petition procedure. As from 1 July 2015 employment petitions/claims—thus, not only the petition to terminate an employment contract, but, also, for instance, claims for wages in arrears, disputes about non-compete clauses, etc.—can be submitted by way of petition. In addition, the law of dismissal has undergone major changes on 1 July 2015. The legislature's idea and intention with these changes is to make procedural employment law and the law of dismissal more accessible, fair, quicker and cheaper. The consequences of the legislative amendments are discussed in this contribution.

b. Claims

Dutch employment law is largely protective of employees. However, both the employer and employee may have a claim under employment law.

An employee's claim against his/her employer may include the following:

- claim for wages;
- compensation for an occupational accident;
- changes to the number of working hours or staggering of work hours;
- compliance with reintegration obligations during incapacity for work;
- defective termination of the employment contract;
- right to holidays;
- right to other leave (parental leave, long or short-term care leave, etc.);
- annulment of the termination of an employment contract;
- annulment of a non-compete clause;
- compliance with collective employment conditions (if applicable); and
- claims on grounds of "good employment practices".

An employer's claim may include the following:

- repayment obligations;
- cooperating in an amendment to the employment conditions;
- compliance with reintegration obligations during incapacity for work;
- compliance with the employment contract, including confidentiality, non-compete and non-solicitation clauses;
- compliance with safety rules and staff regulations; and
- claims based on "being a good employee".

Employee organizations: trade unions, works council

Besides the employer and employee, employee organizations, such as a trade union or works councils, can institute a claim.

Trade unions may claim compliance with the obligations set out in any applicable CLA (collective labor agreement). The trade union may also claim compensation for damage suffered by it and its members (if the employer fails to comply with a CLA).

As a rule, a works council must be created if an employer has at least 50 employees. The employer must ask the works council for advice or consent in relation to certain topics.

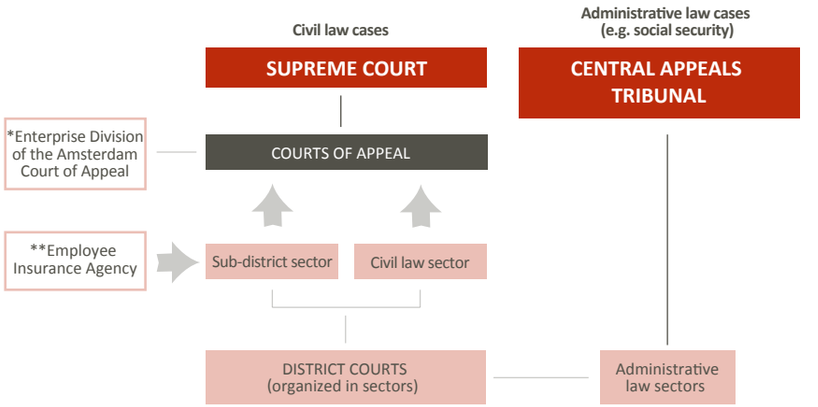
These relate to decisions that the employer intends to make which can affect the company and thus the personnel. The employer requires the consent of the works council for every proposed decision to establish, withdraw or amend a working hours or holiday scheme, personnel evaluation scheme, etc. The employer requires the advice of the works council for proposed decisions to transfer control of the company, or a significant reduction, expansion or other change to the company's activities.

Every interested party, including at least the employee organizations working in the company, the employees working in the company, the works council and the business owner, may demand compliance with the obligations under the Dutch Works Councils Act (Wet op de Ondernemingsraden—WOR). Examples of such claims include:

- creating or maintaining a works council or employee representation;
- nominating candidates and electing members of the works council; and
- publishing agendas and minutes of works council meetings and consultative meetings. The works council may institute claims against the employer at the Enterprise Division of the Amsterdam Court of Appeal relating to:
  - compliance with the requirements of the right to be consulted or the right of consent under business law and the right to information; and
  - appealing against the decision of the employer (for example, to reorganize), if the employer does not follow, or does not fully follow, the works council's advice. The Enterprise Division may then order the employer to withdraw the decision, subject to a penalty.

c. Court / Tribunal System

THE DUTCH COURT SYSTEM AS RELATED TO EMPLOYMENT MATTERS



* The Enterprise Division of the Amsterdam Court of Appeal is the competent court for some specific matters among which disputes regarding the works council's rights to consultation.
** In case of dismissal on economic grounds and because of long-term incapacity for work, the employer must ask permission from this Agency for termination of the employment contract.

The Dutch legal system is divided among three judicial authorities:

- **First instance**: the District Courts (11 in total), which can be subdivided into the civil sector and sub district sector, among others (including for employment law cases);
- **Appeal**: the Courts of Appeal (4 in total); and
- **Cassation**: the Supreme Court of the Netherlands (Hoge Raad).

Enterprise Division

Besides the above courts, the specialized Enterprise Division of the Amsterdam Court of Appeal is important to procedural employment law. The Enterprise Division is part of the Amsterdam Court of Appeal and is solely for disputes relating to the works council's right to consultation.

d. Alternative Dispute Resolution (ADR)

Besides arbitration, there is conflict mediation (intermediary and advisory services) and conflict settlement (binding advice and other forms of alternative and consensual conflict settlement), also known as alternative dispute resolution (ADR). There are a lot of alternative dispute resolution institutions in the Netherlands, including both recognized and unrecognized dispute committees. An intermediate form of dispute resolution is the complaints or disciplinary procedure.

Arbitration, a binding opinion and/or ADR are seldom used in the Netherlands for employment law. Mediation, on the other hand, is becoming increasingly common.

Mediation

Mediation is an adequate method with the necessary guarantees for dispute resolution.

An example of where it may be used is a damaged working relationship, because of a dispute or an impending long-term incapacity for work. The manner in which mediation must be conducted in the Netherlands is not yet set out in law. Most mediators working in the Netherlands are, however, registered at the 'MfN' (Mediators Federation of the Netherlands). Mediators registered at the MfN have attended an accredited mediation training course. MfN mediators are also obliged to follow a certain procedure, as established in the MfN regulations.

Parties that wish to resolve their dispute through mediation, sign a mediation agreement with each other and the mediator. This details the basic arrangements, including voluntariness and confidentiality.

The mediation begins after the mediation agreement is signed. Mediation takes place in private; there is no open hearing or public ruling. The parties organize their dispute between themselves and determine what will be made public. The process ends with a settlement agreement, by which the parties re-determine their future relationships.

II. The Litigation Process

a. Typical Case

i. Steps in the process

As from 1 July 2015 every employment law claim regarding the termination of an employment contract must be submitted to the District Court (subdistrict sector) by way of a petition. The petitioner (employer or employee) must substantiate the claim(s) in the petition. In contrast to the summons, the petition does not have to be issued by a bailiff. The petition can simply be submitted to the District Court (subdistrict sector). Immediately after the petition is submitted, the District Court schedules an oral hearing. Under the new Act, the oral hearing must be held no later than the fourth week following the week in which the petition is submitted.

The defendant has the opportunity to submit a written response, by means of a statement of defense. The defendant can also lodge a counter petition. The statement of defense or a counter petition must, in principle, be submitted 10 days before the oral hearing. Until five days before the oral hearing the parties can file further documents. The judge can disregard documents that are filed after that period.

The intention of the legislature in introducing the petition procedure and the possibility to file a counter petition is to make the procedure quicker and simpler. In view of the intended speed of employment law procedures, producing evidence by calling and hearing witnesses, interlocutory orders by the judge to adduce evidence, etc. are thus not always appropriate. Under the new law, it will be left up to the judge to decide whether the law of evidence is applicable. The judge will make this decision on the basis of factors such as urgency and complexity. Thus, a judge must hold requests for evidence against this yardstick (speed and complexity). As a result, the law of evidence will, in any event, be applicable in more complex cases that are not very urgent. It remains to be seen how judges will deal with this in practice and whether the legislature's aims will be achieved.

ii. The Appeal Process

The employer or employee may appeal against all rulings of subdistrict courts to the Court of Appeal. The Court of Appeal will reassess the case again in its entirety. As a final resort, the parties may appeal in cassation to the Supreme Court of the Netherlands (Hoge Raad). However, this is not a normal appeal. The Supreme Court does not re-examine the facts of a case. The Supreme Court reaches its decision based on the facts as established by the Court of Appeal. The Supreme Court assesses whether the Court of Appeal—and, where applicable, the District Court—has interpreted and applied the law correctly in its judgment and whether that judgment is adequately and comprehensibly motivated. Cassation proceedings are aimed at promoting and ensuring the uniformity, development and protection of law.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Attorney's fees

In view of the new legislation, it is difficult to predict whether attorney's fees for proceedings will remain the same. This will depend to a large extent on whether or not the judge declares the law of evidence applicable to the proceedings. If the law of evidence is applicable and witness testimony and interlocutory orders to adduce evidence are granted, this will increase the costs. We expect the judge to declare the law of evidence to be applicable in more complex proceedings (as was the case in summons proceedings before 1 July 2015) and for the costs to thus remain more or less the same.

In relatively simple or short proceedings (with just a petition, statement of defense and oral hearing), for instance, a claim for wages, compliance with a non-compete clause or dismissal proceedings (via the Employee Insurance Agency or the subdistrict court), the attorney's fees range from approximately EUR 5,000 to EUR 10,000 (excluding VAT). In a more complex case, requiring several written rounds with witness testimony/interlocutory orders to adduce evidence, the attorney's fees can range from approximately EUR 10,000 to EUR 20,000 (excluding VAT), or more.

Once again, attorneys' fees will depend largely on the complexity of the case and how judges will deal with the new legislation as from 1 July 2015.

Certain employees qualify for assignment of counsel (subsidized legal assistance), depending on their income and property. Employees can also have legal expenses insurance, or be a trade union member. In that event, the employee will, in principle, be represented by a lawyer of the insurance company or the trade union.

Court registry fees

In addition to attorneys' fees, court registry fees are payable to the judicial authorities. In a subdistrict case (including employment claims) in civil proceedings, only the petitioner (who initiates the proceedings) pays the court registry fee. The defendant pays nothing.

The amount of the court registry fee depends on the amount of the claim and a distinction is made between natural persons and legal entities for this purpose. The court registry fee in subdistrict court cases currently lies between EUR 78 and EUR 932 (for claims exceeding EUR 12,500). It is still unclear whether the court registry fee will be adjusted in the near future.

Court-approved scale of costs

It is very rare in the Netherlands—except in intellectual property proceedings—for litigants to be ordered to pay the actual procedural costs and attorney's fees of the other party. In an order for costs, the attorney's fees are estimated according to what is known as the court-approved scale of costs, under which the amount to be paid depends on the standard work performed and the importance of the case.

Although this scale is not binding, the courts generally apply it. In practice, the actual attorney's fees will always be higher—and often far higher—than the fees calculated on the basis of the court-approved scale of costs. The advantage of this is that a party whose claims are rejected does not have to pay the invoices of the other party's attorney, but only the amount included by the court in the judgment.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Trade unions

Reference has been made to trade unions in parts a. and b. of this chapter. Just like employers and employees, trade unions are normal litigants to which the procedural rules as described above apply.

Works Council

In the aforementioned matters, the works council can appeal against the decision of the employer/business owner to the Enterprise Division by way of a petition. The employer can then submit a statement of defense. An oral hearing then takes place. The entire procedure—from the submission of the petition to the ruling—normally lasts between two and four months.

d. Specialized Litigation Bar

There is the Netherlands Bar Association of which all attorneys (of all specializations) are members. However, there are special associations for lawyers that specialize in employment law. The Dutch Employment Lawyers Association (Vereniging Arbeidsrecht Advocaten Nederland) and the Employment Law Association (Vereniging van Arbeidsrecht) are the most well-known associations for employment law specialists.

III. Tips to Avoid Litigation

A common way to terminate an employment contract and avoid dismissal proceedings is by entering into a settlement agreement. This is what is known as dismissal by 'mutual consent'. The employer and employee then make specific arrangements for the conditions under which the employment contract will end and the amount of the severance pay (through negotiations). This way of terminating an employment contract is popular, because the parties are certain about the conditions of the dismissal and the risk of litigation (including appeal) is bought off. Despite the existence of such an agreement, in principle, the employee retains the right to unemployment benefits, provided that the agreement is drawn up correctly.

It is essential in Dutch employment law/HR practice, and certainly as from 1 July 2015, for an employer to have a proper personnel file for each employee. The employer should have regular appraisal interviews with the employee. If an employee's performance is inadequate, this must be brought to his/her immediate attention. The employee ought to be offered a chance to improve, if necessary with the aid of training/ coaching (the 'improvement plan'). It is important that the plan is documented properly and complies

with the new statutory requirements. On the basis of the new Act, the employer is obliged in any case to arrange training for the employee (for the purpose of employability) during his/her employment. If the employer fails to do so, the petition to set aside the employment contract will be denied. The new Act is stricter than the law before 1 July 2015 in this regard. Before 1 July 2015 the subdistrict court could amend an incomplete file by granting a higher payment to the employee. This is no longer possible under the new Act (due to the strict new grounds for dismissal).

Furthermore, it is important for an employer/HR to apply clear rules of conduct or draw up protocols, for instance, with regard to sickness absence, conduct in the workplace, on social media, etc., and to then pursue an unambiguous and strict enforcement policy. This will place an employer in a strong position if it wishes to rely on and enforce these rules, for instance, through dismissal. According to the case law, an important test is always whether the employee was well aware, or ought to have been well aware, of the rules and/or whether the employer applied them unambiguously, so there is no question of any arbitrariness.

IV. Trends and Specific Cases

Law of dismissal: Termination of employment contracts in the Netherlands as from 1 July 2015

Employment contracts may be terminated, inter alia, in the following ways:

- Notice of termination once a dismissal permit is obtained from the Employee Insurance Agency;
- Termination of the employment contract by the subdistrict court;
- By mutual consent;
- Summary dismissal;
- Termination by the employer or employee during the probationary period;
- Termination by operation of law;
- Dismissal with consent of the employee; and
- Termination by the employee.

The manner of termination referred under bullet points 1 and 2 above are dealt with further below, in circumstances where the employer follows the formal dismissal route.

Dutch law of dismissal, preventive test

The employer must seek permission for the termination of an employment contract (other than summary dismissal/dismissal during a trial period and specific categories of employees for which an exception can be made) from the Employee Insurance Agency or initiate proceedings to set aside the employment contract at the subdistrict court. This involves what is known as the preventive test for the intended dismissal of the employee.

The law determines which dismissal route is to be followed, depending on the ground for dismissal.

- Dismissal on economic grounds and because of long-term incapacity for work are undertaken via the **Employee Insurance Agency**. Notice of termination of the employment contract can be given with the dismissal permit of the Employee Insurance Agency.
- Dismissal on other grounds (including inadequate performance) are undertaken via the **subdistrict court**. The subdistrict court then sets aside the employment contract (in case the request to set aside the employment agreement is granted).

Termination/setting aside of the employment contract is possible only if there is:

- a reasonable ground for dismissal; **and**
- reinstatement within a reasonable period is not possible or is not logical, with or without training.

The reasonable grounds for dismissal are listed exhaustively in the Act:

Employee Insurance Agency

- Economic (jobs become redundant); and
- Long-term incapacity for work.

Subdistrict Court

- Frequent absence due to illness;
- Unsuitability for the position (other than because of illness);
- Culpable act or omission of the employee;
- Refusal to work due to a serious conscientious objection;
- Damaged working relationship as a result of which the employer cannot reasonably be required to continue; and
- Other circumstances as a result of which the employer cannot reasonably be required to continue.

It is important that every ground for dismissal which the employer puts forward is assessed separately and that every ground—in accordance with the intention of the legislature—is strictly tested by the Employee Insurance Agency or the subdistrict court.

Ministerial regulations that explain the grounds for dismissal (i.e. the requirements for each ground for dismissal) are still to be followed.

CLA dismissal committee

It is possible in case of a dismissal related to economic reasons (for example, if a job becomes redundant) to create an independent and impartial CLA dismissal committee, which takes over the testing from the Employee Insurance Agency. In that case, the CLA may deviate from the reflection principle (last in, first out principle for each age category). The CLA dismissal committee is thus expected to allow greater scope to select on the basis of the quality of employees in case of reorganizations.

Procedural law of dismissal: Employee Insurance Agency and subdistrict court

Employee Insurance Agency; permission to terminate an employment contract (a-b)

The procedure at the Employee Insurance Agency is instituted by means of a standard form. The employee is then given 14 days to submit a statement of defense. The intention of the legislature is for the procedure at the Employee Insurance Agency to be completed within four weeks, including one written round, in principle, for the employer and employee. If the Employee Insurance Agency needs more information, a second written round will take place. In principle, there is no oral hearing.

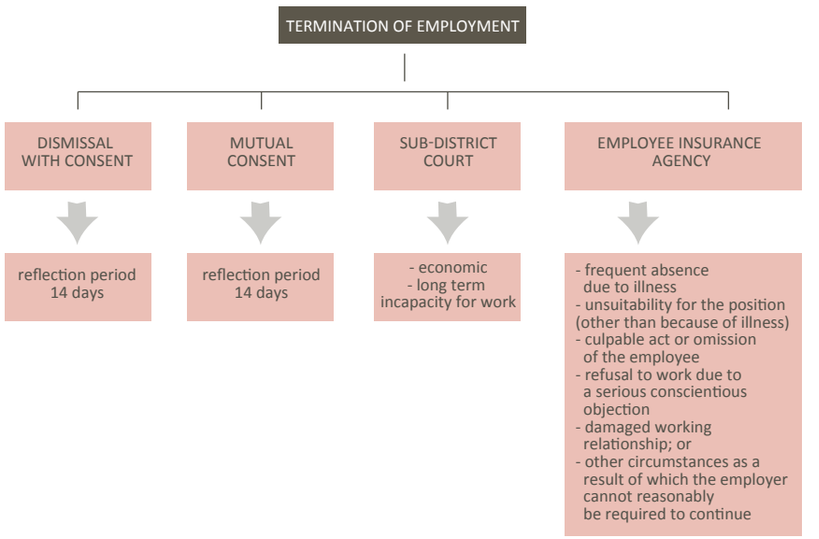
Subdistrict court; petition to set aside an employment contract (c-h)

The procedure at the subdistrict court is instituted by means of a petition, after which the respondent can submit a statement of defense. The oral hearing is scheduled for no later than four weeks after the petition is submitted. The court's ruling usually follows

within four weeks (usually earlier) after the hearing, so that the entire subdistrict court procedure takes around eight weeks. The procedure at the subdistrict court is described in the text above ('The Litigation Process').

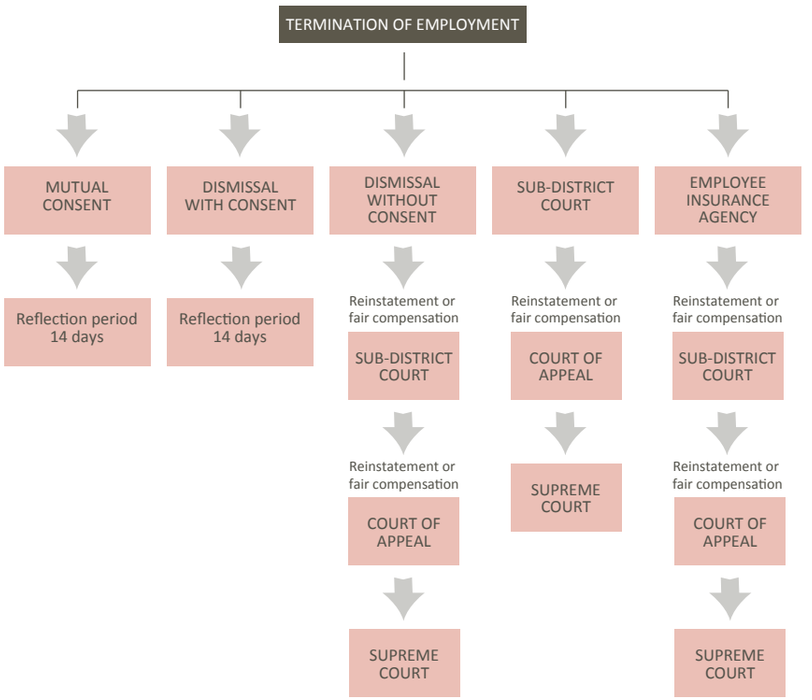
Both after the procedure at the Employee Insurance Agency and after the procedure at the subdistrict court, the employer must pay the employee the statutory transitional payment (*transitievergoeding*) if the employer took the initiative to terminate the employment contract and the employment contract has a duration of at least 24 months. Furthermore, a judge can grant an additional payment (*billijke vergoeding*) in case of a culpable act or omission of the employer.

The law of dismissal, as explained above, is set out schematically below. The diagram also includes the new statutory form of dismissal, namely dismissal with consent (the employee simply agrees, without any further arrangements being made). However, it is expected that this will rarely occur in practice, because the employer and employee will usually agree on the conditions of the dismissal by means of a settlement agreement (mutual consent).



Appeals

Under the new legislation, the employer and employee may appeal against the decision of the subdistrict court or the Employee Insurance Agency. After a procedure before the subdistrict court, an appeal must first be lodged to the Court of Appeal and then to the Supreme Court. After a procedure before the Employee Insurance Agency, an appeal must first be lodged to the subdistrict court, to the Court of Appeal and then to the Supreme Court. The employee may request to be reinstated, or alternatively ask for fair compensation on appeal. If the first request is denied, the employer may again request the termination of the employment relationship at the Court of Appeal, and then at the Supreme Court.



This involves a fundamental change in the law of dismissal. Before 1 July 2015 the law of dismissal was characterized by a short procedure, after which the employer had certainty about the termination of the employment relationship. Under the new law, there is uncertainty about the termination of the employment relationship.

The law of dismissal and the appeal options as from 1 July 2015 are set out schematically above. The overview also shows the possibility of an employer giving notice of termination without consent and which actions the employee can then take.

Procedure to set aside an employment contract at the subdistrict court; counterclaims and related claims

As from 1 July 2015, the employee may, if the employer has submitted a petition to have the employment contract set aside, submit counterclaims in his/her statement of defense. Examples would include claims for wages in arrears, for a number of days' leave not taken, claims on the basis of discrimination or damage to his/her health or a release from the obligations under a non-compete clause. Before 1 July 2015, the employee needed to institute separate proceedings by summons for this purpose. Under the new legislation, it is simpler for the employee to institute such claims.

However, the court has the power to not assess all or part of any counterclaims or other claims related to a dismissal petition, and to separate them. In this way, an expeditious dismissal procedure can still be guaranteed; separate litigation must then take place for the other complex claims.

V. Conclusion

As the new dismissal laws only entered into effect on 1 July 2015, it remains to be seen how procedural employment law practice will develop in the near future, both with regard to general procedural practice and the law of dismissal.

In terms of general procedural practice, it is the express intention of the legislature that employment law proceedings become quicker and simpler. Even so, we doubt whether this will be achieved, particularly in the more complex cases. It is expected that judges will still have to declare the law of evidence fully applicable to such cases, even if every employment law claim regarding dismissal is to be instituted by means of a petition from 1 July 2015. Besides, the possibilities to appeal increased. As a result of this, the complexity and length of such procedures, and the associated costs, will probably remain the same. Complex proceedings usually take as long as one to two years.

In terms of the laws of dismissal, it is expected that the number of terminations of employment contracts by means of a settlement agreement, i.e. by 'mutual consent', will increase. This is in order to buy out the increased risk of litigation, including the chance to appeal, and because an employee will soon be able to simply institute counterclaims in dismissal proceedings (in his/her statement of defense). Employees are expected—for tactical reasons or otherwise—to make frequent use of this, even if their counterclaim is small or has a limited chance of success. An anticipated result of this is that procedural documents will be lengthier and oral hearings will last longer than is currently the case.

An important new law that employers must take into consideration is that employees are entitled to revoke a settlement agreement within 14 days of signature, without having to state reasons. The employee who consented to the termination of the employment contract may also withdraw the consent within 14 days. The employee may do this once within a six-month period. If no reflection period is included, the reflection period is extended to 21 days. This additional protection for the employee obviously implies greater uncertainty for the employer and must be taken into account.

Another important amendment as of 1 July 2015 is the introduction of the statutory transitional payment. Every employee is entitled to this payment if his/her employment contract is terminated (even by operation of law) and has lasted at least 24 months, subject to a few exceptions (including dismissal for urgent cause). The payment amounts to roughly one-third of a month's salary for each year of service. On the face of it, this is considerably less than the severance pay that was calculated until 1 July 2015 on the basis of the subdistrict court formula (roughly one month's salary for each year of service). Collective dismissals as a result of reorganizations will therefore work out considerably cheaper for employers.

At the same time, the requirements for dismissal have become stricter. Recent case law shows that it is more difficult for employers to dismiss an employee as from 1 July 2015. The number of rejections of requests for termination of the employment contract increased substantially. As a result, employers are more willing to pay an employee more than just the statutory transitional payment in order to be able to terminate the employment contract by mutual consent (and avoid uncertain proceedings).

NEW ZEALAND

I. Overview

a. Introduction

The employment litigation system in New Zealand aims to resolve most employment issues quickly and informally, with minimal cost. The Employment Relations Act 2000 ("the Act") includes as its tools for promoting the overall objective of good faith in employment relationships: *"promoting mediation as the primary problem-solving mechanism"*, *"reducing the need for judicial intervention"*, and *"acknowledging and addressing the inherent inequality of … power in employment relationships"*[1].

The Ministry of Business, Innovation and Employment ("MBIE") Mediation Service and the investigative tribunal the Employment Relations Authority are the first line in dispute resolution and adjudication. In most cases, parties will be required to attend mediation before adjudication in the Employment Relations Authority is available. Parties are entitled to appear in the Employment Relations Authority without representation or with non-legally qualified representatives. The specialist Employment Court hears appeals from the Authority (including by a de novo rehearing of the case). Questions of law can be appealed to the Court of Appeal or Supreme Court.

b. Claims

There are a number of different employment claims available in New Zealand, both at common law and under statute. Claims can be filed by any party to an employment relationship (i.e. employee, employer or union). Claims by employers include:

- Disputes regarding the interpretation, application or operation of an employment agreement (whether individual or collective).
- Breach of good faith.
- Claims for penalties for certain breaches of the Act.
- Compliance orders to enforce provisions of an employment agreement or the Act.
- Declarations and injunctions regarding restraints of trade.

A personal grievance claim is the most widely used employee claim in New Zealand. Claims by employees include:

- A personal grievance for unjustified dismissal (including constructive dismissal).
- A personal grievance for unjustified disadvantage (that the employee's employment, or 1 or more conditions of the employee's employment, is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer).
- Claims for arrears of wages, including failure to pay holiday pay under the Holidays Act 2003.
- Discrimination.
- Sexual harassment.
- Racial Harassment.
- Duress in relation to membership or non-membership of a union or employees' organisation.
- Claims relating to the failure to comply with statutory provisions applying in the event of sale, transfer or contracting out of all or part of the employer's business.
- Disputes regarding the interpretation, application or operation of an employment agreement (whether individual or collective).
- Breach of good faith.

[1] Employment Relations Act 2000, s 3.

- Claims for penalties for certain breaches of the Act.
- Compliance orders to enforce provisions of an employment agreement or the Act.
- Declarations regarding restraints of trade.
- Complaints under the Parental Leave and Employment Protection Act 1987.
- Complaints under the Human Rights Act 1993 (which are made to the Human Rights Review Tribunal).
- Complaints under the Equal Pay Act 1972.
- Complaints under the Privacy Act 1993 (which are made to the Privacy Commissioner and the Human Rights Review Tribunal).

c. Administrative Agencies That Investigate or Adjudicate Claims

Adjudication

The Ministry of Business, Innovation and Employment ("MBIE") is the government department that has oversight of employment matters in New Zealand.

The MBIE Mediation Service provides a free mediation service for the resolution of employment relationship problems[2]. MBIE mediators are empowered to adjudicate on matters covered in mediation, provided both parties agree to this in writing at the time[3].

The Employment Relations Authority is the tribunal responsible for adjudicating most employment claims in the first instance. It is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities[4]. The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally[5].

Either party can appeal part or the whole of the Employment Relations Authority determination to the Employment Court. In limited cases, the entire matter may be removed to the Employment Court for hearing in the first instance, for example, where an important question of law is likely to arise[6].

A party may apply to the Court of Appeal for leave to appeal on a question of law that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision[7]. A further appeal (again, by leave) may be pursued in the Supreme Court, although this is very rare[8].

Investigation

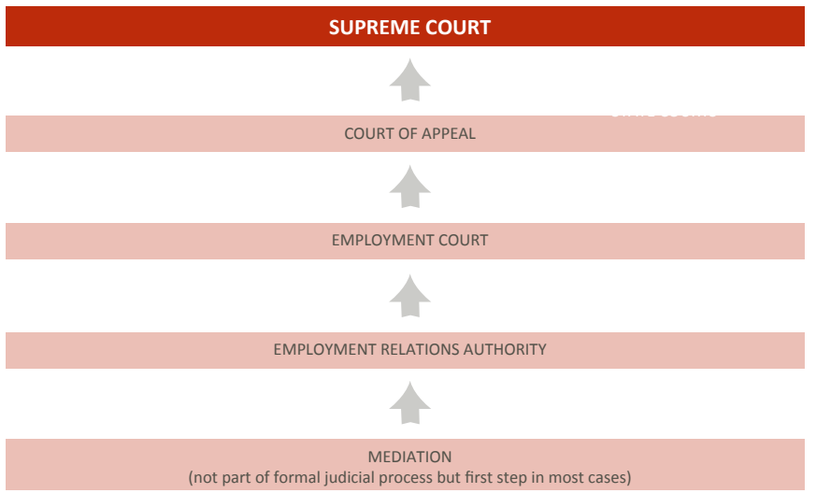
MBIE Labour Inspectors have broad powers to enter workplaces, inspect and review documents, and conduct interviews for the purposes of ensuring minimum employment legislation has been complied with and bringing enforcement action if there is non-compliance[9]. Labour Inspectors can also bring claims for wage arrears in some cases (for example, where holidays are unpaid).

[2]See further information below.
[3]Employment Relations Act 2000, s 150.
[4]Employment Relations Act 2000, s 157.
[5]Employment Relations Act 2000, s 161.
[6]Employment Relations Act 2000, s 178
[7]Employment Relations Act 2000, s 214.
[8]Supreme Court Act 2003, ss.12-16.
[9]Specifically, the Employment Relations Act 2000, the Equal Pay Act 1972, the Holidays Act 2003, the Minimum Wage Act 1983, the Parental Leave and Employment Protection Act 1987, the Volunteers Protection Act 1983 and the Wages Protection Act 1983. See ss. 223 and 224 of the Employment Relations Act 2000.

Worksafe New Zealand ("Worksafe") is New Zealand's workplace health and safety regulator. Worksafe's health and safety inspectors have the power to investigate incidents and accidents and take enforcement action such as issuing improvement, prohibition and infringement notices and pursuing prosecutions in the District Court.

d. Court / Tribunal System

THE NEW ZEALAND COURT SYSTEM AS RELATED TO INDUSTRIAL RELATIONS AND EMPLOYMENT



e. Alternative Dispute Resolution (ADR)

The MBIE provides a free mediation service for the resolution of employment relationship problems. This service is widely used by parties to resolve employment issues, both before and after proceedings have been filed. There is a high settlement rate, with around 80% of disputes settling in mediation. Before it hears a matter, the Employment Relations Authority or Employment Court must consider mediation and, where the parties have not participated in mediation, in most cases will direct the parties to attend mediation before the matter can be heard[10].

Parties can participate in mediation outside of the MBIE service[11]. However, if this occurs, it would be common for the parties to agree to have a settlement agreement signed by a MBIE mediator[12]. Private arbitration is also available[13]. The Arbitration Act 1996 does not apply to such arbitrations and the parties must formulate their own process.

[10]Employment Relations Act 2000, ss. 159 and188(2)
[11]Employment Relations Act 2000, s 154.
[12]Employment Relations Act 2000, s 149.
[13]Employment Relations Act 2000, s 155.

II. The Litigation Process

a. Typical Case

As set out above, there are many forms of employment claims, but a "typical case" is likely to involve an employee who has been dismissed from their employment. A dismissal could have occurred for any number of reasons, including for serious misconduct, poor performance, redundancy, or medical incapacity.

Section 103A of the Act requires that a dismissal (or action) be what a fair and reasonable employer could have done in all the circumstances. Accordingly, the typical claim by the employee would be that they have been unjustifiably dismissed when measured against section 103A. A claim may seek reinstatement, in which case a claim may also involve an interim reinstatement application pending the determination of the employee's claim that they have been unjustifiably dismissed.

i. Steps in the Process

The process in a standard employment case usually commences with the filing of a Statement of Problem in the Employment Relations Authority. This is an informal document, which can be downloaded online from the Employment Relations Authority website. A respondent has 14 days to file their Statement in Reply.

If the parties have not attended mediation, the Employment Relations Authority will usually issue a direction that the parties attend mediation before the matter proceeds to hearing (known as an "investigation meeting").

If the matter has not settled in mediation, or the parties have already attended mediation voluntarily without resolution, the Employment Relations Authority will generally hold a telephone conference with the parties (or their representatives) to address procedural and preliminary matters prior to an investigation meeting. A date for an investigation meeting will usually be set at that teleconference and advised to the parties.

Ordinarily, witnesses who will give evidence will file written witness statements in advance of the investigation meeting, and provide relevant documentation either voluntarily or in accordance with a direction by the Authority to provide information or documentation.

The Authority Member has a broad discretion in the way the investigation meeting proceeds. Witnesses may be examined in turn or all at the same time. Parties' representatives are entitled to be present and to question (and cross examine) witnesses[14]. There is no transcript of the evidence. The Authority Member will usually invite the representatives (if any) to make oral submissions at the end of the hearing and/or provide written submissions.

Authority Members make oral determinations or an oral indication of preliminary findings wherever practicable at the end of the investigation meeting, which must then be recorded in writing. If it is impracticable to do so orally, then the Authority Member must issue a written determination within three months after the investigation meeting.

ii. Pre-Trial Proceedings

Interlocutory or pre-trial proceedings are not the norm. There is no formal discovery process in the Authority, but the Authority does have broad powers to investigate,

[14]The right to cross examine is included at s. 160(2A) of the Emloyment Relations Act 2000.

including requiring witnesses to appear and provide relevant documents[15]. It is not uncommon for parties to apply for this power to be exercised. An employee can also make a request under the Privacy Act 1993 for all "personal information" the employer holds about him/her (this will cover most documents required for litigation) and, during a decision making process, the employee is also entitled to access information relevant to a decision (which will include all relevant documents) before a decision is made[16]. Relatively common interim applications made to the Authority include applications for interim reinstatement pending hearing of an unjustified dismissal grievance.

iii. Role of Witnesses, Counsel and Court/Tribunal

Witnesses who provide written statements are required to attend the investigation meeting (unless the Authority Member has decided otherwise) and affirm or swear any written statement at the investigation meeting. They are not required to read their witness statement. They must answer questions from the Authority Member and from any of the parties' representatives.

A party can elect to be represented by a solicitor, barrister, non-legally qualified advocate, union official or be self-represented. If counsel represents a party, their role is to cross-examine witnesses and make submissions, and otherwise act as representative.

The role of the Authority Member is to conduct an investigation, and issue a determination in relation to the claim(s). Employment Court proceedings are adversarial, and so the role of a Judge is to issue a judgment on the claim(s).

iv. The Appeal Process

Challenges to determinations of the Authority are made to the Employment Court[17]. Either party can appeal part of the Authority determination (called a non de novo challenge) or the whole matter (de novo challenge) to the Employment Court. In limited cases the entire matter may be removed to the Employment Court for hearing in the first instance, for example, where an important question of law is likely to arise[18]. The Employment Court usually consists of one judge sitting alone, but the Chief Judge can direct that a matter should be heard by a full Court[19].

The Employment Court is a specialist court of record, with similar powers, status and procedures to the High Court. The Court has been left to determine difficult issues of law, issues where a large number of employees are likely to be affected, such as torts or injunctive relief in relation to industrial action, and challenges to the determinations of the Authority[20]. In addition, the Employment Court is the only employment institution that has the power to make freezing orders and search orders (formerly known as *Mareva* injunctions and *Anton Piller* orders)[21]. It cannot, however, make decisions about the procedure followed by the Authority nor can it direct or advise the Authority in relation to the exercise of its investigative power[22].

[15]Employment Relations Act 2000, s 160.
[16]Employment Relations Act 2000, s 4.
[17]Employment Relations Act 2000, s 179
[18]Employment Relations Act 2000, s 178
[19]Employment Relations Act 2000 ss. 208 and 209.
[20]Employment Relations Act 2000 s. 143(g).
[21]Employment Relations Act 2000 s 190(3).
[22]Employment Relations Act 2000 s 188(4).

b. Costs, Attorney's Fees, Remedies / Damages, Timing, ...

Parties are not required to have representation in the Authority and it is not uncommon for one or both parties to be unrepresented. Representatives do not have to be admitted to the bar or even legally qualified (non-lawyer representatives are known as "advocates")[23]. All lawyers in New Zealand are admitted to the High Court of New Zealand as barristers and solicitors and can appear in any court. There is also an independent bar of barristers. Some of these specialise primarily or solely in employment law, acting as litigators or, in some cases, practising generally in employment law.

Costs of obtaining representation vary greatly. There are a number of advocates who provide representation for low rates or on a "no win no fee" basis. Lawyers usually charge an hourly rate, which will vary depending on the seniority of the lawyer and the area of New Zealand. Costs of representation in the Authority for a typical one-day hearing varies from under $5,000 to $20,000 (plus GST) or more.

In the Authority, a successful party will usually only obtain costs on the basis of a daily tariff. This is currently $3,500 per day of an investigation meeting. *Calderbank* offers (or offers without prejudice save as to costs) can lead to an increased costs award, although costs are ultimately discretionary.

For a personal grievance claim, the key remedies are reinstatement into the employee's former position or into a position no less advantageous to the employee, reimbursement of lost remuneration and compensation for humiliation, lost dignity and injury to feelings ("distress damages").

In most cases, an employee who succeeds on an unjustified dismissal claim is entitled to the lesser of their actual lost remuneration or 3 months' ordinary remuneration. Awards can be made beyond that, provided the employee can show that he/she has made reasonable efforts to mitigate loss by looking for other work. Distress damages can be awarded in situations where an employee has an unjustified disadvantage grievance, as well as in an unjustified dismissal claim. These awards vary greatly depending upon evidence of distress, and generally range up to $30,000, with an average award being approximately $5,000 to $7,000.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Unions pay a key role in many industries in New Zealand, such as ports, the health sector, various large nationwide retailers, and the public sector. In the New Zealand employment legal system, unions have a special status and role, and only unions are recognised as representing collective interests and can engage in collective bargaining.

A union is a party to a collective agreement, which covers either specific employees or particular types of work/employees. A union may therefore bring a claim to enforce a collective agreement or seek a remedy for a breach. Collective agreements are for a maximum of 3 years' duration.

III. Tips to Avoid Litigation

To avoid litigation, it is essential that good employers have strong human resources systems in place. This starts with robust hiring systems, including well-documented pre-employment checks, which comply with discrimination and privacy law.

[23]Employment Relations Act 2000 Schedule 2, clause 2.

An employer should ensure all employees enter into well-drafted employment agreements at the time they accept employment. New Zealand employment agreements have specific legal requirements.

Good systems for managing day-to-day employment issues, such as performance or conduct issues, relationship issues, bullying and harassment, are essential. Policies are invaluable to ensure consistency and also allow the employer to make and change rules with some flexibility.

Prompt and consistent communication about day-to-day employment issues when they arise is the key to ensuring the employer can show they have taken the appropriate steps to remedy issues before they proceed to litigation.

MBIE mediators can sign a settlement agreement under a process set out in section 149 of the Act, as this has advantages for enforcement (for example, a penalty may be sought for a breach). In particular, a settlement agreement of this type is final, binding and enforceable, and may not be cancelled or brought before the Authority except for enforcement purposes. The section 149 process is also available for settlement agreements negotiated between the parties (or their representatives) without a mediator and it is good practice to ensure all settlement agreements are formalised using this process. Parties can participate in mediation outside of the MBIE service[24].

IV. Trends and Specific Cases

In March 2015, as part of a package of changes to employment legislation which came into force, significant changes to collective bargaining occurred, including a removal of the presumption that the parties will conclude a collective agreement and by allowing the Employment Relations Authority to determine that bargaining is at an end. Litigation on issues relating to these matters is now starting to proceed through the Courts.

Further changes to the law included exempting an employer that employs 19 or fewer employees from the requirement to employ employees in specific transfer of undertakings situations. Such a party is now required to provide a specific warranty. This means that employees of an employer that contracts out its work to another employer (for example) may not have an automatic right to transfer to the other party. Further changes occurred to the right to request flexible working arrangements.

The Health and Safety at Work Act will, from April 2016, change New Zealand's health and safety laws, which will include specific requirements for employee participation in health and safety matters. Regulations to govern those specific requirements are currently being consulted on and are yet to be passed.

There has been some suggestion in the New Zealand media that "zero hours contracts" were becoming more established. As a consequence, an Employment Standards Bill has been introduced to Parliament. This Bill has not yet been passed.

The Bill defines such contracts with reference to "availability provisions". These are defined to be employment relationships where an employee's performance of work is conditional on the employer making work available to the employee, where there is no obligation on the employer to in fact make work available, but the employee must accept any such work made available. The Bill provides that such an "availability provision" is unenforceable unless the employment agreement provides for the payment of "compensation" to an employee for making him or herself available to perform the work.

[24]Employment Relations Act 2000, s 154.

An employee is entitled to refuse to perform that work if the employment agreement does not have such compensation.

The Government has proposed further changes to parental leave provisions as part of the Bill. These include: extending parental leave payments to non-standard workers (such as casual, seasonal, and employees with more than one employer) and those who have recently changed jobs, extending entitlements to primary carers and enabling employees to take the leave more flexibly, by mutual agreement with their employer.

There is also a private member's bill before Parliament, which proposes to extend the period of paid parental leave to 26 weeks (Parental Leave and Employment Protection (Six Months' Paid Leave and Work Contact Hours) Amendment Bill). This Bill has been referred to a Parliamentary Select Committee for consideration, but as this is not a government bill, it is unclear whether it will pass into law.

There are some specific cases of interest at present.

The Supreme Court declined an application for leave to appeal a decision of the Court of Appeal in *Service and Food Workers' Union Nga Ringa Tota Inc. v Terranova Homes and Care Ltd*[25]. That was a landmark case examining the Equal Pay Act 1972. The Employment Court had held that an employer will not necessarily be able to defend an equal pay claim by pointing to male employees who work in the same position and who are paid the same, and that had been confirmed by the Court of Appeal. It is now for the Employment Court to apply the principles that it has established in deciding whether the employer has breached the Act. This case is yet to be heard. Whatever the outcome of that decision, it is likely to have far-reaching implications in industries dominated by female labour, such as care giving in rest homes and cleaning.

V. Conclusion

The current New Zealand system of having a low level investigative tribunal for speedy and relatively informal adjudication of employment disputes in the first instance, with the Employment Court as a specialist appeal and trial court of record, has been in place for nearly 25 years now. The Authority itself has been operating for nearly 15 years.

It is always difficult to balance the widely different interests involved in employment disputes and different interest groups will have different views on whether the current system meets the Act's goals of *"promoting mediation as the primary problem-solving mechanism"*, *"reducing the need for judicial intervention"*, and *"acknowledging and addressing the inherent inequality of…power in employment relationships"*[26]. However, the fact that this framework has been in place for some time without significant change indicates that, for the most part, the balance is being struck.

[25][2014] NZSC 196.
[26]Employment Relations Act 2000, s 3.

NORWAY

I. Overview

a. Introduction

The rules of procedure in Norway are based on the principle that disputes arising from individual employment contracts shall be settled by the general courts – the districts courts – and may be appealed to the Courts of Appeal, and possibly to the Supreme Court (any matter brought before the Supreme Court must initially be considered by the Appeals Selection Committee). However, there is a special court for collective agreement disputes: the Labor Court. The Labor Court has jurisdiction over:

- Disputes concerning the validity, interpretation and existence of collective agreements.
- Disputes concerning industrial action that contravenes the negotiated obligation to observe peace or the Labor Disputes Act's peace obligation provisions.
- Issues concerning compensation for breach of collective agreement or the statutory peace obligation.

The Labor Court has exclusive jurisdiction over these areas. Furthermore, the Labor Court is a one-stop shop, as its judgments, as a rule, cannot be appealed.

The Labor Court does not have jurisdiction in individual disputes, unless individual claims arise from breaches of collective agreements, provided these claims follow as a direct consequence of the judgment of a collective agreement dispute in the same case.

In all other matters of labor law, jurisdiction resides with the ordinary courts. Accordingly, it is the ordinary courts that have jurisdiction over rights issues concerning individuals, whether that be statutory or contractual rights, such as dismissals, wage claims, discrimination in hiring or employment, restrictive covenants, work safety and protective labor legislation, pensions and social security.

As already mentioned, the Labor Court has a strictly limited power to determine claims based on individual employment contracts. Such claims may be adjoined to a Labor Court case by the competent organization (for example, the collective agreement party having the right of action). However, the organization does not have an obligation to adjoin an individuals' claim to a collective agreement dispute. The right of the individual to bring a claim in the ordinary courts is not dependent on a refusal by the organization to pursue the individuals' claim in a case before the Labor Court.

b. Claims

Employees can bring all kind of employment claims to the courts in Norway: wrongful dismissals, wage claims, discrimination in hiring or employment, restrictive covenants, work safety and protective labor legislation, data protection, pensions and social insurance.

c. Administrative Agencies that Investigate or Adjudicate Claims

A number of administrative bodies have been set up to deal with employment and labor law related disputes. These bodies provide a more rapid and cheaper resolution of disputes, and also a need for expertise.

The National Insurance Organization and the National Insurance Court

The National Insurance Organization (NAV) administers the National Insurance Scheme. The legal framework for the National Insurance Scheme is derived primarily from the National Insurance Act. The National Insurance Scheme covers a range of benefits

including sick pay, work assessment allowance, disability pension, unemployment benefits, retirement pensions, survivor's pension, occupational injury benefits, healthcare allowance, benefits to single parents and benefits during pregnancy, birth, adoption and parental leave.

Decisions by the National Insurance Organization may be appealed to the National Insurance Court (Trygderetten). The National Insurance Court is an extra-judicial tribunal whose decisions may be appealed directly to the Courts of appeal, bypassing the district courts.

The Equality and Anti-Discrimination Ombud and the Equality and Anti-discrimination Tribunal

The Working Environment Act sets out rules on protection against discrimination within the workplace. The Gender Equality Act, the Ethnicity Anti-Discrimination Act, the Sexual Orientation Anti-Discrimination Act and the Anti-Discrimination and Accessibility Act also govern protection against discrimination in working life. These acts apply to all aspects of an employment relationship and sets out protection against both direct and indirect discrimination.

Two independent administrative agencies enforce the anti-discrimination rules: the Equality and Anti-Discrimination Ombud (Likestillings- og diskrimineringsombudet) and the Equality and Anti-discrimination Tribunal (Likestillings- og diskrimineringsnemnda).

The handling of complaints by the Ombud is free and normally takes less time than proceedings before the courts. When the Ombud has concluded that there has been a breach of law, the party responsible is obliged to rectify its conduct in accordance with the Ombud's statement. The Ombud's statements are, however, not legally binding in the way a court judgment is. The homepage for the Ombud notes that most parties opt to rectify their conduct in accordance with the statement.

The Ombud cannot impose any legal sanctions; however, the case can be appealed to the Equality and Anti-Discrimination Tribunal. If the Tribunal upholds the statement by the Ombud, the Tribunal can issue orders to the effect that the employer, for instance, must raise an employee's wages, or change a discriminatory practice. The Tribunal can, in some cases, impose daily penalties on a party if the responsible party does not make adjustments in accordance with the Tribunals' decision.

An order to pay compensation for breach of the prohibition on discrimination can only be imposed by the ordinary courts.

The Labor Inspection Authority

The Labor Inspection Authority (Arbeidstilsynet) is the public body responsible for ensuring that enterprises comply with the provisions of the Working Environment Act and the Annual Holidays Act.

In dealing with enterprises that do not comply with the requirements of the Working Environment Act, the Labor Inspection Authority may respond with orders to correct the situation within a given time limit. This is done in writing, and the recipient has the opportunity to lodge an appeal. If the order is not complied with, coercive fines may be imposed.

Furthermore, an enterprise may be shut down with immediate effect if the life and health of its employees are in imminent danger. Shutdowns may also be imposed when enterprises fail to comply with orders given.

The authority may report enterprises to the police for serious breaches of the Act. A serious violation can result in fines, or, in the worst case, imprisonment.

The Data Protection Authority and the Privacy Appeals Board

The Personal Data Act sets out rules relating to the processing of personal data. These data protection rules apply to all aspects of an employer's processing of employees' personal data.
Two independent administrative agencies enforce these data protection rules: the Data Protection Authority (Datatilsynet) and the Privacy Appeals Board (Personvernnemnda). Handling of complaints by both agencies is free.

The Data Protection Authority gives a request or, on its own initiative, its opinion on matters relating to the processing of personal data. The Data Protection Authority may order that the processing of personal data in violation of the provisions of the Personal Data Act shall cease, or shall be subject to certain conditions, which would cause the processing to come into compliance with the Act. The Data Protection Authority may issue a non-recurrent fine or day fines, which will run until the order by the Data Protection Authority has been complied with.

Decisions made by the Data Protection Authority may be appealed to the Privacy Appeals Board. The Privacy Appeals Board's decisions may be appealed to the ordinary courts.

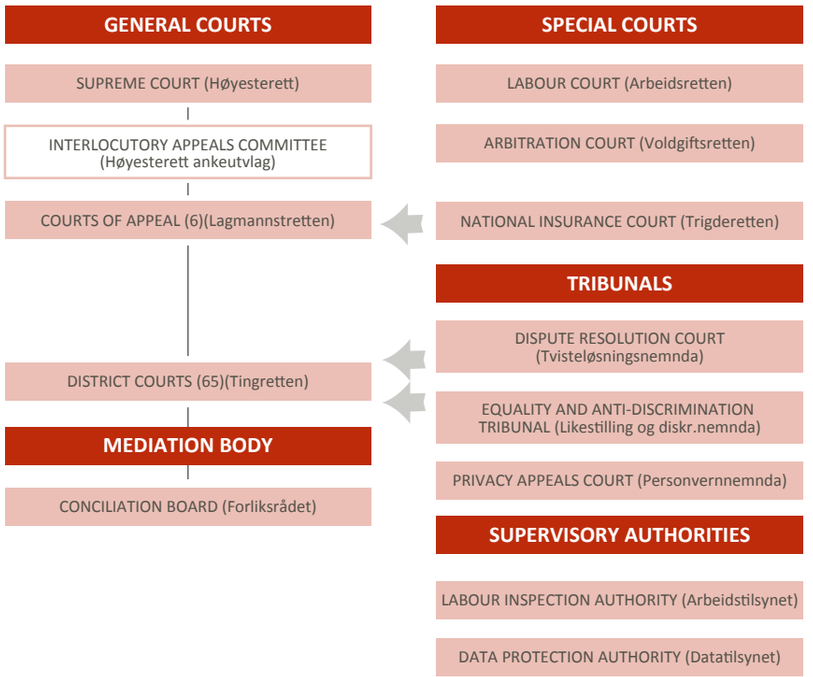
An order to pay compensation for breach of the rules relating to the processing of personal data can only be imposed by the ordinary courts.

The Dispute Resolution Board

Disputes between the employer and the employee concerning the entitlement to a leave of absence to care for a child, prenatal examination, pregnancy leave, maternity leave, parental leave, partial leave of absence, time off for nursing mothers, child's or child-minder's sickness, care and nursing of close relatives and/or other close persons, educational leave, military service, public office and religious holidays may be resolved by the Dispute Resolution Board (Tvisteløsningsnemnda). The same applies for disputes concerning preferential rights for part-time employees.

A dispute may not be brought before the general courts until the Board has reviewed the case. When the dispute is reviewed by a court of law, the conclusion arrived at by the Board shall stand while the matter is under review. The court may, if so demanded by either of the parties, decide upon another temporary arrangement. The time limit for bringing the dispute before the courts is eight weeks from the date of the Board's decision.

d. Court / Tribunal System



The general courts are comprised of the Supreme Court, the Courts of Appeal and the District Courts. The Arbitration Courts and the Labor Court are also included in the Norwegian court and tribunal system.

The Supreme Court

The Supreme Court (Høyesterett) pronounces judgments in the final instance. Any matter brought before the Supreme Court, must initially be considered by the Appeals Selection Committee. As well as adjudicating on appeals against interlocutory orders, the Appeals Selection Committee also functions as a filter for appeals against judgments. An appeal cannot be brought before the Supreme Court without leave of the Appeals Selection Committee.

Each case is usually decided by five judges, but certain cases may be decided by 11 judges (grand chamber) or all 20 judges of the court (in plenary).

The Courts of Appeal

The country is divided into six appellate districts. The Courts of Appeal (lagmannsrettene) are:

- Borgarting Court of Appeal in Oslo;
- Eidsivating Court of Appeal in Hamar;
- Agder Court of Appeal in Skien;
- Gulating Court of Appeal in Bergen;
- Frostating Court of Appeal in Trondheim; and
- Hålogaland Court of Appeal in Tromsø.

Civil cases are decided by three professional judges. In addition, two lay judges (meddommere) take part in the decision, if so demanded by one of the parties or the court so decides. If the parties and the court agree that lay judges are not necessary, the court may hear the case without lay judges. In labor law cases, the lay judges are appointed from persons with knowledge of labor life.

The District Courts

The District Courts (tingrettene) are the first instance courts of justice. Civil cases are decided by one professional judge, but if so demanded by the parties, two lay judges shall also participate. As regards labor law cases, the lay judges are appointed from persons with knowledge of labor life.

The Labor Court

Norway has only one Labor Court (Arbeidsretten). The Labor Court is composed of a President and six members, three judicial judges and four judges nominated by the labor market parties. The President and one of the professional judges must have all the qualifications prescribed for a Supreme Court Judge. In practice, however, both neutral members alongside the President have been appointed among persons who meet those requirements. The President and the Vice President are the only judges in a full time position with the court. The remaining judges serve on a part time basis, appearing when required. The four lay judges are chosen among persons nominated by the major organizations. Only employers' associations with at least 100 members and 10 000 employees, and any trade unions with at least 10 000 members, may each nominate two members, with substitutes.

The Court is organized as a one-division court. Each case is heard by the Full Court and decided by majority vote of the seven sitting judges. In fact, in two thirds of the cases the judgment is unanimous. Judgments by the Labor Court are final.

The jurisdiction of the Labor Court is confined to disputes pertaining to collective agreements and industrial action. The Court handles cases concerning interpretation, validity and existence of collective agreements, questions of breach of collective agreements and of the peace obligation, and claims for damages resulting from such breaches.

In collective agreements' disputes, only the superior party to the agreement, normally a central organization (trade unions, employers' associations) may act as plaintiff. Likewise, at the outset, only the superior party on the other side may act as defendant.

Boycotting acts are dealt with by the ordinary courts. The parties may agree that disputes regarding the interpretation of a collective agreement, as well as questions regarding compensation caused by violations of a collective agreement, are to be decided upon by a court of arbitration.

e. Alternative Dispute Resolution (ADR)

Pursuant to the Norwegian Dispute Act, and notwithstanding any mediation contract, disputing parties are obliged to investigate the possibility of, and attempt, reaching an amicable settlement of the dispute before an action is brought before the court. This can be undertaken through conciliation before the Conciliation Board, non-judicial mediation or by bringing the dispute before a non-judicial dispute resolution board. If a party resists adequate attempts of reaching an amicable settlement, this may inflict on a later court decision regarding the legal costs in connection with the dispute. A party's non-compliance with the provision will, however, not be a ground for dismissal of the case.

The Conciliation Boards

There is a Conciliation Board (Forliksråd) in every municipality. It is the only truly lay tribunal; consisting of three lay members elected by the municipal council for a four-year period. The conciliation board has a double function. Firstly, as its name indicates, the conciliation board shall mediate between parties with a view to achieving a friendly settlement, and secondly, it is empowered by statute to adjudicate civil claims if mediation is unsuccessful. The power of the conciliation board to deliver default judgments is particularly important in practice, as it provides the creditor of an uncontested claim with the necessary legal basis for execution. The board's powers to pass judgments have been extended step by step, and since 1993 have covered any asset claim (whether contested or not, and regardless of amount) if both parties met before the board and one of them requested judgment. By caseload, the conciliation boards play an important part in Norwegian civil justice.

The Dispute Act upholds the general duty to bring the case before the conciliation board before proceedings in asset claims are instituted in the district court, albeit with a number of exceptions: cases where extrajudicial mediation has taken place, the merits have been decided by a tribunal, the disputed claim exceeds NOK 125.000 and both parties are assisted by a lawyer. The authority to pass judgments is also maintained, but is limited to cases concerning asset claims where (i) the parties consent, (ii) the claims do not involve a serious objection,(iii) if contested, they do not exceed NOK 125.000, or (iv) the judgment is by default.

With regard labor law cases, the WEA Section 17-1 (3) stipulates that claims which are subject to negotiations pursuant to Section 17-3 or that have been reviewed by a Dispute Resolution Board shall not be subject to mediation by a Conciliation Board.

Arbitration

In general, parties may agree in writing to arbitration if they have the right to dispose of a matter. The decision of an arbitration court has the same effect as a decision of an ordinary court, but can be appealed against only if the parties so agree.

Employees cannot enter into an agreement in advance, which states that a dispute concerning dismissal, etc., shall be brought before an arbitration board. A hearing before an arbitration board may, however, be agreed upon as soon as the dispute is a fact and has commenced. Additionally, the employer may enter into a written agreement with the chief executive of the enterprise to the effect that disputes in connection with termination of the employment relationship shall be settled by means of arbitration.

Judicial mediation before the ordinary courts

Judicial mediation is an alternative approach to settling disputes before advancing to proceedings in court. Judicial mediation is often easier, faster and cheaper for the

parties than proceedings in court. If the parties reach an agreement during the judicial mediation, the case can be concluded in the form of an in-court settlement. If the case is not concluded at mediation, it shall continue to be heard before the District Court.

II. The Litigation Process

a. Typical Case

Employment contracts that are not fixed-term are terminated by notice or by the execution of a severance agreement. Most labor law cases disputed in the court of law in Norway are claims of unfair dismissals. Employees may not be dismissed unless the dismissal is objectively justified on the basis of circumstances relating to the undertaking, the employer or the employee.

The Work Environment Law provides detailed procedural rules for disputes over wrongful dismissal. Furthermore, the general rules of procedure pursuant to the Act relating to the Resolution of Disputes (the Disputes Act) will apply.

Before making a decision regarding dismissal with notice, the employer shall, to the extent that is practically possible, discuss the matter with the employee and the employee's elected representatives, unless the employee does not wish for this to occur.

When dismissed, the employee has the right to demand negotiations with the employer. The demand must be submitted in writing within two weeks of receiving the notice. The employer is responsible for making sure that negotiations are held no later than two weeks after receiving the demand. If the employee takes legal action instead of negotiating, the employer may demand a negotiation meeting. The employee has a right to be assisted during negotiations by a representative or another adviser. Minutes shall be made of the negotiations.

Within eight weeks of the conclusion of negotiations, the employee may bring action before the District Court to hear dismissal disputes, etc. If negotiations are not demanded, the action has to be brought within eight weeks of receiving the notice of termination. If the employee is only claiming damages, the deadline for taking action is six months, unless the parties agree to a longer deadline for taking action. If the employee challenges the notice of termination, the employee will be entitled to remain in his or her position until a court has settled the case, provided that the employee has completed his or her trial period. This, in a worst-case scenario, may take two to three years. During this period, the employee has the right to keep working as usual and to keep receiving a salary as usual. If the court finds it unreasonable to sustain the employment during the hearings, it may issue a ruling that the employee leaves the job, if so demanded by the employer.

i. Steps in the Process

A lawsuit is instituted by filing a writ of summons with the court of competent jurisdiction. The writ must include certain information, such as the identities of the parties and the competent court, the plaintiff's claim, a detailed statement of the facts and legal arguments on which the plaintiff bases his or her claims, and a reference to the documents upon which the plaintiff relies and, if appropriate, witnesses, expert judges, expert opinions etc.

As a rule, legal proceedings must be instituted against a person before the district court in the judicial district of his or her residence. A company must be sued before the district court in the judicial district of its head office, or, if no such head office exists, the judicial district of a board member or a member of the management board.

Upon receipt of the writ, the court will serve the writ on the defendant, who is given the opportunity to file a statement of defense within a stipulated date, normally three weeks. The statement of defense must include the defendant's claim, a statement of counterclaim, if any, a detailed statement of the facts and legal arguments on which the defendant bases his or her claims and/or counterclaims, a reference to the documents upon which the defendant relies and the defendant's postal address in Norway. If no statement of defense is filed within the fixed time-limit, the court will normally grant a default judgment.

ii. Pretrial Proceedings

After the defendant has filed a statement of defense within the fixed time-limit, there will be a preliminary hearing before the court (normally held as a conference call), where the parties must consider judicial mediation, the legal and factual circumstances and the extent of evidence, such as expert opinions and witnesses. At the preliminary hearing the court will list the case for trial.

The court shall proceed with the case as quickly as possible and, if necessary, schedule the case out of turn. The main hearing shall be scheduled within six months after the writ was filed. In the main hearing, the court shall be convened by the district court with lay judges from special committees familiar with employment relations, unless the parties agree that lay judges are unnecessary.

iii. Role of Witnesses, Counsel and Court / Tribunal

During the main hearing, the parties will be given the opportunity to present the case and adduce evidence. The Disputes Act imposes a duty to give evidence on all witnesses of fact, thus such witnesses must attend trial and be cross-examined on their evidence. Only in limited circumstances may the witnesses be privileged. Witnesses are examined in Norwegian, or by means of an interpreter before the court.

A typical main hearing may take from one to three days. The court may at all times during the trial try to mediate a settlement.

iv. The Appeal Process

Rulings by the District Court may be appealed to the Court of Appeal, and further to the Supreme Court. Also in the main hearing before the Court of Appeal, the Court is convened with lay judges unless the parties agree that lay judges are unnecessary. The appeals deadline is one month.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The district courts handled 1006 labor disputes in 2013. The trial period for these cases is normally 4.5 months.

The costs connected with a lawsuit in Norway are normally legal fees. Basically, legal fees include lawyers' fees. Lawyer's fees vary from NOK 1,500 per hour to NOK 4,500 per hour. A party must pay all costs connected with a lawsuit, at least until the case has been closed. As part of the judgment, the court awards costs to the successful party. As a rule, the unsuccessful party must reimburse the other party for all costs connected with the lawsuit. In reality, the successful party's costs are only partly reimbursed. The reason being is that the court will only award the reimbursement of costs that are reasonable. Parties must therefore be prepared to bear parts of their own costs even if they succeed in the lawsuit. The court may, under specific circumstances, decide to derogate from the general rule that the unsuccessful party bears all costs.

In cases of unfair dismissals, an employee may claim compensation. There is no statuary fixed amount to be paid. Compensation is estimated at the amount the court deems reasonable, and may include both financial and non-financial losses. Non-financial loss will normally not exceed NOK 100,000, but may also be higher, for instance, in anti-discrimination cases.

c. Trade Unions, Works Councils and Other Employee Representative Bodies

In disputes involving collective agreements, only the superior party to the agreement, normally a central organization, may act as plaintiff. Likewise, at the outset, only the superior party on the other side may act as defendant.

In Labor Court cases, the organization parties (trade unions, employers' associations) appear and act in their own name, as well as on behalf of their members (subordinate organizations, individual employees or employers being bound by the collective agreement). However, a suit may also be filed against members, for instance, to declare a decision by an employer invalid or against employees for the payment of damages. In such instances, the relevant member must be sued and then obtain status as a defendant alongside the defendant organization party.

The rules pertaining to the procedure in labor court cases today are contained in the Labor Disputes Act (LDA).

The Labor Disputes Act lays down a requirement that prior negotiation on the disputed issue(s) – so-called "dispute bargaining" – has been conducted or that, at least, serious attempts to engage the opposite party in "dispute bargaining" have been made. Therefore, a case will normally not be admitted by the Court unless the dispute has been subject to negotiation between the parties to the collective agreement at issue prior to the filing of a complaint.

Although there are a number of differences, for example, regarding the status of parties and litigation costs, the essential features of the procedure in labor court cases correspond to the ordinary civil procedure. Nevertheless, the legal situation leaves the Labor Court a certain freedom in procedural matters, which allows for a high degree of expediency, if needed, and somewhat less formalized proceedings than in the ordinary courts.

Labor Court judgments are final and immediately enforceable in the same way as are Supreme Court judgments. There is no "contempt of court" remedy available.

In accordance with well-established Labor Court case law, costs are generally not awarded in ordinary disputes concerning interpretation of collective agreements. However, in disputes on the lawfulness of an industrial action, the common practice is that costs are awarded against a "guilty" party. In cases regarding breach of collective agreement, the court sometimes awards case costs.

No court fees are charged for labor court cases. The basic legislative consideration being that court fees should be no argument or obstacle to resolve rights' disputes peacefully and by adjudication.

d. Specialized Litigation Bar

A Norwegian lawyer is licensed to litigate in the District Courts and the Courts of Appeal. To appear on behalf of a client before the Supreme Court requires a right of audience.

III. Tips to Avoid Litigation

The daily operations of HR and personnel managers are characterized by a broad set of legal issues related to the management of employees. Major conflicts may often be avoided and constructive solutions will be reached quicker by strengthening the HR managers' and the personnel managers' professional confidence through competence training. However, a quick phone call to the company's employment lawyer may also often be enough.

Written internal policies and legal templates are also key factors.

The employer's management prerogative is limited by legislation, collective agreements, individual agreements and general principles of fairness. Hence, documentation of the employer's grounds for decision-making and fair process is important.

Experience shows that it is essential that cooperation between company representatives and the employee representatives takes place in an efficient and reliable manner, and that the employee representatives are equipped and able to fulfill their tasks under Norwegian law and collective agreements. Mutually correct and trusting behavior between the company representatives and the employee representatives is thus an essential prerequisite for cooperation between the parties to succeed. The courts are also cautious to overrule decisions based on a common understanding between employer and employee representatives. Discussions with employee representatives and safety delegates will thus create leeway for the employer.

IV. Trends and Specific Cases

The changes to the Working Environment Act, which came into force on July 1, 2015, allow employers to hire temporary workers without any specific reason (contrary to the general rule, which is that all employees shall be hired on a permanent basis). The intention of the amendments was to give people outside the working life a chance to try working, and to give businesses greater flexibility. Some limits on this liberalization, however, were imposed to prevent employers from hiring on a temporary basis only.

The amendments to the Working Environment Act also include several changes regarding working hours, retirement age, collective class actions, hiring workers from temporary-work agencies and the penal provisions. For example:

- Changes have been made to the regulations on the average calculation of working hours, overtime work and Sunday work. The amendments make it possible for employers and employees to reach agreements regarding the average calculation of working hours without the involvement of unions or the Labor Inspection Authority.
- The current limit on termination of employment on account of age has been increased from 70 years to 72 years and the company-specific age limit of 67 years has been increased to 70 years.
- The collective right of action for trade unions regarding unlawful hiring has been repealed.

Finally, there has been an amendment to the Working Environment Act, which now regulates competition clauses. The law of contracts originally regulated competition clauses in employment contracts. However, as of January 1, 2016 these competition clauses are regulated by section 14A of the Working Environment Act. The new provision provides that competition clauses are only valid if they are in writing and can only be enforced to the extent necessary for the employer to protect trade secrets and know-how.

Furthermore, a competition clause is only valid for a period of up to one year after the employment contract is terminated. However, the competition clause cannot be enforced if the employment contract was terminated by the employer for reasons not related to the employee.

Should the employer decide to enforce the competition clause, the employee is entitled to economic compensation. The employee shall receive economic compensation equivalent to his or her normal salary, however, if the annual salary of the employee is more than NOK 720 544, certain restrictions apply. If the employment contract is terminated, the employer is obliged to notify the employee whether or not the competition clause will be enforced and of the reasons for that decision.

POLAND

I. Overview

a. Introduction

In accordance with Polish law, each party to the employment relationship (employee or employer) may pursue its claims arising from the employment relationship in court. General regulations in force, stress the need for resolving claims in settlement proceedings. In pre-trial proceedings, this happens within the framework of conciliation commissions. During employment litigation, the court encourages the resolution of a case by court settlement.

Claims arising from an employment relationship are settled by **labour courts** – separate organizational units of district courts, labour and social insurance courts and regional courts. Labour law dictates the competent court of first instance – the district court or regional court (higher court), depending on the subject matter of the case – independent of the will of the parties.

Legal proceedings in employment litigation are based on the rules of general civil procedure, with certain exceptions.

The most important differences between proceedings in cases within the subject matter and scope of labour law and social insurance and general provisions in civil procedure are detailed below.

Expanded definitions of "employee" and "labour law cases" within the meaning of the labour code

Cases within the subject-matter and scope of labour law are cases concerning:

- claims arising out of, or in connection with, an employment relationship;
- determination of the existence of an employment relationship, if the legal relationship between parties has the features of an employment relationship, contrary to the actual agreement executed between the parties;
- claims under other legal relationships to which provisions of the labour law apply by virtue of other regulations; and
- damages sought from a work establishment on the basis of provisions regulating compensation for occupational accidents and diseases.

An "employee" is widely defined. The following are considered employees:

- a member of an agricultural cooperative;
- a person working under a home work agreement;
- family members and beneficiaries of an employee, member of an agricultural cooperative or person working under a home work agreement, as well as other persons entitled to seek claims within the subject-matter and scope of labour law on the basis of other regulations; and
- a person seeking damages from a work establishment's right to benefits on the basis of provisions regulating compensation for occupational accidents and diseases.

Capacity to be a party to and conduct court proceedings

In employment cases, the employer also has capacity to be a party to and conduct court proceedings, even if it does not have legal personality, and in cases within the subject-matter and scope of social insurance, a social insurance institution also has such capacity. This provision is an equivalent to article 3 Labour Code, which states that an employer is an organizational unit with or without legal personality, as well as an individual, which employs one or more employees.

Capacity to sue

In cases within the scope of labour law or social insurance, non-governmental organizations may, within the scope of their statutory duties and subject to the written consent of an employee or insured person, bring actions on behalf of the employee or file appeals against decisions of pension institutions and, subject to the written consent of an employee or insured person, join them in pending proceedings.

Court is unable to reject a complaint if legal proceedings are inadmissible

A petition may not be rejected on the grounds that it does not qualify for legal action if another authority is competent to hear the case. In such instances, **the court refers the case to such authority** that is competent to hear the case. A relevant decision may be issued by the court in camera. If, however, that authority has previously declined jurisdiction, the court hears the case.

If a petition is filed with the court and then referred to another authority in accordance with the preceding paragraph, the effects are the same as those associated with the bringing of an action.

Wider circle of persons authorized to be a court representative

An employee may also be represented by an agent of a trade union, a labour inspector or an employee of the workplace, where the authorizing party is or was employed.

To be eligible to collect compensation awarded to an employee or insured person, a representative must have a special instrument of authorization issued after the enforcement order was supplied.

Less formal requirements connected with bringing pleadings

An employee unrepresented by an advocate or legal advisor may submit a petition, as well as any legal remedies used or pleadings made orally for record, with the court of competent jurisdiction.

Initial examination of the case

When a case is brought before the court, the presiding judge, or a judge duly appointed, promptly reviews the case. The purpose of this initial review is to determine whether the pleading instituting court proceedings complies with the necessary requirements being pursued, and to take action to enable the adjudication of the case at the first hearing. Once a case has been reviewed, the presiding judge orders any formal defects of a pleading to be corrected if such defects cannot be corrected in the course of the investigation procedure. If, in the course of the initial review of a case within the subject-matter and scope of social insurance, it is found that the material contains major defects, and it would be very difficult to correct such defects in court proceedings, the presiding judge, or a judge duly appointed, may return the case file to the social insurance institution to be supplemented. The same applies where the decision of a social insurance institution does not include: (1) the legal and factual basis, (2) the method of calculation of payments, and (3) relevant instructions on the legal effects of the decision and possibilities to appeal against the decision.

Possibility to perform an investigative procedure

The court performs an investigation procedure where this is justified by the results of the initial examination of a case and where a case has not been investigated before a

conciliation board, unless such procedure would not expedite the proceedings or is otherwise evidently pointless.

The purpose of the investigation procedure is to:

- correct formal defects in pleadings, in particular to specify the claims made;
- in cases within the subject-matter and scope of labour law, explain the attitudes of the parties and encourage them to reconcile and reach a settlement;
- to determine which of the facts that may affect the outcome of the case are disputed between the parties and whether and what evidence should be taken in order to clarify them; and
- clarify other facts which are important in order to resolve the case promptly and correctly.

Limitations in the liberty of concluding settlements

In employment law cases, the court also considers a settlement, withdrawal of a petition, objection or legal remedy, as well as waiving or limiting a claim as inadmissible **where it is against the justified interest of an employee**.

Less formal requirements connected with the summoning of parties and other participants in trial

In employment law cases, the court may summon the parties, witnesses, expert witnesses or other persons in the manner that the court considers to be most appropriate and where the court decides it is necessary to expedite the hearing of a case. This also applies to pre-trial service, in particular to requests to produce personal files and other documents as may be necessary to resolve a case.

Summons and services in accordance with the above have normal effect where there is no doubt that it has come to the attention of the addressee.

No limits on the admissibility of witness and party testimony

In employment law cases there is an extraordinary regulation, under which, provisions limiting the admissibility of evidence by witness testimony or interrogation of parties do not apply.

In normal civil procedure, where it is required that an act in law be made in writing, witness testimony or interrogation of parties in a case between the parties of such an act in law, relating to the fact of executing such an act, is admissible only if the document that provides for said act has been lost, destroyed or removed by a third party, and if the written form was reserved for evidence purposes only – also in certain cases provided for by the Civil Code.

Moreover, witness testimony or interrogation of parties against or beyond the body of a document that provides for an act in law is normally severely limited.

In employment litigation, the above-mentioned limitations regarding admissibility of evidence do not apply, but only in those cases when the employee is a claimant. Such privileges do not apply where the employer is the claimant.

Wider scope of disciplinary measures

In employment law cases, if in the course of proceedings, a party fails without just cause to comply with decisions or orders, the court may **fine them** in accordance with the

provisions relating to fines for the non-appearance of witnesses and/**or refuse to award costs** to that party; however, the court may not issue a warrant for that party. If the party is an organizational unit, a fine may be charged to the employee who is responsible for complying with the orders or, where such employee has not been delegated or cannot be identified, to the manager of that unit.

The court may change the defendant (employer) ex officio if the claimant was mistaken

In employment law proceedings initiated by an employee, a summons to appear as a defendant may also be issued by the court ex officio.

Where it is determined that an action was not brought against the person who should be the defendant party in the case concerned, the court, usually (but not in labour law cases) at the request of the plaintiff or defendant, summons that person to join the case. A person summoned at the request of the defendant may request the reimbursement of costs from the defendant only, if it is found that the request was groundless.

If it is determined that an action for the same claim may be brought against other persons who are not acting as defendants, the court may, at the request of the plaintiff, summon such persons to join the case.

Court's freedom in granting alternative claims

In employment law cases, if an employee chooses one of the alternative claims available (reinstatement), and if the claim made by the employee proves to be impossible to grant, the court may grant the alternative claim (compensation) ex officio. This possibility only works in one way; granting reinstatement in place of compensation is impossible.

Partial immediate effect of 1st instance ruling - in employment law cases, when awarding payments to an employee in cases within the subject matter and scope of labour law, the court, upon the issuing of a judgment, declares ex officio its immediate enforcement in a part not exceeding the employee's monthly salary.

When pronouncing the termination of an employment relationship to be ineffective, the judgment of the court may, at the request of the employee, include an order for the work establishment to continue his/her employment until the case is finally adjudicated.

b. Claims

Cases within the subject matter and scope of labour law concern:

- claims arising out of, or in connection with, an employment relationship (for example, appeals from termination, cases regarding pay, appeals from disciplinary measures, discrimination, harassment);
- determination of the existence of an employment relationship, if the legal relationship between the parties has the features of an employment relationship, contrary to the actual agreement executed between the parties;
- claims under other legal relationships to which provisions of the labour law apply by virtue of other regulations (for example, certain public officers); and
- damages sought from a work establishment on the basis of provisions regulating compensation for occupational accidents and diseases.

As a rule, the court of first instance hears a case with the use of a single judge, unless otherwise provided for in specific provisions. The court of first instance, composed of one judge and two layman jurors, hears the following cases within the subject matter and scope of labour law:

- determining the existence, establishment or expiry of an employment relationship;
- recognizing the invalidity of termination of an employment relationship or reinstatement
  - and other claims pursued jointly with the abovementioned;
- compensation in the case of termination without just cause or illegal termination of an employment relationship;
- breach of the principles of equal treatment in employment and related claims; and
- damages or compensation for harassment.

In all other cases, the court of first instance will hear the case with the use of a single judge and, depending on the value of the matter at issue (for example, total value of the overtime, remuneration, value of bonuses), the case will be settled by a district court or a regional court.

The district court hears cases as the court of first instance if the value of the matter at issue does not surpass 75.000 PLN (approx. 18.750 EUR). When the value of the matter at issue surpasses 75.000 PLN, the case is heard by the regional court, as the court of first instance.

Claims by works councils or other employee representative bodies

In cases within the scope of labour law or social insurance, non-governmental organisations may, within the scope of their statutory duties and subject to the written consent of an employee or insured person, bring actions on behalf of the employee or file appeals against the decisions of pension institutions and, subject to the written consent of an employee or insured person, join them in pending proceedings.

Non-governmental organisations may, within the scope of their statutory duties, bring actions on behalf of a natural person, subject to his/her written consent, in matters concerning employment litigation. Such consent may also be a result of the employee's membership in the trade union.

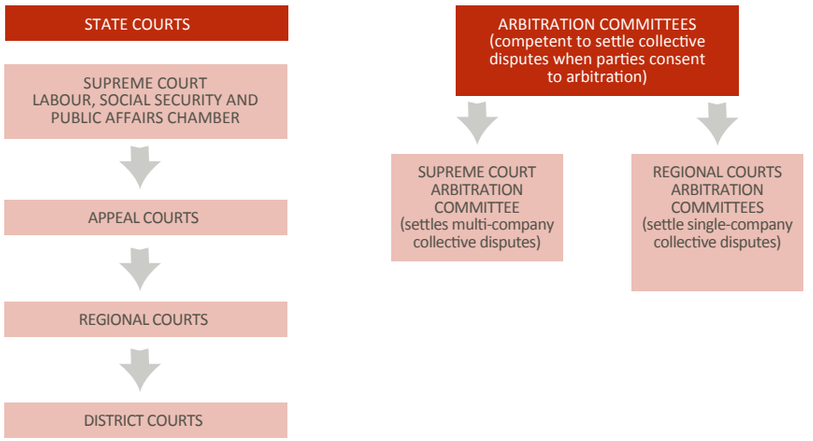
c. Administrative Agencies that Investigate or Adjudicate Claims

The governmental body competent to exercise permanent supervision over labour law is the National Labour Inspectorate. The National Labour Inspectorate is also competent in the field of health and safety at work and legal employment.

In cases for determination of the existence of an employment relationship, labour inspectors may bring actions on behalf of citizens and, subject to the plaintiff's consent, join proceedings at any stage.

d. Court / Tribunal System

THE POLISH COURT SYSTEM IN EMPLOYMENT LITIGATION AND INDUSTRIAL RELATIONS



Poland has a Unitarian court system, which results in a uniform court model for almost all court cases. Depending on the case type, cases are filed with district courts or regional courts, with the right to appeal to the higher court. Judgement of appeal courts are final, but a Cassation to the Supreme Court may be filed in certain cases.

Proceedings in cases within the subject-matter and scope of Labour Law and Social insurance are settled by district courts, regional courts and courts of appeal.

In cases within the subject matter and scope of Labour Law and Social insurance, the legal proceedings are settled in two instances. Each party (employee or employer) is entitled to lodge an appeal to the court of higher instance, but only when the sentence is of an unfavourable nature.

An extraordinary appeal – an appeal in cassation to the Supreme Court – is not possible in cases falling within the scope of the labour and social insurance law if less than ten thousand Polish zlotys (approx. 2.500 EUR) is at issue. Moreover, the following must be jointly met:

- an appeal in cassation to the Supreme Court is filed with the court that issued the contested ruling within two months from the date of serving the ruling, accompanied by a statement of reasons;
- the appeal in cassation is formulated and signed by an advocate or legal advisor;
- the appeal in cassation must be based on misinterpretation or misapplication of substantive law, or infringement of the rules of procedure, where such infringement could significantly affect the outcome of a case; and
- one of the four is present:
  - a major legal issue is involved;
  - it is necessary to interpret legal provisions which cause major doubts or cause discrepancies in case law;
  - the proceedings were invalid; or
  - an appeal in cassation is evidently justified.

As a rule, the court of first instance hears a case with the use of a single judge, unless otherwise provided for in specific provisions. The court of first instance, composed of one judge and two layman jurors, hears the following cases, within the subject matter and scope of labour law:

- determining the existence, establishment or expiry of employment relationship;
- recognizing the invalidity of termination of an employment relationship or reinstatement;
  - and other claims pursued jointly with the above;
- compensation in the case of termination without just cause or illegal termination of employment relationship;
- breach of the principles of equal treatment in employment and related claims; and
- damages or compensation for harassment.

In all other cases, the court of first instance hears the case with the use of a single judge.

e. Alternative Dispute Resolution (ADR)

Conciliation commissions

Current regulations allow for the creation of joint employer-trade union conciliation commissions (or employer-appointed, employee consulted conciliation commissions, where there are no trade unions active) for the purpose of settling disputes initiated by employees, though these are rare in practice.

Only non-managerial employees may be members of such commissions. A conciliation commission initiates its proceedings on the written or oral application of the employee. The initiation of proceedings before a conciliation commission interrupts limitation periods.

If a settlement is reached before the conciliation commission, the settlement is entered into the protocol of the meeting. Such a settlement may be executed just like a court judgment. If no settlement is reached within 14 days from the initiation of the conciliation proceedings, the commission, if the employee so demands, passes the case to the labour court for settlement. The employee's application takes the role of the claim in court proceedings. Instead of demanding the matter to be passed to court, the employee may file a separate claim.

Mediation

Mediation is voluntary and conducted on the basis of a mediation agreement or a court decision to refer the parties to mediation. A mediation agreement identifies, in particular, the subject matter of mediation, the specific mediator or the method of selecting a mediator. Mediation is conducted before instituting proceedings, or, subject to the consent of the parties, in the course of court proceedings.

Mediation is not open to the public. A mediator keeps any facts disclosed to them in connection with mediation confidential, unless released from this obligation by the parties. Any proposed settlements, mutual concessions or other statements made in mediation, have no effect when invoked in the course of proceedings before a court or court of arbitration.

The court may refer parties to mediation until the end of the first scheduled hearing. After the end of such hearing, the court may refer the parties to mediation only subject to a joint petition from the parties. The court may refer parties to mediation only once in the course of proceedings (even against their will). A relevant decision may be issued in camera. No mediation is conducted if a party does not express its consent to mediation

within one week from the day on which a decision to refer the case to mediation is announced or served on a party.

When referring parties to mediation, the court determines the period of such mediation (up to one month, unless the parties jointly request a longer period for mediation). In the course of mediation, such period may be extended upon a joint petition from the parties.

Once a settlement is reached, the mediator promptly files a report with the competent court. If a settlement is reached before a mediator, the court, at the request of a party, takes prompt actions to validate the settlement reached before the mediator. If the settlement is subject to enforcement, the court validates it by issuing a writ of execution; otherwise the court validates the settlement in camera. **The court refuses to declare a settlement enforceable or validate a settlement reached before a mediator in whole or in part, if the settlement is contrary to the law or social norms, if it intends to circumvent the law or where it is incomprehensible or contradictory**.

II. The Litigation Process

a. Typical Case

i. Steps in the process

Employees or employers **filing claims** with the competent court initiate judicial proceedings in labour law matters.

Upon filing an action, the competent court remains competent until completion of the procedure, even if the grounds for its jurisdiction change during the course of the action.

In cases relating to financial claims, the person filing the claim has the duty to state the Value of the Matter in Issue, which influences (1) the competent court (i.e. whether the matter will be settled in the first instance before the District Court or before the Regional Court), (2) the need to pay the fee for the claim and (3) the amount of the costs for professional representation by a lawyer granted to the winning party.

In cases relating to financial claims, even when filed in return for another object, the stipulated amount of money is the value stated in the claim.

In cases concerning employee claims relating to the establishment, existence or termination of an employment relationship, the Value of the Matter in Issue is, in the event of **fixed-term** contracts, the sum of remuneration due for the disputed period, however not exceeding one year, whereas in the case of **contracts for an indefinite period**, for the period of one year.

In labour law cases in which the Value of the Matter in Issue exceeds the amount of 50 000,00 PLN (approx. 13.000 EUR), a fee for a claim or an appeal equal to 5% of the Value of the Matter in Issue should be paid. In the majority of cases with a Value of the Matter in Issue lower or equal to 50.000,00 PLN, the litigation is generally free of charge.

ii. Role of Witnesses, Counsel and Court / Tribunal

Court sessions and trials are open to the public. Court sessions are scheduled by the presiding judge ex officio, whenever so required by the status of the case concerned.

The defendant (the employer or employee) may file an answer to a complaint before the first hearing. Usually the court orders the preparation of such an answer within 14 days from receipt of the claim (complaint).

On May 3, 2012, stronger rules for evidence preclusion were introduced. All evidence should be stated in the claim or in the answer to the claim, unless the party proves that they failed to report them in the claim or in the answer to the claim or further pre- trial pleadings due to no fault of his own, or that taking the late allegations and evidence into consideration will not delay the examination of the case, or that there are other exceptional circumstances. This regulation serves the need for concentration of evidence. In practice, this is only possible if the content of the documents is uncontested between the parties, and the Court does not need to examine witnesses or, for example, need the opinion of an expert.

Each hearing is held in such way that after a case is called, the parties, first the plaintiff, then the defendant, verbally states their respective requests and petitions as well as present allegations and evidence in support thereof. Moreover, the parties may suggest the legal bases of their respective requests and petitions.

Parties are obliged to present evidence in order to establish facts from which they derive legal consequences. The court may admit evidence, which has not been presented by a party. The court will assess the reliability and validity of evidence at its discretion, following extensive deliberations of the available material.

The following in particular may be presented as evidence: documents, witnesses, expert opinions, inspections, testimony of the parties, and other evidence, which may affect the result of the case.

Having closed a trial (i.e. after evidence has been taken and the parties have spoken) the court issues a judgment on the basis of the actual state of affairs at the time of the closing of the trial. In particular, the fact that a claim becomes due while a case is pending is not an obstacle to the awarding of such claim. A trial should be re-opened if important new facts are disclosed after it was closed.

The court issues a judgment following the judges' secret deliberations. Such deliberations include discussions and voting on the ruling to be issued as well as the essential reasons for the particular adjudication, and recording the operative part of the judgment.

iii. The Appeal Process

A judgment of the court of first instance may be appealed to the court of second instance. Such a case is heard by a panel of three professional judges.

An appeal should comply with the requirements of a pleading and moreover contain the following:

- reference to the judgment that is being appealed and information whether the appeal concerns the whole or part of that judgment;
- brief presentation of the allegations;
- justification of the allegations;
- if need be, reference to new facts and evidence, demonstrating why these could not be brought in proceedings before the court of first instance or why the need to bring such new facts or evidence arose at a later date; and
- a demand to vary or set aside a judgment, specifying the subject-matter and scope of the requested modification or setting aside.

A trial before the court of second instance is held notwithstanding the possible non-appearance of one or both parties. After a case is called, the trial begins with a judge's report containing a summary of the status of the case concerned and, in particular, the allegations and petitions presented in the appeal.

The court of second instance hears a case insofar as it is subject to appeal; however, the court considers ex officio the possible invalidity of proceedings.

Proceedings are null and void:

- if a case did not qualify for legal action;
- if a party did not have the capacity to be a party to and conduct court proceedings, did not have a representative authority or a legal representative, or if an agent of a party was not duly authorised;
- if an action concerning the same claim between the same parties brought at an earlier date is pending, or if a non-appealable judgment has already been issued in such action;
- if the composition of the court of trial was not in accordance with relevant legal regulations or if a case was heard in the presence of a judge who was subject to exclusion;
- if a party did not have a chance to defend its rights; or
- if a district court adjudicated a case which falls under the jurisdiction of a regional court notwithstanding the value of the matter at issue.

The court of second instance adjudicates on the basis of materials gathered in the course of proceedings in the first instance and in appellate proceedings. However, if circumstances change, instead of the original subject matter of the dispute, the value thereof or a new object may be claimed, and moreover in cases relating to recurring payments, original claims may be extended by further periods.

In labour cases, if, for example, the employee was reinstated or awarded compensation, the employee may demand reinstatement in place of compensation, and vice versa, before the appellate court passes judgment, and the court will be bound by such a change.

The court of second instance dismisses an appeal if it is groundless. If proceedings are established to have been invalid, the court of second instance sets aside the contested judgment, annuls the proceedings insofar as they are invalid and refers the case back to the court of first instance for reconsideration. Moreover, the court of second instance may set aside a contested judgment and refer a case back for reconsideration only if the court of first instance did not adjudicate on the merits of the case or if the issuing of a judgment requires the entire evidentiary hearing to be repeated. If an appeal is accepted, the court of second instance varies the contested judgment and adjudicates on the merits of the case.

Legal assessment and indications for further proceedings referred to in a statement of reasons for a judgment of the court of second instance, are binding both on the court to which a case is referred, and on the court of second instance while the case is reconsidered. However, this does not apply if the legal status changes.

An appellate court judgment is final **as soon as it is announced**.

In labour law cases where the Value of the Matter in Issue exceeds 10 000 PLN (approx. 2500 EUR), an extraordinary remedy (an appeal in cassation) to the Supreme Court is possible if the following are jointly met:

- an appeal in cassation to the Supreme Court is filed with the court that issued the contested ruling within two months from the date of serving the ruling, accompanied by a statement of reasons;
- the appeal in cassation is formulated and signed by an advocate or legal advisor;
- the appeal in cassation must be based on misinterpretation or misapplication of substantive law, infringement of the rules of procedure, where such infringement could significantly affect the outcome of a case;
- one of the four is present:
- a major legal issue is involved;
- it is necessary to interpret legal provisions which cause major doubts or cause discrepancies in case law;
- the proceedings were invalid; or
- an appeal in cassation is evidently justified.

An appeal in cassation does not constitute a “third instance” (a right of the party to question a negative result), but at the same time, is supposed to be a remedy serving the public interest, and influencing the development of jurisprudence. The lack of any of the four prerequisites stated above results in a dismissal of the appeal in cassation by the Supreme Court.

b. Costs, Attorney’s Fees, Remedies / Damages, Timing, …

The losing party, upon request of the adverse party, reimburses any reasonable costs of asserting his/her rights and defending him/herself (costs of legal proceedings). Reasonable court costs incurred by a party or his court agent other than an attorney, legal advisor or patent attorney include court costs, travelling costs of the party or his/her court agent to the court and an equivalent of earnings lost as a result of appearing before the court. The sum of the costs of travel and the equivalent of earnings lost combined must not exceed the fee of one attorney performing his professional activities at the court. The reasonable costs of legal proceedings incurred by a party represented by an attorney include the fee, which may in no case exceed the rates determined in separate provisions, and costs of one attorney, court costs and the costs of appearing in person before the court, as summoned by the court.

Reasonable costs of legal proceedings also include the costs of court ordered mediation. Where civil proceedings are initiated within three months from the date of completion of mediation, which did not result in a settlement, or within three months of the validation of a court refusal to approve a settlement, reasonable costs also include the costs of mediation in an amount not exceeding the fourth part of a fee for the case.

Where only a portion of the claims is awarded, costs are reciprocally exclusive or proportionally shared. However, the court may order one of the parties to reimburse all costs if the adverse party lost only a minor part of their claim or where the amount due to the latter party depends on reciprocal calculation or evaluation by the court.

In practice, labour courts award the winning party with the costs of legal representation based on certain Polish ordinances. The costs in cases of reinstatement are largely symbolical in nature in labour law cases, to allow the employee broad access to labour courts. Such a sum in cases regarding restitution to work equals **60 PLN** (approx. 15 EUR).

In cases regarding compensation, pay or overtime, the value of which is between 50.000 to 200.000 PLN the court is supposed to grant 3.600 PLN (9.000 EUR) and in cases with a value over 200.000 PLN – 7.200 PLN (18.000 EUR), although such cases are rare.

A separate agreement for representation of the Client should be concluded, stating the attorney’s real remuneration, as state-regulated costs do not compensate the effort resulting from involvement in such a case.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Apart from the comments regarding **conciliation commissions** stated above, in accordance with regulations regarding employees hired under indefinite-term contracts,

if an employee is a member of a trade union functioning in the workplace, the relevant employer should communicate the intention to terminate the employee's employment contract to the trade union in writing, stating the reason for the termination. If the trade union organisation decides that such a termination would be unfounded, it may, within **five days** from receipt of the notification, provide the employer with its reservations. After considering the trade union's standpoint, or in the case of a lack thereof, the employer decides on the termination.

If the employer fails in this duty, it will result in a violation of the law on the termination of contracts, and the labour court will uphold the employee's claim without analysing its merits.

In practice, apart from the above-mentioned consultation stage, trade unions do not appear. The employee may be represented in court by a trade union member, but as a rule, the employee is represented by a legal advisor or an advocate.

d. Specialized Litigation Bar

There is no specialized labour law litigation bar. All attorneys admitted to the bar (i.e. legal advisors and advocates) may represent clients in labour law cases. There are, however, law offices specializing in labour law litigation and employment law litigation departments in international law offices.

III. Tips to Avoid Litigation

Observation proves, indiscriminately, that (1) the low potential cost of labour law litigation and (2) the lack of will to resolve conflicts by way of out-of-court methods results in a large number of labour law cases settled by labour courts.

The most common error is the **incorrect wording of the reasons for the termination of employment contracts** of employees hired for an indefinite time. As part of the court procedure, the employer must prove that the reasons stated in the notice were true and that they were sufficient grounds for termination. Providing additional reasons than those stated in the notice is impossible. Consequently, stating true, precise and correctly worded reasons may discourage the employee from pursuing his/her claim in court. To the contrary, providing incorrect wording may encourage such behaviour.

Under Polish employment law, an employee whose employment contract has been terminated has a short period (7 days in case of termination with notice, 14 days in case of termination without notice) during which he/she may appeal the decision to the Labour Court. Failing to meet this deadline, if not due to non-culpable circumstances or if the employee has not received instruction regarding the deadline, will cause the complaint to be dismissed, even if the employee is in the right. Thus, it is important to instruct the employees about their right to appeal the employer's decision.

IV. Trends and Specific Cases

a. New or Expected Developments

Presently, a serious problem in Polish labour law litigation is the length of proceedings. Amendments to the Polish civil procedure code, which are aimed at accelerating and simplifying litigation, are set to take effect in September 2016. These amendments include the possibility for a wider use of IT systems in litigation (for example, on-line applications). Hopefully these amendments with have a positive effect on the length of litigation in Poland.

b. Recent Amendments to the Law

The most significant changes affected fixed-term employment contracts. From 22 February 2016, the maximum combined term of fixed-term contracts under a given employer will be 33 months, with certain exceptions. The above amendment also limits the types of employment contracts in Poland to three categories: contracts concluded for an indefinite period of time, fixed-term contracts and contracts for a trial period. As a general rule, termination notice periods for fixed term contracts and for indefinite term contracts will be equal. The employer will also be able to unilaterally grant paid garden leave during the notice period.

From 1 January 2016, all employers will be obliged to pay social insurance contributions from civil law contracts of mandate.

From 1 January 2016, the minimum monthly wage will be increased to 1850 PLN (approx.. 436 EUR) gross.

V. Conclusion

As a general rule, employment law litigation is easily accessible, deformalized and cheap. Therefore, it plays a major role in Polish litigation, even having a separate department (one of four) of the Supreme Court. However, due to the ever-rising tide of employment under civil law contracts, this role may decline in the foreseeable future. Another problem that Polish labour law litigation is currently coping with is the length of proceedings – reaching a final resolution usually takes 2 years, during which the employee is left in a state of uncertainty. The right to appeal from a notice of termination to the labour court remains firmly ingrained in Polish employment culture and, as such, it remains a day-to-day reality of employment in Poland.

PORTUGAL

I. Overview

a. Introduction

Labour procedure in the Portuguese jurisdiction is its own special branch, independent from general civil procedure. This specialization is in line with the specific nature of most of the labour law rules and principles, which apply in the context of both the individual employment relationship and the collective agreement level.

In this later context, it is important to note the relative weight that trade unions have in Portugal, particularly in business areas that are heavily regulated by collective bargaining agreements. As far as employment litigation is concerned, trade unions are entitled to file suits whenever the claims involve collective interests within the unions' scope of activity and in representation and substitution of affiliated employees, against breaches of individual employee rights or guarantees undertaken by employers on a general basis, affecting union representatives or union members. The same applies to other employee representative structures (as is the case of employee work councils).

The labour court judge is granted broader powers than those exercised by judges in general civil or commercial courts, to decide beyond the specific terms of the claim which, to a certain extent, reflects the fact that a relevant number of existing labour law rules are of a protective nature towards the employees and have the intention of creating legal mechanisms to level the power imbalance between employers and employees.

A distinctive feature of labour and employment litigation in the Portuguese legislative system which should also be signalled is the fact that most procedures comprise of a preliminary conciliation stage, following the filing of a claim and before the defendant is required to submit the response (and counter claim, if any).

b. Claims

Portuguese law recognises a variety of claims of a different nature, which explains the procedural division between common and special procedures (explained further in chapter II (The Litigation Process) below).

A number of litigation procedures are qualified as urgent, having priority over the regular labour procedures. Examples of urgent procedures are those connected with work accidents and with claims against employee dismissals (both individual and collective dismissals).

Most litigation dealt with by labour courts arises from individual employment disputes, namely those which concern work accidents and professional illnesses and employment contract disputes, such as claims arising from disciplinary procedures and claims against contract dismissal. A number of claims also concern the qualification of existing contractual relationships as employment relationships (as opposed to independent professional activities or businesses). This has significantly increased in the last two years due to a new type of special judicial procedure that was introduced in Portugal in September, 2013, with the purpose of reducing the cases of employees formally imposing self-employed hiring alternatives on job candidates as a way to elude the application of statutory labour law principles and rules.

Other collective labour disputes involving collective employee representation structures or entities and employers (or employer representative associations) can translate into disputes arising from collective bargaining agreements and their interpretation, or conflicts which derive from specific collective action tools, such as strikes and civil liability originating from their illegal use. Nevertheless, collective conflict claims are less common as there seems to be certain reluctance from trade unions and other employee representative structures to resort to the courts in such cases.

Certain employer conduct, such as the failure to comply with labour regulation, is sanctioned with fines by means of an administrative process conducted by the relevant labour authority. Litigation frequently follows an administrative procedure that results in the application of fines; however, the law entitles defendants to appeal decisions of the labour courts that impose such fines.

Finally, a number of labour law provisions are covered by criminal sanctions (for example, employer lock-out or qualified disobedience). Labour courts, however, do not have jurisdiction over criminal matters, even when they arise from labour law issues. These are dealt with by the criminal courts.

c. Administrative Agencies that Investigate or Adjudicate Claims

The two main administrative agencies, which have jurisdiction to investigate and adjudicate claims involving labour or labour connected misdemeanours, are:

- the Autoridade para as Condições de Trabalho (ACT) [the Authority for Work Conditions]; and
- the Instituto da Segurança Social (ISS) [the Social Security Institute].

ACT's mission is to promote the improvement of labour conditions by monitoring compliance with labour regulations and controlling respect for applicable legal rules and principles on safety and health in the workplace. The ACT is also responsible for promoting policies that prevent professional risks.

The ACT has powers to investigate labour misdemeanours and to decide upon the application of both fines and accessory sanctions (for example, employers' temporary activity suspension). The ACT is also empowered to investigate situations where an activity is being carried out as self-employment, but where there is some evidence that the situation should be properly qualified as an employment relationship subject to labour protective laws. The special procedure introduced in September 2013, as mentioned above, created a special jurisdiction for claims before the labour courts, which seek the recognition of an employment relationship in place of an existing self-employment relationship. Such claims are originated by inspective actions conducted by the ACT.

The ACT is also empowered to investigate, in cooperation with the Public Prosecution Office, labour crimes, which may be connected to labour misdemeanour cases. However, as previously mentioned, such crimes do not fall within the jurisdiction of the labour courts.

The ISS's mission is to manage social security systems (unemployment, sickness pay, retirement pensions, parental leave pays, and funding for the treatment, recovery, and reparation of illnesses or disability resulting from professional risks).

The ISS has jurisdiction to investigate and adjudicate fines or accessory penalties in the context of misdemeanour responsibility within the social security system and rules.

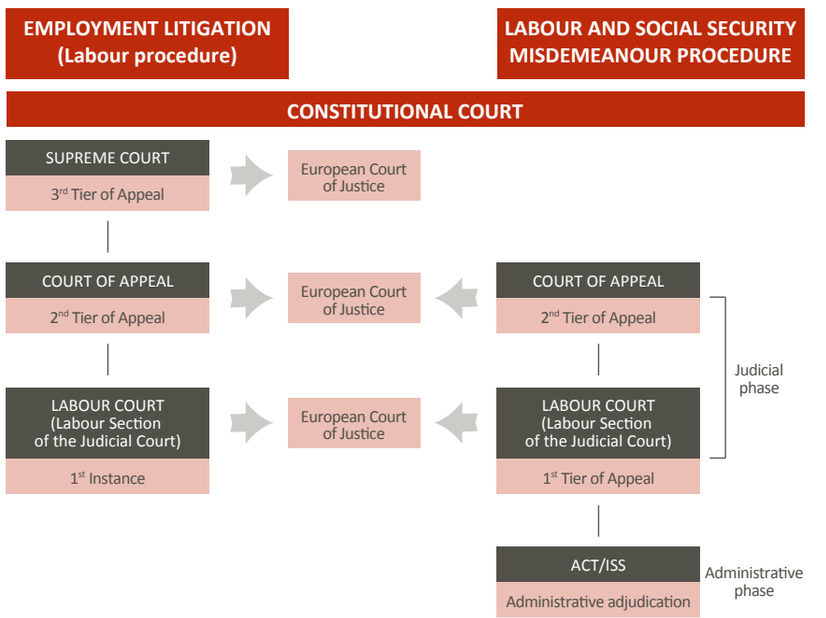
Another agency could also be mentioned, that being the Comissão para a Igualdade no Trabalho e no Emprego (CITE) [Commission for Equal Rights in Labour and Employment].

The mission of the CITE is to pursue equal rights and opportunities between men and women, and to avoid gender discrimination in employment and in professional training. It is responsible for ensuring respect for legal and collective agreement provisions on this subject matter, as well as all issues generally relating to the protection of parenthood and the conciliation between professional activity and family and personal life, in all sectors of activity.

The CITE cannot adjudicate claims, but it must be consulted in cases that fall within the scope of the agency's mission and activity. For example, employers must consult CITE prior to dismissing a pregnant employee or an employee who is breastfeeding or who has recently given birth. In such cases, if upon consultation, CITE issues an opinion contrary to dismissal, the employer will only be allowed to move forward with the dismissal after having obtained recognition from the labour courts, through a special judicial procedure, that the dismissal was not discriminatory and that there is, indeed, due grounds to proceed with the employee's dismissal.

d. Court / Tribunal System

THE PORTUGUESE COURT SYSTEM



The Portuguese Court System is divided between the lower courts (judicial courts) – Tribunais Judiciais – and two levels of higher courts: the Courts of Appeal and the Supreme Court. There are five Courts of Appeal – Tribunais da Relação – and their competence is territory based. The Supreme Court (Supremo Tribunal de Justiça) is a final appeal court (except where constitutional issues arise, in which case further appeal to the Constitutional Court will be admissible), although third tier appeals are limited. The Supreme Court has nationwide jurisdiction.

Within the labour jurisdiction litigation, there is a stark difference between litigation involving civil labour conflicts and those that arise from procedures regarding labour and social security misdemeanours.

As far as the **civil labour conflicts** are concerned, disputes are initiated by the relevant claim being entered by the plaintiff in the labour sections of lower courts, in their role

as first tier courts in the judicial hierarchy. Appeals from rulings granted by the labour sections of the judicial courts (the labour courts) to the 2nd tier appeal courts are subject to specific rules, which will be further discussed below in chapter II. The possibility of further appeals (from the appeal decision) being brought before the Supreme Court is limited to certain cases and lawsuit values, but are, in any case, not permitted when the appeal decision of the Court of Appeals fundamentally coincides with the decision of the Labour Court in the 1st instance.

Somewhat different is the structure in the case of litigation following **labour and social security misdemeanour** administrative procedures investigated by the labour and social security authorities that have authority to apply fines and accessory sanction measures. In this case, the judicial procedure is always preceded by an administrative phase. As mentioned above, both the ACT and the ISS, each in their own sphere of action, investigate misdemeanour cases and have powers to impose both fines and accessory measures resulting from such investigation. Misdemeanour decisions issued by either administrative agency imposing fines or other sanctions may be appealed to the Labour Sections of the Judicial Courts (the Labour Courts). When filed, the appeal is subject to payment of a judicial fee. The appealing defendant may choose to deposit the amount of the awarded fine in escrow to ensure that the administrative decision sees its effects suspended.

If issues arise involving a discussion on the application of a specific legal provision resulting on the breach of a constitutional principle or rule provided for in the Portuguese Constitution or the adherence of the interpretation of local law provisions to European law principles at any level of litigation, the Court may suspend the process and send the specific question to the Constitutional Court or to the European Court of Justice, respectively, for a preliminary ruling.

Appeals to the Constitutional Court are generally admissible whenever the lawsuit (or appeal) decision refuses to apply a specific legal provision on the basis that it does not comply with a provision contained in the Constitution or whenever the decision is based on one or more provisions which compatibility with constitutional provisions has been the object of discussion in the relevant lawsuit.

e. Alternative Dispute Resolution (ADR)

The Portuguese Labour Code specifically rules the recourse to arbitration as alternative dispute resolution mechanism for issues arising from collective bargaining agreement interpretation and application and conflicts on the definition of the scope of minimal services in case of strike in essential or prime social need service or business areas (or minimal services to guarantee safety and maintenance requirements).
Collective conflicts

i. Negotiation

Every so often, the parties, employers, and employees or employee representative bodies, may reach an agreement through direct negotiation. Most of the time, negotiation is the key to closing off new collective bargaining agreements or their revision.

ii. Conciliation

Conciliation is a particular form of negotiation, that is provided for in the context of collective agreement negotiations, where new agreements or revised agreements are not reached after the negotiation activity has been initiated and has led to a negotiation deadlock or inconclusive results. In such cases, the responsible ministry of labour is called upon by one of the negotiating parties to facilitate further negotiation rounds.

Conciliation may be called upon by either (or both) negotiating parties if, for instance, no response has been received from one of the parties to the other party's formal proposal of a new collective bargaining agreement or a revision proposal. The goal of this alternative mechanism is to bring the parties closer in order to reach an agreement. Throughout this process the conciliator plays an active role, including with the presentation of possible solutions for deadlock or deal breaker issues.

iii. Mediation

The mediation is structured as an additional stage to the conciliation. Like with conciliations, mediations may be requested by any of the parties involved in the collective agreement negotiation procedure. A mediator from the competent service of the responsible ministry of labour, prepares an agreement proposal or recommendation which should reflect a balance between the interests and positions of each of the parties involved. The mediator may request information from the parties or from State departments if necessary. The parties have the ability to approve or decline the mediator's proposal, and refusal is assumed if no response is given. If the mediator's proposal is accepted by both parties, the parties will be required to sign the corresponding collective convention (new or revised).

iv. Arbitration

Voluntary arbitration is available to parties for the resolution of any labour disputes related to the interpretation, integration, and application of collective bargaining agreement provisions. Each party appoints one arbitrator, who will, in turn, designate a third arbitrator.

Arbitration is mandatory in the following three cases:

- in the case of frustrated negotiations of a first collective bargaining agreement (in which negotiation, conciliation, and mediation have failed), where a voluntary arbitration was not possible due to one of the parties having acted in bad faith and subject to prior consultation with the Permanent Commission of Social Dialogue (consultation body that includes representatives from unions and from employer federations);
- in cases where the Permanent Commission of Social Dialogue issues a recommendation, approved by the majority of its members, for mandatory arbitration to be adopted for resolution of disputes in the context of collective bargaining agreement negotiations or revision; or
- by ministerial initiative (employment ministry), after consultation with the above mentioned Commission in the case of conflicts related to the negotiation or revision of collective bargaining agreements involving areas that render essential services involving the protection of peoples' life, health or security.

The resource to mandatory arbitration may additionally be determined for resolution of conflicts in the context of collective bargaining agreement negotiation or renegotiation, by decision issued by the employment ministry, following request of either of the negotiating parties, and in cases where a previous existing collective bargaining agreement has elapsed and a new agreement has not been put in place for 12 months of more and provided no other bargaining agreement applies to at least 50% of the employees of the same company, group of companies, or business activity.

In all cases of arbitration, the decision binds the parties and produces the same effect as a collective bargaining agreement.

Individual Conflicts

Alternative Dispute Resolution mechanisms are also provided for in the context of individual conflicts. However, arbitration in the case of an individual conflict is slightly different from arbitration in the case of collective conflicts. The principle of resorting to voluntary arbitration for individual employment conflicts is admitted, as a principle, but there is no specific legislation on arbitration for this purpose in Portugal and the general arbitration law (dated 2011) establishes that labour conflicts arising in connection with individual employment agreements will be subject to specific legal provisions. Nevertheless, the general arbitration provisions do not exclude the possibility of labour issues being brought to voluntary arbitration by the parties, provided the issues under discussion are limited to employee disposable rights and entitlements. This is, not at all, the current practice.

II. The Litigation Process

a. Typical Case

The Portuguese Code of Labour Litigation Procedure foresees two major types of procedures: a) the Common Procedure and b) different Special Procedures. Additionally, the Code also provides special injunctions for labour related issues (these include, among others, measures for temporary suspension of employee dismissal and urgent preventive measures towards health and safety at the workplace).

One of the different types of Special Procedures must be adopted for specific litigation issues and claims for which a specific procedure structure is expressly foreseen by law. All other non-typified claims of a labour or employment nature (i.e. for which no special procedure is provided for) will follow the, so called, Common (or ordinary) Procedure structure model. This means that when preparing to file a claim in the Portuguese labour courts one must first check whether the plaintiff is pursuing a typified claim or judicial measure for which a special procedure model applies – in which case that should be the specific type of lawsuit to adopt – or not – in which case the common procedure rules and labour lawsuit structure will be applicable.

The following typical claims have special procedure rules that qualify as Special Procedure cases:

- Challenges of the lawfulness of an individual employee dismissal;
- Actions arising from work related accidents and professional diseases;
- Challenges of collective dismissal measures;
- Claims relating to the institutions of social security, family allowance, trade union organisations, employers' associations, and workers' commissions;
- Challenges (by employee representative structures) of a confidential nature of information provided by employer (for representative consultation purposes) or of refusal (by employer) to provide information to representative structures (or to consult structures on same information);
- Judicial measures for protection of employee's personality rights;
- Judicial measures towards equality and non-discrimination on the basis of gender; and
- Recognition of the existence of an employment contract.

The structure of the special procedure cases typically differs from the standard procedure described below. Examples of these differences may be found, for instance, in the special lawsuit that must be filed when challenging a collective dismissal (in which the expert evidence is produced in a preliminary stage prior to the main hearing) and in the special action for the recognition of the existence of an employment contract (where the procedure starts with the filing of a participation addressed by the Portuguese

employment authority, to the public attorney's office, reporting the "suspicion" of false self-employed case being the public attorney (and not the potentially interested party/employee who may actually not even intervene in the lawsuit, if he/she chooses so) the one filing the petition.

i. Steps in the Process

The Common or ordinary type of Procedure is structured on the basis of the following stages: a) Claim Filing (Court seizing); b) Conciliation Hearing; c) Defence / Response [and Counter claim] Filing; d) Preliminary Hearing [optional]; e) Final Hearing, e) Judgment; and f) Appeal(s) [depending on the nature and value of the claims].

ii. Pretrial Proceedings

Claim Filing (Seizing the Court)

The proceedings start with the filing of an initial application/petition by the claimant containing a written submission describing the facts on which the claim is based, detailing the nature of the claim(s) and its (their) monetary evaluation. This, and all other procedural protocol, is submitted electronically on a specific platform to which lawyers and courts have access and on which all written submissions, seizures notifications, and all other process information which is served and available.

It is important to note that the evidence that the claimant intends to present must, as a rule, be listed in this petition (provided or requested, in the case of documents), including the witness list (although this may be changed up to 21 days before the trial starts), subject to a maximum of 10 witnesses.

The defendant is then summoned to a conciliation hearing together with the claimant, in presence of the judge. A copy of the petition is provided to the defendant beforehand.

Conciliation Hearing

This hearing starts with each party briefly presenting a summary of their claims, after which the judge will encourage the parties to reach an agreement.

If no agreement is reached, the judge fixes the date for the final hearing and instructs the Court to immediately notify the defendant to present his/her defence and counterclaim (if any) within 10 days following the conciliation. In specifically complex claims, or very extensive ones, the defendant may request that an additional 10 days are granted to prepare and submit the defence. Sometimes the parties are not able to reach an agreement at the conciliation hearing but wish to have some additional time to conclude an ongoing negotiation. In such cases, an agreement may be reached to temporarily suspend the process or to adjourn the conciliation session and fix a new date to continue the session.

Defence / Response [and Counter claim] Filing

Once the defence is received by the court and the claimant, the claimant is granted 10 days to respond to any preliminary or formal process issues included in the defence or 15 days when a counterclaim is presented. If no such matters are included in the defence, the claimant will not have a right to respond to the defence.

After the presentation of these documents, the parties may only submit new written documents to bring forward supervening facts which constitute new rights or which modify or extinguish any of the rights already in discussion.

Preliminary Hearing (optional)

Following the previous stages, the judge invites the parties to perfect or remedy deficiencies that the claims or responses may have and, if the complexity of the cause so demands, convenes the parties for a preliminary hearing. When a preliminary hearing is convened, the date of the final hearing may be postponed.

iii. Role of Witnesses, Counsel and Court / Tribunal

Final Hearing

In the final hearing, the case is typically presented to one judge. If the decision is susceptible to appeal, the parties may request the recording of the audience and this will allow the appeal to cover evidence of proven and unproven factual issues.

Before the hearing actually starts, the judge will make a final attempt to reconcile the parties, and if this is unsuccessful, the final hearing promptly commences.

As the claims and pleas have been presented in the documents aforementioned, the hearing starts with the presentation of evidence, namely, the hearing of witnesses.

As a general rule, each party must prove the assertions beneficial to their own position. However, there are a few exceptions to this rule and the burden of proof can be lightened for the employee or inverted in his/her favour, such as in cases of discrimination in the workplace or recognition of the existence of an employment contract.

After all the evidence has been presented, the floor is given to the claimant's lawyer, followed by the defendant's lawyer, to plead their case one last time. Each party will be granted a maximum of one hour.

Judgment

If the question at hand is particularly simple, the final decision may be delivered right after the final pleadings of each party. In this case, differently to the civil procedure, the final decision can be delivered in a summarized manner, without all the required formalities.

If this is not the case, the court's final decision has to be delivered within the 20 days following the final hearing, and it must obey the formalities set out in the civil procedure code, which includes the need to identify the parties in litigation and the object of their discussion, listing the legal issues that the court was called to decide upon. The decision must then list the facts under discussion that the court considered to have been proven and the legal principles and rules based on which the final decision was issued. The decision must also indicate relevant facts that the court considered not to have been proven and must include a critical analysis of the relevant pieces of evidence that lead to the conclusion on the different sets of proven and unproven facts and allegations, as well as on instrumental or any decisive circumstances that were considered by the court to be relevant for the final decision on the facts. Facts admitted by agreement or confessed are also indicated as such.

The parties can always ask for a reform of the final decision, but can only appeal in some situations.

iv. The Appeal Process

Usually, a party can only appeal to the 2nd tier Court if the case value exceeds the threshold value of the 1st tier Court (currently set at € 5,000.00), and parties can only

appeal to the Supreme Court of Justice if the case value is above the threshold value of the 2nd tier Court (presently € 30,000.00).

There are certain claims that always grant the losing party the right to appeal, such as claims regarding the validity or subsistence of an employment contract.

Appeals to the 2nd tier Court must be filed within 20 days following the delivery of the final decision, although there are some exceptions to this which either shorten this term to 10 days (for example, appeals based on the discussion of procedural court competence or jurisdiction issues) or extend it, allowing 30 days to file the appeal (for example, if the appeal includes revision of recorded evidence – re-appreciation of the court's decision on proven and unproven facts).

The appealing party presents his/her appeal in writing, and then the other party is allowed the same term to respond (and in some cases, to present a secondary appeal). After this, the court presents its decision (in a number of cases the public attorney is called upon in the appeal process to issue an opinion on the party's allegations).

The 2nd tier Court has the power to review the facts (whenever the appeal also comprised a request to revise the decision issued on the facts) and legal arguments contained in the final decision issued by the 1st tier Court. The Supreme Court of Justice is bound by the facts established in the judgement of the court below and does not review them. It reviews whether the judgement of the 2nd tier Court is in line with the applicable employment law provisions. As a rule, if the 2nd tier Court confirms the decision issued by the 1st tier Court, further appeal to the Supreme Court of Justice is excluded.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, ...

The costs usually incurred in a labour procedure are court fees and the cost of legal representation, although, if the parties require expert witnesses, for example, those will be included in the fees due. From the filing of the suit to the final decision, each party will be responsible for their court and legal representation costs, but, at the end of the procedure, the losing party(ies) will be liable for the payment of the costs incurred by the winning party (proportionally to their loss). Nevertheless, the winning party must request payment of such legal costs directly from the losing party within 5 days after the decision (or appeal) is issued.

Legal costs are calculated based on the case value, and can vary from € 102 (suits in which the case value is set at € 2,000 or less) to more than € 1,600 (when the case value ranges between €250,000 and € 275,000). The losing party will also be required to support the lawyer fees of the winning party up to a limit of 50% of the court costs borne by the parties.

Employees that litigate in court on employment issues under the representation of the public attorney (within specific employment issues where this representation is foreseen) or represented by trade unions (that are granted free of charge) are exempt from paying court fees if their monthly income does not exceed € 2,040.00. Trade unions acting within their scope of interest are also exempt from paying court fees.

The cost of legal representation depends on the value negotiated with the lawyer(s).

Remedies and Damages

In the case of claims for illegitimate contract termination by the employer or contract termination for cause by initiative of the employee, compensation awarded by Labour Courts is generally based on the number of years worked at the employer and the

employee's salary. For instance, in the case where an employee requests compensation for unlawful contract termination by the employer (in lieu of being reinstated in his/her previous position), besides being entitled to pay for the period between the date of dismissal and the final court decision confirming dismissal to be unlawful, the employee is awarded compensation of an amount between 15 to 45 days of salary for every year and fraction of a year of service at the employer.

Personal injury damage compensation is awarded on the basis of equity and fairness.

Timeframe

The standard duration of a suit varies a lot depending on its complexity and geographical area (because of the number of existing cases and public employees in each Court), and can range between 8 months to 3 years (although there may be exceptions). In some special procedure cases, there are shorter periods set in law. The statistics show that, for instance in 2012, the average duration of labour litigation lawsuits was 12 months, and 13 months in 2013 (in both cases, excluding appeals).

c. Trade Unions, Work Councils and Other Employee Representative Bodies

As mentioned above, in the context of employment litigation, trade unions qualify as legitimate parties both to file suits that involve collective interests within its scope of activity and to file suits connected with breaches of individual employee rights, performed on a general basis and affecting such union affiliated members. The same rights are granted to Employee Works Councils for the benefit of the respective company employees.

III. Tips to Avoid Litigation

In the present context, considering both the specific powers that labour authorities have to officially initiate administrative and even judicial procedures and taking into account the standard type of litigation initiative that trade unions and other employee representative structures typically pursue, as well as the most common individual employee claims that may be found in Portuguese courts, the following preventive measures or policies could be taken as useful "tips" for employers to avoid employment and labour litigation:

- Perform regular employment audits on company policies and practices: either broader or more specific (work hours, remuneration, collective bargaining agreements, professional training, etc.);
- Periodically review template employment contracts and other standard drafts adopted in the context of employer/employee or employer/candidate relationships: in order to assure compliance with the applicable rules and to update documents in view of amendments to legal provisions and labour or other relevant authorities' interpretation or guideline updates;
- Revise specific rules and collective bargaining business area provisions on extra payment or allowance payment rules: in order to ensure that employees are paid in full and on time the amounts they are entitled to. In a number of these cases the burden of prove is on the employer and the costs of litigation are a lot of times higher than the actual amount claimed;
- Make use of probation periods to actually check that the employee has been adequately selected and is a due performer: the same opportunity will not arise later;
- Follow up employee complaints: analyzing them and addressing feedback;
- Promote regular meetings with employees' representative bodies: eventual issues may be anticipated and potentially remedied;
- Get preventive legal advice: this usually means expense savings ahead;
- Train business partners: in human resources and legal matters;

- Be prepared to be sued: by way of example, keeping all documents organized, requiring exchange of communication to be in writing whenever convenient, etc.;
- Reach an agreement for the termination of the contract: favouring this route whenever possible.

IV. Trends and Specific Cases

a. New or Expected Developments

A new Government took office at the end of 2015 and changes are expected to be implemented, following some expected change of policy on economic and consumption incentives.

The increase of the minimum wage is one of the lines that has already been negotiated with employee and employer representative structures, and an increase of actions against fake service providers (claimed to be employees) has been pre-announced as an expected development.

b. Recent Amendments to the Law

Last year (2015) started with the end of a suspension period of almost two and a half years, during which all clauses contained in collective bargaining agreements providing for extra work bonus amounts that exceeded those provided for by law were kept on hold. The same applied to the extra pay amounts applicable to work rendered on public holidays. The suspension measure was ordered by Law no. 23/2012 of June 15 and it came into force on August the 1st, 2012. This same law reduced the amounts that were previously proscribed in the Labour Code for extra work pay and public holiday work extra pay by fifty percent. From January the 1st 2015, the application of such collective bargaining agreement provisions was automatically reinstated.

During 2015 the Portuguese Labour Code underwent two alterations. The first amendment occurred in April (Law no. 28/2015, of April 14), whereby gender identity was expressly added to the illustrative list of features on the basis upon which no discrimination, privilege, or prejudice may influence recruitment or labour rights or conditions, thus reinforcing the right to equality in the access to work and employment (article 24/1). A second amendment was published in September 2015 (Law no. 120/2015, of September 1). This amendment included a number of provisions on the protection and support of parenthood, both for female and male workers. The new measures include the extension of the mandatory period for the father parental license and provisions whereby both parents will be permitted to enjoy their license at the same time. Parents with children under the age of 3 will be allowed to execute their job functions through telework and flexible timetables, and part time options will be available for parents with children under the age of 12. Other measures could be pin-pointed like, for example, measures that introduced financial incentives for professional training (the so called "cheque formação").

2016 will start with an increase of 25 euros to the minimum monthly wage (for full time employees), raising the amount from € 505 to € 530. Slight increases in pension amounts were also approved for 2016. These measures are in line with one of the strategic lines of the new government programme connected with the intended "increase of the family income as a means to relaunch the economy" and a desire for economic recovery by the stimulation of employment.

V. Conclusion

The Portuguese employment legislation has a history of continuous change, very much in line with economic and political opinions, although some stabilization has occurred in recent years. Whilst no strict rule of precedent is applicable, higher court decisions are an undoubtable tool when seeking adequate interpretation and application of specific labour provisions. Case law should therefore be kept in mind when business decisions and policies, which affect workforce conditions, are adopted. Seeking qualified advice at an early stage is one of the most effective ways to avoid litigation.

Litigation, nevertheless, is reasonably accessible to employees, and is especially prevalent in employment termination matters in strongly unionized business areas, with ADR methods not commonly utilised for individual employment conflict resolution.

ROMANIA

I. Overview

a. Introduction

In Romania, the Employment law regulates the individual and collective relations between employers and employees. During the last 25 years, the employment legislation has been constantly, but slowly, changing towards a more employer oriented system, as a result of government reforms. Nevertheless, the Romanian legislation still ensures a wide range of protection for the employees. Once Romania started to develop legal remedies and working structures that ensure proper judicial control over the labor relationship, employment law matters and litigations started to become an important part of civil matters presented before Romanian courts. Coming from a state controlled system, employment law had to adjust to the new social and economic context and it developed as a mirror of that context. At first, employment law matters involved a great number of collective bargaining and strikes, due to the large influence of unions, and collective dismissals, due to the restructuring of the old state companies.

However, the Last few years has seen a greater expression of individual employment cases presented before Romanian courts. Individuals, rather than unions, were the initiators of judicial claims, as they started to become more aware of their role in the constant negotiation that is the employment relationship. Claims became more divers and courts became more specialized. As a result of this development, companies started to become more aware of the importance of procedural rules and internal regulations in the judicial control of employment law matters and started to use more specialized personnel and legal advisers.

New Civil Procedural rules that apply to employment law related matters made the judicial process less time consuming. Also, years of experience in similar matters for judges made for a more predictable litigation process.

b. Claims

In order to have a clear overview on the specific claims that are presented in Romanian Courts, it is necessary to refer to labor legal related matters as being **collective** or **individual** actions. Usually, unions initiate collective matters, but this is not a legal requirement.

Collective matters include issues regarding the content of collective agreements, the annulment of abusive collective agreements clauses and collective financial claims resulting from existing collective agreements or stated by law. Collective dismissal matters, and also claims of collective discrimination, can be filed. In order to represent individual employees in collective actions, the union has to obtain a written consent from the employees.

Another form of collective matter is the claim of unlawful strike that employers can present in court. Due to strict regulation regarding the right to strike – which cannot be exercised when a collective agreement is in force – such matters are becoming more rare.

Some different types of collective employment law court cases are those represented by the establishment, registration and recognition of unions and employers organizations. As a rule, these are not contradictorily cases, the judge being called to verify the fact that the organization complies with all the legal provisions and that the organization drafted all the required documents and complied with all the procedural rules and terms. Occasionally these cases become contradictorily as other entities can have an interest in the organization not obtaining the necessary court recognition.

Individual matters include litigation concerning unlawful individual dismissals; individual financial claims based on individual employment agreements, collective employment agreements or legal provisions; discrimination; working hours; posting of the individual

employee; negotiated advantages included in the individual employment agreements or the collective employment agreements, etc.

Individual dismissal includes a) dismissal for reasons concerning the employee – the two most important cases being the disciplinary dismissal and the dismissal for professional unfitness – and b) the dismissal for reasons not concerning the employee – the most important being the reorganization of the company for objective reasons (mainly, but not necessarily, economic reasons). All of these dismissals may result in individual court cases.

Both the employee and the employer can bring cases to court in order to obtain a court ruling ordering the other party to cover any financial damage caused by the other party to the individual employment relationship.

c. Administrative Agencies that Investigate or Adjudicate Claims

Alongside litigation presented before Romanian courts, some of the issues that may arise from the employment relationship can be brought to the attention of some administrative institutions specialized in specific employment law matters.

Some matters regarding working time, working conditions, payment of wages and employment without legal forms can be verified by local employment inspectorates (administrative bodies with control attributions that can issue a list of mandatory measures for the employer and can enforce contraventional sanctions in case of breaching of legal provisions). Employees can address the local employment inspectorates in order for them to verify the stated matters.

In cases concerning claims of discrimination, a legal administrative procedure is provided, allowing the National Council for Combating Discrimination ("NCCD") to investigate the claims and to impose measures in order for the discriminatory situation to disappear and the damages to be repaired. The NCCD issues decisions that are mandatory and which can be subject to the court's examination. Also, in all claims of discrimination that are brought to court as distinct claims or as part of complex claims, a NCCD point of view must be issued.

The use of administrative procedures does not exclude the right to bring cases on the same issues before the court. Often measures imposed by the administrative bodies become distinct issues in court cases.

Other administrative bodies have a consulting role in employment law matters. As a part of what it is called a tripartite dialogue system, local and national tripartite bodies can be established according to the provisions of Law no. 62/2011. This notion of tripartite dialogue refers to discussions between the employers and the employees with the participation of national and local representatives who will act as facilitators for the reaching of a mutual point of view in employment law related matters. Also, such bodies can present proposition to authorized institutions in order to change legal provisions that are no longer suited for the factual situation. A more important role, and a greater implication in the legislating process, is ensured by the Social and Economic Council, a tripartite body that acts as a consultative body for the legislators on issues regarding employment law. These tripartite bodies can be used in order to present to the other party and to the legislators the point of view of the employers or of the employees. Efficient use of the tripartite bodies can assist in avoiding employment law litigation.

d. Court / Tribunal System

The Romanian court system is structured in a hierarchy that includes lower courts, which handle most cases, and higher courts (Tribunal and Courts of Appeal), which handle

cases considered to be more important. A single Supreme Court handles few cases of a greater importance and issues general rulings when inferior courts do not have a common practice and this fact is brought to the attention of the Supreme Court.

For both collective and individual employment law claims, the Romanian Labor Code, along with civil procedural provisions, impose a double jurisdiction court system – meaning an initial ruling over the case matter and the possibility for an appeal. Employment law cases are presented in front of higher courts, the first jurisdiction being a Tribunal matter and the appeal a Court of Appeal matter.

Special rules apply for the constitution of the panel that handles the case in the first jurisdiction in employment law cases. As a rule, the initial claim is presented to a single judge who will issue a ruling in the first jurisdiction. In employment law cases in the first jurisdiction, the claim will be presented to a panel composed of one judge and two judiciary assistants. The two judiciary assistants represent the two parties of the employment relationship – the employers and the employees. They hold a consultative role in the final ruling, but can offer a separate opinion that will be included as part of the court ruling. The separate opinion is not legally binding for the parties and cannot be enforced.

If one of the parties (or even both in more complex matters) is not satisfied with the first case ruling, they can appeal to the Court of Appeal. A panel of two judges with equal power of decision will handle the appeal. Judiciary assistants will not participate in the appeal. If the two judges cannot reach an agreement concerning the appeal, a new panel composed of the two initial judges and an additional one will analyze the appeal. This panel, called a divergence panel, will issue a final ruling in the appeal, even if the three judges have different opinions. The two judges with the two most similar opinions will constitute the majority opinion that will become the final definitive opinion of the court.

The system can be summarized as shown in the next table:

Procedural state	**Court**	**Panel**	**Issues**	**Not all the members of the panel agree**	**Mandatory ruling**	**Definitive ruling**
First jurisdiction	Tribunal	1 judge 2 judicial assistants	An initial ruling	Non-binding separate opinion from the judicial assistants	Yes	No
Procedural state	**Court**	**Panel**	**Issues**	**Not all the members of the panel agree**	**Mandatory ruling**	**Definitive ruling**
Appeal	Court of Appeal	2 judges	A definitive decision	A divergence panel of 3 judges issue the definitive decision	Yes	Yes

The parties can also choose not to appeal the first ruling and that first ruling will become final and mandatory. The first jurisdiction ruling is mandatory even if it is not final. Not complying with court rulings is a criminal offence and is punished accordingly.

In some specific cases, concerning strictly regulated, mainly procedural, rules that were overlooked in the two usual jurisdictions, the parties can use extraordinary means of appeal in order to change the final ruling to their favor. These extraordinary means of appeal are judged by the Courts of Appeal after procedural rules common to the appeal.

When the lower courts do not share a common point of view on specific legal provisions, the Supreme Court can issue mandatory guideline rulings concerning employment law related matters. Also, constitutional control of employment law related legal provisions is undertaken by the Constitutional Court, which issues rulings requiring legislative bodies to amend legislation to ensure its compliance with the Constitution.

e. Alternative Dispute Resolution (ADR)

We previously referred to collective and individual actions, making this distinction in order to present the different types of claims that can be brought to the court's attention. Now we are going to refer to collective conflicts as being the type of conflict that may appear in three specific cases – a) when the employer or the employer's organization refuses to commence negotiating for a collective agreement, when no such agreement is in place or the existing one has expired; b) when the employer or the employer's organization does not agree with the employees demands; and c) when the parties do not reach a collective agreement by the date they settled upon.

In cases of collective conflict, the law establishes a mandatory conciliation procedure and alternative facultative mediation and arbitrary procedures. The conciliation procedure implies the naming of an impartial delegate from the Work and Social Protection Ministry, in cases when the collective conflict involves groups of companies or industrial sectors, or a delegate from the local employment inspectorate, in case of a collective conflict concerning a single company. Procedural rules must be observed during the conciliation procedure. If an agreement is not reached after the mandatory conciliation procedure, the parties can agree to go through the mediation or arbitration procedures. If the parties agree, these procedures become mandatory. The mediation procedure will involve a mediator and can result in a mediation agreement. The arbitration procedure involves a claim made to an Arbitration Office and will result in an arbitration ruling.

Apart from collective conflict situations, the mediation procedure, based on common provisions on this matter, can be used by the parties in order to avoid bringing a case to court and to reach a common agreement. Both individual and collective actions can be prevented by the efficient use of the mediation procedure. The main problem with the mediation procedure is that the mediator cannot use employment law provisions in order to bring the parties to a mutual agreement. In most cases, the mediator does not even have a legal background and specialists with a firmer legal background can easily bypass the mediation agreement.

For a brief period of time, common civil procedural provisions stated that it was mandatory for the parties of most civil cases, including employment law related cases, to undergo a procedure of information regarding the advantages of mediation prior to filing the court cases. This provision made for an additional obligation for the parties that did not result in an increase in the amount of cases being resolved by mediation and was later declared to be unconstitutional by the Constitutional Court. The procedure was primarily formal and the parties considered it to be time consuming, especially in cases involving shorter terms for the filing of the court case – such as the dismissal claims and claims regarding disciplinary sanctions.

II. The Litigation Process

a. Typical Case

When an employer or an employee considers it to be necessary to take judicial action against the other party to the employment relationship, they will present their claim, in writing, to the Tribunal. According to civil procedural provisions that apply to employment law related cases, the claim must contain specific identification details of the plaintiff and the defendant, an indication of the facts and the legal provisions that apply to the matter, the proofs that sustains the plaintiff's request and the signature. The signature for a company has to be a legally binding one. If the plaintiff wishes for the court to hear witnesses, they have to be named in the claim. Also, if the plaintiff wishes to question the opposite party, the opposite party being a company that will reply in writing, the questions have to be included in the claim. The registered claim is randomly assigned to a specialized judge. The judge that will handle the case verifies the claim and any irregularities that he might find with the claim are to be covered in a stated term. If the irregularities are not covered, the claim will be annulled.

After the claim is verified by the judge and all the irregularities covered, the claim is transmitted to the defendant, who is required to respond in writing within a 25 day term. The defendant's response must to contain all of the defendant's arguments and evidence, and also all the exceptions that the defendant understands to arise in the matter. The defendant's response is transmitted to the plaintiff who can respond to the defendant's argument within a 10 day term. The judge can establish shorter terms within which the defendant and the plaintiff must send their responses. A conventional representative for the party (a lawyer) can make the claim and all the responses. Proof of the lawyer's representation right will be presented with the claim or the defendant's response.

After this administrative procedure is completed, the judge will establish a court date. For the court date, the judge will issue subpoenas for all the parties. All parties must receive the subpoena in order for the case to enter the debate part, but the presence of the parties, or of their representatives, is not mandatory; parties have the right to request that their matters be ruled in their absence. However, if both parties are not present and neither of them requested for the case to be ruled in their absence, the judge will suspend the matter.

The burden of proof in employment law related cases always lies with the employer. This means that when the employer is the defendant, the burden of proof is inverted; the plaintiff not being held to prove his/her allegations, but, rather, the defendant being held to prove the contrary to the plaintiff's allegations.

Written documents are considered the most relevant evidence in employment law cases. They have to be presented in conformed copies. Most cases are judged based only on these written documents and only in exceptional cases witnesses are heard in order to establish facts that were not recorded in writing. As a rule, witness' testimony cannot be held as true if it is contrary to a written and signed document concerning certain amounts of money. All parties can be questioned by the other party, and by the judge, but parties cannot be herd on their own behalf. Some cases, especially claims against disciplinary sanctions, may require the use of audio/video recordings or photographic captures. In cases concerning financial demands or the correct remuneration of working hours, a judicial expertise might be needed.

Some claims, like those concerning alleged discrimination, require an official point of view of a specialized body – in the case of discrimination claims, the NCCD. The official point of view is not mandatory for the court.

Depending on the evidence the judge allows to be presented, the court case can be ruled in only one court date – if all the documents are presented, no witnesses are to be herd, nor it is necessary to administrate any other evidence; or even in 12-14 court dates, if a judicial expertise is needed. Court dates are usually 1 month apart.

After all the evidence is administered, the court hears the parties in their final pleadings, finds the debate closed and issues the ruling. The judgment is pronounced in the same day the court holds the final hearing, or on a later date. The motivation for the solution and, if necessary, the separate opinion, will be transmitted to the parties in order for them to exercise their right to appeal the initial ruling.

During the appeal, the court will take into consideration all the evidence and arguments presented in the initial claim, and also any additional arguments and evidence the court considers necessary.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Employment law related cases are not subject to the judicial tax that usually applies to civil cases. No matter the value of the case, the judicial undergoing does not imply any other costs than those concerned with representation by a lawyer. Depending on the matter, the lawyer might negotiate with his/her client an hourly fee or a "per case" fee. An additional success fee can also be negotiated. The party that wins the matter is entitled to receive from the other party an amount for legal fees incurred. If the court considers the fees to be excessive, the amount to be paid by the party that lost the matter can be reduced. This, however, does not affect the fees originally negotiated between the winning party and their lawyer.

The court's solution depends on the type of matter. In cases regarding unlawful dismissal (no matter the ground of the dismissal or the grounds of the annulment of the dismissal), for instance, if the court finds that the claim is legally grounded, it will rule for the dismissal to be annulled, the employee to be reinstated and for the employer to pay damages equal to the "to date" amount of the employee's salary for the time he/she was unlawfully dismissed. In cases regarding financial claims, the losing party will have to pay a "to date" value of the amount stated in the court's ruling. This obligation to pay any amount "to date" can result in further issues regarding the enforcement of the court rulings and sometimes even in new court cases regarding the exact amount to be paid.

As for the time frame for employment law related court cases, as mentioned, the initial claim can be completed in a period that may vary from 4 months to more than a year. The appeal is usually a procedure that takes less time, but the administrative procedure of transmitting the appeal and the subsequent response exchange presented for the initial claim implies the same terms, meaning that the appeal will take an additional 4 to 6 months.

One thing that has to be taken into consideration is the fact that in collective actions the procedural part of the court case tends to become very important. Employees who initially were part of the case, as being represented by a union, can exit the union during the trial and it will become necessary for the employee to express his/her option to continue the trial in his/her own name, or not. If the parties of such cases do not agree to have a common representative, the issuing and receiving of the subpoenas in order for the trial to begin will take more time. In such cases, a lawyers experience with handling collective actions becomes of great relevance.

c. Trade Unions, Works Councils and Other Employee Representative Bodies

Apart from the written mandate of the employees who were mentioned as being mandatory for the union to represent its members in court, litigation involving unions follows the same procedural rules as any employment law case.

d. Specialized Litigation Bar

Specialized judges and judicial assistants handle employment law cases in the first instance, but no legal requirement states that the lawyers representing the parties should be specialized in employment law. However, lately both employers and employees tend to look for specialized lawyers, being more aware of the importance of experience in handling these specific types of cases.

III. Tips to Avoid Litigation

Due to the fact that legal provisions regarding employment related matters rarely tend to change, and also the fact that national courts have established some common direction in a judicial system that does not recognize judicial precedent as mandatory, it becomes important for companies to use all available resources in order to avoid litigation.

The first step in reducing the risk of litigation is establishing clear and simple internal procedures that all employees will be required to be familiar with. Strict compliance with internal regulations can significantly reduce the risk of litigation. In order to ensure that, specialized Human Resources personnel must be employed, and for issues requiring more experience and contact with the judicial system, legal advice from specialized lawyers would prove useful.

Also, all internal documents, job offers, individual employment agreements, job descriptions, work procedures, professional unfitness procedures and annual/periodic evaluation procedures must be clear and well drafted. Procedural rules, stated by law or part of any internal regulation, have to be strictly respected.

An important fact to be taken into consideration, more importantly by international companies that open subsidiaries in Romania, is the attention required in establishing the working hours for employees and also their wages. Stricter rules than those provided by the European regulations concerning daily and weekly rest periods apply in Romanian employment law. Also, specific rules on compensating overtime, night work or work performed on weekends and on legal holidays applies. The correct wording in all documents – starting with the job offer, the individual employment contract and continuing with the collective agreement contract – is very important, as any omission could result in an expensive judicial undergoing and significant financial damage to be paid by the company.

Also, all mentions of individual employment agreements that the company has concluded has to be recorded in an electronic system with the careful observation of the legal terms. The correct registration of these mentions can mean the difference between a legal employment relationship and work without legal form.

Companies should pay great attention to disciplinary proceedings, in order to avoid the annulment of the disciplinary sanction by the court. Again, procedural rules are important, with the form of the document stating the disciplinary sanction being as important as the disciplinary offence. Correct use of disciplinary sanctions is also important.

As of 2011, the professional unfitness of an employee has been enforced as an expressly stated cause for an employee's dismissal. This means that the company has to have an internal professional evaluation procedure and each employee has to have professional objectives and evaluation criteria clearly stated.

All of the abovementioned measures, attention to detail and the use of highly trained personnel and legal advisers can result in a lower risk of litigation and a lower risk of losing court cases if they arise.

IV. Trends and Specific Cases

In 2011, a new perspective on employment law regulations opened with the changes made in the Labor Code and the enforcement of a new law, Law no. 62/2011 of social dialogue. The law removed many privileges given to trade unions, annulled some institutions which exceeded the balance between the employer's prerogative of decision and the social protections that need to be guaranteed to employee and also aligned the collective labor relations to the general rules of the common law. Also, the law managed to unite all of the regulations of social partnership, gathering both labor conflicts and the rules of labor jurisdiction. Few changes have been made in the national employment law system since 2011. This means that the new system of regulations resulted in a more predictable outcome for most court cases. However, the same system led to an increase in the number of certain types of court cases.

In a recent ruling, the Constitutional Court stated that the extensive protection of union leaders is not in compliance with the Constitution and should be restricted to the protection against dismissal based on their activity as union leaders. Prior to this ruling, union leaders benefit from protection against any type of dismissal, except those for disciplinary reasons.

A continuing trend in the type of cases brought to court by the employees is the number of cases involving financial demands based on existing or passed collective employment agreements, or even on legal provisions. Such cases include demands of seniority bonuses (fewer such cases at this time, since most employers no longer offer such bonuses as they can be discriminatory), overtime payment, bonuses for work performed during the weekend and on legal holidays and compensation for non compliance with special rules on daily and weekly rest times. These cases are usually brought as collective actions, sometimes involving more than 300 employees with a high cost risk. Clear internal regulations, effective collective bargaining and strict compliance with procedural rules can reduce the risk for companies to become the target of such demands. However, there are still some specific activities (for example, offshore activities) that are not clearly regulated by national legal provisions and that, by their nature, cannot be subject to the normal regulations on working time and weekly rest, meaning that court cases can be filed for financial demands concerning this matter.

Also, a recent decision of the Supreme Court ruled that a judge who decides on the legality of a disciplinary sanction is able to change the sanction applied by the employer if the judge believes the sanction not to be suited for the disciplinary offense. As a result of this new approach, employers now need to more carefully analyze each disciplinary action they take against their employees, becoming more aware of the importance of the correct and proportional sanctioning of their employees. There has also been an increase in the number of such court cases. This increase has been caused, on the one hand, by the fact that employees fired due to a disciplinary sanction now have a greater chance of getting their jobs back and their sanctions changed and, on the other hand, employers engaging in more disciplinary procedures (even for offences that are not considered to be that serious, but which would otherwise have been overlooked). At this stage, it remains to be seen whether this tendency is a long term one.

Despite being clearly regulated since 2011, dismissals for professional unfitness rarely occur, meaning that such cases rarely proceed to court; there is currently no clear direction on this matter. However, courts tend to give more credit to employers when it comes to the evaluation of the way employees perform their work. This tendency can also be observed in cases concerning dismissals due to the reorganization of the company on objective grounds and in cases concerning disciplinary sanctions.

V. Conclusion

Recently, there has been a tendency in the Romanian judicial system for a more uniform judicial practice, making the outcome of claims more predictable for employers and employees. A period of stability in national employment regulations has made for a more detailed approach to each case and for more complex court cases and rulings. Employers have become more aware of the importance of good internal regulations and practice and tend to trust specialized legal advisors for employment law related issues, making for a greater success rate in employment law related cases.

SPAIN

I. Overview

a. Introduction

Historically, labour litigation in Spain has been substantial. This has been due to two main factors:

On one hand, trade unions have had a huge presence in companies, independent of their size and relevance.

On the other hand, Spanish legislation regarding Labour and Social Security is abstract and incomplete, and therefore needs to be complemented by Collective Bargaining Agreements, which must be previously approved by the legal representatives of workers, "Trade Unions", the legal representatives of companies and "Employers' Associations".

For these reasons, a large number of cases end up in court.

Spanish Social Jurisdiction foresees and promotes extrajudicial conciliation between parties, mainly to alleviate the Courts of a substantial percentage of cases. Judges invite the parties to reach an agreement outside the courtroom in order to free the Court's extremely tight agenda, resolve cases in the shortest time possible and limit the worker's and the Company's potential monetary damage.

In view of this, certain responsibilities are given to court clerks, who can now lead a pre-trial settlement. Before, only Judges had the authority to do this. From a practical standpoint, however, the Judge is still the only person who makes a substantial difference to the settlement of a case before a hearing.

The Social Jurisdiction is known in Spain for having a more flexible approach and being less bound to formalities than the Commercial and Civil Jurisdictions.

In favour of solving the problem at the heart of the matter, the principle "pro actione" is applied, which establishes that the lack of a mere formal requirement cannot result in the disqualification or suspension of the proceedings.

Finally, the Spanish Social Jurisdiction does not require judicial taxes for access to the Labour Courts of Justice in the first instance. A law regulating judicial taxes, approved in November 2012, inserted a new tax that affects the Social Jurisdiction when appealing a Court Ruling. This law has been highly criticized for its potential to cause defencelessness to workers or parties with limited means.

The combination of these factors – free and tax-free access to the courts of justice and the pre-trial conciliatory approach – makes the Social Jurisdiction one of the most efficient in solving conflicts. Before the economic crisis it was also one of the quickest jurisdictions, but this has gradually changed as the amount of claims filed has drastically increased and no further Court positions have been opened by the Administration due to financial shortages.

b. Claims

In Spain, the labour and employment legislation covers a vast range of procedures through which plaintiffs can claim the violation of Fundamental Freedoms and Rights (recognized by the Spanish Constitution) and the illegality or invalidity of any measure or abuses by the employer or the workers. The most common claims are listed below:

Claim for Unfair Dismissal: this action requires the demanding party in the proceeding to prove the existence of a defect in the formalities and or the inexistence of the dismissal cause, with regard to either the objective or the disciplinary dismissal.

If the judge considers the dismissal to be unfair, the employer can choose between reinstating the worker, upon payment of the lost wages (during the time spent in the procedure), or terminating the employment contract upon payment of the difference of the cost due to inadmissibility. If the worker concerned was part of the Workers Council, the choice between the two options above is up to the worker and not the employer, because members of the Workers Council receive special protections by Spanish labour and employment legislation. The dismissed worker has 20 working days to proceed with the filing of the claim.

Claim for Null and Void Dismissal: This action requires the claimant to prove the existence of a situation that represents (according to labour and employment law) a violation of the Fundamental Rights of an individual.

Discrimination on grounds of sex, race and religious or political beliefs are constitutive of rights violations. Likewise, dismissal as a result of legal actions undertaken by the worker in order to defend his/her rights in the Courts of Justice is considered a violation of the freedom to access to the Courts of Justice. All of the above is protected by article 24.1 of the Spanish Constitution. The employee has 20 working days to file the claim.

Claim for Null and Void Employer's Action: Company reorganization measures carried out by the company without respecting the requirements established in labour and employment law, may give rise to a claim before the Social Courts of Justice. Measures considered illegal or disproportionate will be declared null and void, and the Courts of Justice will condemn the employer to restore the previous conditions, both individually and collectively.

The affected employee has a period of 20 working days to file the claim.

Claim for Right Recognition: the worker has the right to claim his/her employment conditions if the employer decides to change them, either not following the correct procedure or by not justifying the change sufficiently. The employee has 1 year to file the claim.

Claim of Amount Due: This type of claim is intended to make the employer pay the employee amounts due to him/her (concerning salary). The employee may only claim due amounts up to 1 year prior to the action. Any other amounts, such as severance compensations, must be requested using the dismissal action.

Claim for Violation of Fundamental Rights: the violation of a Fundamental Right by the employer is considered a serious breach in Spanish Labour Law. This action also allows the employee to claim compensatory damages, which must be correctly proven in Court.

Collective Conflicts: Because conflicts regarding Collective Bargaining Agreements affect all workers in the field of a ruled activity, they must follow a specific procedure before the Courts.

Claim for Professional Disability: A worker is considered to have a permanent incapacity when, after completing the prescribed treatment and having received a medical discharge, he or she is still physically or functionally incapacitated to the point that he or she will probably not be able to perform normal work for the rest of his or her life. A person over the legal age of retirement who is entitled to an old-age pension cannot claim permanent incapacity benefits for non-work-related injury or illness. At the legal age of retirement, a

permanent incapacity allowance is automatically transformed into a retirement pension. This does not change the way in which the benefits are paid. Permanent incapacity is also the incapacity that remains at the end of the maximum temporary incapacity period. In general, permanent incapacity follows a temporary incapacity.

A special scheme exists for self-employed persons.

The nature of the Disability – permanent (in its different degrees) or temporary – can be due to a common illness or a work accident. Common illness/disease, covers situations in which the employee falls into illness or medical leave as a result of events unrelated to the performance of his/her work. A work accident, as the name suggests, refers to any disability arising from the performance of the work activity.

c. Administrative Agencies that Investigate or Adjudicate Claims

The public body responsible for pre-trial or extrajudicial conciliation regarding labour and Social Security conflicts is called the SMAC (Mediation, Arbitration and Conciliation Center or Mediation, Arbitration and Conciliation Service).

SMAC (Mediation, Arbitration and Conciliation Center/Service): This centre is managed by each of the Spanish Autonomic Communities (an autonomic community is a first-level political and administrative division of Spain). The Social Jurisdiction regulatory law establishes a number of cases in which this centre must have knowledge of the case before allowing it to go to trial. The SMAC is intended to be an organism within which the parties try to reach a settlement that puts an end to the dispute. This is normally possible because of the economic nature of most of the claims.

The main public bodies with regard to the Labour and Employment Jurisdiction are: INSS (National Social Security Institute), SEPE (Spanish Public Employment Service) and FOGASA (Wages Guarantee Fund).

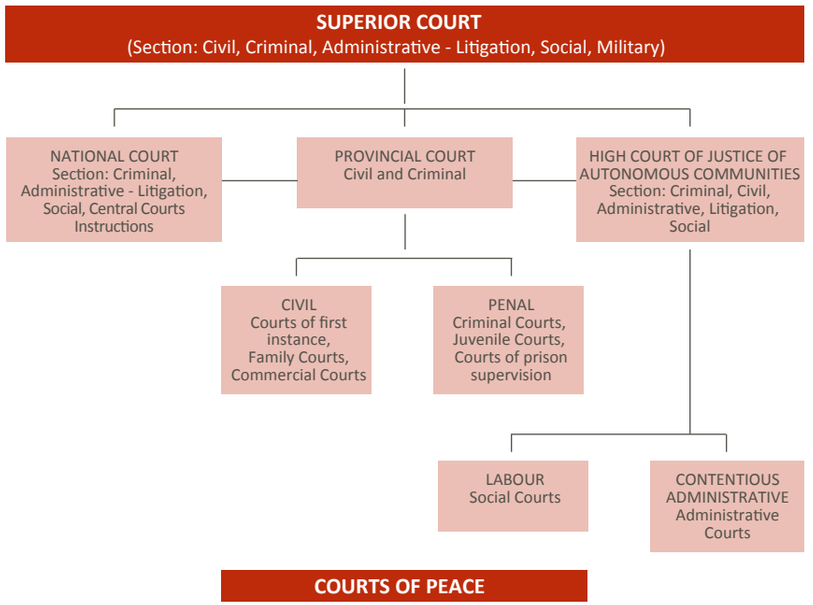
INSS or National Social Security Institute: this body is competent in all Spanish territories, and is responsible for the management of everything related to Social Security benefits for workers.

SEPE or Spanish Public Employment Service: it is an independent organism outside the Spanish Public Administration, responsible for managing the development and supervision of labour political measures. Its main function is to manage the employment situation in general and the public register of labour contracts.

FOGASA or Wages Guarantee Fund: the legal definition is set out in article 33.1 of the Workers' Statute and article 1 of the Royal Decree 505/1985, of March 6, regarding the Organization and Functioning of the Wage Guarantee Fund. According to these articles, FOGASA is:

> *An autonomous administrative body attached to the Ministry of Employment and Social Security, with legal personality and legal capacity to carry out the purposes specified in Article 33 of the Statute of Workers. The basic purpose for which it was set up is the guarantee of wage claims against the insolvency of the employer. Another of its purposes is to support or protect companies in crisis, and encourage job retention and business continuity, by paying certain benefits on behalf of the company without obliging the employer to return the money, provided certain situations are met.*

d. Court / Tribunal System



Labour Courts are located in the capital of each province and have general jurisdiction at first or single instance over matters of a labour nature not attributed to other bodies of this jurisdictional division.

The Labour Division of the High Courts of Justice has general jurisdiction at single instance over proceedings provided for by law, regarding disputes affecting the interests of workers. It also has jurisdiction over appeals against decisions issued by the Labour Courts of the Autonomous Region and over disputes regarding the respective jurisdiction of those Labour Courts.

The Labour Division of the National Court has general jurisdiction at single instance over special proceedings challenging collective labour agreements ("convenios colectivos") to be enforced in territories superior to the Autonomous Region, as well as over proceedings regarding collective disputes ("conflictos colectivos") whose resolution affects a territory superior to the Autonomous Region.

The Labor, or Fourth Section of the Supreme Court, has general jurisdiction over cassation appeals and other extraordinary appeals provided for by Law regarding matters pertaining to this jurisdictional division.

e. Alternative Dispute Resolution (ADR)

It is always preferable to attempt to reach an out-of-court settlement or amicable resolution. Spanish law promotes the use of these alternative measures by facilitating access to them and, in some cases, such as certain employment disputes, making them compulsory before having recourse to the courts.

In Spain, in addition to private negotiation, the parties can have access to an administrative conciliation process, which **must** be carried out before Labour Administration Mediation Services prior to labour litigation.

Mediation is very common in labour disputes. It is sometimes compulsory to attempt mediation before resorting to the courts. Collective disputes are usually subject to mediation. In some Autonomous Communities, even individual disputes are mediated.

The Autonomous Communities have employment mediation bodies, which specialize in such matters. At national level, the Servicio Interconfederal de Mediación y Arbitraje, SIMA, (interconfederal mediation and arbitration service) offers a free mediation service for disputes, which fall outside the remit of the bodies of the Autonomous Communities.

Law 36/2011, governing the labour courts, introduces a genuine novelty by establishing a general rule that all applications must be accompanied by a certificate attesting to a prior attempt at conciliation or mediation before the appropriate administrative service, the Mediation, Arbitration and Conciliation Service (SMAC), or before bodies performing such functions under a collective agreement, although the article following lists the procedures that are exempt from this requirement.

Law 36/2011 introduces express reference to mediation, not only during pretrial conciliation, but also once the court proceedings are under way.

Finally, arbitration is regulated by the Law on Arbitration, Law 60/2003 of 23 December 2003. This law also applies to special arbitration mechanisms, the one most used in practice being arbitration in consumer affairs to solve disputes relating to the consumption of goods and services covered by Law 26/1984 of 19 July 1984 on General Consumer and User Protection.

Unlike conciliation and mediation, it is not considered as a prerequisite for the successful commencement of the process.

Arbitration in Spain can be based on law or on equity. Generally speaking, arbitration resolves disputes by applying the law in force, unless the parties have given express authorization to solve the dispute solely on the basis of equity. This criterion of equity, in other words, without applying the legislation in force, is the one used to underpin an arbitration decision in some institutional arbitration proceedings, such as those relating to consumer affairs.

However, in practice, in labour procedures arbitration it is not very common, unless it comes in electoral matters.

II. The Litigation Process

a. Typical Case

i. Steps in the process

The main steps in process are the following:

Filing of action: The action starts with the filing of a claim before the Courts of Justice and, in certain cases, where regulated as such, before the Conciliation Chamber.

Admissibility: All claims shall be filed in writing and shall meet the following general requirements:

- The identity of the body to which the claim is being presented.
- The identity of the plaintiff.
- A clear and succinct listing of the facts on which the claim is based, and any others which, according to material law, are indispensable in order to resolve the matters raised. In no event may facts be claimed different from those alleged in the conciliation proceedings or prior administrative claim, unless they took place thereafter.
- The corresponding petition, in terms adjusted to the content of the claim brought.
- If the plaintiff is acting on its own, it shall designate an address within the city where the Court or Tribunal is located which shall be used in any subsequent steps.
- Date and signature.

Conciliation Act: As mentioned above, where certain requirements are met, prior to filing the Judicial claim, the applicant party must file a claim before the Administrative Conciliation Chamber. This prior step is intended to promote a settlement agreement between the parties before the claim reaches court.

Hearing: Once the court has convened a public hearing, it shall try to reach an agreement, advising the parties of the rights and obligations inherent thereto, without prejudging the content of any future ruling. If the court considers that the agreement is seriously detrimental to any party, or amounts to a fraud or abuse of law, it shall not accept the agreement.

A settlement may be approved at any time before the final ruling is issued. A certificate shall be issued of the conciliation act. If no settlement is reached in conciliation proceedings, the trial stage shall be initiated next, and the Secretary shall record all measures already taken. Thereafter, the plaintiff shall ratify or extend its claim without making a substantial change therein.

The defendant shall reply, specifically affirming or negating the facts of the claim, and alleging as many exceptions as may be applicable. In no event may it bring a counter-claim, unless this had been announced in the conciliation prior to the lawsuit or in the reply to the prior claim, and the facts on which it is based and the exact petition made were substantially described. If a counter-claim is brought, the stage shall begin to issue a reply thereto in the terms established in the claim. The same reply stage shall begin for procedural exceptions, if alleged.

Judicial Decision: The Judge or Tribunal shall deliver a judgment within a term of five days, which shall be immediately published and notified to the parties or their representatives within the following two days. Further to the background facts, the judgment shall provide a sufficient summary of what was the object of discussion during the proceedings. Furthermore, and based on the reasoning provided, it shall expressly declare the facts that it deems proved, referring to the grounds on which it bases its conclusion in the Points of Law. Finally, it shall provide sufficient grounds for the ruling handed down.

ii. Pretrial proceedings

Preparatory acts and pre trial proceedings can be divided in two measures:

Preparatory measures

If a party wishes to sue another party, it can request the court to compel the party, which it intends to sue to give evidence about a fact concerning the personality, ability

or legitimacy of the party or, for the same purpose, to provide some document which should be noted for the trial.

The party who intends to sue may also request information regarding the partners, shareholders, members or managers of an entity which it intends to sue, if that entity is without legal personality and the preliminary inquiries are aimed at determining who is the employer and the members of the group or business unit.

Moreover, in cases where the examination of books and accounts is imperative to substantiate a claim or its opposition, the party seeking to sue, or the party that expects that it will be sued, may request the disclosure of the relevant documents from the Court.

Precautionary measures

There are certain measures, which should be taken to ensure the success of the process and the satisfaction of the claims.

iii. Role of Witnesses, Counsel and Court / Tribunal

The important aspects of the labour and employment process before the Social Court of Justice are detailed below:

Witnesses: parties may request that individuals acquainted with the facts at issue relating to the subject matter of the trial be declared witnesses.

All individuals may act as witnesses, except those who are of permanent unsound mind or who are unable to use their senses in relation to facts that can only be witnessed using those senses.

Persons under fourteen years of age may act as witnesses if, in the opinion of the Court, they possess the necessary capacity of judgment to know and declare truthfully.

Counsel: lawyers in the Judicial Social Order, unlike in other jurisdictions, completely absorb the development of the financial year, advising the client and celebrating the act of judgment. Also, there are no Solicitors of the Courts in Labour and Employment Jurisdiction to support private lawyers.

Court / Tribunal: the Courts of Justice, addressed in the session of Judgment Act, gave the floor to lawyers, witnesses and experts. Finally, the Tribunal is the one who after judgment, and with all information, must to resolve the dispute of the case.

iv. The Appeal Process

In labour disputes, there are two possible appeals that can be filed once the initial court ruling has been issued.

Appeal process to the High Court of Justice

The object of the appeal for reversal shall be:

- To restore the proceedings to the state in which they were at the time of breach of the rules or procedural guarantees that led to unprotection.
- To review the facts declared as proved, in light of the documentary and expert evidence conducted.
- To examine any breach of material rules or case-law.

An appeal for reversal must be announced within five days following notification of the judgment; it shall suffice for the party or its lawyer/representative to merely declare, upon notification of the judgment, of its wish to lodge the appeal. It may also be announced in a hearing or through a writ addressed by the parties or their lawyer/representative to the Court that issued the challenged resolution, within the foregoing term.

If the Chamber overrules the judgment in full, and the appellant has made a cash deposit of the amount claimed, or has secured said amount, including the deposit required in order to appeal, the ruling shall order the return of all consignments and deposits and the cancellation of all guarantees provided, once the judgment becomes final.

If the appeal for reversal is upheld and payment is ordered of an amount that is less than the resolution appealed, the ruling shall order the partial reimbursement of consignments, in the amount corresponding to the difference between both sanctions, as well as the partial cancellation of the guarantees provided, once the judgment becomes final.

In all cases where the appeal for reversal is partly upheld, the ruling shall order the full reimbursement of the deposit.

Appeal before the Fourth Chamber of the Supreme Court

The Fourth Chamber of the Supreme Court shall examine cassation appeals lodged against judgments delivered in a single instance by the Industrial Chamber of the High Courts of Justice and by the Industrial Chamber of the National Court ("Audiencia Nacional").

The following may be subject to a cassation appeal:

- Judgments issued in a single instance by the Chamber referred to in the foregoing paragraph.
- Rulings resolving an extraordinary appeal brought against rulings issued by the Chamber when enforcing judgments, if resolving substantial issues not disputed in the lawsuit, not decided in the judgment or that contradict what is being enforced.
- Rulings resolving an extraordinary appeal brought against a resolution in which the Court, immediately after the filing of the claim, declares itself non-competent on the grounds of the subject matter.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The fees derived from the lawyer's professional activity can be freely agreed with the client, and may include a variety of pay scales, from a minimum flat fee to a combined success fee scale, based on the achievement of goals.

In addition, the Lawyers Association (BAR) provides a guideline of standard legal fees accepted by the collective of lawyers.

c. Trade Unions, Works Councils and Other Employee Representative Bodies

The litigation process with Trade Unions, Work Councils or other employee representative bodies may involve the **challenge of a collective bargaining agreement itself**.

A challenge against a CBA which seemingly infringes on the current legal framework or seriously injures a third party interest may be brought ex officio before the competent Court or Chamber, through a notification sent by the relevant labour authority. If the CBA was not registered, the workers' legal, or trade union, representatives or the employers who claim its illegality, or injured third parties who so claim, must previously request that the labour authority address an ex officio notification to the Court or Chamber.

If the labour authority does not reply to the request referred to in the foregoing section within a term of fifteen days, rejects the application or if the CBA was already registered, any challenge against it may be directly brought by the parties entitled to do so, through the collective dismissal procedure.

The ex officio notification that upholds the illegality of the CBA must contain the following:

- Specification of the law and the legal issues that are deemed as breached by the CBA.
- A succinct reference to the legal grounds of the illegality.
- A list of the representatives belonging to the committee that is negotiating the challenged CBA.

Protection of trade union freedom rights

Any worker or trade union with a legitimate right or interest that believes its trade union freedom rights have been infringed, may apply for protection thereof through a specific process whenever the petition falls within the competence of the industrial courts.

In such cases, where the worker, as the injured party, is entitled to act as the main plaintiff, the trade union to which he/she belongs, as well as any other trade union that enjoys the highest representation, may appear as co-adjunct parties. The latter may not appeal or continue the proceedings separately from the main parties.

The Public Prosecutor shall always be a party to these proceedings and shall adopt, as the case may be, the measures required to clarify any conduct amounting to an offence.

d. Specialized Litigation Bar

In the majority of capital cities in Spain there is a Professional Association of Lawyers.

III. Tips to Avoid Litigation

Procedural labour law has traditionally imposed on litigants certain means for the purpose of avoiding the process, to speed up the response to claims of workers, to seek a negotiated or voluntary settlement of labour disputes and, ultimately, to contribute to the economy of labour procedure.

There are several practices to take into account in each stage:

The first step is to recruit the right employees. Special attention has to be drawn when searching for employees who want to establish a career in the company with compromise and dedication, rather than hiring those who simply search for a job that will allow them to retain a permanent position in the company. These employees usually become unmotivated and tend to cause conflicts with management.

In this regard, a special emphasis has to be made to the company's culture and values. The closer they are to the employees' values, the better the relationship will develop in the future. Every organization has a culture of its own. It is up to the entrepreneur to choose to define and build it or let it develop on its own. Screening a candidate for a cultural fit is critical.

The employer must know what motivates its employees—financial rewards and money is not always the best way to give your employees drive. Every HR department must set-up non-financial rewards programs like mentorship lunches, featuring special employees or better parking. Money is not the only driver of strong performance.

Workplace culture, benefits and transparency are important values. Sometimes these issues even trump salary considerations. Therefore, the most crucial HR best practice, which every business should implement, is stressing the transparent culture of the business during interviews.

Communication with employees and defining work expectations is absolutely crucial. If the time comes to terminate the employee, it should not be a huge surprise. Documenting the process is important, especially documenting progressive disciplinary measures. Regardless of whether the company is large or small, keeping records of the situation goes a long way to avoiding litigation, and it also ensures that appropriate procedures are followed. Having a system to identify performance objectives and advise employees on whether they meet or do not meet those criteria is helpful not just for termination, but also for training and motivating the staff.

Last but not least, training employees plays a very important role in human relations. Employees understand how to communicate without the stigma of discrimination or harassment. Knowing the responsibility of being an employer or a manager and using effective and efficient communication should be the subject of training staff. If employees are trained and they understand their responsibilities, this will assist in avoiding future labor disputes.

IV. Trends and Specific Cases

a. Recent Amendments to the Law

i. It should be noted that the labour reform of February 2012 has had an important impact on employment litigation. Royal Decree-law 3/2012 of 12 February 2012 significantly modified the institutional framework of Spanish labour relations. The following amendments are of particular importance:

- Compensation for unfair dismissal has been reduced from 45 to 33 days per year of service and the maximum limit from 42 to 24 months, notwithstanding certain transitory provisions applicable to employment agreements in force on 12 February 2012;
- An administrative authorization is no longer required for collective dismissals and new reasons have been established to carry out these dismissals;
- Express dismissals have been eliminated and back pay is no longer payable in most cases of unfair dismissal;
- Relevant amendments have been approved to promote internal flexibility in companies as an alternative to terminating employment contracts; and
- The primacy of the company collective bargaining agreement in certain areas cannot be counteracted with sector-specific collective agreements and the so called “ultra-activity” of the collective agreement (the period of time that a collective agreement remains applicable after its expiration) is limited to one year from the termination of the agreement.

ii. Recently, the Supreme Court (TS 22-12-2014) considered that once the ultra-activity period of a collective agreement has ended, the conditions established by the collective agreement do not disappear since they are part of the employment contract from the beginning of the employment relationship.

iii. Act 26/2014 of November 27th introduced an important novelty regarding the taxation of severance pay. Before the reform, workers were exempt from taxation on allowances paid up to the limit set by the Statute of Workers of 33/45, 33 or 20 days per year. Presently, any compensation that exceeds the amount of 180,000 € is subject to taxation.

V. Conclusion

Currently, the Spanish legal system is highly flexible, allowing the employer to fit the company’s needs to keep the business viable. This has a direct impact on human labour relations, as the company’s culture should not change dramatically in a short period of time. The new flexibility given to employers has increased, however, the Spanish judicial system includes a number of measures, which make it possible to settle disputes fast and accurately.

That is why the Labour and Employment Jurisdiction is quite different from the rest of the Jurisdictions in Spain, such as the Civil one, where formalisms and strict procedures are common. Employment law is one of the fastest evolving areas of law in Spain, but, in reality, the daily life of companies tend to change at a faster speed than the law itself.

In recent years, after the 2012 labour reform, legislation and case law has become more protective of companies in areas regarding dismissals and conflicts in the field of changing working conditions. However, overall, the Spanish Social Courts (following the European pattern) are still very protective of employees’ rights.

SWEDEN

I. Overview

a. Introduction

The Swedish labour market, where collective bargaining agreements (CBAs) play an important role, is characterized by self-regulation by the labour market organisations (employers' organisations and trade unions). Traditionally, the Swedish government is responsible for a small portion of the rules and regulations governing the labour market. The fundamental rules are found in the Employment Protection Act (mainly rules related to termination of employment) and in the Co-Determination in the Workplace Act (rules regarding CBAs, information and consultation obligations, as well as some procedural rules for dispute resolution).

By way of CBAs, it is possible to deviate from the law, as well as to achieve independent rules in areas that lack legislation. For example, terms and conditions of employment, as well as procedural rules regarding co-determination and dispute resolution, are often regulated through CBAs. It is worth noting that CBAs cannot be made generally applicable (i.e. there is no procedure for the government to incorporate CBAs into law).

As a result of the Swedish labour market system, the majority of labour disputes are resolved through consultations between the labour market organisations. In cases were dispute consultations are unsuccessful, or where the organisations are not involved, disputes are generally settled through civil court proceedings. Thus, if one party claims that the other party has breached a certain rule, it is up to that party to submit said claim to court. If CBAs apply, the one and only instance for dispute resolution is generally the nationwide Labour Court. If CBAs do not apply, the dispute will be handled at a district court in the first instance, with the possibility to appeal to the Labour Court.

b. Claims

Swedish employment law can be divided into two main areas: the individual side and the collective side. The individual side concerns the relationship between employer and employee, and the collective side concerns the relationship between employers/ employers' organisations and trade unions.

The most common claim is a claim for damages due to breach of the employment protection rules, the CBA or the employment agreement. Breach of employment law or a CBA may, in general, incur both punitive and financial damages. Punitive damages may be awarded to the plaintiff whose right (according to employment law or a CBA) has been violated by the breach. Thus, if, for example, an employer fails to observe the consultation obligation towards the trade union, it is the trade union that will be awarded such damages. On the other hand, if the employer is in breach of a provision in a CBA concerning, for example, minimum wages, the rights of both the trade union and the underpaid employee have been violated and, consequently, they can both receive punitive damages for the breach.

However, normally the breach of an employment agreement is sanctioned solely through damages compensating for economic loss, unless a contractual penalty (judged reasonable) has been agreed upon between the parties.

Other common claims on the individual side are, for example, claims to declare wrongful dismissals invalid and claims related to discrimination.

c. Administrative Agencies that Investigate or Adjudicate laims

There are two main administrative agencies that investigate employment law claims in Sweden: the Equality Ombudsman and the Work Environment Authority.

The Equality Ombudsman is an administrative agency with the principal task of ensuring compliance with the Swedish anti-discrimination rules. The Ombudsman investigates employees' complaints and may represent an employee in court. The typical claim is for financial and punitive damages due to a breach of the rules. The Ombudsman mostly represents employees that are not trade union members, and will only represent trade union members if the trade union has, for some reason, refused to represent the employee. The Ombudsman also supervises employers to ensure that they adhere to the provisions of the anti-discrimination rules, and may request that employers take active measures against discrimination.

The Work Environment Authority primarily ensures compliance with the precise rules related to the work environment and working hours. The authority conducts public supervision and may issue an injunction or even a prohibition, as well as a fine.

d. Court / Tribunal System

THE SWEDISH COURT SYSTEM AS RELATED TO LABOUR DISPUTES

* A labour dispute shall be brought directly before the Labour Court in certain situations.

Employment disputes may be brought either to the Labour Court as the first and final instance, or to the district court (i.e. general court for civil and criminal cases) as the court of first instance, with the Labour Court as the final court of appeal. Hearings in the district courts, as well as in the Labour Court, are generally public.

The Labour Court is situated in Stockholm and has jurisdiction throughout Sweden. The Labour Court is the court of first and final instance in disputes where the action is brought by a trade union (representing itself or an individual employee), an employer's organisation or an individual employer, which has entered into a CBA, if the case involves either:

- a dispute which relates to a CBA or to the Co-Determination within the Workplace Act; or
- any other labour dispute where a CBA is in force between the parties and the employee concerned is covered by the terms of the CBA.

It should be noted that most claims between such parties cannot be tried in court before a formal consultation has taken place between the relevant employer/employers' organisation and trade union.

For other disputes, primarily those involving individual employees and employers which are not members of any organisation (or not supported by their organisation), the district court is the court of first instance, with the possibility to appeal to the Labour Court.

Historically, the Labour Court has granted leave to appeal in approximately 30 % of all appealed cases.

The Labour Court normally consists of seven members, however, in cases without precedential significance and in other issues of a simple nature, the court may consist of only three members and of five members in cases related to discrimination. A chairperson may also take preliminary measures personally and strike out or stay a case, provided that such measures adhere to clear procedural rules.

In a normal seven-member-seating there are three neutral members, two representing employee interests and two representing employer interests. Among the impartial members, the chairman and vice chairman are legally qualified. The third impartial member is a person with expert knowledge in labour law matters.

The four members representing employee and employer interests are nominated by the employees' and employers' organisations. The idea is that the four partisan members are able to provide the court with inside knowledge on the opinions amongst the labour market organisations, and also help to legitimise the Labour Court (and its central role in developing the law in this field) in the eyes of the social partners.

e. Alternative Dispute Resolution (ADR)

The majority of labour disputes are settled promptly by consultations between the labour market organisations. However, other forms of ADR (mainly mediation and arbitration) involving third parties are also used to some extent.

Both the Labour Court and the district courts actively strive to facilitate amicable settlements as early as the prehearing, and the courts can, to some extent, act as a mediator in the dispute. However, the courts must properly balance the interest of facilitating the conclusion of a settlement with the strict requirement of objectivity of the courts.

The National Mediation Office mediates disputes in the labour market concerning the conclusion of CBAs (between unions and employers/employers' organisations), especially when there is a risk of industrial action. The Office may appoint a mediator in such disputes if the parties concerned jointly agree to it. If the Office assesses that there is a risk of industrial action, or if an industrial action has already commenced, a mandatory mediator may be appointed without the consent of the parties.

The mediator shall try to persuade the parties to settle the dispute by calling the parties to consultations, and, if appropriate, by putting forward proposals for resolving the dispute. If a party does not participate in the consultation, the mediator may, under certain circumstances, issue a fine. In 2014, the National Mediation Office appointed a mediator in a total of 6 disputes.

Another alternative dispute resolution procedure is *arbitration*, which may be prescribed by the CBA or the individual employment agreement. As a general rule, the arbitration clauses constitute a procedural impediment both in the Labour Court and in the district courts. However, arbitration clauses are normally not enforceable in disputes regarding discrimination or the right of association. Furthermore, an arbitration clause in an individual employment agreement may be judged unreasonable, and set aside or modified by the court. Arbitration clauses are normally considered reasonable for employers with managerial or equivalent positions, and for employees that have qualified tasks and individualized employment agreements. Arbitration clauses are commonly used in management level employment agreements.

The primary benefit of using arbitration instead of proceeding through the public courts is that arbitration is generally swift and the dispute remains confidential. Further, relevant expertise within the labour law area can be ensured through the appointment of an experienced arbitrator or arbitration board.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

Normally, the first step for labour market organisations, individual employers that have entered into a CBA and employees/employers that are members of a labour market organisation, is to initiate consultations to settle the dispute. If the consultations are unsuccessful, the organisations (and individual employers that have concluded CBAs) may typically make their own claims, as well as claims on behalf of their members, directly to the Labour Court as the court of first and final instance.

For other labour disputes (primarily those involving employees and employers that are not members of any organisation), the district court is the court of first instance. The district court's judgment in labour disputes may be appealed to the Labour Court as the court of final instance (leave to appeal must be obtained).

When the plaintiff has filed a claim, the court will order the respondent to submit a statement of defence. This constitutes the start of the process leading up to the trial. The main objectives during this process are to clarify any ambiguities in the parties' claim or respective defence, and to establish the factual circumstances that are in dispute. The latter is particularly important, since the parties' only opportunity to present their evidence is at the main hearing. The court will also inquire about the possibility for the parties to achieve an amicable settlement.

The process leading up to the trial normally includes both a preliminary hearing and written submissions from the parties. However, there is, in general, no preliminary hearing in the Labour Court cases that are appealed from the district courts (in most cases there would already have been a preliminary hearing conducted in a similar manner and also a main hearing). During the process leading up to the trial, the court will order the parties to finally state the evidence that they wish to invoke. After the expiration of time to submit this information, the parties may not submit any new evidence unless they can reasonably prove that they have a valid reason for not submitting the evidence earlier or that the proceedings will not be substantially delayed.

The court may, in some cases, pass judgment without a final hearing. However, in most cases, the final step in the litigation process is a main hearing in which the parties present their respective cases.

In summary, the main hearing is conducted as follows. First, the plaintiff presents its claim and then the respondent states its position to the claim. After that, the plaintiff presents the particulars of the case and the written evidence in support of the claim, and in turn the respondent presents the particulars of the defence and the written evidence in support thereof. Thereafter, examinations of the parties normally take place. First, the parties are interrogated by their respective legal counsels and then a cross-examination will take place, conducted by the counterparty's legal counsel. After the examinations of the parties, the witnesses, if any, will give testimony. These examinations are conducted in the same manner as the examinations of the parties. Finally, the parties present their closing arguments.

The Labour Court's judgment is based on what has been presented during the main hearing only. Normally it takes a few weeks to pass the judgment.

ii. Pretrial Proceedings

Consultations may be requested (by a trade union on the one side, and the employer/employers' organisation on the other) according to the Co-Determinations Act in many different situations. The basic rule is that a trade union may call for consultations on all issues concerning the relationship between its member and the employer. The employer has a corresponding right to call for consultation with the trade union. Pretrial dispute consultation is nearly always a prerequisite for court proceedings in labour disputes where the employee concerned by the dispute is a trade union member. However, there is generally no obligation to consult with any trade union if the dispute only concerns an employee who is not a trade union member. Procedural rules for the dispute consultations are stipulated in law and supplemented by more detailed rules (or deviations from law) in the CBA. In these regulations, time limits within which the counterparty must be notified and a claim must be raised are established. If the time limits are not observed, the right to bring a claim will normally lapse.

Consultations typically take place at two levels before court proceedings are commenced: 1) locally between the employer and the local trade union and 2) centrally between the employer and the trade union at the national level. If the consultations have been concluded without a successful settlement, the case may be brought before the court.

The main purpose behind the requirement to consult before going to court is to facilitate amicable settlements. According to a recent government survey, majority of dismissal disputes are settled without bringing the dispute before the court. For other disputes, there are no official statistics available concerning how often dispute consultations are successful. Considering the fact that roughly only 400 cases are brought before the Labour Court each year, it is quite clear that the parties, in practice, are able to settle the majority of disputes. Additionally, only around 100 judgments are made by the Labour Court annually, due to the fact that a large number of cases are withdrawn as the parties reach settlements during the prehearing stage of proceedings.

The dispute consultations also have a function as a preparation phase, where the parties are forced to sort out the relevant contentious questions, which is especially important since judgments in the Labour Court are final.

iii. Role of Witnesses, Counsel and Court / Tribunal

Standard court procedures for civil litigation are applied. This means that it is up to the parties (in practice, their legal representatives) to present their case before the court. The court is prohibited from taking any claim or objection into account that has not been invoked by a party in court, and the court may not pass judgment on anything other than what has been presented by the parties. Consequently, all oral and written evidence must be presented by the parties at the main hearing. The parties are free to invoke any evidence deemed necessary to support their claim. However, the oral evidence generally consists of examinations of the parties and witnesses. Witnesses are often of fundamental importance to the outcome of the case.

The main rule states that the parties are responsible for ensuring that invoked witnesses appear for the hearing. Examinations of witnesses are, in principal, also handled by the parties. However, the court may ask questions for clarification purposes.

iv. The Appeal Process

An appeal may be filed with the Labour Court against a judgment of a district court in labour disputes. Generally, the Labour Court will grant a leave of appeal if:

- there is any reason to believe that the Labour Court will come to a different conclusion than that of the district court;
- it is deemed important to establish a precedential judgment in the case; or
- there are other extraordinary reasons.

Historically, leave of appeal has been granted in approximately 30% of appealed cases. Judgments by the Labour Court are always final and, thus, no appeal may be filed against them.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The typical costs in labour litigation include attorney's fees, compensation for loss of income and travel expenses for parties and witnesses. Attorney's fees vary considerably, depending on the complexity of the case.

The basic rule in court is that the losing party shall reimburse the winning party for the litigation costs. If there are several claims in the same case and/or the parties win in different parts respectively, each party can be ordered to bear its own costs, or one of the parties can be awarded adjusted compensation for his costs. In labour disputes, there is an additional rule that the winning party may be ordered to bear its own costs if the court deems that the basis for bringing the dispute to court was reasonable.

The usual claims in labour disputes are for financial damages (compensating for economic loss) and punitive damages (varying depending on several factors, for example, the severity of the violation and negligence). In case law, there are examples of punitive damages amounting to more than 500 000 SEK, but typical punitive damages do not exceed 100 000 SEK per employee or organisation affected by the violation.

Financial damages to employees for economic loss after the termination of employment are maximized by law to 16, 24 or 32 months' salary, depending on the employee's total period of employment. However, if a dismissal is declared invalid, but the employer refuses to comply with the judgment, the employer has to pay standardized damages at the previously described levels. It should be noted that the employee is entitled to salary and benefits if the employee is entitled to remain in their position during the court proceedings.

A recent government survey showed that the majority of the disputes related to dismissals tried by the Labour Court take more than 17 months from the dismissal until judgment. If the dispute is tried by the district court as the court of first instance, it takes even longer. Approximately 50 % of trials before the district court that are appealed to the Labour Court, take 35 months or more from the dismissal to the final judgment of the Labour Court.

Concerning other types of labour disputes, there are no official statistics, but the Labour Court estimates that it normally takes around six months from application until judgment.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

In Sweden, trade unions are the only employee representative body involved in labour litigation. The general description of the litigation process above also covers trade unions.

As previously mentioned, trade unions (together with employers' organisations) have a predominant role in Swedish labour disputes, both at the consultation stage and in

the court proceedings. However, trade unions can be involved in litigation in different ways. On the collective side, i.e. in disputes primarily concerning the relationship between employers/employers' organisations and the trade unions, the trade unions are naturally involved to protect their own rights (for example, a trade union may claim punitive damages from an employer on the ground that the employer has violated a provision in the CBA).

Trade unions may also bring an action on the Individual side (i.e. concerning the relationship between employer and employee), on behalf of its member (for example, a claim for wrongful dismissal or vacation pay may be brought by the trade union on behalf of its member against the employer).

When a member of a trade union is Involved in labour disputes, the union may also be involved as the employee's attorney or as legal assistant (since an attorney must be an individual person, it is the trade union representative who personally takes on the role of attorney).

d. Specialized Litigation Bar

Any individual deemed suitable by the court, considering that person's honesty, knowledge and earlier activities, may appear as an attorney. Also, the attorney must be able to speak the Swedish language in court.

In practice, labour litigation is typically handled by lawyers specialized in labour law, working at unions, employers' organisations or law firms.

III. Tips to Avoid Litigation

Employers who acknowledge the important role that the trade unions have in the Swedish labour law system, for example, by complying with the obligations to inform and consult with the unions (as prescribed by law or CBA), and, in general, maintain good relations with them, can often significantly reduce the risk of labour disputes. There are many ways for trade unions to legally disrupt businesses, and unnecessary aggressive actions towards trade unions should always be avoided. The best practice in dispute resolution is to seek cooperation with the concerned trade unions, with a give and take understanding on both sides.

Nevertheless, when a dispute arises it is important to carefully consider if it is a dispute that is suitable for litigation. Employment disputes can be both lengthy and disruptive to the business. Thus, the possibility for a settlement out of court should always be considered at an early stage. A good rule of thumb is to actively seek an amicable settlement in all disputes, except in questions of principal importance (typically concerning interpretation of CBAs).

The mandatory dispute consultations described above will normally present an opportunity for settlement negotiations.

IV. Trends and Specific Cases

a. New or Expected Developments

Nearly 500 CBAs will expire during 2016 and, therefore, have to be replaced. Another 150 CBAs may need to be renegotiated. Almost all CBAs applicable in Sweden concern, and cover, around 3 million workers.

In general, discrimination issues appear to be increasing. According to a recent report, the number of complaints regarding discrimination and harassment reported by individuals

to the Equality Ombudsman, with or without connection to working life, increased in 2014. Around 1,950 complaints were reported to the Equality Ombudsman in 2014. The Equality Ombudsman found that only 25 of the complaints had grounds to be taken to court, however, this was an increased number compared to previous years. Many of the complaints, which had been taken to court, were withdrawn as the parties had reached an amicable agreement.

b. Recent Amendments to the Law

From January 2015, employers are obliged, under the Discrimination Act, to take reasonably accessible measures to avoid discrimination of disabled individuals. If the employer breaches the prohibition on discrimination, the employer may be liable to pay compensation to the concerned employee.

As from 31 March 2016, new provisions related to the social work environment enter into force. The employer must, inter alia, take necessary measures to prevent victimisation at the workplace. For example, the employer will need to have a policy in place with routines for how to handle victimisation at work. If the obligations are not observed, the employer may be liable to pay a conditional fee, or even be subject to corporate fines.

V. Conclusion

The most common claim in a labour dispute is a claim for damages due to breach of the employment protection rules, a CBA or the employment agreement. Breach of employment law or a CBA may incur both punitive and financial damages.

Majority of labour disputes in Sweden are resolved through consultations between employers' organisations and trade unions. In cases were dispute consultations are unsuccessful, or where organisations are not involved, disputes are generally settled through civil court proceedings. However, other forms of ADR procedures may also be used, such as mediation held by the National Mediation Court and arbitration.

Standard court procedures for civilian litigation are applicable to labour disputes, and the process leading up to trial typically includes written submissions of the parties and, in certain situations, a preliminary hearing. A main hearing is normally included, and is the final step in the process. There are, however, some parts of the court procedure, which are specific to a labour dispute.

Consultations between the employer/ employers' organisation and the trade unions are nearly always a prerequisite for court proceedings in labour disputes where the concerned employee is a trade union member, and certain procedural rules for the consultations must be observed. Depending on whether a CBA applies, the dispute will be handled at a district court in the first instance, with the possibility to appeal to the Labour Court, or directly at the Labour Court. Thus, the waiting time for the final judgment of the Labour Court may be rather long.

Trade unions may bring an action on behalf of an employee against the employer, and the trade union may take the role as an employee's attorney or legal counsel. If the case is related to discrimination, the Equality Ombudsman may represent the employee in court.

The typical costs in labour litigation are attorney's fees, compensation for loss of income and travel expenses for parties and witnesses. It must be noted that the court may order one party, even the winning party, to bear the litigation costs.

SWITZERLAND

I. Overview

a. Introduction

In Switzerland, as in most jurisdictions, the settlement of individual disputes should be distinguished from the settlement of collective disputes. While individual disputes are, in principle, submitted to the courts, arbitration panels or other social organizations settle most collective disputes.

For many decades, the procedural law and judicial organization rested mainly within the competence of the cantons. However, on 12 March 2000, the Swiss people and the cantons accepted a revision of the new Federal Constitution, which transferred to the Confederation the competence to unify civil (and penal) procedures. The new Swiss Code of Civil Procedure (SCCP) came into effect on 1 January 2011. Despite this, the 26 cantons are still responsible for organizing the court system. Therefore, depending on the jurisdiction, either a labor court or an ordinary district court will hear employment-related complaints.

Depending on the language of the region in which the competent court is located, the proceedings are either held in German, French or Italian.

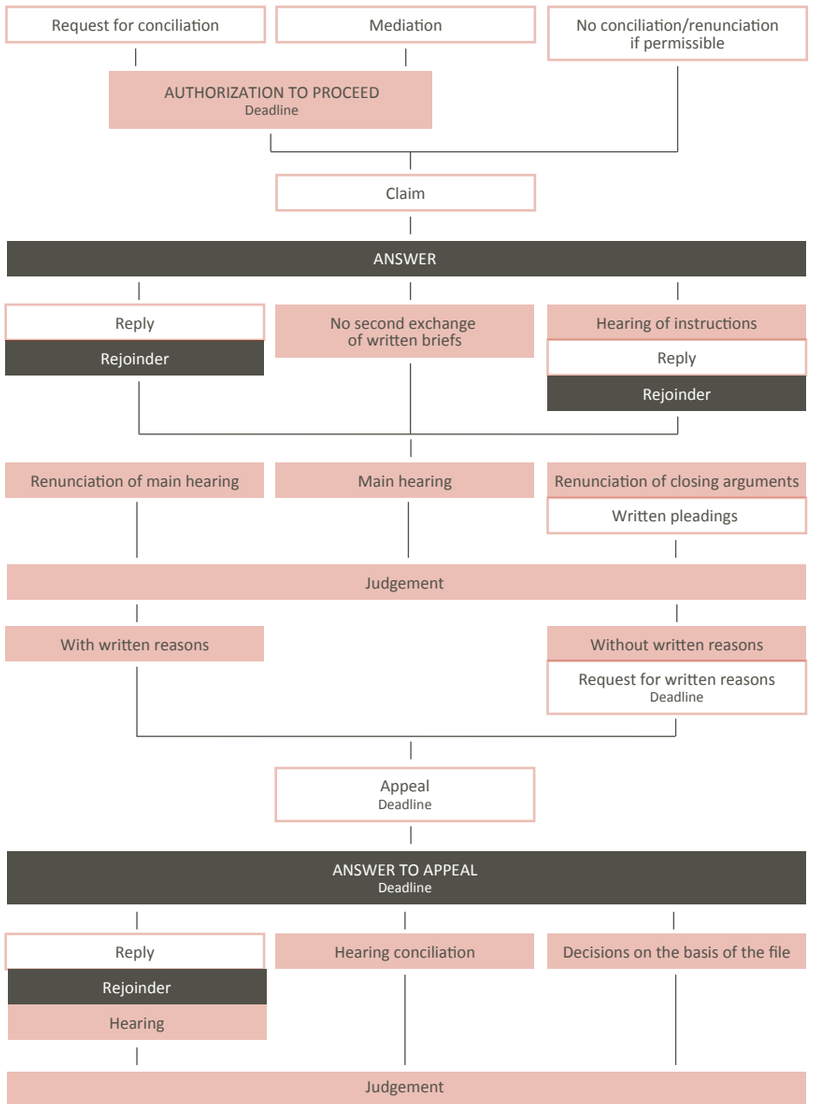
b. Claims

“Numerus clauses” do not apply to employment-related claims. The most common claims, however, concern wrongful dismissal, wage (including bonus claims), compensation for overtime and accrued vacation, written work reference, mobbing, gender discrimination and liability issues.

c. Administrative Agencies that Investigate or Adjudicate Claims

Each canton has a labor inspectorate, which is the inspection and enforcement authority for the implementation of labor legislation. In addition, trade unions carry out checks; in particular, in cases where violations of collective agreement provisions have been reported.

d. Court / Tribunal System



The courts, which can hear individual disputes arising from employment relationships, vary according to the cantonal constitution or legislation. There are three main systems, but the situation is complicated by the fact that in some cantons there are differences according to the communes or the category of workers concerned.

The main systems are as follows:

- Litigation is brought before the ordinary civil courts.
- Litigation is brought before a special court (labor court, industrial court, tribunal de prud'hommes) when the amount at issue does not exceed a given sum (in most cases CHF 30'000 – this is to say 25.000€). Above this amount the ordinary courts are competent.
- Litigation is brought, whatever the amount in dispute, before a special labor court. This is the case in some French speaking cantons, for example, Geneva and Jura.

In most of the cantons, where there are special labor courts, these courts consist of a lawyer (generally a professional judge who is a member of a civil court) and, in equal numbers, representatives of the employers and employees. In some cantons, the president is competent to decide small cases on his/her own (generally if the amount in dispute is below CHF 30'000 – this is to day about 25.000€).

The Swiss judicial system offers two levels of appeal: Cantonal and Federal appeals. At cantonal level, the appeal is brought before an ordinary civil court of appeal.

The Federal Court has no special chamber for cases arising out of employment contracts. These disputes are submitted either to civil law chambers or public law chambers, depending on the case.

e. Alternative Dispute Resolution (ADR)

According to Article 354 SCCP, any claim can be subject to arbitration, insofar as it comes within the parties' free disposal. In the field of labor law, the latter provision must be set in connection with Article 341 para. 1 Code of Obligations, according to which the employee cannot relinquish, throughout the duration of the contract and during the month which follows, the claims resulting from mandatory provisions of the law or from a collective agreement.

Very few collective agreements provide that individual disputes between employers and employees shall be brought before arbitration panels.

At all times during conciliation or court proceedings, parties can, by common request, turn to mediation.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

In labor law disputes, there is a mandatory conciliation hearing before a claim can be filed. When the amount in dispute is equal to or greater than CHF 100,000 – this is to say about 85.000 € –, the parties can mutually agree to omit conciliation proceedings. These proceedings are not public.

ii. Pretrial Proceedings

Conciliation proceedings are initiated by filing a request for conciliation in writing or by oral deposition before a conciliation authority. This request may take the form of a brief summary of the dispute or of a comprehensive statement of claim. As a rule, the parties must appear in person at the conciliation hearing. Parties domiciled/seated abroad or out of the canton where the proceedings take place, as well as parties prevented from attending for serious reasons, are exempt from appearing personally and may send a representative instead.

Upon the claimant's request and when the value in dispute is below CHF 2,000 – this is to say about 1.500 € –, the conciliation authority can, without being so obliged, render a decision on the merits. In disputes with a value of up to CHF 5,000 – this is to say about 3.500 € – the conciliation authority may choose to submit a 'proposition of decision' to the parties, which becomes final and binding unless a party objects to it within a period of 20 days. The conciliation authority may thus be considered as a type of small claims court.

A settlement reached by the parties in the conciliation proceedings has the effect of an enforceable decision. If the conciliation fails or if a party rejects the 'proposition of decision', the claimant is granted leave to pursue the claim before the ordinary courts.

iii. Role of Witnesses, Counsel and Court / Tribunal

Types of Proceedings

The SCCP provides for three types of proceedings: ordinary proceedings, simplified proceedings and summary proceedings.

Each of the three types of proceedings consists of three stages: the assertion stage, where the parties may plead their arguments and offer evidence available to them; the evidentiary stage; and the post-hearing stage, where the parties may comment on the result of the evidentiary phase before the judgment is rendered.

Courts are usually prepared to outline their preliminary view of the case during the first hearing. The majority of cases are settled based on such preliminary assessments.

Ordinary Proceedings

Articles 219 to 242 of the SCCP regulates ordinary proceedings. This set of rules applies to all labor disputes where the value in dispute exceeds CHF 30,000 (25.000€).

Proceedings are initiated by filing a fully substantiated, written statement of claim. The statement must contain the names of the parties, the alleged facts, the value in dispute, and must list all available evidence substantiating the alleged facts. The claimant may include legal reasoning.

Upon receipt of a statement of claim, the court assesses whether the procedural prerequisites are satisfied. If they have been satisfied, the court will serve the defendant with a copy of the statement of claim and will set a deadline for the defendant to file a written statement of defense and the necessary supporting evidence. This deadline may be extended upon a reasoned request by the defendant. Courts have broad discretion regarding the length of the extension. The claimant has no right to object to or appeal against a court order rendered in this respect.

When filing its statement of defense, the defendant may include a counterclaim, provided that the same type of proceeding applies to the counterclaim. If the defendant does not

include a counterclaim in the statement of defense, the defendant is barred from filing a counterclaim in the same proceedings, but may initiate separate proceedings.

Under the SCCP, a second exchange of briefs is not mandatory and should remain the exception. The court may call the parties for an oral main hearing directly after the first exchange of briefs. However, the court may, at any time, hold an 'instruction hearing' in order to clarify the matter in dispute, complete the facts, attempt a settlement, or generally prepare the main hearing.

At the main hearing, the parties defend their pleadings orally. New facts and new evidence are, as a rule, only allowed at the main hearing if they occurred or were discovered after the exchange of briefs or after a possible instruction hearing, or if they existed earlier but could not be submitted despite reasonable diligence. If there was no second exchange of briefs or no instruction hearing, it is possible to present new facts and evidence without limitation at the beginning of the main hearing.

For a limited number of proceedings where the court has to establish the facts and take evidence ex officio, such as for labor law disputes with a value of up to CHF 30,000, new facts and evidence may be presented until the court has deliberated and rendered its decision.

Simplified Proceedings

Simplified proceedings apply to labor disputes where the value in dispute is below CHF 30,000. The disputes are referred mostly to a single judge who has to establish the facts of the claim ex officio.

Simplified proceedings are exempt from court charges, are less formal and favor oral submissions and provide a more active role to the courts.

Contrary to ordinary proceedings, a claimant may submit his/her claim orally before the court. In practice, however, oral depositions will presumably remain exceptional. When a statement of claim does not include any legal reasoning, the court will call the parties directly for a hearing. At the hearing, the claimant will have to further substantiate his/her claim orally and present the evidence available to him/her.

Likewise, the defendant has to answer the claim orally. This first round is followed by an oral reply from the claimant and a rejoinder from the defendant. As in ordinary proceedings, if the claim has been filed in writing, the court sets a deadline for the defendant to file its written statement of defense.

Summary Proceedings

The SCCP provides for summary proceedings in Articles 248 to 270. These summary proceedings go even further in terms of simplification and expediency. They apply, in particular, to urgent requests and requests for provisional measures.

They also apply to 'clear-cut cases', which are non-contentious matters or matters where the facts can be immediately proven or where the legal situation is straightforward and non-disputable.

As in simplified proceedings, a claimant may present his/her claim orally, provided that the facts of the case allow such a course of action. Here again, it is to be expected that, in practice, such an oral deposition remains exceptional.

In the context of summary proceedings, the evidence available is limited to documents. Other means of evidence are only admissible if the taking of such *evidence does not delay the proceedings, or is indispensable for the purpose of the proceedings, or if the court has to establish facts ex officio*.

Evidence

Each allegation must generally be supported by corresponding evidence. The statement of claim must include a list of evidence detailing all items of evidence.

The Code of Civil Procedure provides for a conclusive list ("numerus clausus") of admissible evidence: testimony, physical records, inspection, expert opinion, written statements, questioning and deposition of the parties.

The court appraises the evidence at its discretion. The judges are, of course, not bound by the judicial assertions of the parties ("iura novit curia").

As there is a statutory deadline of three months for filing a claim after the authorization to proceed was granted by the conciliation authority, the analysis and documentation of evidence must begin at an early stage.

iv. The Appeal Process

Each canton has a second-instance, appellate court. At the cantonal level, the SCCP offers three appellate remedies: appeal, complaint, and revision. Subsequent appeals against final cantonal decisions can, in limited cases, be filed with the Swiss Federal Supreme Court. The Federal Court Act governs such appeals.

An appeal is the ordinary remedy against final and interim decisions at first instance and decisions on interim measures, if the value in dispute amounts to at least CHF 10'000. The value in dispute is determined on the basis of the relief sought in the statement of claim and not on the basis of the issues still in dispute when the decision subject to appeal is rendered.

An appeal must be filed within 30 days after notification of the court decision. This is a statutory deadline, which cannot be extended. The grounds of appeal are not restricted. They may be based on grounds such as the incorrect application of law and/or incorrect establishment of facts. In principle, an appeal suspends the legal effect of the decision concerned. However, in exceptional cases where an appeal is devoid of any chances of success, the appellate court may authorize early enforcement.

Complaint

When an appeal is not admissible, such as when the threshold set for the value in dispute is not given, a party may raise a complaint. This is a subsidiary form of appeal. The grounds upon which a complaint may be brought are more restrictive. Incorrect establishment of facts may be raised as a ground only if it is flagrant.

The deadline for filing a complaint is 30 days. In case of summary proceedings, it is 10 days. Contrary to an appeal, a complaint does not, as a rule, stay the enforcement of the challenged decision. However, exceptionally, a stay may be granted. Contrary to an appeal, new evidence and/or new facts are, in principle, not admissible.

Revision

A party can apply to the court of last instance to reopen proceedings leading to a final judgment if significant facts or evidence are discovered which were not available in the proceedings beforehand. Revision of a decision may also be requested when the decision was unlawfully influenced to the detriment of a party — for instance, by a felony or misdemeanor.

A revision must be filed within 90 days from discovery of the ground for revision and, at the latest, within 10 years after the decision has been rendered. Similar to a complaint, a revision does not suspend the legal effect and enforceability of the decision.

Federal Appeal

The Federal Court decides appeals on issues of federal or constitutional law. For labor disputes, the minimum amount in dispute is CHF 10'000. The Court, however, will deal with cases below this threshold if a question of law is of "fundamental significance". An appeal must be filed within 30 days of the service of the preceding judgment. The scope of re-examination is limited to questions of law. An exception exists if the finding of facts by the lower instances was obviously incorrect or in violation of the law.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

As a rule, courts determine the costs of the proceedings in the final judgment. The principle 'costs follow the event' is applicable. Accordingly, the unsuccessful party has to bear all costs. Costs include court fees and part of the legal expenses of the prevailing party ('party compensation'). A party that proceeds in bad faith or wantonly can be made liable for costs even in proceedings for which, as a rule, no costs are charged. In the same perspective, unnecessary costs are charged to whomever caused them.

Costs of employment-related procedures are free where the amount in dispute does not exceed CHF 30'000. The same is true, regardless of the value of the dispute, if the litigation is based on the Federal Act on Gender Equality and the Federal Act on Information and Consultation of Workers in the Enterprise.

Court costs are regulated by cantonal tariffs. In financial disputes, court costs depend on the amount in dispute. Other factors can have an influence, such as the type of procedure, the complexity of the case, and the time spent by the court on the matter. The legal expenses reimbursed to the prevailing party, which do not necessarily cover a party's full legal costs, are taxed according to official rates. Costs for cantonal appeal proceedings are calculated based on the same principles.

The claimant is requested to pay an advance on court costs up to the amount of the expected court costs. Even if the claimant prevails, the advance is not paid back to him/her, but directly set off against the costs of the proceedings. Courts leave it up to the prevailing claimant to recover the paid court fees from the unsuccessful defendant. If a claimant has no permanent residence or registered seat in Switzerland or if he/she appears to be insolvent, the defendant may require the claimant to provide security for the estimated party compensation. However, such security deposit is prohibited by the 1954 Hague Convention for parties falling within the ambit of this Convention.

The conciliation proceeding should take a few weeks only. Thereafter, a straightforward claim in an expedited oral proceeding (i.e. the amount in dispute is below CHF 30'000) should take less than six months. Other cases might be pending for one to two years (first instance)

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The capacity of the industrial associations (employers' associations and trade unions) to take action at law has to be examined from two different points of view: at public level and at private level.

Associations can appeal against sentences of cantonal and federal authorities. Nevertheless, according to case law, a provision authorizing these types of associations to defend the interests of their members has to appear in their statutes.

At private level, industrial associations may take action at law when they intend to defend a collective interest, for example, to safeguard the economic interests of their members. Before acting, the organizations are required to attempt conciliation with the employer. Apart from that, they act in their own name and have the same rights as any individual complainant.

d. Specialized Litigation Bar

Professional representation of parties before any court in Switzerland is reserved to lawyers admitted to a cantonal bar. However, there is no specialized litigation bar.

III. Tips to Avoid Litigation

Proper contract drafting and the enactment of the most relevant employment policies (including policies on mobbing and sexual harassment) are crucial in order to avoid litigation. Moreover, employers should handle work conflict situations with due care and take all necessary measures to ensure safety at work.

For larger companies, it is advisable to have a staff representative body in place helping to anticipate, discuss and settle potential conflicts.

IV. Trends and Specific Cases

a. New or Expected Developments

The Swiss legislator is currently discussing an amendment to the Code of Obligations with the aim to better protect whistleblowing at the workplace.
b. Recent Amendments to the Law

The obligation to record working time has recently been eased for the middle management. It is no longer necessary to record working time in detail (including breaks etc.), rather, it is sufficient to record overall work time per day /week.

V. Conclusion

An important factor in Swiss employment litigation is the value in dispute. If the value in dispute does not exceed CHF 30'000, no court costs will be imposed and the simplified proceedings apply. Most cases are indeed settled in court, sometimes with substantial influence from the judge.

UNITED ARAB EMIRATES

I. Overview

a. Introduction

The United Arab Emirates (the "UAE") is a federation of seven constituent states formed in 1971. The seven emirates comprise of Abu Dhabi, Dubai, Ajman, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain. The UAE federal constitution provides for an allocation of powers between the federal government and the government of each emirate.

The UAE has a unique legal and regulatory framework adopting predominantly a civil law regime, which comprises of a blend of French and Islamic Sharia principles. The UAE also constitutionally permits federal financial free zones to be established in any emirate, which has its own civil and commercial laws and court system distinct from those of the wider UAE. To date, two financial free zones have been established, the first being the Dubai International Financial Centre (the "DIFC"), which was established in 2005 and models its civil and commercial laws on principles of common law, and the Abu Dhabi Global Market (“ADGM”) financial free zone, which was established in 2013 and largely applies English common law (to the extent not overridden by ADGM). The DIFC and ADGM, however, remain subject to other federal laws, such as immigration, state pension, and criminal laws.

Employment relationships in the UAE are predominantly subject to UAE Federal Law No 8 of 1980 Regulating Labour Relations, as amended by Federal Laws No 24 of 1981, No 15 of 1985, No 12 of 1986 and No 8 of 2007, and the applicable ministerial orders implementing its provisions ("Labour Law", with the exception of those employees in the aforementioned financial free zones). The Labour Law is a federal law, which applies to each emirate within the UAE and, with a few minor exceptions, covers all employees in the private sector in the UAE. The Labour Law has been supplemented over the years by Cabinet Resolutions and Ministerial Resolutions issued by the UAE Ministry of Labour. In addition, individual emirates have also issued emirate specific regulations on a limited basis.

With the exception of the financial free zones, various free trade zones have been established in the UAE in order to encourage direct foreign investment. These other free zones have, in some cases, issued their own employment regulations; however, unlike the position in the DIFC and ADGM, these must be read in conjunction with the Labour Law. Employees working in the DIFC are subject to DIFC Law No 4 of 2005, as amended ("DIFC Employment Law") and employees working in ADGM are subject to ADGM Employment Regulation 2015, as amended ("ADGM Employment Regulation").

The Labour Law, DIFC Employment Law and ADGM Employment Regulation set out an employee’s minimum entitlements and employers are free to confer different terms, provided these are not less favourable to the employee (subject to some exceptions). The Labour Law is administered and enforced by the UAE Ministry of Labour ("MOL"). Throughout this chapter, we will identify where the position in the DIFC and ADGM differs to the position in the UAE generally.

b. Claims

The majority of employment claims brought in the UAE revolve around arbitrary dismissal, unpaid dues or workplace injury. The most pertinent minimum statutory standards that must be met are set out below.

Maximum working week

Pursuant to the Labour Law, the maximum working hours for an adult employee is eight hours per day (excluding a one hour break) or 48 hours per week (based on a six day

week). Employees should work for no more than five consecutive hours without a break. However, working hours may be increased to nine hours per day for persons employed in commercial establishments, hotels, cafeterias and as guards.

Friday is the statutory weekly rest day.

The DIFC Employment Law sets out a maximum permitted working week of 48 hours, averaged over a seven-day period. Unlike the Labour Law, employees are permitted to opt out of this provided they do so in writing; however, employers are under a general duty to ensure that employees do not work excessive hours to the detriment of their health and safety.

The position in ADGM is very similar to the DIFC in that ADGM Employment Regulation sets out a maximum weekly working time of 48 hours for each seven day period, unless prior consent (to work in excess of this) is obtained from the employee.

Leave

Holiday entitlement

The Labour Law provides that employees are entitled to at least two days of leave for every calendar month if their continuous service is more than six months and less than one year. Employees who have more than one year of continuous service are entitled to no less than 30 calendar days of annual leave. Employees in the private sector are also entitled to around 10 days of public holidays annually, as declared by the Government. Furthermore, an employer cannot adopt a “use it or lose it” policy with regard to annual leave. As such, accrued but unused leave must either be carried forward or paid out either at the end of the holiday year or upon termination of employment.

The DIFC Employment Law provides for 20 working days of annual leave (exclusive of public holidays) and an employer can fix the periods of leave in line with its business needs. Payment in lieu of accrued annual leave is only permitted on termination of employment, unlike under the Labour Law. Employees are permitted to carry forward 20 days of accrued but untaken leave into the next calendar year.

ADGM Employment Regulation provides for 20 working days of annual leave (exclusive of national holidays) for any employee who has been employed for 90 days or more. A maximum of five days' accrued but untaken leave can be carried over into the next calendar year and an employee is entitled to a payment in lieu of accrued but untaken leave on termination.

Maternity leave

Pursuant to the Labour Law, female employees are entitled to 45 calendar days’ maternity leave with full pay upon completion of 12 months continuous employment or 45 calendar days maternity leave with half pay where they have completed less than 12 months continuous employment. The Labour Law also provides for nursing breaks, without a reduction to the employee's salary, once the employee returns to work until the baby reaches 18 months.

The DIFC Employment Law provides for 65 working days’ maternity leave, 33 working days of which will be on full pay and 32 working days on half pay, where the employee has completed 12 months’ continuous employment.

Similar to the DIFC, the ADGM Employment Regulation provides for 65 days maternity leave (or adoption leave where a child under 3 months' old is being adopted) if the

employee has been employed for 12 months or more and complies with the notification requirements. Such leave will be paid in full for the first 33 days and at half pay for the remainder. Annual leave continues to be accrued during maternity leave. 5 days' paid paternity leave is also provided in the regulation.

Probation and Termination

The Labour Law provides for the initial employment period to be classed as a probationary period. The probationary period can last up to six months. During this period the employer may terminate the employment immediately.

The Labour Law makes a distinction between unlimited and limited term contracts. After the probationary period, where the employment contract is for an unlimited term, such contract may be validly terminated at any time by the provision of written notice at least 30 days prior to termination, or any longer period provided for in the contract provided the employer provides an “acceptable” reason. An acceptable reason is not defined in the Labour Law, but is generally considered to be a reason for termination that must relate to the employee’s work. Where an employer or an employee fails to give the other party notice of the termination of the contract or reduces the period of notice without prior agreement, the party obliged to give notice must pay the other party compensation in lieu of notice, even where no prejudice has been sustained by the other party as a result of such failure or reduction.

Limited term contracts previously had no notice provisions and expired at the end of the period or on the date specified in the contract (except in cases of summary dismissal). However, a new Ministerial Decree came into effect from 1 January 2016, which provides for a maximum notice period of three months in limited term contracts. If an employer seeks to terminate the contract prior to the end of the limited term, the employee is entitled to early termination compensation of up to three months’ remuneration (inclusive of basic salary and allowances), or a shorter period if the contract has less than three months to run, in addition to the notice period under the Ministerial Decree. However, parties are able to agree that the level of compensation in advance is not to exceed three months' wages.

Pursuant to the Labour Law, an employee loses the entitlement to notice or payment in lieu of notice or other termination payments if he or she is terminated “for cause”. The exhaustive list of circumstances in which “cause” will exist to justify summary dismissal is set out in the Labour Law.

Furthermore, there are limits on the circumstances in which employment can be terminated by an employer, where the employee involved is a UAE national. These do not apply in the ADGM and the DIFC.

There is no reference to probationary periods under the DIFC Employment Law; however, the minimum notice provisions vary depending on the length of service. They range from between 7 days and 90 days. However, the parties may contractually agree to a different period, agree to waive notice altogether or agree payment in lieu of notice. There is no equivalent list of reasons for termination under the DIFC Employment Law, as compared to the Labour Law. Pursuant to the DIFC Employment Law, either party may terminate employment without notice where there is “cause”. The DIFC Employment Law provides that cause to dismiss an employee without notice exists in circumstances where the employee’s conduct warrants termination and where a reasonable employer would have terminated the employee. The employer is obliged to provide an employee with a written statement of the reasons for the employee's dismissal upon the request of the employee who has been employed continuously for not less than one year.

ADGM Employment Regulation provides for a probation period not exceeding six months. During the probationary period, either party can terminate the employment with or without cause on one week's notice. Termination notice provisions are similar to those stated in the DIFC Employment Law in that they range from between 7 days and 90 days depending on the employee's length of service. However, the parties cannot contract out of these minimum notice periods, but are free to agree to increased notice periods. Both parties are free to terminate "for cause" without notice in specified circumstances. Employees are also entitled to a written statement of reasons for dismissal (upon request and subject to a minimum service requirement of one year).

Severance pay

The Labour Law provides that certain employees may be entitled to receive severance pay commonly known as “end of service gratuity”. If an employee has more than one year of continuous service, they will be entitled to severance pay of up to 21 days of basic wages for every year of the first five years of service, and 30 days of basic wages for every year thereafter (provided the payment does not exceed two years of wages in total). The entitlement to severance pay is pro-rated for partial years worked once the initial year of service is attained.

End of service gratuity is calculated according to the last basic wage paid to the employee and is payable upon the termination or expiry of the contract of employment. Allowances and benefits are excluded from the calculation. However, payments such as bonus or commission may be included, depending on the terms for making such payments and the express provisions of the employment contract.

Where employees resign during the first five years of service, their entitlement to end of service gratuity will be reduced as follows:

- employees resigning between the first and third years of service will be entitled to receive only one-third of the total end of service gratuity pay; and
- employees resigning between the third and fifth years of service will be entitled to receive only two-thirds of the end of service gratuity pay.

The Labour Law provides that an employee on a fixed-term contract of employment will lose the entitlement to end of service gratuity if the employee resigns before the expiry of the fixed-term and has less than five years of continuous service.

Where employees are dismissed for cause under the Labour Law or resign without notice (other than in certain prescribed circumstances), they will lose all entitlements to end of service gratuity.

The DIFC Employment Law and the ADGM Employment Regulation entitles employees to end of service gratuity calculated in the same way as under the Labour Law. However, there is no reduction in the entitlement if an employee resigns during the first five years of employment. Furthermore, gratuity is not payable where the employee elects in writing to take the company pension instead, or where they are dismissed for cause.

Arbitrary dismissal

There is no list of permitted reasons for termination with notice. However, the Labour Law gives employees the right to claim arbitrary termination if they are terminated “for reasons unconnected to their work”, with the implication being that an employer should only terminate employment for poor performance or misconduct. Where an employee is arbitrarily dismissed, the competent court may order the employer to pay compensation, which shall be assessed after considering various factors.

The amount of the compensation for arbitrary dismissal is capped at the employee’s total remuneration for three months, calculated on the basis of the last remuneration.

The DIFC Employment Law does not give employees the right to claim for unfair or arbitrary dismissal. Employees who are dismissed for cause in the DIFC also forfeit their entitlement to end of service gratuity.

The ADGM Employment Regulation does not expressly provide for compensation for unfair dismissal, nor is there a requirement for an employer to follow established procedures for implementing dismissals. However, the explicit recognition of common law principles could potentially open the door to employee claims for damages under the common law concept of implied duty of trust and confidence. It is yet to be seen how this may be interpreted and applied in practice.

Unpaid dues

A large proportion of employment claims instigated relate to unpaid end of service gratuity, unpaid salary, accrued untaken leave on termination and additional contractual benefits, such as commission.

Workplace Injury

Employers are obliged to provide a safe system of work. The Labour Law imposes a number of obligations on employers regarding employee health and safety and managing employee injury, including reporting obligations. Where an employee sustains an employment accident or contracts an occupational disease, the employer is obliged to pay for the cost of the employee's treatment (and related transport costs) until the employee recovers or his disability is confirmed.

Under the Labour Law, employers are liable to pay an employee compensation for a workplace injury on a strict liability / no fault basis. In the case of death of an employee, the compensation is equivalent to 24 months’ basic salary at the time of death, subject to the minimum and maximum caps applied. In the case of permanent injury, the compensation is a proportion of the amount payable on death. Exceptions apply where an employee's injury or disability (not resulting in death) is a result of the employee's deliberate actions.

In addition to bringing a claim under the Labour Law, employees can also bring a claim against their employer under the Federal Law No. 5 of 1987, as amended (Civil Code). These claims are assessed separately to claims under the Labour Law.

The position under the DIFC Employment Law is very similar. Where an employee sustains an injury as a result of an employment accident arising out of or in the course of his or her employment, or dies as a result of an employment accident or contracts an occupational disease, the employer is obliged to pay compensation to the employee based on the last monthly wage the employee received prior to his or her injury, subject to the percentage and minimum amounts detailed in the law.

The ADGM Employment Regulation also has provisions, which oblige employers to pay compensation to employees who are injured or die in the course of their employment.

c. Administrative Agencies that Investigate or Adjudicate Claims

The MOL administers and enforces the Labour Law and will investigate any complaint received from employees or employers. The MOL will also attempt to mediate disputes between employees and employers to reach an amicable settlement on the disputed issues.

The Labour Law permits for the resolution of collective labour disputes through a Ministry of Labour 'Conciliation Board'.

d. Court/ Tribunal System

The UAE Constitution provides that the judicial authorities in each Emirate will retain jurisdiction in respect of all judicial matters not assigned by the UAE Constitution to the Federal Judiciary. However, the UAE Constitution also provides that this residual jurisdiction of the individual Emirati judicial authorities may, at the request of an Emirate, be transferred by Federal law to the Federal judiciary. The Emirates of Ajman, Fujairah, Sharjah and Umm Al-Quwain have transferred these powers to the Federal court system. Abu Dhabi, Dubai and Ras Al-Khaimah have retained their own judicial systems. The result of this is that the UAE's legal system is bifurcated with Dubai and Ras Al- Khaimah outside the 'federal' judicial system, and the remaining Emirates within it.

There are three tiers of courts within the Federal system: the Federal Court of First Instance, the Federal Court of Appeal and the Federal Supreme Court. There are branches of the Federal Court of First Instance and Federal Court of Appeal in each of the Emirates that have adopted the Federal system. The Federal Supreme Court, which is the final appellate court, is located in Abu Dhabi.

The operation of the Federal courts, and the manner in which proceedings are conducted, is governed by the Civil Procedure Code. Proceedings are conducted in the Arabic language, mostly by reference to written submissions and documentary evidence and court appointed experts.

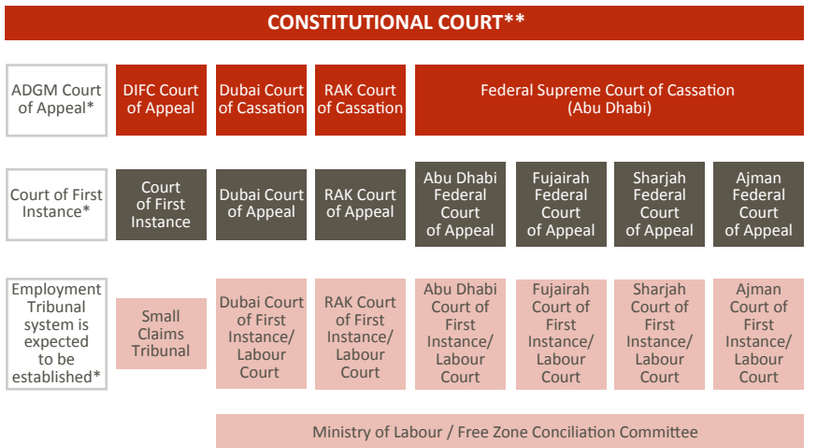
There are no separate free zone judicial authorities. Whilst technically "off shore", the UAE Courts still have jurisdiction over matters that arise in the various free zones, or defendants domiciled in one of the free zones. The jurisdiction of the Court in each Emirate will extend to the free zones within that Emirate and those courts will apply the applicable free zone laws as well as any other laws, which may be applicable (Federal or Emirati). The exception to this rule is the DIFC and ADGM.

Employment claims subject to the Labour Law are required, as a prerequisite, to be filed initially with the MOL or the relevant free zone authority in which the claimant was employed. The MOL or the free zone authority will attempt to mediate between the parties to reach an amicable settlement on the disputed issues. In the event that no such settlement is possible, the MOL or the free zone authority is obliged to issue a 'transfer letter' to allow the matter to be filed and heard before the Labour Court. The claimant then has two weeks from the date of the 'transfer letter' to proceed with filing the claim with the Labour Court/ Court of First Instance. Under the labour law, the time limitation for bringing a claim is one year from the date the entitlement arose. The MOL's 'referral' or 'transfer letter' is valid for two weeks from issue. If an employee fails to raise his or her claim within the two weeks, he or she can seek a renewal 'transfer letter', subject to the one-year limitation period.

Claims subject to the DIFC Employment Law are generally instigated in the DIFC Courts. The DIFC is a Common Law and English language jurisdiction, whose court system is largely modelled on the English Commercial Court. The Small Claims Tribunal ("SCT") was established in October 2007 to enable access to justice in a swift and efficient manner. The majority of employment claims are instigated at the SCT. The SCT will hear and determine claims within the jurisdiction of the DIFC Courts where (1) the amount of the claim does not exceed AED500,000; (2) the claim relates to the employment or former employment of a party and all parties elect in writing that it be heard by the SCT; (3) the amount of the claim does not exceed AED1 million and all parties elect in writing within an underlying contract that it be heard by the SCT; or (4) the Chief Justice orders or directs a claim to be heard by the SCT.

The ADGM court structure is yet to be finalised; however, it is anticipated that the structure will consist of a Court of First Instance and a Court of Appeal. It is understood that initially employment disputes will be brought in the Court of First Instance; however, a dedicated employment tribunal system is likely to follow with its own set of procedural rules.

UAE COURT SYSTEM



*Court structure is yet to be finalised. The diagram depicts our understanding of what the structure may look like.
**Any constitutional issues will be referred by the relevant court to the Constitutional Court.

e. Alternative Dispute Resolution (ADR)

Parties are encouraged to settle their claims amicably.

Employment claims falling within the ambit of the Labour Law are required to follow a mandatory procedure as described above involving the MOL. Resolution of labour disputes through arbitration is not generally permissible, as jurisdiction to hear such claims remains with the UAE courts. That said, the parties may, in principle, mutually agree to resolve their dispute through arbitration; however, any award issued potentially remains open to jurisdictional challenge by, in particular, the losing party.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

Pre-trial Proceedings

Before commencing a claim the parties must follow the mandatory procedure set out above.

Pre-action Letters

In most cases, it is prudent to send a pre-action letter to the defendant setting out the basis of the claim (although it is not a legal requirement). There is no concept of without

prejudice communications in the UAE and therefore the pre-action letter should not contain anything that could be construed as harmful to the claim as the letter can be used as evidence in subsequent proceedings.

Similarly, if a potential defendant replies, no admissions or offers should be made, as these will be cited as admissions of full liability.

ii. Commencement in the Labour Court

Statement of Claim

Proceedings are issued by a Statement of Claim. The Statement of Claim is a formal written document setting out the name, address and designation of the claimant and defendant, the facts (in brief) of the case and the remedy the claimant seeks from the court, together with supporting documents. If the original supporting documents are not in Arabic they must be translated into Arabic by a Ministry of Justice approved translator prior to submission, as Arabic is the language of the court. The Ministry of Labour referral notice must be attached to the Statement of Claim. If the action is filed by an advocate on behalf of the claimant, an original notarised Power of Attorney ("POA") must be filed with the Statement of Claim.

The Clerk will open a file for the matter, allocate a case number and schedule a hearing date for the action. Usually, a hearing date will be scheduled within two weeks to one month from the date on which the Statement of Claim was filed.

Service

A summons will be served on each defendant through the court at the address provided in the Statement of Claim. The summons must be served on the defendant after 7am, or before 6pm on a working day.

Service of the summons must be carried out on the defendant in person or on his or her authorised agent or advocate. Service on an agent or advocate will only be valid if the claimant provides evidence that the person who has been served is the authorised agent of the defendant or holds a POA for the defendant thereby enabling such a person to accept service on the defendant's behalf.

The summons must be served within 10 days from the date the summons was handed to the Court Bailiff. In the event that the date of the hearing falls within this period, service must be effected before the hearing date.

Local Service

If the defendant resides within the Emirate in which the action was filed, the summons will be served on the defendant in person at the defendant's domicile or place of work.

If the defendant is a company, association or establishment, the summons must be served at the head office through the officer in charge (such as the owner, general manager or partner, if the concern is a partnership). If such a person is not present, a copy of the summons may be left with a member of staff at the office. If a company has no head office, a copy should be delivered to the person who represents the company either personally or at his or her place of domicile or residence.

Service in Another Emirate

If the action is filed in one Emirate and the defendant is domiciled or has his or her place of business in another Emirate, a petition must be made to the court of the other Emirate to effect the service of the summons.

Service Outside the UAE

If the defendant is domiciled outside the UAE, the Clerk of the Court will ask the claimant to have the summons, the Statement of Claim and all supporting documents translated into English. Once translated, the documents will be forwarded to the Federal Ministry of Justice to effect service on the defendant abroad. The Ministry of Justice in turn will forward the summons and attachments to the Ministry of Foreign Affairs who will then forward the documents to the UAE Embassy or designated other Embassy in the country where the defendant is domiciled, to pass to the Ministry of Justice / Court Department of that country to effect service on the defendant in that jurisdiction. Once the summons is served on the defendant in the foreign country, the Ministry of Justice/ Court Department will so advise the Embassy which will advise the Ministry of Foreign Affairs which will advise the Ministry of Justice, who will then pass the notice/documents to the Clerk of the Court. This will then be considered valid service to enable the court to proceed with the action.

In practice, effecting service through diplomatic channels in this way takes a long time and can seriously delay progress of a matter. The UAE courts do not recognise service of summons by fax, email, courier service or through the claimant directly. Foreign service can only be effected through diplomatic channels.

Alternative Methods of Service

Until proof of service is received, the court will not allow the case to proceed. The court will not accept an alternative method of service unless it has become apparent that the defendant is no longer domiciled at the address provided by the claimant. If the court is satisfied that the defendant is no longer domiciled at the address provided, the court may make an order allowing for the attachment of a copy of the summons to the door of the defendant's place of residence, or last known place of residence, or by publishing it in a widely circulated Arabic daily newspaper. The claimant must show that he or she has made every effort to locate the address of the defendant but that no address has been found.

The Defendant's Response

The defendant is required to file his or her response (defence) at least 3 days before the first hearing of the case, in compliance with Article 45(2) of the Civil Procedure Law. In the Emirate of Dubai, it is common for the defendant to attend the court at the first hearing to request an adjournment to respond to the action, and such an adjournment will usually be granted. The defendant will then be required to file his or her response, together with supporting documents, at the following hearing.

In the defence, the defendant may either make an admission to the allegations contained in the Statement of Claim or deny them and set out a defence. At the same time, the defendant may submit a counter-claim.

The claimant will usually require time to respond to the defendant's submissions and the case will go back and forth between the claimant and defendant with the exchange of memoranda and documents. After the third or fourth hearing, the court is likely to reserve the case for judgment.

Counterclaim

If the defendant has a cause of action against the claimant, he or she may either commence separate proceedings or raise a counterclaim in the existing action. If an employer defending an action brings separate proceedings against an employee, it will need to pay court fees. Counterclaims must be submitted orally at the hearing or by application to the court. Whilst it is in the discretion of the court to admit a counterclaim the court will normally do so, unless the counterclaim is filed at a late stage of the proceedings.

Interlocutory Applications

Applications for preliminary attachments, joinder, referrals to an expert, may be made at any stage throughout the proceeding. It is within the Judge's discretion to deal with the application or (more commonly) to leave it until the matter is reserved for judgment.

Joinder

It is possible to make an application to the court to join one or more defendants to the proceedings while a case is being heard by the Court of First Instance. This may be jointly with the first defendant or as an independent defendant to the action. Generally, the claimant is entitled to join another defendant in the action if there is "just cause" as to why he or she had failed to do so at the commencement of the proceedings.

Such an application should be made to the court by a formal application setting out the grounds for joining the new defendants and the names and addresses of the new defendants. The court will then consider the matter and give a decision. If new defendants are joined, they will be served with a copy of the application and requested to attend the next hearing scheduled for the case.

It is also possible for the defendants to file a counterclaim in the same action in the same manner and following the same procedure as in a normal court action. Both the main action and the counterclaim will be heard together, provided they relate to the same subject matter and are between the same parties.

There are no additional court fees to join a defendant. If, however, the court is of the opinion that the case against the new defendant relates to a separate or new cause of action, it may order the claimant to pay an additional fee for joining a new defendant to the action.

Amendments of Statement of Claim

It is possible for the claimant to amend his or her Statement of Claim at any stage while the court is hearing the case and at any time before judgment is delivered. It is also possible to file further documents or make further submissions or comments on the submissions made by the defendant at any stage in the proceedings.

Withdrawal of an Action

The claimant may make an application to the court to withdraw the action and cancel the proceedings. In most cases the court will grant such a request. The court fees, however, will not be refunded.

The claimant may also apply to the court to suspend the hearing of the case for up to six months. The court will usually have no objection from the defendant, and unless there is a good reason for the defendant to object, the court will normally agree to such a request. Once the period of suspension has elapsed, the court will strike the case off the

record if the parties have not brought the case before the court within 8 days following the end of the suspension period.

Judgments

After the parties have exchanged pleadings with submissions, the court will reserve the case for judgment. Where the Court decides to appoint an expert or deal with interlocutory applications, an interim judgment will be issued.

Once the matter proceeds to final judgment, no further submissions will be accepted. However, on some very limited occasions, the court may, on the application of either party or of its own motion, re-open the hearing of a case to clarify or hear an argument on the issues in the case.

A judgment is the court's decision on the matter. The Labour Court proceedings described above can often take six to nine months before the case is reserved for judgment, although the time taken can increase significantly where an expert has been appointed. Once a case is reserved for judgment, judgment will usually be rendered within two weeks to a month.

The judgment will be delivered in open court in the presence of both parties and it will contain a summary of the facts, arguments and the submissions made. A written judgment will be issued at a later date, setting out the reasons, and be signed by the Judge who delivered the judgment. The full text of the judgment is not normally ready on the same day as the judgment is delivered. The parties will usually receive a complete copy of the judgment a few days after the date on which the judgment was delivered. It is not compulsory for the claimant and defendant to attend, and non attendance will not have any effect on the judgment delivered. If a party fails to attend, judgment will be delivered "in absentia", provided that the parties were properly served in the first place with notice of the hearing, and this affects the timing of any future appeal.

Default Judgment

If a defendant or his or her representative fails to appear before a Court of First Instance after being properly summoned to do so on one or two occasions, default judgment will be granted pursuant to Article 53(1) of the Civil Procedure Law. If default judgment is granted, a defendant will have no rights to apply to review the judgment or re-open the case at any time.

The defendant will, however, have the right to appeal against the judgment within 30 days, calculated from the day following the date the judgment is served on him or her, under Articles 152(1) and 159 of the Civil Procedure Law. If the defendant attended the court (even if he or she attended only one hearing), then the 30 day period will be calculated from the day following the date of judgment. Service of the judgment will be effected by the Court Bailiff in person or at his or her domicile or place of work.

If no appeal is filed within the 30 days, the judgment will become final and may be executed against the judgment debtor in the Execution Court under normal execution procedures. However, if the defendant is domiciled outside the jurisdiction of the court, 10 days will be added to this period and 60 days will be added if the person's domicile is outside the UAE.

Claimant's Failure to Attend Court

As previously mentioned, if the defendant failed to attend the court following proper service of the summons, the court may proceed against the defendant and deliver a

default judgment. If, however, the defendant attended the court at the scheduled hearing and the claimant failed to attend, the defendant may inform the court that he or she would like to withdraw from the hearing. He or she will then be considered to be absent and the court may, if it is the first hearing, strike the case from the court record. If the request is made at a subsequent hearing, the court may reserve the case for judgment or strike it from the record. If the case is struck off the record, the file will be taken off the court roll.

The claimant has a right to make an application to schedule another hearing for the case to restore the case onto the court roll. Such applications must be made within three months of the striking off. There are no legal ramifications for having the case struck off.

If the claimant does not renew the case within the three-month period, it will not be possible to renew the case at a later date and the court fees will be forfeited. The claimant will have to file a new case with the new proceedings and pay a new court fee. The main action will not be considered res judicata by virtue of the fact that it was cancelled, but it may have consequences in regard to time-bar. Once a case is filed, the time-bar will be interrupted for a period of three months. If the case has not been renewed within the three-month period, the time-bar will start to run again.

Enforcement of the Court of First Instance Judgment

A judgment cannot be executed unless it has become final and is certified by the Execution Court. The execution procedure takes place in a separate department of the court, separate from the day-to-day dealings of the clerks of the court. There are judges specifically assigned to the Execution Court, assisted by an Execution Bailiff and administrative staff at the Execution Department to administer the execution and enforcement of judgments and orders. The Executive Judge is in charge of all execution matters, as well as any objections thereto.

A Court of First Instance Judgment can only be enforced in the event that both parties fail to appeal the judgment within the 30 day time period. If a party files an appeal within the requisite time limit, the Court of First Instance Judgment is not considered to be a final judgment and cannot be enforced.

Interest

The UAE courts award interest on judgments. The Dubai Court of Cassation in case No 52/97 determined that interest should be charged from the date a judgment becomes final and non-appealable, unless the claim is a fixed one. If the value of the claim is fixed, interest should be awarded from the date its claim was registered with the court.

In the absence of an agreement between the parties, the court may, at its absolute discretion, award interest at a rate up to 12% (applied on a simple, rather than a compounded, basis).

iii. Role of Witnesses, Counsel and Court / Tribunal

Witnesses

As the UAE is a civil law jurisdiction, all arguments, comments and documents are usually submitted to the court by way of written submissions. However, upon the request or either party (if the value of the claim exceeds AED5,000) witnesses may be called, the Judge will not call a witness of his own accord. If the court agrees to allow the calling of witnesses it will postpone the matter to allow the party who has requested witnesses time to call those witnesses. The court may also give the other party the right to call

counter-witnesses. In such a case, the court will schedule the hearing for both parties to bring their witnesses. They all may be heard at one hearing or the case may be adjourned for two or three hearings to allow the witnesses to be heard.

Expert Witnesses

The court may, upon the request of either party or of its own motion, refer a case, which has a technical element which requires an expert opinion to a court appointed expert for an opinion on the facts of the case and on the arguments raised by the parties.

There is no provision for an appeal against the order. However, a party may appeal against the identity of an expert. An appeal against the identity of the expert must be filed within 3 days, although the identity of an expert may be challenged within a week of the appointment.

The court will assign a mandate (details of the expert's "mission") to the expert. The court often asks the expert to review the documents and submissions made by the parties, meet both parties and discuss the case with them, investigate the matter at any government department or within the private sector as the expert deems necessary, hear the witnesses of both parties and any other person relevant to the case before submitting his report to the court.

The procedure for the selection of experts in the Federal Court is that the court will approach the Ministry of Justice to recommend an expert from the list of experts employed by the Ministry of Justice. If there is no expert available with specific expertise in a particular matter, an external expert or academic will be appointed.

The court will also order one or both parties to pay the fees of the expert. The case will then be adjourned (often repeatedly) until the expert files his report.

Local Advocate

There is no legal requirement that a local advocate has to represent a party in the Court of First Instance or the Court of Appeal. Therefore a plaintiff or defendant can represent himself/herself in person, or be represented by his/her spouse, in-laws or other relatives to the fourth degree without even a POA. Only local advocates who are registered as advocates with the Dubai Court of Cassation or the Abu Dhabi Supreme Court can represent a party in these final courts of appeal pursuant to Article 21 of Federal Law No 23 of 1991 as amended by Federal Law No 20 of 1997 ("the Lawyers Law"). Only advocates who are licensed by the Ministry of Justice and who are also on the roster of practising lawyers can appear before the UAE courts. Appearance is further restricted by the Lawyers Law to UAE nationals. There is an exception to this rule in Article 9 of the Lawyers Law: an advocate who was already licensed before the Lawyers Law came into effect can continue to appear in the courts, provided that he/she has at least 10 years of legal or judicial experience, has a main residence in the UAE and practices through the law office of a UAE national lawyer. Lawyers who practice in the Courts of Dubai and/or the Courts of Ras Al Khaimah must have a further local licence.

International legal consultants are often retained to manage local and regional litigation. As international legal consultants do not have a right of audience in the courts in the UAE, their role involves advising clients on the merits of a claim, gathering evidence, selecting and instructing a local advocate on behalf of the client, briefing the local advocate and reviewing draft pleadings with the advocate and client, formulating and keeping under review litigation strategy and reporting regularly to clients in the degree of detail which they require.

iv. The Appeal Process

Appeals to the Court of Appeal

The Court of Appeal is independent from the Court of First Instance and the judgment delivered by the Court of Appeal will be binding on the lower court and the execution court as far as the merits of the case are concerned.

There is an automatic right for each party, whether a claimant or defendant, to file an appeal against a judgment on facts of law. The appeal is therefore a complete rehearing of the case. Only final judgments can be the subject of an appeal to the Court of Appeal. Interlocutory judgments or judgments on procedure or regarding the calling of witnesses cannot be the subject of an appeal. However judgments on urgent applications, precautionary attachment orders or rejections on jurisdictional points may be the subject of an appeal.

A Memorandum of Appeal must be filed within 30 days from the date on which the judgment was delivered, and in an ex parte judgment, within 30 from the date on which the judgment was served on the respondent. In urgent matters the period is 10 days. The days are calculated from the day following the day on which the judgment was delivered in the presence of the parties or from the date following the day upon which the judgment was served on the respondent.

In an appeal, the whole matter will normally be considered by the Court of Appeal, no matter what the grounds of the appeal may be. Appeals to the Court of Appeal may be filed on points of law and fact and new facts, evidence and arguments may be submitted. It is open to either party to make further arguments, to add to the grounds of appeal, to make further submissions and call for witnesses. Three judges form the appeal bench, the procedure is similar to that of the Court of First Instance and judgment is delivered by a majority.

The law does not require the appellant to set out all of his/her grounds of appeal in the original Memorandum of Appeal. It is possible for a "holding" appeal to be filed without any grounds. In this instance, the appellant may file a detailed Memorandum of Appeal setting out the grounds of appeal at the first hearing date of the case before the Court of Appeal. It is also possible for further grounds to be added in a supplementary Memorandum of Appeal or in documents that may be filed by the appellant.

Counter Appeal

The respondent may file a counter appeal. If a counter appeal is filed by the respondent, the counter appeal will be allocated a separate number, a new file will be opened and, following the payment of the court fees, the same hearing date will be given for the counter appeal. The clerk of the appeal court will prepare the summons for the counter appeal and serve notice of the hearing on the respondent advising him of the counter appeal. There is no need to file a detailed Memorandum of Appeal in the counter appeal; a "holding" Memorandum of Appeal may be filed.

Both files will thereafter be joined and put before the same court to be heard jointly. On the first hearing date of the case, the court will confirm the joining of the two appeals and declare that they will be heard together, as they relate to the same subject matter. The Court of Appeal is a court of fact and law and will review the matter in the same way as the Court of First Instance. It is not, however, possible to ask for further remedies than those that were put before the Court of First Instance in the Court of Appeal. The Court will be limited to those remedies which are requested in the statement of claim filed at the Court of First Instance.

The Court will consider whether the appeal has been filed within the time period and, if not, the appeal may be rejected on its form.

Matters *not subject* to appeal

There are a number of matters that are not subject to appeal at the Court of Appeal:

- An action less than AED 3,000;
- Certain decisions of the Execution Court, apart from those set out in Article 222 of the Civil Procedure Law;
- The award made by an arbitrator in an arbitration case;
- The decision made to assess the fees payable to an expert in a case where the expert has filed a report;
- A decision which has been made by the Court while the case is being litigated, but which did not finally determine the matter according to the meaning of Article 151 of the Civil Procedure Law (i.e. a decision made to refer the matter to an expert or to call on witnesses or to join two cases on one file); and
- A decision made by the Court in a civil matter ordering one of the parties to pay a fine for misbehaving or being in contempt of court.

Following the submission of both parties' arguments, documents, experts' reports or documents requested by the Court, the Court will reserve the case for judgment. The judgment will be delivered in an open hearing on a date set by the Court.

Appeals to the Court of Cassation/Federal Supreme Court

Any judgment delivered by the Court of Appeal can be subject to a further appeal to the Court of Cassation. Appeals to the Court of Cassation must take place within 60 days from the date on which the judgment was delivered, if the party was present at the hearing, or within 60 days from the date on which the party was served with full details of the judgment and the grounds. If the parties were not present at the hearing in which the judgment was delivered or if they were not informed of the grounds of the judgment and the reasoning of the Court of Appeal, the period for appeal would remain open for either party until they are fully and officially served with the grounds of the judgment, thus the 60 day period only commences from the date of notification.

Federal judgments delivered by the Federal courts (Abu Dhabi, Sharjah, Fujairah, Ajman and Um Al Quwain) are subject to an appeal to the Federal Supreme Court of Cassation in Abu Dhabi. Judgments delivered by the Dubai Court of Appeal are subject to an appeal to the Dubai Court of Cassation. There is no Court of Cassation in Ras Al Khaimah. The UAE Federal Supreme Court of Cassation in Abu Dhabi is also the constitutional court.

The Court of Cassation is formed by five judges and judgment is usually delivered by a majority. An appeal to the Court of Cassation is technical and a specific procedure must be followed, failing which the appeal will be dismissed in its form. An appeal to the Court of Cassation may be dismissed on technicalities on more than one ground.

Appeals on merits or facts are not admissible to the Court of Cassation, only legal arguments and appeals on matters of law are admissible. The appeal should focus only on legal arguments, which may not have been dealt with by the court or the law, which has been wrongly interpreted or applied by the Court of Appeal. The Court of Cassation will not review the decision of the Court of Appeal on the merits or understanding of the facts of the case even if the Court of Appeal wrongly understood the facts of the case, unless their understanding of the facts of the case were based on a wrong understanding of a legal argument or a particular law which the Court of Appeal applied incorrectly to the case.

The appeal to the Court of Cassation (called a Statement of Cassation) must be based entirely on the judgment delivered by the Court of Appeal and not on that delivered by the Court of First Instance. The Court of Cassation will not review or consider the judgment delivered by the Court of First Instance and, therefore, the grounds of appeal should concentrate only on the judgment delivered by the Court of Appeal.

It is not possible to call witnesses, experts or to file any further documents or evidence before the Court of Cassation. The Court may, however, of its own accord, order a party to file documents or exhibit evidence in limited circumstances. If an expert was appointed in the Court of Appeal, the Court of Cassation will sometimes require this report to be made available to them.

After the service of the summons has been effected on the respondent, he/she will be given 15 days to respond to the appeal. The Clerk of the Court in the meantime will request the judgment file from the Clerk of the Court of the Court of Appeal. No hearing date will be scheduled and the submission of the response will be made to the Clerk of the Court and the Court of Cassation in writing. No supporting documents are permissible, whether in the Memorandum of Appeal or in the submissions made by the party in response to the appeal.

In practice, it can take several weeks and sometimes months before the Court of Cassation will set a hearing date to hear both parties' arguments orally before the Court. At the hearing, the Court may decide either to adjourn the case, summon one of the parties who has not been summoned properly or, following the hearing of both parties' arguments, decide to reserve the case for judgment. Neither party will be allowed to make further submissions and often the Court of Cassation will reserve the matter for judgment at the first hearing date of the case. The judgment may be delivered at a subsequent hearing or be served on the parties without a hearing.

Stay of Execution

An appeal to the Court of Cassation will not normally prevent the enforcement or execution of a final judgment delivered by the Court of Appeal. The judgment of the Court of Appeal is considered to be a final judgment and good for execution. As such, execution will not be suspended by the fact that the appeal is filed with the Court of Cassation unless the appeal relates to the ownership or vacation of immovable property.

In certain circumstances, however, it is possible to apply to the Court of Cassation to suspend the execution of the judgment subject to the outcome of the appeal to the Court of Cassation. The Court of Cassation may suspend the enforcement of a final judgment delivered by the Court of Appeal until the Court of Cassation has had an opportunity to study the file and deliver judgment. In such cases, the Court of Cassation may order the judgment debtor to file a bank guarantee as security for the judgment.

The appellant may request the Court of Cassation to suspend the judgment delivered by the Court of Appeal and to order that no execution should proceed until the judgment of the Court of Cassation is determined. This request is made in the same application by the appellant to the Court of Cassation, or in a separate application to be filed with the Statement of Cassation. The appellant will be required to state the grounds upon which he/she believes that execution against him/her may irrevocably alter his/her circumstances or to indicate that he/she has good grounds upon which to win the case at the Court of Cassation, and that execution therefore should be suspended until the Court of Cassation determines the appeal.

In the majority of cases, the Court of Cassation will reject an application to suspend the execution of a judgment unless the Court of Cassation is shown that there exist

good grounds that the application should be entertained and an order be granted. Accordingly, suspending the execution of the judgment is only granted in rare occasions, in circumstances where the Court believes that the execution can wait, there is a risk that the circumstances, if changed, cannot be corrected if the judgment is reversed, that the Court of Appeal erred in applying the law or that in all likelihood the appellant will win his/her appeal and the judgment will therefore be changed.

Judgment of the Court of Cassation

Often, the Court of Cassation does not determine the matter. If the Court of Cassation finds in favour of the appellant, it will cancel the judgment delivered by the Court of Appeal, in whole or in part, and refer the matter back to the Court of Appeal to correct the judgment. Therefore, the judgment of the Court of Appeal, or part of it, may be cancelled and have no legal value and any execution proceedings that have resumed based on the judgment of the Court of Appeal, or part thereof, and which have been cancelled by the Court of Cassation will be cancelled and reversed.

Once the matter has been reversed and referred back to the Court of Appeal, the Court of Appeal will allocate a hearing date where both parties will be invited to attend before the Court as in a normal appeal case. Both parties will then be allowed to make written submissions and to file further evidence and request permission to call witnesses. The Court, upon the request of one of the parties or at its own discretion, may refer the matter to an expert to review and decide on one or two issues in the case. It is the task of the Court of Appeal to evaluate the facts, consider the matter, review new facts and evidence and to make a decision at its discretion.

The second judgment delivered by the Court of Appeal can also be the subject of an appeal to the Court of Cassation. The same conditions, time frames and procedures will be applicable to the second appeal. The second appeal to the Court of Cassation will be considered to be a new appeal, and may be based on similar grounds to that of the first appeal or on new grounds. However, the appeal to the Court of Cassation must be based on legal grounds relating to the second judgment delivered by the Court of Appeal.

If the Court of Cassation decides to reverse the judgment delivered by the Court of Appeal in whole or in part, the Court of Cassation in this second appeal will not refer the matter back to the Court of Appeal, except in very exceptional circumstances. In the second appeal, the Court of Cassation will deal with the appeal itself and deliver a final judgment on the matter, correcting the judgment of the Court of Appeal if the Court of Cassation finds in favour of the appellant. In such a case, the judgment delivered by the Court of Cassation will be the final judgment on the matter and will replace the Court of Appeal judgment in whole or in part.

Enforceability of Court of Cassation Judgments

Judgments delivered by the Court of Cassation are final and are not subject to any further appeals to any other court, but there is a limited right for a party to ask for re-examination of the judgment under Article 169 of the Civil Procedure Code. The guidelines set out in the judgment delivered by the Court of Cassation must be followed by the Court of Appeal if the matter is referred back to the Court of Appeal, and those issues decided upon by the Court of Cassation and the judgment must be adhered to.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, ...

Costs

The amount of court fees differs between those Emirates that are part of the federal system and those that are not. The Dubai court and the Ras Al Khaimah court have their own regulations with regard to court fees, whereas the other Emirates fall within the federal system.

Recoverability of Court Fees

Normally, the court will make an order regarding the payment of court fees upon delivery of the judgment, the general rule being that the losing party will be ordered to pay the court fee.

Fees of Local Advocates

Advocacy fees are normally negotiated between the client and the advocate on a case-by-case basis. Advocacy fees were traditionally charged as a lump sum (usually 6-12% of the claim in suit), but a time spent basis computed on an hourly rate is often now negotiated. Advocacy fees usually do not include disbursements or court fees. Normally, half the advocacy fee in lump sum matters is payable in advance and the balance is payable on judgment being delivered by the Court of First Instance. It is illegal to charge contingency fees on a no win/ no pay basis.

Other costs

In addition to legal fees, court fees and expert fees, there may be other costs incurred, such as translation costs. Translation charges are not recoverable.

Recovery of Legal Fees

Advocates fees are awarded to the successful party, but only in a nominal sum, usually ranging from a few hundred dirhams to about one thousand dirhams. Advocate's actual legal fees and other legal consultancy fees are not recoverable.

Timing

It can take between six to nine months before cases in the Court of First Instance on Labour Law matters are reserved for judgment, if an expert has not been appointed. Cases in which an expert has been appointed may last for more than one year before a judgment is handed down in the Court of First Instance.

III. Tips to Avoid Litigation

There are a number of straightforward good practices, which parties can apply in order to mitigate the risk of employment claims arising. They are as follows:

- Know the law— it is important that parties review the UAE employment legal framework and know their rights and obligations pursuant to the relevant laws which govern the particular employment relationship;
- Have in place a clear and comprehensive written employment contract;
- Have in place accurate and detailed employment policies and ensure they are followed. A good proactive human relations team would assist with this;
- Maintain a comprehensive paper trail documenting the employment relationship, including minutes of any meetings held and appraisal documents;

- Seek to be proactive, not reactive, by maintaining an open line of communication throughout the employment relationship. This may flag potential issues early on;
- Seek to resolve a dispute or concerns amicably and early on where possible; and
- Seek legal advice early — as soon as you have a concern, you should obtain legal advice and discuss your options. Do not wait until the dispute has reached litigation.

IV. Trends and Specific Cases

a. New or Expected Developments

The MOL has indicated that it intends to promote transparency and mutual respect within the employment relationship, which may lead to an increase in claims as employees become more aware of their rights. It is expected that reforms will be made to the Labour Law to enable a more flexible and mobile labour force. Other possible areas of development could be the recognition of the concept of redundancy and the extension of the MOL's jurisdiction into some of the Free Zones.

b. Recent Amendments to the Law

The MOL, on 27 September 2015, introduced some changes to the UAE labour regulations by means of three ministerial decrees, which came into effect on 1 January 2016. The changes are as follows:

- Ministerial Decree 764 of 2015 introduces a new MOL Standard Employment Contract. This contract must be executed by the employee and submitted to the MOL as part of the process for obtaining the UAE entry permit and residency visa for non- national employees (without which the non- national employee cannot reside and work in the UAE). Furthermore, this decree requires foreign employees to execute an employment offer letter, the terms of which must conform with the MOL's Standard Employment Contract, as part of the employment visa approval process. Pursuant to this decree, the executed offer letter will be registered with the MOL and will be legally binding and the terms of such offer letter must be reflected in the employee's subsequent employment contract;
- Ministerial Decree 765 of 2015 pertains to termination of employment. This decree provides for a statutory notice period for fixed term contracts (not previously provided for). The decree provides that fixed term contracts may now have notice periods of between 1 month and 3 months. If the fixed term employment contract does not provide for notice, the default notice period is 3 months. Pursuant to this decree, fixed term contracts may not be for a period longer than 2 years (previously 4 years); and
- Ministerial Decree 766 of 2015 sets out new rules on work permits and reduces the circumstances in which labour bans can be issued.

V. Conclusion

Employment laws within the UAE are currently being reformed, with a view to providing added security, greater fluidity and employee mobility within the market.

UNITED KINGDOM (ENGLAND & WALES)

I. Overview

a. Introduction

In 2015 the Office for National Statistics reported that over 31 million people over the age of 16 were in some form of employment in the UK.

There are three principal ways in which a person undertakes work in the United Kingdom:

- **As an employee**, who agrees to work for an employer, as reflected by a contract of employment. An employee benefits from the highest level of protection. Laws govern the reasons for and ways in which their employment may be terminated, protect the employee from discrimination and provide entitlements to various benefits such as national minimum wage, sick pay and pay related to parental leave;
- **As a worker**, who will often have a more indirect relationship with the person benefitting from their services; for example they may be supplied through an agency. A worker benefits from some of the same protections as employees, including entitlement to a national minimum wage, holiday pay and protection from discrimination. However, unlike an employee, a worker will not normally be entitled to benefit from family friendly rights and has no protection from dismissal unrelated to discrimination and may not be entitled to notice pay.
- **As a self-employed contractor**, working for their own benefit. A self-employed contractor will not benefit from any employment rights, but may seek protection from discrimination.

The UK is a common law jurisdiction, so that decisions of a senior court act as a 'precedent' to be followed by a junior court. In the UK the laws governing the employment relationship have three principal sources:

- **Common law**: which covers the laws of contract and tort (civil wrongs). In terms of contract claims, these will include the enforcement of the terms of an employee's contract of employment with their employer and can include claims by an employee for damages for failure to give proper notice as well as claims by employers to enforce the terms of an employment contract against an employee. In terms of tort claims, these will include claims for negligence (personal injury).
- **Statutory law**: being Acts of Parliament and Regulations, which cover matters that fall outside the contract of employment, such as claims including those relating to the formation of the employment relationship and reasons for termination, discrimination related to employment, family friendly rights, wages, annual leave and working time, rights relating to business transfers and collective/union rights; and
- **European Union legislation and judgments of the Court of Justice of the European Union (CJEU)**: arguably the most important source of law, the European Union's legislation is incorporated into the UK's statutes and the decisions of the CJEU are the highest level of case law precedent and are binding on the UK Supreme Court.

The Ministry of Justice reports that in the financial year 2014/15, there were in the region of 21,000 claims issued in the specialist labour courts of the United Kingdom, known as Employment Tribunals. There has been a significant reduction in the numbers of claims being submitted since the introduction of fees in Employment Tribunals in July 2013.

Note that Scottish contract law and Employment Tribunal procedure differ in a number of relatively minor respects from the applicable laws and procedures in England and Wales.

Northern Irish employment law differs more substantially: certain key legislation is not implemented in the same way as in Scotland, England and Wales and compensation

limits are higher. In addition, enforcement action is taken at Industrial Tribunals and Fair Work Tribunals, rather than in employment tribunals.

b. Claims

As explained above, claims related to an employment relationship will fall into two separate categories:

- **Statutory claims** which are heard in the Employment Tribunal. To submit a claim and take a case as far a hearing, claimant employees have to pay a small fee (particularised below). Generally, each party bears their own costs, although the Tribunal does have the power in particular circumstances to require one party to pay some of the other party's costs, as set out in more detail below; and
- **Common law claims** that, depending on the value of the claim such claims are heard in either the County Court or High Court, (known as the civil courts) especially claims in relation to post-termination restrictions on employees, and confidential information. Fees in the civil courts depend on the value of the claim. A significant proportion of the successful party's costs are frequently borne by the unsuccessful party. Note, that in some circumstances (see below), claims for breach of contract worth less than £25,000 can be heard by Employment Tribunals.

Overview of claims heard by an Employment Tribunal

Wages, annual leave and working time

Currently, employers must pay workers and employees at least the national minimum wage. There are four hourly rates for the national minimum wage, with the top rate for workers aged 21 and over currently set at £6.70 per hour. From April 2016, workers and employees over the age of 25 will be entitled to a new "Living Wage" of £7.20. Failure to pay the national minimum wage can result in a civil or criminal claim against the employer by the relevant government authority (Her Majesty's Revenue and Customs). Employers who fail to pay the national minimum wage may also be "named and shamed" on a list published by government. Employees can bring legal action against their employer if they are subjected to a detriment for asserting their right to be paid the national minimum wage and they can also bring claims for unlawful deduction from wages and for breach of contract.

Employees and workers are entitled to 5.6 weeks' paid annual leave (pro-rated for part-timers), inclusive of bank/public holidays. Whether or not an employee is required to work over any of the 8 bank/public holidays is a matter for agreement between the employer and employee. Employees are entitled to be paid in lieu of accrued but untaken annual leave on the termination of their employment. If an employee or worker is prevented from taking their leave entitlement, is not paid for their leave, or is not paid for untaken leave on the termination of employment, then the employee or worker can bring a claim in an employment tribunal.

Workers may not work, on average, for more than 48 hours per week, but can agree to contract out of this working time limit. An employee who works more than 48 hours per week without contracting out of this limit can bring a claim in an employment tribunal. Enforcement action can also be brought by the Health and Safety Executive or a Local Authority Environmental Health Department and employers can be subject to a fine or even a criminal conviction.

Agency workers are entitled: (1) from day 1 of an assignment to the same rights as comparable permanent employees in relation to access to shared facilities and job vacancies; and (2) after 12 weeks of an assignment to additional rights – in particular the

same basic working and employment conditions as comparable permanent employees, including those relating to pay, annual leave, working time and rest periods. They can bring claims in an employment tribunal in a similar way to employees to enforce these rights.

Discrimination

Under the Equality Act 2010, Employees and others have the right not to be discriminated against because of race, sex and sexual orientation, age, disability, gender-reassignment, marriage or civil partner status, pregnancy/maternity and religion/belief (Protected Characteristics) from the moment they apply for a job, throughout employment, on termination and thereafter. The types of claim are direct and indirect discrimination, victimisation and harassment relating to any of the Protected Characteristics.

Claims can be brought in an employment tribunal by all employees, ex-employees, job applicants, contract workers and agency workers – there is no requirement for a period of continuous service. Where a claimant succeeds in their claim, the tribunal may order the respondent to make them a payment made up of: (1) a compensatory award – uncapped for past and future financial losses and career loss; and (2) an injury to feelings award – there are 3 guideline bands, with the lower and upper bands ranging from £660-£6600 and £19,800-£33,000 respectively, depending on the seriousness of the case. Further, an employment tribunal may make a 'declaration' about the rights of the claimant and the respondent in relation to the matters to which the proceedings relate.

Under the Equality Act 2010, men and women have the right to be paid the same for the same, or equivalent, work. Where they are paid at different rates, an employee can bring an equal pay claim and the employer must prove that the reason for this is not gender-related, or be able to objectively justify this. Any equal pay award will be made up of: (1) compensation of arrears of pay plus interest, limited to 6 years; and (2) revised contractual terms, including remuneration terms, so that they are in future the same as that of the person of the opposite sex doing the same work.

Family friendly rights

Pregnancy rights include health and safety protection and the right to reasonable paid time off for ante-natal care, as well as enhanced protection in a redundancy situation.

Family rights to leave and pay have been subject to major reform in the UK with the introduction of shared parental leave and pay which applies to all qualifying working parents of children expected to be born or adopted from 5 April 2015. Whilst the default position of 52 weeks' maternity/adoption leave for employed mothers/primary adopters remains, those employees are entitled to choose to give up their leave and pay and share it with the father/their partner (i.e. whoever shares the main caring responsibility for the child at the date of birth/adoption). It should be noted that Shared Parental Leave is only available where both of the couple work, or have been in work recently.

Employees with 26 weeks' service also qualify for Statutory Maternity/Adoption Pay which is calculated as follows: (1) 6 weeks at 90% of salary; and (2) 33 weeks currently of Statutory Maternity Pay (currently £139.58), or 90% of salary if that is lower. Shared Parental Pay follows the same flat rate for up to 37 weeks. Employers with enhanced maternity pay arrangements need to consider how to treat employees on shared parental leave.

Fathers/co-adopters continuously employed for 26 weeks are entitled to: (1) 2 weeks' Ordinary Paternity Leave; (2) 2 weeks' Statutory Paternity Pay: currently at £139.58, or 90% of salary if that is lower. They can then take Shared Parental Leave, if their partner chooses to give up their leave and pay, as highlighted above.

Failure to allow an employee to take advantage the above rights can result in claims in the employment tribunal for unfair dismissal, sex discrimination, or a claim for a breach of the Maternity & Parental Leave etc. Regulations 1999.

All employees with 26 weeks' continuous service have the right to request flexible working, irrespective of their caring responsibilities, although the employer does not have an absolute obligation to agree to the employee's request. Compensation for non-compliance, or for a decision based on incorrect facts, is capped at 8 weeks' pay, but depending on the circumstances an employee may also have scope to bring claims in an employment tribunal for victimisation, discrimination and unfair dismissal following an employer's refusal to grant the employee's request.

Trade unions

It is unlawful to refuse to employ a person because they are a member or a trade union. Similarly, an employer may not either prevent or compel and employee to join a union (Trade Union and Labour Relations (Consolidation) Act 1992). If these rights are breached, an employee may make a complaint to an employment tribunal, who may make an award of compensation to be paid by the employer, of an amount that the tribunal sees as just and equitable (subject to the statutory cap).

A strike, work to rule or other industrial action need not be called by a union and non-union members can participate. There is limited action that employers can take against employees who take industrial action pursuant to a lawfully managed ballot. If employees are on strike, the employer does not need to pay them for the time that they are not working. However, employees will usually be entitled to full pay when they take industrial action short of a strike. Dismissing an employee on union grounds will be an automatically unfair and may result in a claim to an employment tribunal for compensation.

Business transfers

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) applies to protect employees when either: (1) a business or asset is transferred from one entity to another; or (2) there is a change of identity in the entity providing a service (e.g. outsourcing). TUPE is the UK implementation of the EU Acquired Rights Directive.

The effect of TUPE is that all of the old employer's employees "assigned" to the economic entity or activity automatically transfer to the new employer. In addition, the old employer's rights, powers, duties and liabilities under the employment contracts of those employees who are transferring, transfer to the new employer.

The new employer is obliged to set out in a letter any measures that it envisages taking after the transfer, such as redundancies or changes to the way that work is carried. The old and new employers have a duty to inform employee representatives of their own employees who may be affected by the transfer (**"affected employee"**) about the fact of transfer and consult with them about any measures and any potential implications for them. Employers that breach this duty to inform and consult with employees about the transfer may be subject to a claim in the employment tribunal, which can award up to 13 weeks' pay for each affected employee.

If the new employer does not allow the transferred employees to transfer on their existing terms in accordance with TUPE, then they can be subject to claims from employees in an employment tribunal. Similarly, subject to certain exceptions such as redundancy or change of location, dismissals are automatically unfair if the sole or principal reason for dismissal is the TUPE transfer.

Terminating employment

As long as the employee has not been dismissed due their gross misconduct, employees can bring a claim for their notice pay, if this was not paid to them on termination.

From day 1 of their employment, employees can bring claims relating to discrimination, whistleblowing and health and safety (referred to as a **'day 1 claim'**).

An employee who has continuously employed for more than 2 years can bring a claim against their employer in an employment tribunal alleging either that the reason for, or process followed, in relation to their dismissal was unfair.

Provided that there is no discrimination or other 'day 1 claim', employers will not be liable for dismissals where: (1) they follow a fair procedure (set out in the ACAS Code); and (2) the reason for dismissal is fair, e.g. redundancy, capability, misconduct or that continuing to employ the employee would be unlawful (e.g. if they did not have the right to work in the UK), or some other substantial reason.

If the employee succeeds in their claim for unfair dismissal then they may be awarded compensation, made up of: (1) a basic award (calculated according to the employee's age, length of service and pay) - currently capped at £14,250; and (2) a compensatory award (an amount that is just and equitable having regard to the loss sustained by the employee as a result of the dismissal) – currently capped at the lower of one year's gross basic pay (excluding pension contributions, benefits in kind and discretionary bonuses) and the overall cap, currently £78,335. These figures are updated each February. Employees can also seek re-engagement or reinstatement with the employer as an alternative remedy but this is relatively rarely granted.

A redundancy situation arises where the business, workplace or job disappears, or fewer employees are needed. Failure to conduct a redundancy process appropriately could result in the employee bringing a claim for unfair dismissal in an employment tribunal and claiming compensation as highlighted above.

If an employer proposes to dismiss as redundant more than 20 employees at any one establishment in the UK within a 90 day period, it must also follow a collective redundancy consultation procedure with recognised trade unions, or elected workplace representatives if a trade union is not recognized. The consultation period must last a minimum of 30 days, or 45 days if the number of redundant employees is 100 or more in addition to any individual redundancy consultation procedure. Failure to follow these collective obligations may result in a claim by the representatives, or by the employees if there are no representatives, for payment of a protective award of up to 90 days' pay for each affected employee.

All redundant employees with over 2 years' service have the right to a statutory redundancy payment based on their age and length of service, currently capped at £14,250.

Whistleblowing

Lastly, it is unlawful to dismiss employees, or to subject employees or workers to a detriment, if they make a disclosure of information in the public interest, which they reasonably believe shows specific types of wrongdoing by their employer. An employee or worker can complain to an employment tribunal and awards in whistleblowing claims are uncapped and are assessed on a similar basis to discrimination claims.

Most statutory employment law claims must be submitted within three months less one day from the date of the termination or discriminatory event, subject to duties to conciliate as further set out below.

Overview of employment claims heard by the Civil Courts

Employment claims relating to a breach of contract by either the employer or employee may be heard by the Civil Courts (County Court or High Court). Whether an employment contract claim will be started in either the County or High Court will depend on the value: claims worth more than £50,000 will usually be launched in the High Court.

Where the value of the employment contract claim is less than £25,000, then a claim that arises on or is outstanding on the employee's termination of employment, can be brought in an Employment Tribunal.

Wrongful Dismissal

Unlike the claim for unfair dismissal, which depends on the reason or process followed for a dismissal being unfair, wrongful dismissal occurs when an employer dismisses an employee in a way that breaches the terms of the employee's contract of employment. Further, unlike the statutory claim for unfair dismissal, employees do not need to have two years' service to bring a claim for wrongful dismissal.

Almost always this arises where an employer dismisses an employee without notice, in circumstances where it is not permitted by the contract. Occasionally this arises where the employer dismisses the employer without following some procedure, which is mandatory under the contract, such as a contractual disciplinary procedure. Contractual disciplinary procedures are relatively common in the public sector but extremely rare in the private sector.

The most usual remedy that an employee will seek for wrongful dismissal is damages, which puts the employee back into the position that they would have been in, had the contract not been breached by the employer. Usually this will consist of payment for the notice period. In very rare cases, an employee may apply to the civil courts for an injunction preventing the employer from dismissing the employee in breach of contract.

Breach of specific contract clauses

Employers often include express contractual terms in their employees' contracts of employment relating to confidentiality of information during and after employment and also restrictions on the employees' activities post-employment to limit the damage that the employee can do to their prior employer. UK law implies other duties into the contractual relationship between an employer and employee, including: fidelity; mutual trust and confidence; and confidentiality. Both express and implied contractual duties can be enforced by way of breach of contract claims from either party. The remedy sought will often be an injunction restraining the party from breaching the contract and/or damages for losses caused by the breach.

c. Administrative Agencies that Investigate or Adjudicate Claims

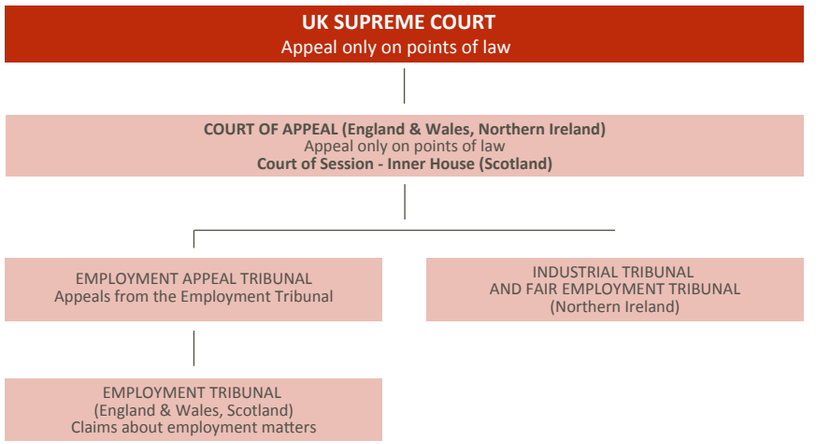
There are no specific administrative agencies in the UK that investigate or adjudicate claims. However, as highlighted above, various agencies have powers to enforce the employer's legal obligations against them, including: HMRC, which can enforce minimum wage claims; the Equality and Human Rights Commission, which can **bring judicial review proceedings on their own account and intervene on other cases involving** equality and human rights issues; and the Health and Safety Executive, which has powers to enforce

health and safety obligations in workplaces by way of enforcement notices or criminal prosecutions.

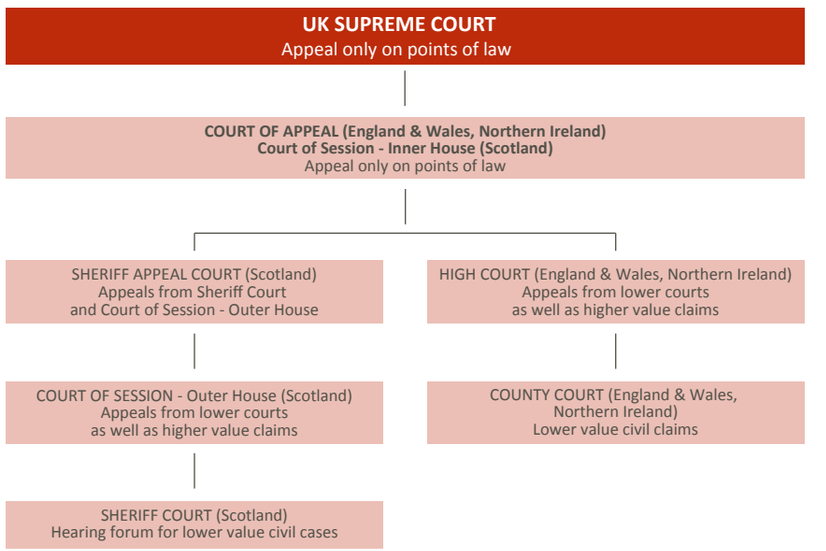
d. Court / Tribunal System

THE COURT SYSTEM IN THE UK

Claims in an Employment Tribunal



Employment Claims in Civil Courts



The UK has a specific jurisdiction for statutory employment law claims, being the Employment Tribunal (England and Wales, Scotland) and an Industrial Tribunal and Fair Employment Tribunal in Northern Ireland. There are currently 38 regional employment tribunals, each of which hears first instance employment related cases. Only matters of law, not fact can be appealed from the Employment Tribunal to the Employment Appeal Tribunal. Any appeals from the Employment Appeal Tribunal are referred to the Court of Appeal (or Court of Session – Inner in Scotland) and thereon to the Supreme Court.

In England and Wales, cases related solely to contractual issues will (depending on value) be commenced in either the County Court (for lower value claims) or the High Court for higher value claims. Claims in the County Court can be appealed to the High Court. Appeals on legal matters are referred to the Court of Appeal and then to the UK Supreme Court.

In Scotland, recent changes following the Court Reform Act 2014 mean that the Sheriff Courts in Scotland now have exclusive jurisdiction to deal with cases with a value of £100,000 and under. Claims worth more than £100,000 must be brought in the Court of Session (Outer). Appeals from these courts are heard by the Sheriff Appeal Court. Where an appeal from the Sheriff Appeal Court raises complex or novel issues, then it may be heard by the Court of Session (Inner). Any further appeal will be heard by the UK Supreme Court.

Where Courts and Tribunals need to make a ruling on a question of European Union law in order to determine the issue being heard, then a reference or referral can be made to the CJEU, requesting a preliminary ruling. In practice, it is usually the appellate courts that make the reference to the CJEU.

Note that at all stages, parties are not required to have legal representation at any hearing but in practice, most litigants find it helpful.

e. Alternative Dispute Resolution (ADR)

Tribunals

Since April 2014, claimants wishing to bring one of the more common claims in an employment tribunal must first try to conciliate the claim with the assistance of the Advisory, Conciliation and Arbitration Service (**ACAS**), a government funded body dedicated to resolving workplace disputes. If a claimant submits a claim to an employment tribunal without going through the Early Conciliation process, then the employment tribunal will not have jurisdiction to hear it.

Contacting ACAS to try to conciliate an employment claim effectively pauses the clock on the time limits for bringing a claim and allows the parties to discuss ways of resolving the dispute, in confidence. Either party can make the first contact with ACAS. Active participation in the conciliation process is not compulsory and if the conciliation process breaks down then, the litigation process will continue, although ACAS remain available to help conciliate the claim.

In addition to approaching ACAS and engaging with the Early Conciliation process, the parties can also approach each other directly with a view to negotiating a settlement, to be recorded in a 'Settlement Agreement', the format of which is specified by statute (s.203 Employment Rights Act 1996).

The employment tribunal can also offer the parties the opportunity to participate in Judicial Mediation. This is a mediation process led by an Employment Judge and is not routinely chosen by litigants as a way to resolve conflicts. Private mediation is sometimes pursued in difficult and high value cases.

Civil Courts

It is a fundamental aspect of pursuing civil litigation that the parties must at least attempt to settle the matter and consider the use of methods of Alternative Dispute Resolution, such as conciliation or mediation, adjudication, or arbitration. Failure to do so can result in costs sanctions from the courts.

II. The Litigation Process

a. Typical Case

This summary focuses on the process followed in statutory employment law cases, pursued in an employment tribunal.

i. Steps in the Process

Early Conciliation

After identifying a potential claim, the claimant must contact ACAS, to discuss Early Conciliation. If the Early Conciliation process is successful then the parties will agree the terms and the litigation process will be halted. However, either party can decide that they do not wish to participate in the conciliation process, which brings the negotiations to a close.

Submitting a claim

If, however, the Early Conciliation process does not result in a settlement, then the next step will be for the claimant to submit a claim, using form ET1, attaching all the key factual and legal details including the remedy sought. The claimant must also pay a fee to submit their claim, as set out below.

Responding to the claim

The respondent then has 28 days to respond with its defence to the claim, which is submitted using form ET3, attaching the key factual and legal details relevant to rebutting the Claimant's claim.

Case Management and Preliminary issues

As set out in further detail below, the employment tribunal will next make orders dealing with the how the case is to be prepared for hearing and will also make orders or judgments on any preliminary issues. These orders will include a requirement to exchange witness statements and to disclose all documents relevant to the case.

The hearing

At the employment tribunal hearing, each side presents their witness and documentary evidence (as set out in more detail below) before each party has the opportunity to make closing submissions and arguments. Hearings are adversarial rather than inquisitorial.

Employment tribunal cases are heard by either an Employment Judge sitting alone, or, in cases involving whistleblowing or discrimination allegations then the Employment Judge will be joined by two lay members, one from an employer's organisation and one from an employee's organisation, such as a union.

The judgment

The judgment may be delivered at the end of the hearing or alternatively (and more commonly), the employment tribunal may decide to deliver its judgment at a later stage.

Remedy

After delivering judgment, the Employment Judge may be able to decide on remedy immediately, or they may convene a further hearing so that additional evidence can be presented about the employee's losses.

ii. Pretrial Proceedings

Once the employment tribunal has accepted the respondent's response, it will consider whether there are arguable complaints and defences within the employment tribunal's jurisdiction. It will also consider whether there are reasonable prospects of success for both the claimant and the respondent. If the employment tribunal decides that it does not have jurisdiction to consider the claim or if the employment tribunal decides that case (or any part of it) does not have reasonable prospects of success, then the employment tribunal may dismiss it or any part of it.

Where the employment tribunal decides that the case should continue, then it will make a case management order setting out the case management issues to be dealt with and listing the case for a hearing. Where there are more complex case management issues, or preliminary factual or legal issues that need to be dealt with prior to the main hearing, then the employment tribunal may convene a preliminary hearing to deal with these matters. It is also open to the employment tribunal to propose judicial mediation or other forms of dispute resolution.

Typically, in England and Wales, the employment tribunal will order the parties to:

- Exchange lists of and disclose relevant documents;
- State who they are going to call as a witness and set a date for the exchange of witness evidence;
- Agree a list of issues to be determined in the case and a chronology of events; and
- Set out a schedule and counter schedule of the claimant's losses.

In Scotland, tribunals do not tend to make many case management orders but rely on applicable practice directions, setting out standard time limits for exchanging lists of documents. Lists of witnesses will be exchanged, but historically in Scotland, parties have not been required to submit written witness statements, although the judge may order this where it is considered appropriate.

iii. Role of Witnesses, Counsel and Court / Tribunal

In the UK, full merits hearings are, with rare exceptions, open to the public, who may also ask to inspect documents referred to in the proceedings.

Witnesses

Witness evidence is key to pleading a case as it is the primary method by which evidence is put to the court. The tribunal will read the witness statement before the witness is called to give evidence and it is rare that the party which has called the witness will be allowed to ask any supplementary questions. Only documents referred to by witnesses in their statement will be reviewed by the tribunal. Each party will cross-examine the other

parties' witnesses. The tribunal may ask its own questions of witnesses at any time. A party may re-examine its witness after cross-examination has been completed.

In England and Wales, all parties and witnesses may be present in the tribunal room throughout the hearing. In Scotland, witnesses may not attend a hearing until they have given evidence.

Counsel

Parties are not required to have legal representation at any hearings. Litigants can represent themselves but in more complex cases usually choose not to do so.

Solicitors are frequently instructed to advise clients on their employment law obligations and to help a client to deal with a claim and prepare for the litigation process. Solicitors will often then instruct barristers (specialist litigation advocates) to represent their client at any hearing. It is the barrister, advised by the solicitor, who normally conducts the cross examination of any witnesses and presents relevant legal arguments. Statements of evidence that are not challenged by cross-examination are taken to have been accepted by the opposing party.

In the UK, lawyers tend to specialise in particular areas of legal practice and it is sensible to instruct solicitors and barristers whose practice is focused on employment law.

iv. The Appeal Process

The Employment Appeal Tribunal (EAT) hears appeals on any question of law arising out of a decision made by or proceedings in front of an employment tribunal. Judicial members of the EAT are High Court or Circuit Judges and since 2013, they tend to hear appeal cases sitting alone, unless directed to sit with lay members, chosen for their seniority and expertise. Notices of Appeal must be submitted to the EAT within 42 days from the date on which the employment tribunal judgment was sent to the parties, in a prescribed form attaching the tribunal pleadings, the judgment and other documents. The appellant must also pay a presentation and hearing fee, as set out below.

The EAT can only deal with questions of fact when the tribunal's treatment of the facts amounts to an error of law, or where the evidence does not support the tribunal's findings of fact. The EAT can also consider appeals on the basis that the decision reached by the employment tribunal was perverse.

All Notices of Appeal are subject to preliminary assessment or 'sift' by the EAT Registrar or a Judge, who reviews the appeal papers. If the appeal is rejected, the appellant has 28 days within which to appeal against this decision but such a hearing rarely leads to the appeal being allowed to proceed to a full hearing.

If the appeal passes through the sift stage, then the respondent to the appeal will have the opportunity to set out their Answer and any cross appeal, within the time limit set by the Registrar (often 14 days).

21 days before the appeal hearing, skeleton arguments must be lodged with the EAT and exchanged with the other parties. These are normally prepared by the barrister. The EAT will hear the appeal and make its decision as to whether the appeal should be upheld or not. If the appeal is upheld, then the EAT may either send the matter back to a tribunal for a rehearing, or it may make its own decision.

Parties may seek to appeal to the Court of Appeal / Court of Session (Scotland) but must seek the EAT's permission to do so. If the EAT refuses, then the parties may apply to the

Court of Appeal for permission to appeal. Sometimes a point of appeal may rely on the interpretation of an EU law or regulation. In such a case, a referral may be made to the Court of Justice of the European Union

b. Costs, Attorney's Fees, Remedies / Damages, Timing, ...

Timing

Typically, employment tribunal litigation proceeds to hearing much more quickly than High Court claims do. Depending on how busy the relevant tribunal is, it can take between 3 and 6 months for a case to reach hearing.

Claims in the High Court and County Court tend to take in the region of one year to proceed to a hearing.

Court Fees

Since 2013, the claimant must pay a fee to submit their claim to the employment tribunal. The current fee for most claims, such as claims for unfair dismissal, discrimination or whistleblowing is £250 and for certain simpler claims, it is £160. The employment tribunal hearing fee is currently £230 for the simplest category of claims and £950 for the remainder. The current fee for presenting an appeal to the EAT is £400. If the appeal proceeds to a hearing then a further fee of £1,200 is payable.

Depending on their financial and social circumstances, claimants can apply for 'fee remission'.

Note that the Scottish government has announced that it plans to abolish Tribunal fees in Scotland in due course. This will not affect claims in England and Wales.

Fees in civil cases will depend on the value of the claim. In the High Court, the issues fees range from £35 to £10,000.

Costs

In the civil courts, the losing party is not only required to bear their own costs, but is normally required to make a substantial contribution towards the successful party's costs as well.

In contrast, employment tribunals are often referred to as a 'costs neutral forum' because each party normally bears their own costs. The employment tribunal has the discretion to order a party to pay costs, when they consider that the party (or their legal representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting the proceedings. In addition, costs can be awarded where a party's claim or response has no reasonable prospects of success. The maximum costs award that an employment tribunal can make is £20,000. Ordering the payment of any higher sum as costs requires a referral to a civil court.

Attorney's Fees

A very limited level of State funded legal aid is available for claimants in an employment tribunal. Otherwise legal fees are set by the lawyers themselves. Some lawyers are prepared to act for free on a "pro-bono" basis in cases which they see as particularly deserving.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

By 'recognising' a union (either voluntarily or following a legally specified recognition process), an employer agrees to allow the union to collectively bargain on behalf of employees in their workplace, in relation to specific terms and conditions. Any agreement reached is a collective agreement. Inevitably, disputes may arise between the union and the employer. Unions can ballot their members to take part in industrial action. Provided that the industrial action has been arranged lawfully, then unions will only bear liability for resulting losses or contractual breaches in very specific circumstances. The Central Arbitration Committee provides arbitration on disputes and provides assistance to resolve complaints about union recognition.

Where an employer recognises a trade union, then union representatives have the right to be informed and consulted about collective redundancies and also about potential business transfers, which will affect employees. Where there is no recognised union, then where the employer plans on making collective redundancies or making a business transfer, then the employer is obliged to facilitate the election of employee representatives so that they can be consulted about the changes. Should the employer fail to inform or consult representatives as required, then the union or employee representatives can bring a claim against the employer for an award on behalf of each affected employee, as highlighted above. Such claims can be costly for employers.

In addition to trade union recognition and collective bargaining rights, there are UK regulations, which specify the circumstances in which, on receipt of a valid request which has sufficient employee support, an employer with over 50 employees must implement information and consultation agreements, specifying how the employer will consult their UK employees about economic and employment matters. These arrangements are sometimes referred to as domestic works councils but they are not at all common in the UK. Disputes with the domestic works council are dealt with by the Central Arbitration Committee.

Finally, litigation can arise out of the relationship between an employer and an individual union member employee. Every worker has the right not to be subjected to a detriment due to their membership of a union and a dismissal will be automatically unfair if the employee was participating in industrial action. Such claims will be dealt with by an employment tribunal.

d. Specialized Litigation Bar

In the UK, lawyers practise either as solicitors, who provide legal advice and support directly to their client; or barristers, who are usually instructed by a solicitor to assist on a particular case and who specialise in litigation advocacy and tend to focus on specific legal areas.

III. Tips to Avoid Litigation

To avoid litigation:

- Employers should ensure that their Human Resources staff are well trained and have access to good employment law advice as understanding workers' legal rights is a key way to avoid claims;
- contractual terms of employment should be documented carefully and updated as necessary, for example updating post-termination restrictions when an employee is promoted;
- employers should introduce employment handbooks, setting out the policies and procedures that will be applied to employees during their employment with the employer and setting out expected standards of behaviour in disciplinary policies. A grievance procedure should always be in place so that employees have an internal

forum for airing dissatisfaction. Such employment handbooks and policies should be reviewed and updated at regular intervals, as well as being circulated to all staff, so that they understand the employer's expectations and their own responsibilities; and

- employees should be trained on workplace equality as well as on disclosing and dealing with whistleblowing issues, as these have the potential to be the most expensive claims.

In addition, it is important to ensure that decisions are taken reasonably and rationally, and can be justified and evidenced, so that if an employee does bring a claim, the employer's actions can be defended.

Finally, engaging with alternative dispute resolution methods and using ACAS Early Conciliation can be an effective way to avoid litigation.

IV. Trends and Specific Cases

There are several issues that are due to either be considered by Parliament or brought into force by the UK government over the next year.

Gender Pay Reporting: The Small Business, Enterprise and Employment Act 2015, brought into force in March 2015, enabled the government to bring in regulations regulating the gender pay gap. These regulations should be published in spring 2016 and will apply to employers employing 250 or more employees. Employers will also be obliged to publish disparity between bonuses awarded, based on gender. How the gender pay reporting will function will not be certain until the draft regulations are published.

Trade Union Bill: the government wishes to pass legislation regulating the proportion of union members who must vote in a ballot, for industrial action. Currently, 50% of votes cast by trade union members must be in favour of industrial action. The government proposes that at least 50% of eligible union members must participate in the vote and that where the action would be taken by those working in essential public services such as health, firefighting and education services, then 40% of those entitled to vote, must vote in favour of industrial action. Amongst other measures, the Bill also proposes that unions must give employers 14 days' notice, rather than the current 7 days' notice, of any proposed industrial action. This Bill is seen by unions as an attempt to significantly water down their power, whereas the Confederation of British Industry has stated that they support the government's proposals.

Grandparental Leave: the government has announced that it is considering extending the statutory right for parents or those with parental responsibility for a child to take leave after the birth or adoption of a child, to grandparents. This means that older members of the workforce will be entitled to statutory time off to care for their grandchild in the first year after their birth or adoption and then will be able to return to work. More concrete details are awaited.

Holiday Pay: this year, the case of Lock v British Gas Trading & Ors was referred to the CJEU on the question of how holiday payments should be calculated in order to be compliant with EU laws. Following the CJEU Advocate General's opinion, the employment tribunal found that commission payments should be included when calculating average salary, on which holiday pay is based. This decision is being appealed, but it seems unlikely that the decision will be overturned.

Tribunal Fees: finally, after several surveys and studies have shown that both lawyers and unions believe that the introduction of tribunal fees has acted as a barrier to accessing justice in the employment tribunal, the Ministry of Justice is conducting its own review and is expected to report on its findings by the end of 2015/beginning of 2016.

UNITED STATES

I. Overview

a. Introduction

In an increasingly global economy, the need to understand the employment law obligations in different jurisdictions becomes increasingly important, especially for employers looking to expand operations into the United States. Unlike other countries where there is one national policy governing employment law obligations, in the United States, the rights and duties of employers and employees are governed by an extensive set of federal, state, and local laws. These laws, which create employment obligations for employers and private causes of action for employees, allow employees to freely bring lawsuits if they believe these rights have been violated. Non-compliance with federal and state laws can carry steep penalties for employers including civil penalties, compensatory and punitive damages, back pay, and attorney's fees. Further, a few federal statutes also allow for criminal penalties, including fines and imprisonment, for egregious violations. Defending the individual lawsuits and class-actions can be very expensive and time-consuming in the American system of broad-ranging pretrial procedures and jury trials. Thus, it is critical for employers to understand the various areas of potential liability within the U.S. employment realm and to learn the best methods and strategies to mitigate their risks.

At-will employment

The most prominent feature of U.S. employment law from the point of view of practitioners in other jurisdictions is undoubtedly the doctrine of "employment at-will," which prevails in all states except Montana. Absent a contrary agreement between parties, at-will employment is the general rule in most jurisdictions. The at-will doctrine allows the employment relationship to be terminated by the employer or the employee at any time with or without notice and with or without reason. At-will employment status is often conveyed and emphasized to employees at the time they are hired in the written offer letter and may also be described in disseminated personnel policies, such as an employee handbook.

Although employment at-will allows for the easy termination of the employment relationship for "any or no reason", the doctrine is not without restriction in that the various laws described below define impermissible reasons for discipline or termination. For instance, an employer may not dismiss an employee on discriminatory grounds, in retaliation for exercising a protected right, taking protected leave of absence (such as a leave of absence protected under the FMLA) or for reporting company conduct that can reasonably be found to be a violation of the law (whistleblowing).

Different terms of employment other than employment at-will status may apply to a unionized workforce under a collective bargaining agreement. The union may have negotiated with the employer that termination and discipline may only be for "just cause." Just cause can mean many different things but it usually means that (1) the employer must prove that the employee did what the employee was accused of doing and (2) the amount of discipline must fit the seriousness of the offense.

b. Claims

Historically, there has been a distinction between "labor law" and "employment law" in the United States. Labor law primarily pertains to the relations between management and unions, while employment law covers laws that are generally applicable to all workplaces, whether unionized or not. Employment law can include wage and hour laws, federal antidiscrimination laws, and occupational safety laws, among other laws.

In the U.S., major labor and employment law claims at the federal level are statutorily-based and are derived primarily from Congress' authority to regulate interstate commerce. Beyond federal statutes, additional obligations are derived from the federal regulations promulgated by the governing federal agencies. There are also state and local labor and employment law claims available as well to employees, which are primarily derived from local and state statutes and common law principles. This section will provide an overview of the major labor/employment statutes that apply to the majority of workplaces:

The National Labor Relations Act

The National Labor Relations Act (the NLRA) grants most employees in private employment the right to form, join, and assist unions, collectively bargain, engage in strikes, picket, and engage in other concerted activities. A union is an organized group of workers who collectively join together to pursue policies and goals beneficial to all workers in the union. When a U.S. employer has a unionized workforce, the company and the union negotiate and enter into a collective bargaining agreement, which sets the terms of employment for all employees in the bargaining unit that the union represents. The NLRA regulates what employers can and cannot do in response to employee collective activity and in terms of bargaining with unions. Enforcement powers under the NLRA are granted to the National Labor Relations Board (NLRB). Its role includes protecting employees from employer reprisals for union activity and making determinations on how unions will represent employees. Employers that violate the NLRA are subject to "unfair labor practice" charges. Allegations of unfair labor practices (ULP) go before the NLRB, which then investigates the claims, holds hearings, and institutes remedies if it finds violations of the law. If the ULP charge is found to be valid, and unless there is a settlement, the NLRB will issue a complaint, which will lead to a hearing before an administrative law judge. Based on the facts and evidence presented by the parties, the judge will file a decision recommending either (1) an order to the employer to cease and desist from the unfair labor practice and providing affirmative relief to the plaintiff or (2) a dismissal of the complaint.

The Board, which is composed of five presidentially nominated members that are confirmed by the Senate, provides appellate review of administrative law judge decisions. Any or all parties can appeal by filing exceptions. Usually, a panel of three Board members decides the case by reviewing the case record and all documents produced from the regional investigation. They will take one of three actions: (1) dismiss the ULP charge; (2) find that the respondent committed the ULP charge and order the respondent to cease and dismiss and to remedy the ULP; or (3) remand the case to the administrative law judge for further action. A full panel of five board members decides cases that are novel or potentially precedent changing. As prescribed under Section 10 of the NLRA[1], Board decisions may be appealed to an appropriate U.S. court of appeals and the U.S. court of appeals decision may then be further appealed to the U.S. Supreme Court.

The Fair Labor Standards Act

Enacted in 1938, the Fair Labor Standards Act (FLSA) governs certain aspects of employment including establishing a national minimum wage, offering incentives for employers to maintain a 40-hour work week in private employment in the form of mandated overtime premium pay, and governing the classification of employees as being subject to or exempt from wage and hour restrictions

The minimum wage nationally, as prescribed under the FLSA, is $7.25 per hour for covered, non-exempt workers. However, this figure is higher in several states and a few cities (for

[1]29 U.S.C. §160(f).

instance, it is $8.20 per hour in Arizona, $8.22 per hour in Florida, and $10.30 per hour in San Jose, California). Under the FLSA, employees must be compensated for any time worked during the week. For non-management employees, non-senior administrative and non-professional employees who work more than 40 hours per week, overtime payments must be provided at 150% of the employee's regular hourly wage rate. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, unless overtime is worked on such days. As a general rule, all employees are covered by the FLSA's minimum wage and overtime requirements unless they are working in occupations specifically exempted from coverage under the statute. Examples of occupations and businesses exempt from coverage are independent contractors and businesses that are not engaged in interstate commerce, or in the production of goods for interstate commerce, although such enterprises would be covered by any applicable state minimum wage requirements.

FLSA violations tend to revolve around two primary statutory issues: the underpayment of wages for time worked, including overtime, or mistakenly misclassifying employees as exempt from coverage under the FLSA. The FLSA is administered by the Wage and Hour Division of the U.S. Department of Labor. The statute can be enforced either through recovery by the Wage and Hour Division on behalf of an aggrieved employee or by suit in federal district court by the Secretary of Labor or by an aggrieved employee or employees. Liability for an FLSA violation can be significant as the employer can be subject to fines and "liquidated damages" (double the overtime pay owed to employees) and, particularly in a large enterprise, the numbers of affected employees can be substantial. In recent years, class actions under the FLSA and analogous state statutes have become extremely popular with plaintiffs' attorneys in the U.S.

The Equal Pay Act of 1963

The Equal Pay Act (EPA) is an amendment to the FLSA. It prohibits an employer from discriminating between employees on the basis of sex by paying lower wages to employees of one sex for jobs requiring equal skill, effort, and responsibility. The EPA provides an employee a private cause of action and allows the employee to bring a lawsuit against his employer in a federal district court or to file a charge with the EEOC. The aggrieved employee is not required to first file a charge with the EEOC prior to bringing a lawsuit in a federal district court. Remedies from the lawsuit can include back pay, attorneys' fees, and court costs.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits discrimination in recruitment, hiring, wages, assignment, promotions, benefits, discipline, discharge, layoffs and almost every aspect of employment based on race, color, religion, sex and national origin. An amendment was added to Title VII in 1978, the Pregnancy Discrimination Act, which prohibits discrimination on the basis of pregnancy. Title VII applies to private employers, labor unions and employment agencies. The statute sets a limit on the amount a plaintiff can recover, which is based on the number of employees the employer had during the current or preceding calendar year. These damage limits are the maximum total amount of compensatory and punitive damages that may be awarded to a plaintiff.

Compensatory damages pay a plaintiff's out-of-pocket expenses caused by the alleged discrimination (such as costs associated with a job search or moving expenses) and for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life). Punitive damages may be awarded to punish an employer for what the court may find to be an especially malicious or reckless act of discrimination. The damage limits are as follows:

- For employers with 15-100 employees, the limit is $50,000.
- For employers with 101-200 employees, the limit is $100,000.
- For employers with 201-500 employees, the limit is $200,000.
- For employers with more than 500 employees, the limit is $300,000.

Title VII also created the U.S. Equal Employment Opportunity Commission (EEOC), a five-member commission with the mission to eliminate unlawful employment discrimination. The Commissioners are appointed to five-year terms by the President and confirmed by the Senate. Title VII is enforced primarily through private actions brought in federal district courts by aggrieved individuals. The major functions assigned to the EEOC under Title VII are to investigate charges filed by employees and to determine if the charges likely contain merit. If the EEOC finds that the charges contain merit, it issues "right to sue" letters, which allow charging employees to commence suit in federal court using a private attorney.

The Americans with Disabilities Act

Enacted in 1990, the Americans with Disabilities Act (ADA) prohibits employment discrimination against a qualified individual with a disability. A "disability" is defined under the ADA as a physical or mental impairment that substantially limits one or major life activities of an individual. Employers are required to provide reasonable accommodations in the workplace that will allow a qualified person with disabilities to perform essential job functions. "In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[2] There are three categories of "reasonable accommodations":

- *"(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or*
- *(ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or*
- *(iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."*[3]

However, employers are not required to make accommodations if it would impose an undue hardship on the employer. The ADA is primarily enforced by private causes of action brought in federal district court. Similar to Title VII, the EEOC investigates charges filed by the aggrieved individual or individuals, determines if the charges contain merit, and issues a "right to sue" letter if it finds that the charges are valid.

The Americans with Disabilities Act Amendments Act of 2008 was signed into law in September 2008. It emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally should not require extensive analysis. It became effective on January 1, 2009.

[2]29 C.F.R. pt. 1630 app. § 1630.2(o).
[3]29 C.F.R. § 1630.2(o)(1)(i-iii).

The Age Discrimination in Employment Act

Enacted in 1967, the Age Discrimination in Employment Act (ADEA) prohibits employers from failing or refusing to hire, discharging, limiting, segregating, or otherwise discriminating against employees with respect to their compensation, terms, conditions or privileges of employment because of their age. The ADEA protects employees who are at least forty years old and applies to all employers with twenty or more employees employed in an industry affecting commerce. Although the EEOC also has the power to file suit, the primary enforcement mechanisms are private lawsuits by aggrieved individuals brought in federal district court. A right to sue letter from the EEOC is not required prior to commencing a lawsuit in federal district court. Instead, a claimant may file a lawsuit in federal court 60 days after their original charge was filed with the EEOC.

The Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification Act (WARN) requires employers, in certain circumstances, to provide 60 days advance notification to employees of a pending plant closure or mass layoff. This notice must be provided to either the affected workers or their representatives, such as a labor union.

Employers in general are covered by WARN if they have 100 or more employees, excluding employees who have worked less than 6 months in the last 12 months and excluding employees who work an average of less than 20 hours a week. The employees that are entitled to notice under WARN include hourly and salaried workers and managerial and supervisory employees. A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss for 50 or more employees during any 30-day period. A covered employer must also give notice if there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce.

Failing to provide proper notification of a mass layoff under the WARN Act may result in workers bringing individual or class action lawsuits in federal district court and being entitled to recover compensation that includes back pay and benefits.

The Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) requires eligible employees working for employers with fifty or more employees to be allowed to take up to twelve weeks of unpaid leave per year for reasons that include the birth or adoption of a child, a "serious health condition" of the employee or spouse, the parent or child of the employee, or for a qualifying exigency arising out of the fact that a spouse, child or parent of the employee is a member of the Armed Forces and is on active duty (or has been notified of an impending call or order to active duty). A "serious health condition" is defined under the FMLA as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider[4].

To be eligible for FMLA leave, the employee must have worked twelve months or longer with his or her employer, performed at least 1,250 hours of service for the employer in the twelve months prior to the date of leave, and must work at a site within seventy-five miles of which the employer has fifty or more employees. When leave is foreseeable, the employee is required to give the employer at least 30 days' notice. The form of notice for

[4]29 U.S.C. §2611(11).

foreseeable leave is not specified in the Act's provisions. If, on the other hand, the leave is not foreseeable, notice must be given as soon as practical under the circumstances. The FMLA allows an employee to sue for a civil right of enforcement in both state and federal court or for the Secretary of Labor to sue the employer on the employee's behalf. If the Secretary of Labor brings a suit on the employee's behalf, the employee's right to individually sue the employer is terminated.

In February 2015, the Department of Labor issued a final rule amending the regulatory definition of spouse to include same sex marriage relationships. The final rule allows employees in legal same-sex marriages to be able to take FMLA leave to care for their spouse or family member. It went into effect on March 27, 2015.

The Occupational Safety and Health Act of 1970

The Occupational Safety and Health Act (OSH Act) is a comprehensive workplace safety measure that was enacted by Congress in 1970. Under the OSH Act, employers are required to furnish their employees with a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. Employers must also comply with occupational safety and health standards which are issued under the Act.

A sub-agency of the U.S. Department of Labor, the Occupational Safety and Health Administration (OSHA), enforces the requirements of the OSH Act and creates occupational safety and health standards. Citations issued for noncompliance with both the OSH Act and the safety standards can result in civil and criminal penalties that include fines and, when violations cause the death of an employee, possible imprisonment.

The Occupational Safety and Health Review Commission (OSHRC), an independent administrative agency, serves as the impartial adjudicator of disputes between OSHA and private employers. OSHRC consists of two levels of review: trial level review that is provided by federal administrative law judges and discretionary appellate review of the administrative law judge decisions provided by three presidentially appointed Commissioners (currently, only two Commissioners sit on the Commission). The Commission decisions are further reviewable in the federal courts of appeals. Unlike the employment laws already discussed, there is no private cause of action for employees aggrieved under the OSH Act. Instead, the OSH Act is enforced entirely by OSHA through administrative litigation within OSHRC and the federal courts of appeals. A minority of states have also chosen to develop and enforce their own plans setting and enforcing occupational safety and health standards.

The Employee Retirement Income Security Act of 1974

The Employee Retirement Income Security Act (ERISA) is a detailed regulatory scheme that governs the provision of pension benefits to employees by ensuring that pensions are adequately funded. It also protects and regulates the welfare benefits provided by employers with regards to medical, dental and vision insurance, life insurance, and disability income plans.

One of ERISA's purposes is to enhance the reliability and fiscal health of pension and welfare plans established by private employers. Another purpose is to enhance the ability of pension benefits to be portable, by allowing workers to earn nonforfeitable benefit increments in successive jobs. ERISA does not require that benefits be provided by employers and does not prescribe particular levels of benefits for employees. It simply regulates the provision of these benefits if an employer chooses to provide them to its employees and requires that if benefits are offered, they comply with regulations prohibiting discrimination and be administered fairly under the terms of the benefit plan.

The administration and enforcement of ERISA is divided amongst the IRS, the Pension Benefits Guaranty Corporation, and the Department of Labor.

ERISA also includes a provision that preempts state laws governing employee benefit plans and arrangements. If an employee wants to file a claim against the pension plan, they must first use the internal claim and dispute resolution process that is required to be provided under the pension plan itself. After this process is exhausted, the claimant may pursue a claim in the judicial system but the employer has the right to have the case decided in a federal court in lieu of a state court.

Health Insurance Portability and Accountability Act of 1996

Employers that administer health insurance plans for their employees may be subject to the Health Insurance Portability and Accountability Act (HIPAA), which, among other things, protects the confidentiality and security of healthcare information. It requires that individuals receive notice on the use and disclosure of the information that pertains to their mental or physical health, healthcare, or payment for health services. It also gives individuals the right to request an accounting of such disclosures, to view and correct any disclosures, and to limit the purposes for which the information may be used without the individual's consent. HIPAA also imposes nondiscrimination requirements on employers, group health plan providers and insurers to ensure that individuals are not excluded from coverage, denied benefits, or charged more for coverage offered by a plan or issuer, based on health status-related factors.

If covered by HIPAA, the documents regarding the health plan must include provisions stating that the covered entity will comply with all the requirements of HIPAA. Violations of HIPAA, even if committed by the plan administrator instead of the employer, may lead to severe civil or criminal liability.

State level employment law claims

The laws that govern employment relationships vary greatly from state to state but almost all states have employment discrimination/harassment prohibitions that mirror federal law. In fact, some states expand the federal categories of protected persons and allow unlimited damages, and in those jurisdictions the state law is far more commonly relied upon than federal law by employees asserting claims. Other states have more stringent requirements than the minimum wage and overtime provisions under the FLSA. To the extent the state law versions of the FLSA provide for better benefits than the federal law, such as with a higher minimum wage, the state law will supersede federal requirements. A number of states have their own versions of the WARN act, which differ from the federal requirements, including the California WARN Act, Illinois WARN Act, New Jersey WARN Act, and New York WARN Act.

Both federal and state discrimination laws typically feature specific provisions prohibiting retaliation by the employer against an employee who asserts discrimination claims. These are quite important in the U.S. context, as frequently juries who may be unsure about whether discrimination actually took place will more readily find that the employer, even if innocent of the discrimination charge, took action against the employee to punish him or her for having brought the complaint and/or to intimidate other employees from pursuing their own discrimination claims.

Another type of claim available in certain federal contexts and in some states is the whistleblower cause of action, in which the employee asserts that (s)he was retaliated against by the employer because (s)he objected to or challenged illegal or non-compliant activity in a variety of areas. Examples include Sarbanes-Oxley, a congressional act passed in 2002 that establishes a broad array of standards designed to increase corporate

responsibility, enhance financial disclosures and combat corporate and accounting fraud, and state laws such as the New Jersey Conscientious Employee Protection Act. This is a popular claim with employees and potentially perilous to the employer because it may easily result in enhanced or punitive damages.

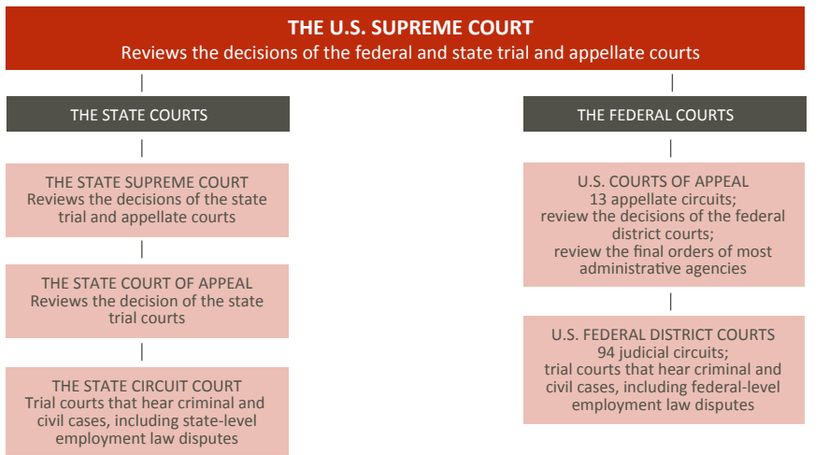
In addition to the various state level labor and employment statutes available, workers' compensation is also available in all fifty states and the District of Columbia. Workers' compensation is best understood as a no-fault insurance system for paying workers who are injured during accidents that occur on the job and is the exclusive remedy individuals have against their employers for these injuries. It removes the option to file a lawsuit and allows for guaranteed benefits for injured workers. If a worker is injured, she receives immediate compensation for her medical expenses and then receives cash benefits for lost work after three to seven days. If a worker is killed, the survivors generally have the costs for the funeral expenses covered and may receive wage-replacement benefits. Employers pay for workers' compensation typically in one of three ways: premiums to a state-run insurance program, payments to an insurance company, or they self-insurance and pay benefits directly to workers.

c. Administrative Agencies that Investigate or Adjudicate Claims

Enforcement of the employment rights created by federal and state laws primarily takes on two distinct forms: administrative enforcement by agencies or private litigation by individuals with causes of actions. With the administrative enforcement model, a specialized agency tasked with enforcing a federal statute, such as the Department of Labor and the NLRB, interprets regulatory standards and pursues instances of violations through investigation and litigation. The litigation may occur within a different division of the enforcing agency itself or through an independent adjudicatory agency. Any further judicial review takes place in the federal courts of appeals with final review resting with the Supreme Court. In contrast, the private litigation model involves an aggrieved employee or an agency with the authority to represent employees in court filing a lawsuit and asserting the statutory rights that have been violated. Depending on if it is a federal or state case, these court decisions are reviewable in federal or state courts of appeals. The U.S. Supreme Court or the highest court of the state in question provides final review after the courts of appeals.

d. Court / Tribunal System

THE U.S. COURT SYSTEM



e. Alternative Dispute Resolution

Alternative dispute resolution, in the U.S. context, is a proceeding or process used to resolve a dispute outside of litigation. It includes mediation and arbitration. As defined by one writer, arbitration is "a simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding."[5] Arbitration is an adversarial proceeding in which the parties present evidence and argue the case to the arbitrator, who then decides which party wins. The process is abbreviated and less formal than a trial. Arbitration awards are virtually immune from judicial review. Absent proof of fraud or corruption, a court will likely enforce an award no matter how unreasonable it may seem. Some US employers require employees to agree to mandatory arbitration as a condition of employment; others prefer to litigate employment disputes.

Mediation is the process where parties attempt to negotiate a settlement with the use of a neutral third party. The parties select the mediator, who meets privately with each party to discuss the strengths and weaknesses of each side's case. The mediator helps the parties identify the risks of the case and encourages them to consider how those risks can affect their goals. In order for any settlement to be concluded, the parties must voluntarily agree to accept it. The mediator does not have the power to force the parties to agree on a settlement. Unlike arbitration, both parties can still decide to pursue litigation. Mediation is a very popular alternative in US employment matters given the time, expense and exposure of litigation.

Settlement is the process where the parties reach an agreement outside of the courtroom. In fact, most employment law matters settle before reaching the trial stage.

[5]Chappel, *Arbitrate…And Avoid Stomach Ulcers*, 2 ARB. MAG., Nos. 11-12, at 6, 7 (1944).

Settlement can be discussed by any party at any time during litigation and can happen in the beginning of the litigation or shortly before the parties meet for the trial. It is often a cost-effective alternative to trial.

II. The Litigation Process

a. Typical Case

Labor and employment lawsuits take place in federal courts, state courts, federal administrative agencies, and within state administrative agencies. All federal court litigation occurs under uniform procedural rules.

In the United States, each state's court system exists independently of the federal court system and on questions confined to state law, federal courts have no power to supervise or review the courts of the states. The federal courts are composed of three levels: district courts, courts of appeals, and the U.S. Supreme Court. District court decisions may be appealed to the court of appeal within whose circuit the district court lies. Decisions by federal courts of appeal are subject to review by the U.S. Supreme Court, which has discretion to grant or deny review, but as a practical matter reviews very few cases. Each state has its own system of courts of first instance and appellate tribunals, generally leading to a state supreme court which will review selected matters.

The plaintiff in the lawsuit is the person bringing the action, i.e., the employee(s). The defendant is the company and, possibly, individuals who were involved in the termination decision or other allegedly discriminatory act. Typically, an aggrieved employee will hire a plaintiff's lawyer that represents the employee on a contingent fee basis, where the plaintiff will not be required to pay for any legal fees if the lawsuit fails.

Some of the more remarkable aspects of the US litigation system to civil law practitioners include its high costs, extensive burden on the parties, delay, and eye-catching levels of exposure. While the federal and various state systems vary considerably in their procedural details, they share a number of characteristics, which help explain these qualities.

i. Steps in the Process

Initiating the Lawsuit/Notice Pleadings

In federal and state court, a lawsuit starts with the filing of a complaint by the plaintiff with the court and with the formal delivery of a copy to the defendant. The complaint describes what the defendant did (or failed to do) that caused harm to the plaintiff and the legal basis for holding the defendant responsible for that harm. A complaint must contain all claims the plaintiff has. Unlike many civil law jurisdictions, the federal and state court systems in the U.S. require very little detail in the initial pleadings as long as the employer is put on notice of the nature of the claim. It is assumed that the details will be developed in the pretrial discovery process described below.

The defendant typically then files an answer to the complaint and any counterclaims it may have against the plaintiff, again in a fairly general way. Instead of filing an answer, a defendant may choose instead to file a procedural or dispositive motion in an effort to immediately put an end to the litigation. Once an answer is filed, discovery is permitted under the court's supervision. Civil lawsuits generally proceed through distinct steps: pleadings, discovery, trial, and possibly an appeal. However, parties can halt this process by voluntarily settling at any time. Most cases settle before reaching trial. Arbitration is sometimes another alternative to a trial.

The Discovery Process

During discovery, the parties ask each other and third parties for information about the facts and issues of the case. Discovery consists of written questions to be answered under oath, requests to produce documents or data, requests for inspections and examinations, and depositions (the oral examination of prospective witnesses under oath outside the court's presence). The elaborate pretrial proceedings in U.S. employment litigation—so alien to employment matters in most of the world—become easier to understand when viewed in the context of the very open-ended quality of discrimination and other U.S. employment law claims, together with the adversarial nature of the U.S. litigation process. U.S. discrimination litigation, for example, often hinges on intent of the employer and its managers; yet witnesses do not normally create documents or make statements admitting explicitly that they have engaged in discrimination. The question becomes one of surrounding circumstances, treatment of similarly situated employees, and statements from which one might infer a malicious intent. This is a far more complex inquiry than the typical civil law question of whether there was "good cause" to terminate an employee. Moreover, courts in the U.S. system act more as "referees" than active inquisitors, leaving more freedom for each party to present its case with a broad view of relevance.

Document Requests

The parties will nearly always file requests for production of documents, which ask the opposing party to disclose relevant documentation about the case. These requests are far more sweeping than those encountered in a civil law system; the concept goes far beyond the identification of individual specifically-described documents to encompass broad categories of files which need not even be admissible in evidence at trial, as long as their disclosure might reasonably be expected to lead to the identification of other admissible evidence. The complexity of responding to document requests has increased dramatically in the electronic age, as e-mail and other electronic documents have come within the ambit of routine discovery.

Interrogatories

Information about the case and the other side's position can also be gathered formally through written questions known as interrogatories that are to be answered in writing under oath. This technique, long subject to overuse, has been controlled in the federal system and in some but not all states. There are still jurisdictions where a party may propound over 100 detailed questions requiring extensive research and careful drafting of answers by the other party.

Depositions

A deposition is a question and answer session under oath. One side notices (requests) a deposition of a particular witness or corporate representative. A plaintiff's deposition may take anywhere from one to two (sometimes even three or more) days, depending on the complexity of the case. The typical goals of a deposition include (a) finding out what an adverse witness knows about the case and is likely to testify about at trial; (b) obtaining testimony which may be used in a pretrial motion for "summary judgment" (a request to the court to resolve the case for a party without the need for a trial); (c) obtaining testimony to be used at trial from a witness who will not appear in person at the trial; and (d) eliciting statements which may be used to "impeach" (contradict) the witness' testimony at trial. Preparation for the deposition of a key witness is arduous and exacting for both the party conducting the examination and the party whose witness is being examined.

ii. Role of Witnesses, Counsel and Court / Tribunal

Jury Trials

The unique U.S. feature of a jury trial to determine an employment suit colors all of the preparation of the case and can greatly increase its time and expense. In cases with significant exposure, it is common to engage jury research firms and stage mock trials just to test themes a party intends to present and gauge the likely reaction to its key witnesses. In even the simple case, the attorneys must carefully prepare their witnesses for testimony, develop lines of cross-examination for adverse witnesses, identify and prepare expert witnesses, prepare opening and closing statements, propose written instructions for the court to give the jury, and argue orally and in writing the many legal issues that will emerge before and during the presentation of evidence.

Damages and Other Exposure

In a typical employment case, the employer is potentially exposed to back pay for the period from termination to trial, compensatory and punitive damages, and payment of the plaintiff's attorney's fees if the employee prevails. (The reverse is seldom true, that is, the employer can rarely recover its attorney's fees if it prevails.) These amounts can easily reach several million dollars where the jury finds the employer acted badly or where the employee is highly compensated. Given the potentially high exposure and the labor-intensive pretrial process in the U.S., it is not unusual in many U.S. jurisdictions for trial of a single-employee matter to cost $250,000 or more in legal fees alone.

Class Actions

Class actions are suits that aggregate a large number of employee claims into a single matter before a single court and jury. In the employment law setting, typical class action claims include wage and hour disputes and class-wide discrimination on race, gender, age or other grounds. The complexity and potentially massive exposure associated with recovery by a large group of employees generates even more extensive pretrial proceedings and preparation than the single-employee suit.

iii. The Appeal Process

A party dissatisfied with the result of a trial may appeal the decision to a higher court. At the federal level, there are twelve courts of appeals in the United States each within a designated judicial circuit. These courts of appeals hear both district court decisions and the final orders of most administrative agencies. Typically, a panel of three judges selected from the appellate judges appointed to that particular appellate court will hear and decide an appeal. At the state level, typically parties can appeal a state court decision to a state supreme court or state court of appeals. The parties will argue their positions in briefs submitted to the appellate court and the record of evidence from the trial will be submitted to the appellate court to help the court understand the case and make a decision. Typically, the appellate court reviews the case for a legal error only and will only review the factual evidence or override a jury's finding of fact in unusual circumstances. The appellate court's decision is presented in an opinion where the court affirms the verdict if it finds that there was no error. If there was an error, the appellate court will reverse the verdict or order the trial court to administer a new trial. An appeal can add additional time to the litigation process by a year or more.

III. Tips to Avoid Litigation

An employer can take several proactive steps to reduce the likelihood of litigation, including:

- Train managers and supervisors to monitor inappropriate behavior and employment problems and to document all actions taken related to compliance with federal and state laws.
- As violations can stem from both the action and inaction of a supervisor and the failure to recognize a situation that may have legal consequences, it is important to train managers and supervisors to avoid violations of applicable laws or employee rights and to take action if they learn of a potential issue that may violate applicable laws.
- Institute policies where any complaints of discrimination and harassment are immediately investigated, and, if warranted, institute prompt remedial measures to prevent any future reoccurrences of discrimination or harassment.
- Have a legitimate business reason for dismissing an employee and have backup documents to prove the reason if the employee claims the dismissal was unlawful.
- Treat employees with fairness, dignity and respect during employment and during the termination process.
- Put all policies in writing and communicate them to employees through the use of an employee handbook. Use stand-alone memos from time to time to clarify or highlight particular polices.
- Ensure employees are paid in accordance with applicable laws.
- Maintain accurate documentation of everything (why an employee was terminated, what led to the termination, the overtime hours of non-managerial employees, etc.) and ensure the documents are easily accessible and stored safely.
- Since employees usually complain before they file a claim, a charge, or a lawsuit, ensure employees have a well-publicized avenue for expressing their complaints without fear of retaliation.
- Before making a final decision to discharge an employee, determine if the action will be viewed by the employee as unfair, a surprise, or inconsistent with situations involving other employees. Determine if an employee that is within a protected class due to race, sex, age, national origin, religion, or disability, and if there is arguably any pattern of activity that could be perceived as violating federal and state anti-discrimination laws. Assessing how an employee will respond to a particular job action before making a final decision will allow an employer to communicate the decision more effectively.
- Ensure that all government mandated non-discrimination notices are posted in areas accessible to employees.
- Ensure that your personnel policies are regularly updated and that your policies are consistently applied and enforced across-the-board upon all employees in the workforce.
- Train managers in performance management techniques, and conduct regular performance evaluations of employees, taking place at least once a year. Document performance problems including verbal warnings and performance-related counseling. These items can help defend a lawsuit and provide proof as to the reason for a termination, demotion, or decision not to promote.

Best Practices

There are several key best practices that can minimize the risk of litigation and put employers in the best footing. It is important to have well-drafted personnel policies in place that are memorialized in writing because they prevent and minimize employment law liabilities, put employees on notice as to what is expected of them, and enable employers to treat employees in a fashion that workers regard as more fair and just than if personnel policies were unwritten. These policies also give employers more discretion

to terminate employees who do not follow the company's rules and expectations and can provide support for an employer's disciplinary decisions more easily in front of a judge or jury.

It is important to have procedures in place where employees can raise and resolve work-related grievances or complaints. This will allow a grievance to be immediately identified and quickly resolved before it escalates to an employee filing a lawsuit or filing a complaint. The written grievance also serves as a record of the employee's problem and locks them into a certain version of the facts that led to the grievance.

To avoid running afoul of FLSA requirements, employers should regularly evaluate their payroll practices and compensation decisions, as well as their job descriptions. Employers should also institute an anti-harassment policy that prohibits harassment in the workplace based on an employee's sex, race, color, religion, age, national origin, disability or any other categories protected by federal, state or local laws. It is also important to institute a complaint procedure and to ensure that the anti-harassment policy is both disseminated to all employees and is rigorously enforced if there are any complaints.

Employers should maintain an Equal Employment Opportunity (EEO) policy that states that all employees and job applicants will be judged on the merits of their performance and experience, and not their sex, age, national origin, religion, race, disability, or other legally protected categories under federal, state or local laws. Having an EEO policy in place in an employee-initiated lawsuit can be helpful in defending a discrimination lawsuit; while not having one in place can work to the disadvantage of the employer during the lawsuit.

There should also be a reasonable accommodation policy that shows all employees that the employer is committed to providing reasonable accommodations to any employees with a disability that asks for it. This will place the burden on employees to request reasonable accommodations on a timely basis and can help defeat a lawsuit where an employee or rejected applicant claims that the company should have provided them with an accommodation. Similarly, it is best practice to have a religious accommodation policy that allows employees to seek time off for observing religious holidays and that places the burden on employees to notify the employer if a religious accommodation is needed. The lack of such a request by the employee and a subsequent lawsuit can make the religious discrimination lawsuit easier to defend.

Finally, employers should implement a personnel policy that describes the basic leave policies in place and the actions employees must take to affirmatively seek a leave of absence. Having a leave of absence policy in place will help the employer comply with the FMLA and other state and federal leave of absence statutes. It will also allow the employer to have the appropriate methods in place for responding to requests from employees for a leave of absence.

EUROPEAN UNION

I. Overview

a. Introduction

There are four types of procedures that are central to EU litigation: the request for preliminary ruling; the action for annulment; the action for infringement; and State liability for breach of EU law.

Before examining EU litigation per se, it is necessary to review the principles of primacy and direct effect so as to understand how national and EU law intertwine as is often the case before the national judge.

II. Primacy

a. Notion

The principle of primacy is one the cornerstones of the European legal order. Together with the direct effect, it regulates the relationship of EU law with the national laws of Member States. According to the principle of primacy, EU law is **superior** to the national laws of Member States so that Member States may not apply a national rule that contradicts EU law.

With EU law having precedence over national law, the uniform protection of citizens across the national territories of the EU is ensured, since Member States cannot validly invoke their national laws as an excuse for not applying EU law.

The principle of primacy is not set forth in the treaties on which the EU is based, yet it is a fundamental principle of EU law which has been enshrined by the Court of Justice of the European Union (CJEU) in its well-known *Costa v. Enel* Case of 15 July 1964.

In this case, the Court declared that the laws issued by the European institutions are to be integrated into the legal systems of the Member States, who are obliged to comply with them. Therefore, EU law takes precedence over national laws, so that if a national rule is contrary to a European legal provision, Member States' authorities cannot apply it. National law is neither rescinded nor repealed, but its binding force is suspended.

b. Scope

The CJEU has made clear that the primacy of EU law is absolute:

- **All national acts** are subject to this principle, irrespective of their nature: acts, regulations, decisions, ordinances, circulars, etc., irrespective of whether they are issued by the executive or legislative powers of a Member State. The judiciary is also subject to the primacy principle. Member State case-law should also respect EU case-law. The CJEU has ruled that even national constitutions should be subject to the principle of primacy. As such, it is the responsibility of national judges not to apply the provisions of a constitution which contradict EU law;
- Likewise, it applies to **all European legal acts** with binding force, whether emanating from primary legislation, mainly the Treaty on the European Union and the Treaty on the Functioning of the European Union (TFEU), or secondary legislation (regulations, directives and decisions).

c. Consequence: the National Judge Suspends the Application of National Law

As for the direct effect principle, the CJEU is responsible for ensuring that the principle of primacy is adhered to. Its rulings may impose penalties on Member States who infringe it once the Commission brings an action for failure to fulfill an obligation of EU law (cf. *infra*).

It is also the task of national judges to ensure that the principle of primacy is adhered to. Should there be any doubt regarding the implementation of this principle, judges may make use of the reference for a preliminary ruling procedure (cf. *infra*). Most importantly, national judges, of their own motion, are under the **obligation to refuse** to apply any conflicting provision of national legislation, even if it is adopted subsequently, and it is not necessary for them to request or await the prior setting aside of such provisions by legislative or other constitutional means.

The principle of primacy entails refusal to apply national law, but it does not replace it with the provision of EU law with which it is in conflict. For that, the European provision must be directly applicable within the national legal order so that it can be invoked before the national judge.

III. Direct Effect

a. Notion

Direct effect is a cornerstone of the European legal order. Together with the principle of primacy, it defines how the national and European legal orders intertwine. The direct effect of EU law has been enshrined by the Court of Justice in its famous *Van Gend en Loos* judgment of 5 February 1963.

In this judgment, the CJEU states that EU law not only engenders obligations for Member States, but also rights for individuals. Individuals may therefore take advantage of these rights and **directly** invoke them before national courts. As a result, it is not necessary for the Member State to adopt the European act concerned into its internal legal system. Individuals may invoke it directly, despite the absence of any prior implementation into national law.

The direct effect is an undisputed principle of EU law, but it is subject to conditions, which vary depending on the legal act at issue. It is also important to specify against whom that legal act may be invoked, the state or another individual.

b. Conditions

There are two aspects to direct effect: a **vertical** aspect and a **horizontal** aspect.

Vertical direct effect is concerned with relations between individuals and the State. This means that individuals can invoke a European provision in relation to the State.

Horizontal direct effect pertains to relations between individuals. This means that an individual can invoke a European provision in relation to another individual.

According to the type of act concerned, the CJEU has accepted either a full direct effect (i.e. a horizontal direct effect and a vertical direct effect) or a partial direct effect (confined to the vertical direct effect).

Direct effect and primary legislation

As far as primary legislation is concerned, i.e. the treaties at the top of the European legal order, the CJEU established the principle of the direct effect in the *Van Gend en Loos* judgment. However, it laid down the condition that the obligations must be **precise**, **clear** and **unconditional** and that they do not call for additional measures, either national or European.

In the *Becker* judgment of 19 January 1982, the CJEU rejected the direct effect where the States have a margin of discretion, however minimal, regarding the implementation of the provision in question.

Direct effect and secondary legislation

The principle of direct effect also relates to acts of secondary legislation, such as those adopted by European institutions on the basis of the founding Treaties. However, the application of direct effect depends on the type of act:

- The **regulation** always has direct effect. In essence, Article 288 TFEU specifies that regulations are directly applicable in the Member States. This direct effect is vertical as well as horizontal;
- The **directive** is an act addressed to Member States and must be transposed by them into their national laws. However, in certain cases, the CJEU recognizes the direct effect of directives in order to protect the rights of individuals.
- Therefore, the CJEU rules that a directive has direct effect when its provisions are **unconditional** and sufficiently **clear** and **precise**. However, it can only have direct vertical effect and it is only valid once the transposition deadline has elapsed;
- The **decision** may have direct effect when it is addressed to a Member State. As a consequence, the CJEU only recognizes a direct vertical effect.

c. Consequence: the National Judge Applies EU Law

Once the conditions for direct effect are met, the individual can invoke the European rule before the national judge, who must apply it to resolve the case, as he/she would with national law. Whereas primacy leads to a national law being set aside, direct effect replaces it with legal obligations directly flowing from EU law with which the national judge must comply.

d. Examples and Practical Tips

The importance of direct effect and primacy may be illustrated by the following example directly taken from case-law.

In the *Defrenne* case, the CJEU had to deal with a preliminary reference arising from an action before a Belgian court between an air hostess and her employer. The air hostess was claiming she had been discriminated against by her male colleagues, because she was paid less to perform the same job. Back then (1976), Belgian law did not provide for protection against discrimination based on sex and her salary was paid according to the contract she had signed.

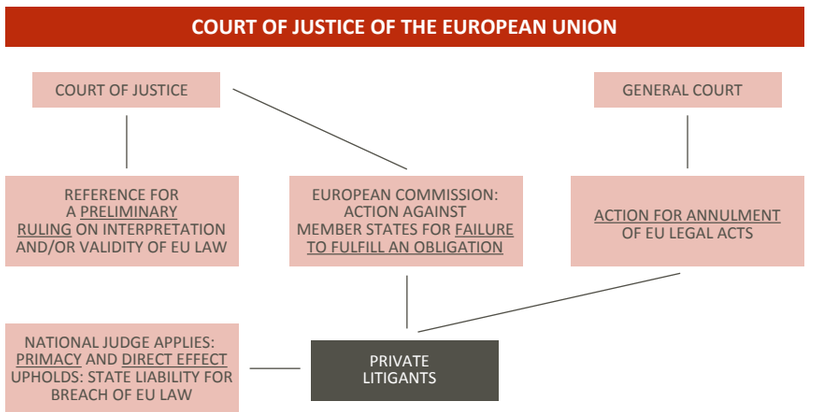
The CJEU took the position that the principle of equal pay for equal work set forth in the treaties overruled the contractual provision at stake by virtue of the principle of primacy. Therefore, the latter had to be set aside and replaced by the principle of equal pay for equal work found in EU law, which the CJEU deemed directly applicable in the Belgian legal order. As a consequence, the air hostess was able to claim compensation despite the contract in force on the basis of a right directly flowing from EU law.

This is only one example among many to show that it is important for employers to **look beyond national law**. They have to respect EU law as well even when it is not part of their own national law. As such, nothing prevents a national judge from setting aside a contractual provision, a collective labor agreement or even a piece of legislation which is contrary to EU law, and replace it by a provision of EU law which meets the conditions for direct effect.

As a consequence, EU law as well as the CJEU case-law must be closely followed, in particular regarding the issue of non-discrimination.

IV. The Reference for a Preliminary Ruling

THE EU COURT SYSTEM



a. Notion

The reference for a preliminary ruling is a procedure exercised before the CJEU. This procedure enables any national court to question the CJEU on the interpretation or validity of EU law. The reference for a preliminary ruling therefore promotes active cooperation between the national courts and the CJEU and the uniform application of EU law throughout the EU.

In contrast to other judicial procedures, the reference of a preliminary ruling is not a recourse taken against a European or national act, but a question presented to the CJEU on the application of EU law, an answer to which is deemed important by the national judge to solve the case at hand.

b. Personal Scope

Where a question pertaining to the validity or interpretation of EU law is raised before a national court or tribunal, that court or tribunal **may** request a preliminary ruling if it considers that a decision on the question is **necessary** for it to provide a judgment. However, where such question is raised before a national court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal **must** request a preliminary ruling.

In order to determine whether the jurisdiction that asks the question is a court or tribunal within the meaning of EU law, various criteria will be taken into consideration including whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies the rule of law, and whether it is independent.

The place of the parties to the main proceedings in a preliminary ruling procedure is quite limited since it is for the national judge to decide if a question has to be asked to the CJEU or not. The parties may only suggest that a reference be made and try to frame the question before it is asked. Once the question is asked, the parties can still provide observations as to how the question should be answered (cfr. *Infra*).

c. Material Scope

The preliminary reference must pertain to the **validity** or **interpretation** of EU law.

There are additional requirements to be met. In that respect, the national judge may consider that a ruling is not necessary if:

- the CJEU has **already ruled** on the matter. In this case, the CJEU will not formally decline to answer, but will simply refer to previous case-law;
- the correct application of EU law is so **obvious** as to leave no scope for any reasonable doubt. This is called the “acte clair” doctrine.

The CJEU will, on the other hand, decline to provide a ruling if:

- the question referred is **hypothetical**;
- the question is **not relevant** to the substance of the dispute;
- the question is **not sufficiently clear** for any meaningful response;
- the facts are insufficiently clear for the application of the legal rules.

d. Effects

The submission of a reference for preliminary ruling calls for national proceedings to be **stayed** until the CJEU has given its ruling. The CJEU Decision has the force of **res judicata**. It is binding not only on the national court on whose initiative the reference for a preliminary ruling was made, but also on all of the national courts of the Member States.

In the context of a reference for a preliminary ruling concerning validity, if the European instrument is declared invalid, all of the instruments adopted based on it are also invalid. It then falls to the competent European institutions to adopt a new instrument to rectify the situation.

e. Procedure

It is important to note that, in addition to the text of the questions referred to the CJEU for a preliminary ruling, the request for a preliminary ruling must contain:

- a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;
- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
- a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union

law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

It is for the national court to decide at what stage of the procedure such a request should be made.

Once the preliminary ruling is referred to the CJEU, the following are authorized to submit observations to the Court:

- the parties to the main proceedings,
- the Member States,
- the European Commission, and
- the institution which adopted the act, the validity or interpretation of which, is in dispute.

Once the observations have been submitted, the CJEU will deliver its judgment after having held oral hearings if deemed necessary. The CJEU only gives a decision on the constituent elements of the reference for a preliminary ruling presented to it. The national court therefore remains competent for the original case.

The preliminary ruling procedure lasts approximately two years. However, a reference for a preliminary ruling may be subject to an **expedited** procedure when the nature of the case and exceptional circumstances require it to be handled quickly.

Preliminary ruling proceedings before the CJEU are free of charge and the CJEU does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; it is for the referring court or tribunal to rule on those costs.

f. Examples and Practical Tips

Preliminary rulings have been central to the development of the CJEU's case-law. In sensitive cases, the CJEU has delivered rulings, which have changed the course of European employment law. The *Defrenne* case (see supra) is an outstanding example of this, since the CJEU decided therein that the principle of equal pay for work of equal value could be directly invoked before national courts.

Other famous examples are the *Viking* and *Laval* cases. In both cases, the CJEU ruled that industrial action represents a restriction on the freedom of establishment and the freedom to provide services if it makes the exercise of that right "less attractive", but is acceptable if it pursues a legitimate aim and is justified by overriding reasons of public interest (such as the protection of workers and jobs that are "under threat").

The following practical tip might therefore be suggested. If you do not like the way the jurisdictions of your Member State interpret EU law or if you find that a provision of EU law is invalid, it is possible to suggest a preliminary reference during a national litigation process. The answer of the CJEU will be legally binding for the judge that referred the question, but also for all other national judges in Europe.

The preliminary ruling procedure is especially interesting if you want to circumvent unfavorable case-law from your supreme court, for any national judge may ask the question at any time and will be bound by the CJEU's ruling.

The preliminary ruling also gives you the opportunity to challenge the validity of EU law despite the expiry of the time-limit for annulment proceedings, which are anyway not accessible to private litigants in most cases.

V. Action for Annullment

a. Notion

The action for annulment is one of the actions that may be brought before the CJEU. Through this action, the claimant requests the annulment of an act adopted by a European Union institution, body, office or organization. The CJEU will annul the act concerned if it is judged to be contrary to higher rules of EU law.

b. Personal Scope

Article 263 TFEU distinguishes between several categories of plaintiffs. First, it refers to **preferential plaintiffs**. These are Member States, the Commission, the European Parliament and the Council. These plaintiffs are 'preferential' in the sense that they may bring an action for annulment before the CJEU without having to demonstrate any interest in taking action.

Private litigants may also refer an action to the CJEU. They constitute the category of **non-preferential plaintiffs**. In contrast to preferential plaintiffs, private litigants must demonstrate an interest in taking action in order to request the annulment of a European act. Thus, the contested act must be **addressed** to the plaintiff or must concern him or her **directly** and **individually**.

A novelty introduced by the Treaty of Lisbon is that private litigants may also bring an action for annulment against any regulatory act, which is of direct concern to them and does not entail implementing measures. By regulatory act, the CJEU means a non-legislative measure of general application. Despite this opening of the *locus standi* rules, challenging European legal acts still remains a remote possibility for individuals because of the narrow meaning given to the requirement of "individual concern" which is still applicable for legislative acts as opposed to regulatory acts.

Furthermore, there is a strict time-limit for filing the action for annulment. Indeed, plaintiffs have a period of two months for filing the action. This period begins either from the date of publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter.

Accounting for those limits, the only realistic way for private litigants to challenge the validity of EU law will therefore be through a preliminary ruling on validity, which they may only suggest to the national judge who can then sovereignly decide to refer or not.

c. Grounds for Review

Once an action for annulment has been filed with the CJEU, it shall assess whether the act conforms to EU law. It may then annul the act based on the grounds of:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the Treaties or of any rule of law relating to their application; or
- misuse of powers.

d. Effects

If the action is well-founded, the CJEU may annul the act in its entirety or only certain provisions. The annulled act or provisions shall therefore no longer have legal effect. Moreover, the institution, body, office or organization that adopted the act is required to fill the resulting legal void in accordance with the judgment delivered by the CJEU.

e. Examples and Practical Tips

If you find an EU legal act to be unlawful, it will often be a waste of time and resources to file a case against it before the CJEU, even if the time-limit to do so is respected, considering the existence of restrictive *locus standi* rules for private litigants.

However, keep in mind that you may still rely on the preliminary reference for validity, which delivers the same result indirectly and without time-limits, with the important caveat that the national judge may however refuse to ask the question.

VI. Action for Failure to Fulfill an Obligation

a. Notion

Proceedings for failure to fulfill an obligation may be brought before the CJEU. These proceedings may be brought by the Commission or by a Member State against a Member State, which has not complied with EU law.

Proceedings for failure to fulfill an obligation are based on Articles 258 to 260 TFEU.

b. Nature of the Failure

The failure can stem from **instruments** (laws, decrees, administrative decisions, etc.) or be the result of **facts** (administrative practices, etc.).

It can be the consequence of **positive** behaviors (actions) or **negative** behaviors (abstentions, omissions). Thus, actions can, for instance, consist of the adoption of a text contrary to EU law or the expressed refusal to repeal a national measure that is contrary to EU law. Abstentions or omissions can, for example, consist of delays in transposing a directive or failure by Member States to notify national implementing measures to the Commission.

The act must be attributable to the Member State. For this reason, the concept of State is interpreted broadly by the CJEU in that it may mean all of the State bodies such as the government, the parliament, federated entities or sub-national bodies, etc.

c. Procedure

Proceedings may be brought either by the Commission, which is most often the case in practice, or by a Member State:

- **When the Commission initiates proceedings**, it must first address a reasoned opinion to the Member State, which has not complied with EU law. If, after a certain period, the Member State has still not rectified its failure to fulfill its obligation, the Commission may then bring proceedings against the Member State before the CJEU;
- **When a Member State initiates proceedings**, it must first bring the matter before the Commission. The Commission then delivers a reasoned opinion after having heard the arguments of the Member States concerned. The plaintiff Member State may then bring the matter before the CJEU.

Private litigants also have an important role to play in these proceedings, since they will, in most cases, be the ones who warn the Commission about the Member States' failures to fulfill their obligations. To this end, the Commission has set up a specific mechanism where private litigants may submit a complaint in writing to the Secretariat-General of the Commission, who will then gather information and open infringement proceedings if deemed appropriate.

The filing of a complaint is open to all and free of charge. It does not guarantee that proceedings will be brought before the CJEU. However, it provides complainants with administrative guarantees such as the right to be informed about the course of any potential infringement procedure and the right to confidentiality.

d. Effects

Once the matter has been referred, if the CJEU finds that there has been a failure to fulfill an obligation, it shall deliver its first judgment, which includes the measures to be adopted by the Member State in order to rectify the situation. Subsequently, if the Commission considers that the Member State has not taken the necessary measures, it shall bring the matter before the CJEU a second time. If the Court confirms that the Member State has not complied with its first judgment, it may then impose a fine upon the Member State.

e. Examples and Practical Tips

The most common failure to fulfill obligations sanctioned by the CJEU is where Member States infringe European employment law by not transposing directives within the prescribed time-limit or because they incorrectly or partially transpose these directives.

In a recent judgment, the CJEU has for instance declared that, by not introducing a requirement for all employers to make reasonable adjustments, where needed in a particular case, for all persons with disabilities, the Italian Republic has failed to fulfill its obligation to ensure the correct and full implementation of Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

We may gather from this example that if a Member State either fails to implement EU law or implements EU law late or incorrectly, a complaint may be filed before the Commission, which may eventually lead to a finding of infringement by the CJEU.

Filing a complaint with the Commission is free of charge and open to all. It should not be underestimated, because it is, in most cases, through individual complaints that the Commission will become aware of infringements with the consequence that it may then go before the CJEU to have these infringements sanctioned.

VII. State Liability for Breach of EU Law

a. Notion

In the famous Francovich case, the CJEU came to the conclusion that *"it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible"*. Through this judgment, the CJEU established the principle of State liability for breaches of EU law.

b. Conditions

The following three conditions have to be met for establishing State liability for breach of EU law:

- the rule of law infringed must be intended to confer **rights** on individuals;
- the breach must be sufficiently **serious**;
- there must be a direct **causal link** between the breach of the obligation resting on the State and the loss or damage sustained by those affected. It is a question of

assessing whether the alleged loss or damage flows sufficiently and directly from the breach of EU law by the Member State to render the Member State liable to rectify the breach.

As regards to the **seriousness** of the breach, the CJEU has made clear that where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach. The breach will, for instance, be sufficiently serious if the Member State has not transposed a directive in time.

Besides, State liability may be invoked in any case in which a Member State breaches EU law, whatever the organ of the State whose act or omission was responsible for the breach, even where the judiciary is responsible for it. This is particularly important when the principles of primacy and direct effect are not respected by national judges or when a jurisdiction of last resort declines to refer a preliminary ruling where it should have done so.

c. Procedure

It is within the framework of national liability law that the Member States must rectify the consequences of any loss or damage caused by an infringement of EU law. Therefore, it is up to the national courts both to assess, on the basis of the cases in question, whether the complainants are entitled to reparation for any loss or damage they may have sustained as a result of an infringement of EU law by a Member State and, if so, to determine the amount of the reparation.

However, there are two principles with which the conditions laid down by national law must comply, namely that they must not be less favorable than those relating to similar domestic claims (**principle of equivalence**) and that they must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (**principle of effectiveness**).

d. Examples and Practical Tips

State liability for breach of EU law is an overarching framework, which complements the different types of procedures analyzed hereinabove. Therefore, it is advisable to seek damages if:

- a national court refuses to set aside national law as a result of primacy or to apply EU law directly as a consequence of the direct effect;
- a national court of last resort refuses to refer a preliminary ruling whereas it was under the obligation to do so; and
- a Member State is found to infringe EU law and/or refuses to comply with a judgment of the CJEU.

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