Labour & Employment 2019

Contributing editors
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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Finland, Indonesia, Brazil, Bangladesh, Greece, Egypt and Portugal.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark E Zelek of Morgan Lewis & Bockius LLP, for their continued assistance with this volume.

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Getting The Deal Through

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Contents

Global overview 5
Mark E Zelek
Morgan, Lewis & Bockius LLP

Mandatory employee board representatives – fantasy or the future? 7
Matthew Howse and Lee Harding
Morgan, Lewis & Bockius LLP

Argentina 9
Mercedes Balado Bevilacqua and Analía Durán
MBB Balado Bevilacqua Abogados

Armenia 19
Sedrak Asatryan and Janna Simonyan
Concern Dialog

Australia 25
Joydeep Hor and Therese MacDermott
People + Culture Strategies

Bangladesh 33
Tanvir Quader and Maliha Ahmed
Vertex Chambers

Brazil 39
Ana Lúcia Pinke Ribeiro de Paiva, Flavia Sulzer Augusto Dainese and Marília Chrysostomo Chessa
Araújo e Policastro Advogados

Canada 52
Craig T Munroe, Clare Hauer and Jessica Forman
Pulver Crawford Munroe LLP

Chile 63
Enrique Munita, Paola Casorzo, Marcela Salazar and Catalina González
Munita & Olavarría – Ius Laboris Chile

China 72
K Lesli Ligorner
Morgan, Lewis & Bockius LLP

Colombia 82
Vicente Umaña Carrizosa and Isabella Gandini
Holland & Knight

Costa Rica 89
Alexander Godínez Vargas
Bufete Godínez y Asociados

Denmark 96
Morten Langer
Norrbom Vinding

Egypt 104
Mahmoud Ahmed Belal
Eldib Advocates

Finland 109
Pekka Kiviniemi and Tuuli Willgren
Kalliolaw Attorneys

France 116
Sabine Smith-Vidal and Charles Dauthier
Morgan, Lewis & Bockius LLP

Germany 126
Walter Ahrens
Morgan, Lewis & Bockius LLP

Greece 136
Grace Katsoulis
Ballas, Pelecanos & Associates LPC

Hong Kong 144
Vivien Chan and Patty Chan
Vivien Chan & Co

India 152
Rohit Kochhar
Kochhar & Company

Indonesia 160
Fahrul S Yusuf
SSEK Legal Consultants

Ireland 168
Louise O'Byrne and Sarah Faulkner
Arthur Cox

Italy 176
Angelo Zambelli
Grimaldi Studio Legale

Japan 187
Motoi Fujii and Tomoko Narita
TMI Associates

Kazakhstan 200
Klara Nurgaziyeva, Marat Mukhamediyev and Zhamilya Bilisbekova
Morgan, Lewis & Bockius LLP

Korea 209
Kwang Sun Lee, Young Hwan Kwon, Ja Hyeong Ku and Jane Young Sohn
Jipyong LLC

Luxembourg 216
Guy Castegnaro and Ariane Claverie
Castegnaro

Malaysia 229
Selvamalar Alagaratnam, Siva Kumar Kanagasabai and Foo Siew Li
Skrine

Mexico 237
Humberto Padilla Gonzalez
Morgan, Lewis & Bockius LLP

Monaco 244
Sophie Marquet and Florence de Guzman de Saint Nicolas
CMS Pasquier Ciulla Marquet & Pastor

Nigeria 251
Adekunle Obebe
Bloomfield Law Practice

Norway 257
Tore Lerheim and Ole Kristian Olsby
Homble Olsby advokatfirma AS

Peru 265
Renato Mejía Madrid and Flavia Zarins Wilding
Miranda & Amado Abogados

Philippines 270
Ronald Mark C Lleno, Emmar Benjoe B Panahon, Mark Kevin U Dellosa and Hans Cedric I Santos
SyCip Salazar Hernandez & Gatmaitan

Portugal 279
Joana Almeida
Morais Leitão, Galvão Teles, Soares da Silva & Associados

Puerto Rico 287
Melissa C Rodriguez
Morgan, Lewis & Bockius LLP

Russia 297
Bela Pelman and Dmitry Dmitriev
Morgan, Lewis & Bockius LLP

Singapore 306
Ian Lim, Nicholas Ngo and Elizabeth Tan
TSMP Law Corporation

Slovakia 324
Pavol Rak
Noerr s.r.o.

Sweden 333
Robert Stromberg and Jonas Lindskog
Cederquist

Switzerland 342
Roberta Papa and Thomas Pietruszak
Blesi & Papa

Thailand 351
Pisut Rakwong and Wayu Suthisarnsuntorn
Pisut and Partners

United Arab Emirates 359
Charles Laubach and Zahra Zaidi
Afridi & Angell

United Kingdom 367
Matthew Howse, Lee Harding and Nicholas Hobson
Morgan, Lewis & Bockius LLP

United States 377
David A McManus, Michelle Seldin Silverman and Michael A Correll
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LEGISLATION AND AGENCIES

Primary and secondary legislation

1 What are the main statutes and regulations relating to employment?

The Labour Standards Act (the LSA), the Act on the Guarantee of Workers' Retirement Benefits (the GWRB Act) and the Minimum Wage Act (the MWA) are the main statutes relating to employment. The Trade Union and Labour Relations Adjustment Act and the Act on the Promotion of Workers' Participation and Cooperation are the key legislation relating to labour-management relations.

Protected employee categories

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Discrimination based on gender, nationality, religion or social status is expressly prohibited under the LSA.

The Equal Employment Opportunity and Work-Family Balance Assistance Act likewise prohibits discrimination based on gender, marital status or maternity.

All forms of age discrimination in the workplace are prohibited under the Act on Prohibition of Age Discrimination in Employment and Elderly Employment Promotion.

The Protection of Temporary Agency Workers Act and the Protection of Fixed-Term and Part-Time Workers Act (the PFPW Act) prohibit discrimination against non-regular workers.

The Act on Prohibition of Discrimination against Persons with Disabilities and the Employment Promotion and Vocational Rehabilitation of Disabled Persons Act prohibit discrimination based on disability and impose an obligation on the employer to provide all appropriate facilities and resources.

Enforcement agencies

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Employment and Labour (MEL) is the primary government agency that administers employment policies, labour standards and relations. As of February 2019, the MEL has six regional employment and labour administrations and 40 branch offices. Labour supervisors affiliated therewith (who also act as judicial police officers) oversee compliance with employment laws. The labour relations commission (which is similar to the US National Labor Relations Board) is a quasi-judicial administrative body responsible for coordinating and granting remedies for the violation of certain private rights in labour disputes.

WORKER REPRESENTATION

Legal basis

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Under the Act on the Promotion of Workers' Participation and Cooperation (PWPC), a business or workplace employing 30 or more employees must establish a labour-management council (LMC), which must meet with the employees' representative every three months to discuss and resolve certain labour-related matters.

Under the LSA, when dismissing employees for business reasons or when introducing a working-hour system that is different from and more flexible than the one stipulated by law, an employer must consult or obtain the consent of the trade union (which shall be composed of the majority of employees) or, if no such union exists, the consent of the employees' representative (who shall represent the majority of employees).

Powers of representatives

5 What are their powers?

According to the PWPC, certain matters are required to be decided by, consulted with or reported to the LMC. An employer must strictly adhere to the decisions of the LMC. Failure to comply without justifiable grounds may lead to criminal liability or charges. Matters requiring ordinary resolution of the LMC are as follows:

- establishment of a basic plan for the education, training and development of workers;
- establishment and management of welfare facilities;
- establishment of an in-house employee welfare fund;
- matters unresolved by the grievance handling committee; and
- establishment of labour-management joint committees.

Matters for consultation are:

- improvement of productivity and distribution of results achieved;
- recruitment, placement, education and training of workers;
- settlement of workers' grievances;
- safety, health and improvement of working environment, and promotion of workers' health;
- improvement of personnel and labour-management systems;
- general rules of employment adjustment, such as manpower transposition, retraining and dismissal owing to managerial or technological reasons;
- administration of working and recess hours;
- improvement of payment systems and remuneration structures;
- introduction of new machinery and technologies, or improvement of work processes;

- establishment or amendment of work rules;
- employee stock ownership plan and support to enhance workers' assets;
- remuneration for employee inventions;
- improvement of workers' welfare;
- installation of surveillance equipment within a workplace;
- protection of motherhood and matters relating to work-life balance; and
- any other matters relating to labour-management cooperation.

Matters to be reported are:

- overall management plans and actual results;
- quarterly production plans and actual results;
- manpower plans; and
- economic and financial conditions of the company.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

6 | Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

To the extent background checks involve collecting personal information (ie, information relating to a living individual that makes it possible to identify such individual), an employer must obtain the prior consent of the applicant (Personal Information Protection Act (PIPA), article 15(1)). Additionally, separate consent must be obtained where sensitive information (ie, information relating to ideology, belief, admission to or withdrawal from a trade union or political party, political opinions, health, sexual life, DNA records (obtained from DNA test results) and criminal records) is being collected (PIPA, article 23(1)).

Subject to obtaining prior consent, an employer may access criminal and investigation records of an applicant only in certain limited industries such as child-related industries and the medical industry (Act on the Lapse of Criminal Sentences, article 6(1) and 6(3)).

Where an employer intends to hire a third party to conduct background checks, it must first obtain consent from the applicant (Credit Information Use and Protection Act, article 32(1)), and all costs related thereto must be borne by the employer (Fair Hiring Procedure Act, article 9).

Medical examinations

7 | Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There is no legislation specifically restricting or prohibiting against requiring a medical examination as a condition of employment. However, because information relating to an applicant's health constitutes sensitive information under the PIPA, consent must be obtained prior to collecting the same. Before obtaining consent, the employer will need to inform the applicant of the purpose of collection and use, the category of information required, the period of use and retention, that the applicant has the right to refuse collection, and of the disadvantages (if any) that the applicant may suffer if he or she were to refuse.

An applicant's failure to submit medical examination data alone will not justify an employer's refusal to employ such applicant. The National Human Rights Commission (NHRC) of Korea Act (the NHRC Act) empowers the NHRC to provide relief where an applicant has been discriminated against in the recruitment process purely on the grounds of medical history. It is not uncommon for applicants to file complaints with the NHRC in such instances.

Drug and alcohol testing

8 | Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

The position regarding drug and alcohol testing of applicants is the same as the position regarding the collection of medical examination data.

HIRING OF EMPLOYEES

Preference and discrimination

9 | Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

The NHRC Act stipulates that preferential treatment, exclusion, distinction or disadvantageous treatment of specific persons based on gender, religion, disability, age, social status, region or country of origin, ethnic origin, physical appearance, marital status, maternity, family background, race, skin colour, ideology or political opinion, criminal record, sexual orientation, academic career or medical history without just cause shall constitute a 'discriminatory act violating the equal right' (NHRC Act, article 2-3).

However, preferential treatment of certain groups of persons, such as men of national merit, disabled persons, women (where the number of female workers is disproportionate to the number of male workers), senior citizens (at least 55 years old) and youths (aged between 15 and 29) is excluded from the above.

10 | Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Terms relating to wages (the calculation and payment thereof), working hours, holidays and paid annual leave must be clearly stated in writing (LSA, article 17). Failure to do so could result in a fine of up to 5 million won. Therefore, in Korea, employers should enter into written employment contracts that clearly set out the above matters.

11 | To what extent are fixed-term employment contracts permissible?

In principle, the term of fixed-term employment contracts cannot exceed two years; otherwise the non-regular worker will be considered to have entered into an unlimited employment contract. However, in certain cases (such as where a fixed-term contract is with a senior citizen or is for the completion of a discrete project or a particular task), the term of the fixed-term contract may exceed two years (PFPW Act, article 4).

Probationary period

12 | What is the maximum probationary period permitted by law?

The law does not provide for a maximum probationary period. However, based on article 4 of the PFPW Act, which limits the term of a fixed-term contract to two years, the maximum probationary period may, in fact, be considered to be two years.

While the courts may be more accepting of cases where an employer refuses to extend an applicant's employment beyond a probationary period (as opposed to dismissal cases), an employer will still need to show it had an objectively reasonable cause for refusing to do so.

Classification as contractor or employee

13 What are the primary factors that distinguish an independent contractor from an employee?

According to case law, the Korean courts will look to the substance of the relationship between the employer and an individual as well as to the form of the contract (eg, employment contract, subcontract or delegation contract). The courts will consider a variety of factors in a comprehensive manner. Some key considerations include:

- whether wages are paid for work performed at the business or workplace;
- whether a basic or fixed rate has been established; and
- whether there is a subordinate relationship between the individual and the employer (eg, whether the employer decides the nature of work to be performed, whether the relationship is subject to employment rules, the extent and degree of the employer's supervision over the work performed and the process related thereto, and whether the employer has specified the working hours and place).

In such cases, an individual would likely be considered an employee.

An individual would likely be considered an independent contractor if:

- the individual independently possesses equipment, raw materials or tools;
- the individual can engage third parties to perform the works;
- the individual can manage the business independently;
- the individual undertakes the risk of profit and loss;
- remuneration is for actual work performed; and
- the individual withholds business income tax.

Temporary agency staffing

14 Is there any legislation governing temporary staffing through recruitment agencies?

The Employment Security Act governs the business of recruitment services, and certain conditions must be satisfied in order to undertake such business. Temporary staffing through recruitment agencies is possible, but an employer will need to comply with the PFPW Act.

FOREIGN WORKERS

Visas

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There are no specific numerical limitations to the short-term business visitor visa (C-3), which permits stay in Korea for business reasons for up to 90 days. The C-3 visa (which sub-divides into various categories) may be issued on a single- or multiple-entry basis depending on the nature of the applicant's business and eligibility. However, if an applicant is seeking to conduct a profit-making business in Korea (ie, if the applicant will receive compensation for work performed or services provided), such an applicant will need to obtain a different form of visa from the immigration office.

Visas are available for the following employees transferring from a corporate entity in one jurisdiction to a related entity in another jurisdiction:

- a journalist dispatched to Korea from a foreign press agency, under a contract with a foreign press agency while staying in Korea or dispatched by a foreign press agency having a branch office in Korea, must obtain a D-5 visa;
- a religious worker dispatched to related Korean religious organisations or branches by a foreign religious body or social welfare organisation, or intending to engage in religious activities at Korean religious organisations while being dispatched from a foreign religious organisation or social service agency, must obtain a D-6 visa; and
- an employee who has worked for more than a year at a foreign public institution, group or company and is being dispatched, as an essential skilled personnel, to an affiliated company, subsidiary, branch or office located in Korea, or who has worked for more than a year at a foreign subsidiary or branch of a Korean listed company or public institution and is being dispatched to the Korean head office to acquire specialised skills or knowledge, must obtain a D-7 visa.

Spouses

16 Are spouses of authorised workers entitled to work?

A spouse of a foreigner holding a D-1 to E-7 visa will automatically be granted an F-3 (dependent family) visa; however, this visa alone will not allow the spouse to work (Enforcement Decree of the Immigration Act, article 23). A spouse who intends to work in Korea will need to obtain a separate work visa.

General rules

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

An employer who wishes to hire a foreign worker must obtain an employment permit or a certificate of exceptionally permissible employment from an employment security office (Act on the Employment of Foreign Workers (EFWA), articles 8(4) and 12(3)), unless the foreign worker has any of the following visas: a short-term employment visa (C-4), an E-1 to E-7 visa (professor, long-term visa to teach a foreign language, research, technological guidance, profession, culture or arts, specially designated activities) or a working holiday visa (H-1) (EFWA, article 2). An employer employing such foreign worker must report the employment arrangement and any changes thereof to the relevant governmental agency (failure to do so may result in an administrative fine of up to 2 million won (Immigration Act, article 100(1)-1). A foreign worker holding any of the specified visas must either obtain the prior approval of the relevant governmental agency if he or she intends to change his or her workplace, or file a report after moving (depending on the type of visa) (Immigration Act, articles 19 and 21); failure to do so may result in expulsion, up to one year's imprisonment or a fine of up to 10 million won (where the obligation is to obtain prior approval) (Immigration Act, articles 46 and 95(6)) or an administrative fine of up to 2 million won (where the obligation is to file a report) (Immigration Act, article 100(1)-3). In some cases, the foreign worker will be punished with imprisonment and the relevant fine. An employer who employs a foreign worker who has failed to obtain prior approval may be subject to up to one year's imprisonment or a fine of up to 10 million won, or both (Immigration Act, article 95(6)).

The employment of any person not holding the appropriate work visa is prohibited (Immigration Act, article 18(3)) and an employer who violates this may be sentenced to up to three years' imprisonment or fined up to 20 million won (Immigration Act, article 94(9)).

An employer who must obtain an employment permit or a certificate of exceptionally permissible employment from an employment security office but fails to do so before hiring a foreign worker (even if the foreign worker has the appropriate visa) may be subject to a three-year restriction on the employment of foreign workers (EFWA, article 20(1)-1).

Resident labour market test

18 | Is a labour market test required as a precursor to a short or long-term visa?

Where an employer intends to employ a foreign worker for a non-vocational position (E-9 visa) or on a working visit (H-2 visa), the employer must first file an application to recruit nationals with an employment security office and may only apply for consent to employ foreign workers where it has failed to hire a national despite the referral efforts of the employment security office (EFWA, articles 6, 8).

Certain employers in the construction, services, manufacturing, agricultural and fishery industries who hold a certificate of exceptionally permissible employment may not require the consent of an employment security office to employ foreign workers (EFWA, article 12).

TERMS OF EMPLOYMENT

Working hours

19 | Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

In principle, working hours are limited to 40 hours per week or eight hours per day, but the employer and employee may agree to extend the working hours by up to 12 additional hours per week (ie, the maximum working time is 52 hours per week) (LSA, articles 50 and 53). Even if the employee agrees to work beyond the maximum 52 hours per week, it is not legally permissible.

However, the above restriction does not apply to certain industries, such as the agriculture and fishery industries (LSA, article 63), and in the case of some transportation and medical services, overtime of more than 12 hours per week is possible if there is a written agreement between the employer and the employees' representative. In this case, the employer must give the employee at least 11 consecutive hours' break between the end of the work day and the start of the next working day (LSA, article 59).

Overtime pay

20 | What categories of workers are entitled to overtime pay and how is it calculated?

At least 50 per cent of ordinary wages is additionally payable for work performed beyond the 40-hour week, eight-hour day (ie, extended work), for night duty (from 10pm to 6am) or holiday work (LSA, article 56). 'Ordinary wages', for these purposes, means wages, salary and any other kind of consideration the employer pays to a worker as remuneration for work. The actual scope of ordinary wages, however, is a common matter of dispute.

Additional payments for extended, night and holiday work may be calculated and made on an aggregate (and duplicate) basis. However, an employee who has worked for less than eight hours on a holiday will only be eligible to claim for one set of overtime pay (ie, at least 50 per cent of ordinary wages only). An employee who has worked for more than eight hours on a holiday will be eligible to claim overtime pay for both extended and holiday work on an aggregate (and duplicate) basis (ie, at least 100 per cent of ordinary wages).

Employees in Korea are generally entitled to overtime pay unless they are engaged in agriculture and fishery or surveillance and intermittent works. Also, where a business or workplace ordinarily employs four workers or fewer, there is no duty on the employer to make overtime payments.

21 | Can employees contractually waive the right to overtime pay?

An agreement by which the employee agrees to waive all rights to future overtime pay even before the accrual of overtime hours will violate the LSA and therefore will be invalid. However, an employee may waive his or her right to overtime pay (by not making a demand for the same) after overtime hours have started to accrue.

Vacation and holidays

22 | Is there any legislation establishing the right to annual vacation and holidays?

An employer must grant its employees at least one paid holiday per week worked (LSA, article 55).

The first of May each year (Labour Day) has been designated by the government as a paid public holiday, and any other day so designated will also be a paid public holiday (LSA, article 55).

An employee who has been in continuous service for more than one year but less than three and who has worked 80 per cent or more of one work year is entitled to 15 paid leave days. An employee in his or her third year of continuous service will be entitled to 16 paid leave days; thereafter, an employee's annual leave entitlement should be increased by one day for every two years of continuous service, up to a maximum of 25 days per year. An employee who has worked for less than one year or less than 80 per cent of a given year shall be entitled to one paid holiday for one month of continuous service (LSA, article 60).

Sick leave and sick pay

23 | Is there any legislation establishing the right to sick leave or sick pay?

Employees are not legally entitled to sick leave for illness or injury arising for reasons unrelated to work. However, it is not uncommon for Korean companies to grant unpaid leave for illness or injury arising for reasons unrelated to work.

Where the illness or injury is work-related, the employee shall be compensated under industrial accident compensation insurance (a mandatory insurance).

Leave of absence

24 | In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

A female employee may take maternity leave for 90 days, 60 of which are paid leave.

Employees who have children under the age of eight years or in the second year of primary school may take childcare leave for up to one year. An employer has no legal obligation to pay such employee during his or her leave. However, for the first three months of the leave, such employee should receive 80 per cent of his or her ordinary wages from his or her employment insurance and 40 per cent thereafter.

An employee may take up to 90 days' leave to take care of his or her family for reasons of disease, accident or senility.

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

Employees are legally entitled to receive retirement benefits and are automatically subscribed to the national pension, health insurance, industrial accidents compensation insurance and employment insurance.

Part-time and fixed-term employees

26 | Are there any special rules relating to part-time or fixed-term employees?

The relevant rules are found in the PFPW Act. A fixed-term employee cannot be engaged for more than two years; beyond that, the employee's status automatically switches to full-time status. Where non-regular workers undertake work that is the same as or similar to work performed by regular employees, such employees cannot be treated differently (eg, in terms of salaries and benefits) without justifiable grounds. Korean courts have held that in certain cases, a non-regular worker may have a right to renew the term of a fixed-term contract after expiry thereof, in which case an employer will not be able to refuse such renewal without justifiable grounds.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Companies that are required to publish their annual reports, such as public companies, are required to publish each executive's remuneration and calculation basis thereof. Since 2018, such companies also need to disclose the remuneration and calculation basis thereof of their top five highest earning persons, even if such person is not an executive of the company. In addition, the annual report should also include the per-person average salary; therefore, for listed companies, the average salary level of general employees is disclosed (Financial Reporting Standards of the Financial Supervisory Service, article 9-1-2).

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

The Supreme Court has held that post-termination covenants that excessively restrict a worker's professional freedom, right to work or free competition are invalid. When deciding the validity of such covenants, the Supreme Court will consider the following:

- whether the employer's interests are worthy of protection;
- the employee's status prior to his or her retirement or resignation;
- the period, territory, target and job position subject to the restriction;
- whether the former employee will be compensated;
- the circumstances surrounding the employee's resignation;
- public interests; and
- any other relevant matters.

The courts may give only partial effect to a restrictive covenant if they determine that the period of restriction is excessive. The courts have previously accepted one-year restriction periods, but each case will be judged differently on its own merits. In addition, the courts may reduce the amount of damages payable on a breach of a restrictive covenant if the contractually specified amount is deemed too excessive.

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

There is no legal requirement obligating an employer to pay the former employee while they are subject to post-employment restrictive covenants. However, the existence of such compensation rights is an important factor considered by the courts when determining the effectiveness of such covenants.

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer may be held liable to a third party for damages incurred by the acts or conduct of its employees. If the employer can prove that it was extremely cautious and diligent in hiring and supervising its employee, the employer may be exempt from this liability; however, satisfying the burden of proof is extremely difficult.

TAXATION OF EMPLOYEES

Applicable taxes

31 | What employment-related taxes are prescribed by law?

Income taxes on salary (including local tax) are imposed. An employer has a duty to withhold taxes on remunerations paid to the employee. In addition, although not strictly employment-related taxes, both the employer and employee must pay national pension, health insurance and employment insurance contributions. The employer must also pay industrial accidents compensation insurance contributions.

EMPLOYEE-CREATED IP

Ownership rights

32 | Is there any legislation addressing the parties' rights with respect to employee inventions?

The Invention Promotion Act regulates the treatment of employee inventions, which are inventions related to an employee's work that, by their nature, fall within the scope of the employer's business and are derived from the acts of an employee in his or her current or past position.

Unless an employer contractually agrees with the employee in advance or establishes a set of employment regulations (upon prior consultation with its employees) that state that an employee must grant the employer an exclusive licence to the employee's inventions and related patents, such employer will have only a non-exclusive licence to the employee's inventions.

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

The Unfair Competition Prevention and Trade Secret Protection Act serves to protect trade secrets and other confidential business information. Under this statute, the following actions are prohibited:

- the acquisition of trade secrets by unfair means and use or disclosure thereof;
- the acquisition or use of trade secrets that a party knows or should know have been acquired by unfair means; and
- use or disclosure of trade secrets (after acquisition thereof) that a party knows or should know have been acquired by unfair means.

Additionally, the Act on Prevention of Divulgence and Protection of Industrial Technology and the Defence Technology Security Act have been enacted to protect technology.

DATA PROTECTION

Rules and obligations

34 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Information relating to a living individual that makes it possible to identify the individual by his or her full name, resident registration number and image (ie, personal information) is protected under the PIPA. Unless certain unavoidable circumstances recognised by the laws and regulations exist, an employer must obtain the prior consent of the employee to collect and use his or her personal information.

BUSINESS TRANSFERS

Employee protections

35 Is there any legislation to protect employees in the event of a business transfer?

The Supreme Court has held that where an organisation's assets are transferred (with their identity intact) for certain business objectives, the relevant employee's employment relations are also transferred to the acquirer of the business. However, where an employee opposes such a business transfer, the relevant employment relation remains with the party disposing of the business.

While there is no legislation or case law regulating the position regarding equity transfers, there have been instances where collective agreements have been executed in order to provide job security in such scenarios.

TERMINATION OF EMPLOYMENT

Grounds for termination

36 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer cannot dismiss an employee without justifiable grounds (LSA, article 23). The Supreme Court has held that 'justifiable grounds' may be established where an employee's liability is such that an employment relationship cannot be maintained in view of social norms.

Notice

37 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

An employer must give 30 days' advance notice of dismissal. Should the employer dismiss an employee without giving such requisite notice, it must pay the employee, in lieu, his or her wages for not less than 30 days (ie, an allowance for dismissal).

38 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may be exempt from the legal requirement to give prior notice of dismissal or payment in lieu in the case of natural calamity, other unavoidable circumstances that make it impossible to continue the business or where an employee has wilfully caused damage to the business or its assets.

Severance pay

39 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Under the GWRB Act, an employer may sign up to a retirement pension plan or may give an exiting employee severance pay. In the latter case, such severance pay is calculated in accordance with the following formula:

Average daily wage in the last three months × 30 days × number of years of service

This must be paid within 14 days of the employee's resignation.

Procedure

40 Are there any procedural requirements for dismissing an employee?

Notice for dismissal must be in writing and must detail the reasons for dismissal. Where an employer has already provided the employee with 30 days' advance notice of dismissal, stating the reasons and expected timing of dismissal, no further written notice is required under the LSA.

An employer must also comply with the dismissal procedures set forth in any collective agreement or employment regulations.

Employee protections

41 In what circumstances are employees protected from dismissal?

An employee's dismissal will be deemed to be invalid if it was without justifiable grounds and if it was effected in breach of procedures outlined in the LSA, any collective agreements or employment regulations.

Where an employee's employment has been suspended for medical treatment for an occupational injury or for childbirth, an employer may not dismiss the employee during such period of suspension and for 30 days immediately thereafter, unless the employer has provided the employee with lump sum compensation (LSA, article 23(2)).

Mass terminations and collective dismissals

42 Are there special rules for mass terminations or collective dismissals?

An employer may collectively dismiss employees for business reasons subject to satisfaction of the following conditions (LSA, article 24):

- an urgent managerial necessity exists;
- every effort to avoid dismissal has been made;
- employees to be dismissed have been selected pursuant to a fair process; and
- the employer has notified the employees' representative or trade union (as applicable) at least 50 days prior to the expected date of dismissal and has consulted with them in good faith.

Where the number of employees to be collectively dismissed exceeds a certain threshold (which threshold should be proportionate to the size of the employer), the employer must also report to the MEL.

Class and collective actions

43 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Generally, employees may assert labour and employment claims on an individual basis. While it is procedurally possible for multiple employees

to bring a claim against an employer and to undergo the same claims process together, each claim will be decided on an individual basis.

Mandatory retirement age

44 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Generally, employers may establish their own retirement policy, as long as the mandatory retirement age imposed thereunder is set above 60 years. Anything below that will be deemed invalid and, in such cases, 60 years will be the mandatory retirement age regardless of what is stated in the employer's own retirement policy.

DISPUTE RESOLUTION

Arbitration

45 May the parties agree to private arbitration of employment disputes?

The parties may agree to private mediation or arbitration of employment disputes.

Employee waiver of rights

46 May an employee agree to waive statutory and contractual rights to potential employment claims?

In order for a waiver agreement to be valid and effective:

- the agreement must not have been pursuant to one party taking advantage of the other party's distress, carelessness or lack of experience;
- the waiver must relate to a situation that can be foreseen at the time of execution of the agreement;
- the waiver must relate to rights that can be freely disposed of by the parties; and
- the waiver must relate to specific rights.

In respect of a waiver of an employee's right for severance pay, the Supreme Court has held that such a waiver is in violation of the mandatory law and cannot be effective.

Limitation period

47 What are the limitation periods for bringing employment claims?

Claims for unpaid wages must be brought within three years of the date such wages were due.

Claims to the labour relations commission for unfair dismissal must be brought within three months of the date of dismissal.

Where an employee intends to file a court claim to request that his or her dismissal be nullified, there is no specific limitation period. However, the courts may reject a claim if it is filed after a significant amount of time has passed, on the basis that such a filing goes against the principles of good faith.

UPDATE AND TRENDS

Emerging trends

48 Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction?

The Committee for the Improvement of the Working Hours System under the Social and Labour Relations Committee, a social-dialogue organisation under the direct control of the president, has agreed to extend the flexible working-hour system from three to six months, meaning that employers will have slightly more flexibility when it comes to implementing their flexible working-hour system. For example, if an employer decides to implement a flexible working-hour system for a period of six months, it will be able to flexibly apply its working hours on a daily or weekly basis (subject to certain other rules) as long as it complies with the working-hour regulatory standards over the whole of the six-month period on an averaged basis. If the law is revised accordingly, the flexible working-hour system periods available will be as follows: up to two weeks, up to three months and between three and six months.

The Supreme Court recently ruled that, as holiday working hours are not included in the one-week standard working hours under the former LSA, additional wages for holiday work (for less than eight hours) and overtime cannot be paid in duplicate. This is in line with the revised LSA (enacted from March 2018), but the Supreme Court clarified that duplicate additions cannot be recognised for past wages that do not fall within the scope of the revised LSA.

As the minimum wage has continued to rise sharply, controversy over this has also continued, leading to partial amendments to the MWA and the related enforcement decree and regulations. The amended MWA now recognises a portion of monthly bonus payments as wages. Minimum wage issues are complex and employers paying high wages to employees are not immune to such perplexities.

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