

Labour & Employment 2020

Contributing editors

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**Matthew Howse, Sabine Smith-Vidal, Walter Ahrens,
K Lesli Ligorner and Mark Zelek**
Morgan Lewis

Lexology Getting The Deal Through is delighted to publish the fifteenth 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 Angola, Belgium, Ghana, Israel, Kenya, Myanmar, Netherlands, Poland, Slovenia, Turkey and Zambia.

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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 editors, Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek of Morgan Lewis, for their continued assistance with this volume.



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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 (LSA), the Act on the Guarantee of Workers' Retirement Benefits and the Minimum Wage Act 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 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 is the primary government agency that administers employment policies, labour standards and relations. As of February 2019, the Ministry has six regional employment and labour administrations and 40 branch offices. Labour supervisors affiliated with it (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 Labour Standards Act, 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 must be composed of the majority of the employees) or, if no such union exists, the consent of the employees' representative (who represents 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:

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

Matters for consultation are the:

- improvement of productivity and distribution of results achieved;
- recruitment, placement, education and training of workers;
- settlement of workers' grievances;
- safety, health and improvement of the working environment, and the promotion of workers' health;
- improvement of personnel and labour management systems;
- adjustment of general rules of employment, such as manpower transposition and 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; and
- protection of motherhood and matters relating to work-life balance.

Any other matters relating to labour-management cooperation are also matters for consultation.

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 the individual), an employer must obtain the prior consent of the applicant (the Personal Information Protection Act (PIPA), article 15(1)). Additionally, separate consent must be obtained where sensitive information (ie, information relating to ideologies, beliefs, 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 (the 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 (the Credit Information Use and Protection Act, article 32(1)), and all costs related to it must be borne by the employer (the 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 the requirement of 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 it. 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, the right of the applicant to refuse collection and 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 will alone not justify an employer's refusal to employ the 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 those 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 National Human Rights Commission of Korea Act (the NHRC Act) stipulates that preferential treatment, exclusion, discrimination 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 (the Labour Standards Act, 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 (the Protection of Fixed-Term and Part-Time Workers Act (the 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 be considered to be two years.

Although 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 the 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;
- a basic or fixed rate has been established; and
- 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 to it, and whether the employer has specified the working hours and place).

In those 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 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 subdivides 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), the 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 (the 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 (the 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 government agency. Failure to do so may result in an administrative fine of up to 2 million won (the Immigration Act, article 100(1)-1).

A foreign worker holding any of the specified visas must either obtain the prior approval of the relevant government agency if he or she intends to change his or her workplace, or file a report after moving (depending on the type of visa) (the 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) (the 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) (the 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 (the Immigration Act, article 95(6)).

The employment of any person not holding the appropriate work visa is prohibited (the 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 (the 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?

In the event that 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 and 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 the 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) (the Labour Standards Act (LSA), articles 50 and 53). Even if the employee agrees to work beyond the maximum 52 hours per week, it is not legally permissible.

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. Furthermore, 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 will, therefore, be invalid. However, an employee may waive his or her right to overtime pay (by not making a demand for it) 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(1)).

The first of May each year (Labour Day) has been designated by the government as a paid public holiday, and any business or workplace regularly employing at least 300 employees must guarantee its employees paid leave on a national holiday or substitute holiday. As an exception, where the labour representative and the employer have agreed in writing, those paid holidays may be substituted by a specific working day (LSA, article 55(2)).

An employee who has been in continuous service for more than one year but less than three years 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, the employee should receive 80 per cent of his or her ordinary wages from his or her employment insurance and 50 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 Protection of Fixed-Term and Part-Time Workers 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, those 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 its expiry, in which case an employer will not be able to refuse the 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 of it. Since 2018, such companies also need to disclose the remuneration and the calculation basis thereof of their top five highest earning persons, even if the person is not an executive of the company. In addition, the annual report should also include the average salary per person; therefore, for listed companies, the average salary level of general employees is disclosed (the 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, the 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 Personal Information Protection Act (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.

- 35 | Do employers need to provide privacy notices or similar information notices to employees and candidates?

No such provisions exist in respect of employment relations; however, the PIPA will apply.

When collecting an employee's personal information, an employer, as a personal information controller under the PIPA, must inform the employee of the:

- purpose and intended use of the personal information;
- particulars of the personal information to be collected;
- period of retention and use of the personal information;
- fact that the employee is entitled to deny the collection of the personal information; and
- disadvantages (if any) to which he or she may be subject as a result of denial.

Furthermore, should there be any changes to any of the above matters, the employer must inform the employee and obtain his or her consent (PIPA, article 15(2)).

The employer must also obtain the employee's consent when providing the employee's personal information to a third party (PIPA, article 17) and where any personal information is divulged in breach of this provision, the employer must immediately inform the relevant employee of it (PIPA, article 34).

- 36 | What data privacy rights can employees exercise against employers?

Although this is not specific to employment relations, under the PIPA, an employee is entitled to request access to his or her own personal information (article 35) and to request a correction or erasure of such personal information (article 36).

BUSINESS TRANSFERS

Employee protections

- 37 | 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.

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

TERMINATION OF EMPLOYMENT

Grounds for termination

- 38 | 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 (the Labour Standards Act (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

- 39 | 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 the requisite notice, it must pay the employee, in lieu, his or her wages for not less than 30 days (ie, an allowance for dismissal).

- 40 | 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

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

Under the Act on the Guarantee of Workers' Retirement Benefits, an employer may sign up to a retirement pension plan or may give an exiting employee severance pay. In the latter case, the 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

- 42 | 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

43 | 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 the 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

44 | 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;
- the 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 (the threshold should be proportionate to the size of the employer), the employer must also report to the Ministry of Employment and Labour.

Class and collective actions

45 | 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. Although 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

46 | 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 those cases, 60 years will be the mandatory retirement age regardless of what is stated in the employer's own retirement policy.

DISPUTE RESOLUTION

Arbitration

47 | May the parties agree to private arbitration of employment disputes?

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

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Employee waiver of rights

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

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

49 | What are the limitation periods for bringing employment claims?

Claims for unpaid wages must be brought within three years of the date those 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 the filing goes against the principles of good faith.

UPDATE AND TRENDS**Key developments of the past year**

50 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

In the past, it was possible to modify working conditions unfavourably in accordance with the company's rules of employment or by obtaining the consent of a labour union comprised of a majority of employees or the consent of the majority of employees (the Labour Standards Act, article 94(1)). However, the Supreme Court has recently held that to amend the rules of employment so that the terms of these are less favourable than the terms of individual employment contracts, the consent of individual employees must be obtained in addition to the consent of the labour union comprised of a majority of employees or the consent of the majority of employees.

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