SHOOSMITHS

Exiting Executives

A GUIDE TO TERMINATING SENIOR EXECUTIVES AROUND THE GLOBE

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FOR WHAT MATTERS

Contents

INTRODUCTION

In today's global economy, many companies across the world have cross-border line management responsibilities or may run or be looking to acquire companies or businesses based in another jurisdiction. Such organisations need advice that provides integrated solutions to the employment issues which arise when working across multiple jurisdictions with different legal and regulatory requirements. As a result, General Counsels, HR directors (and their teams) along with senior managers in the business may find themselves in unfamiliar territory when it comes to dismissing employees around the globe.

As recognised leaders in employment and labour law, Shoosmiths LLP and partnering law firms around the globe have prepared this guide outlining the key aspects to consider when it comes to successfully transitioning senior employees or executives out of businesses in countries around the world.

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TACTICAL AND PRACTICAL ISSUES TO CONSIDER

The tactical and practical issues when considering the termination of a senior executive in either the UK or globally are largely the same; often the reason for dismissal is commercially sensitive, there will most certainly be risk and more often than not, costs. However, it is unlikely that there will be a 'one size fits all' approach, as other influential factors will also need to be taken into account.

Key points to consider include the following:

1. Make sure you have a clear plan of action in place prior to meeting the senior executive. Preparation is everything!

2. Consider the various factors at play – if a swift exit is needed, then following due process may not always be appropriate. Medium to long term strategy is key.

3. Determine who can legitimately action the dismissal? Is prior Board approval required, for example? Will shareholders need to approve compensation payments?

4. Will any regulatory authorities need to be notified?

5. Are there any listed company requirements that need to be followed)?

6. Identify the reasons for the termination. Can you clearly outline these, and will you be able to articulate them when you meet with the senior executive? Do you have clear evidence that supports these reasons?

7. Do you have all the relevant contractual documentation relating to the senior executive? For example, offer letters, contract of employment or service or executive agreement, governing rules of the company (such as articles of association), bonus schemes, equity and share option plans, etc.

8. Does the reason for termination trigger any 'good / bad leaver' provisions, or dismissal for 'cause' in any of the above documentation?

9. What severance package are you prepared to offer the senior executive (if any)? Is the company willing to offer an enhanced package in exchange for the senior executive agreeing to certain terms on exit?

10. What process do you intend to follow and does this expose the company to any risk in terms of future litigation? Much will depend on your relationship with the individual, their character, and the position they hold within the company.

11. Have you instructed legal counsel? When should you do so?

12. Will there be disruption to the business caused by the senior executive's departure and if so, how can this be minimised?

13. How swift should the departure be? Do you anticipate that the senior executive will be disruptive? Should you consider paid leave (sometimes termed "garden leave")?

14. Is the senior executive also a director of the company, and are they willing to resign from that office? If not, what other steps are required?

15. Are there client or internal people issues to consider? What impact will the exit have on business continuity?

16. What message should be communicated either internally or externally about the reason for the senior executive's exit? Make sure your press and regulatory announcements are prepared in advance.

17. What post termination restrictions apply and are these sufficient? Can they be enforced, or should enhanced restrictions be put in place? If so, will the value of any severance package on offer need to be enhanced?

THE UK

THE APPROACH

In the UK, there are a number of ways in which the dismissal of a senior executive can be executed. Much will depend on the circumstances and reason for termination, the role of the senior executive, the risk of claims and whether there are reputational and regulatory issues to consider. Some employers will prefer to follow due process at all times; others may want to explore settlement as a way of mitigating against the risk of future litigation. More often than not, when it comes to senior executives, a negotiated settlement is the usual method for exiting them from companies but of course complications can always arise, and awareness of rights and obligations are essential before embarking on a dismissal process.

The use of settlement agreements is common in the UK, and there is a statutory process which must be followed including the requirement for the senior executive to seek independent legal advice on its terms. If done correctly, settlement agreements can be the most effective way to dismiss a senior executive where there are multiple factors to consider. Negotiations should always be conducted on a without prejudice basis, meaning that an employer does not have to disclose settlement conversations in future litigation. However, without prejudice protection may not always be available for instance if there is no existing dispute between the parties. Therefore, if negotiations take place directly between the employer and the senior executive it is also advisable to ensure these conversations are conducted on a protected basis under section 111A of the Employment Rights Act 1996, which allows for parties to have discussions in certain circumstances not covered by the without prejudice rule. Any communications regarding settlement should also be marked subject to contract, so that there is always room for negotiation until the settlement agreement is signed by all parties (and therefore legally binding). While settlement agreements may not be suitable for every dismissal, they are certainly worth bearing in mind in the context of the following issues.

HOW CAN THE CONTRACT BE TERMINATED?

The termination of an employment contract can be communicated verbally or in writing. Service agreements for senior executives will invariably provide that to validly terminate the contract, it must be in writing - and good practice would be to do so.

Given their level of seniority within an organisation, senior executives may also benefit from other contractual provisions outside of their contract of employment, such as bonus or commission schemes, long term incentive plans or other equity arrangements. These documents and the rules they set out will also need to be factored into termination discussions.

POTENTIAL CLAIMS IN THE UK

All employees in the UK have:

- Contractual rights - largely governed by the contract of employment but are also subject to certain implied terms;
- Statutory rights - derived from the laws of the UK, such as the right not to be unfairly dismissed or discriminated against for certain prescribed reasons; and
- Common law rights - established by case law and precedence, such as the right to a safe place of work.

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

The concept of 'termination at will' is not something that applies in the UK. All employees, irrespective of their seniority, are entitled to receive minimum notice periods which are set out in legislation and will depend on length of service. Often however, employment contracts will set out a longer notice period and all senior executives will invariably have a notice period which is longer than the statutory minimum, usually for a period of either 6 or 12 months. If a senior executive's contract is terminated in breach of his/her notice provisions, then the company exposes itself to a claim for wrongful dismissal. The only exceptions are where the company is entitled to terminate the employee summarily due to gross misconduct, or otherwise under the terms of the

employment contract.
In the absence of an ability to terminate summarily, the company will have to pay damages to the senior executive to put them in the position that they would have been in had the contract been terminated in accordance with its provisions. In other words, the senior executive will be entitled to receive compensation to reflect the value of any salary lost and any other contractual benefits to which they would have been entitled, had they been allowed to work out their notice period.

A wrongful dismissal claim may also arise where the company has "constructively" dismissed the senior executive either through its actions or omissions. This arises where the company has committed a repudiatory breach, that entitles the senior executive to resign in response with immediate effect and seek damages to reflect any losses that he/she has sustained (which may also include a claim for constructive unfair dismissal). The repudiatory breach must be 'fundamental' and one that also demonstrates that the company no longer intends to be bound by one or more of the senior executive's contractual terms.

If possible, companies will want to avoid breaching the senior executive's contract of employment, since it will usually contain post termination restrictions which the company will be unable to enforce if, for example, the contract is terminated by the company without giving the senior executive the correct notice.

PAYMENT IN LIEU OF NOTICE

If permitted by the contract of employment, the company may make a payment in lieu of notice ("PILON") and in such situations, the senior executive's contract will terminate with immediate effect. As a result, there are no grounds for a wrongful dismissal claim and any otherwise enforceable restrictive covenants will remain binding.

Ideally, PILON clauses should be limited to payments for basic salary only. Otherwise, a senior executive may be entitled to receive a payment equivalent to all of the contractual benefits they would have received, had they worked their full notice period (for example salary plus bonus, car allowance, LTIPs, share options and any other premiums such as private medical insurance). It is therefore important to check the precise wording of the PILON clause in the senior executive's contract. In addition, it is often preferrable for PILON payments to be made in instalments (assuming the contract allows), to avoid the company having to pay a large lump sum payment up front – this will be more palatable to an executive committee if the ex-employee then goes on to secure alternative employment shortly after their termination.

If the company terminates in circumstances where there is no PILON clause (which can happen), then this would amount to a repudiatory breach of contract as described above and thereby releases the senior executive from any post termination restrictions or other onerous terms within their service agreement. However, payment of salary and other contractual benefits would minimise any risk of a contractual claim for damages.

WHAT CONSTITUTES DAMAGES FOR BREACH OF CONTRACT?

The general rule is that a senior executive who is wrongfully dismissed is entitled to claim damages representing the pay and benefits that they would have received had they been able to work their full notice period.

The senior executive will be expected to mitigate their loss by attempting to seek alternative employment. This can give the company some room to negotiate a settlement sum, however, a poor performing senior executive may be less likely to obtain employment in the short to medium term, thereby limiting the company's leverage to negotiate a lower figure.
When assessing the level of damages payable, the company will need to consider the following:

- Salary increases during the senior executive's notice period – are these contractual?
- Bonuses - an Employment Tribunal may compensate for loss of bonus (including for discretionary bonuses if these are paid as a matter of custom and practice).
- Share options – the issue here usually being options that would have vested during the relevant period of notice had such notice been given.
- Pension scheme benefits - compensation for loss of this can be considerable, for example under a defined

benefit pension scheme.

- Loss of other benefits such as a company vehicle, private medical insurance, permanent health insurance and life assurance.
- Accrual of holidays during notice period – most companies do not allow this; however, it is often a matter for discussion between the parties.
- "Golden Parachute" clauses – although rare these days, it is worth checking to ensure that the senior executive is not entitled to receive a payment and/or benefits in the event of termination following a takeover.

INJUNCTIONS AND RESTRICTIVE COVENANTS

An injunction is an order from the Court which puts certain restraints on a particular party, most often to stop senior executives from using or benefitting from confidential information relating to the company after their employment has been terminated. Most senior executives will, therefore, have post termination restrictions in their service agreements to prevent them from doing certain things for a period of time after their employment has ended which can be enforced through the Courts by obtaining an injunction.

In the UK, the most common post termination restrictions are:

- **Non-compete** – prevents an ex-employee from joining a rival employer for a defined period of time after employment has ended;
- **Non-solicitation** - restricts the ex-employee's ability to contact customers or clients of a former employer with a view to obtaining their business;
- **Non-dealing** – also restricts the ex-employee's ability to deal with former customers or clients after termination of employment;
- **Non-poaching** – this seeks to prevent ex-employees poaching former colleagues.

Depending on the circumstances of the dismissal, companies will have to decide whether to enforce these restrictions by seeking an injunction in the Courts. When enforcing a post termination restriction, a Court must consider the doctrine of 'restraint of trade' – any contractual provision which seeks to restrict an employee's activities after termination will be void, unless the employer can show that it is seeking to protect a legitimate business interest and the restriction goes not further than reasonably necessary to protect that interest. Restrictions must therefore be drafted carefully, in terms of their applicability and duration.

The company will want to ensure that it is protected so far as possible in terms of its own business interests. This will invariably mean ensuring that confidentiality is maintained, and that consideration is given to placing the senior executive on garden leave. Garden leave has the effect of reducing the senior executive's exposure to business transactions, contacts, and trade secrets, but also that any time spent on garden leave reduces the period of restrictions post termination. If the restrictions in the senior executive's contract are inadequate, then the company has the option of increasing their length or scope in a settlement agreement, however, companies will need to bear in mind that sufficient consideration (usually a financial payment which is subject to tax) should be given in exchange in order for these to be enforceable.

STATUTORY CLAIMS

The UK has implemented a number of statutory rights that seek to protect employees or groups of employees irrespective of the contractual position that may have been agreed between the parties. Many of these rights, which are numerous, have been introduced following legislation by the European Parliament and are, therefore, common throughout the European Union although the method of implementation by individual member states may differ.

Since Brexit and the UK's withdrawal from the European Union, steps have been taken to enshrine many of these statutory claims in domestic law. However, we anticipate that over the coming years, the scope of statutory claims arising on the termination of employees and senior executives may change depending on the circumstances of the dismissal.

UNFAIR DISMISSAL

The primary statutory right for a senior executive is the right not to be unfairly dismissed. To qualify, the senior executive needs to have been continuously employed by the company or organisation for at least two years.

An unfair dismissal claim may arise where the company terminates a senior executive's employment without a good reason, without following a fair procedure or otherwise acting unreasonably. The reason for dismissal will, therefore, often inform key aspects of the process – is it due to performance or personality? If the reason for dismissal is poor performance, then the senior executive's ability to negotiate an enhanced exit package will be limited. Conversely, if the real reason is due to a personality clash or because their 'face doesn't fit', then the risk of a successful unfair dismissal claim is higher (see further below). More often than not, compensation for an exit is more than the statutory cap for an unfair dismissal award and, for this reason, such claims are rarely an issue financially when it comes to exiting senior executives.

There are 5 potentially fair reasons for dismissal, namely conduct, capability (which breaks down into performance or ill-health), illegality (i.e., expired work permit), redundancy (which can also result out of a reorganisation, take-over, or merger) and some other substantial reason (a catch-all such as a client request for removal from post or personality impacting on the workplace and/or on colleagues). Without one of these reasons, any dismissal is likely to be substantively unfair.

Whatever the reason might be, there are essentially two options – either a) follow a formal process or b) enter into settlement discussions.

If a formal process will be followed, consideration needs to be given as to whether there are internal policies or procedures governing the management of poor performance or sickness absence for example. Is there an appetite for patience within the business, will warnings be given or the chance for the senior executive to improve? What has been discussed with the senior executive already? If the Board are involved, to what extent can conversations about the senior executive be kept confidential?

These decisions will be factored into a future Employment Tribunal's assessment of whether the process to dismiss was procedurally fair. As a minimum, companies will be expected to follow the Acas Code of Practice on Disciplinary and Grievance Procedures in all but cases of redundancy as well as the principles of fairness derived from UK case law. In order to avoid these processes, any settlement sum will usually factor in the senior executive's ability to claim unfair dismissal as, invariably, when it comes to senior executives, a formal process is often not followed, with commercial reasons outweighing the legal process to ensure a fair dismissal.

AWARD FOR UNFAIR DISMISSAL

If a dismissal is shown to be substantively and procedurally unfair, a senior executive would be entitled to claim a basic award (which is calculated in the same way as a statutory redundancy payment based on their age and length of service) and a compensatory award, which is capped at the lower of a year's salary or the applicable statutory limit as at the date of termination. The cap is increased in April each year and is currently £105,707 (April 2023). An Employment Tribunal must make an award which they think is "just and equitable" and this can be increased by as much as 25% for a failure to comply with the Acas code of practice mentioned above.

Alternatively, if settlement is the preferred route, then the package on offer is likely to be the main driving factor in achieving a swift and amicable exit. There will need to be a quantification of basic entitlements such as salary and contractual benefits, whether bonus payments are being forfeited, and the impact of termination on share options and equity arrangements, if applicable. A business may want to reduce the costs involved in dismissing a senior executive by terminating employment before eligibility kicks in.

The value of any package may not only be financial and may include the transfer of company property such as a mobile phone, laptop, or company car. Another major factor to consider will be the tax treatment of any termination payments. Contractual PILONs and post-employment notice pay are both subject to income tax and employer / employee National Insurance Contributions, whereas only the first £30,000 of any ex-gratia payment is free of income tax.

Depending on the reasons for the exit, a senior executive may also want to agree the wording of a reference or company-wide announcement in advance which should always comply with any regulatory requirements that may apply. Once the settlement agreement has been drawn up, all communications relating to it should be marked as 'without prejudice and

subject to contract' to avoid the content being disclosed in future litigation.

REDUNDANCY

In rare cases, a senior executive may be redundant. If a senior executive is made redundant, they are entitled (if they have two or more years' service) to not only receive contractual notice but also a statutory redundancy payment (which is helpfully capped according to a prescribed formula). In the grand scheme of things, this amount is currently relatively low at £19,290 (April 2023) (again, this amount is updated annually each April).

Importantly however, while redundancy is a potentially fair reason for dismissal, a fair process must be followed. If not, the senior executive may have a claim for unfair dismissal. Some companies have a contractual redundancy policy setting out how redundancy payments are calculated, and if so, it may be the case that the senior executive can benefit from its terms.

Where a restructure takes place involving the potential redundancy of the senior executive and a minimum number of 20 or more employees, the company will also need to participate in a process of collective consultation and follow due process, including notifying the relevant government bodies. For these purposes the definition of redundancy is wide and can include contractual variation processes. Failure to undertake the correct process can lead to a "protective award" being made of up to 90 days' actual pay (where there is no statutory cap on a week's pay). Such award could include bonuses that may have accrued over that period. Once again, the reality is that a settlement package may well factor in any potential protective award.

DISCRIMINATION, WHISTLEBLOWING AND OTHER STATUTORY CLAIMS

A discrimination complaint may arise, for example, if the company terminates a senior executive for a reason that relates to age, sex, race, disability, sexual orientation, gender reassignment, marriage and civil partnership, pregnancy and maternity, or religion or belief. It is also unlawful to discriminate on the grounds of fixed-term or part-time employment status. Significantly, unlike claims for unfair dismissal, there is no service requirement for bringing such claims and no cap on the amount of compensation an Employment Tribunal can award in a successful discrimination claim.

The Employment Tribunal may award compensation calculated by reference to any financial loss that a senior executive may have suffered as a result of the discrimination (including their termination), which may also include an award for injury to feelings (the current maximum is £49,300), aggravated damages and losses for personal injury. However, there can be no 'double recovery' where losses are suffered as a result of unfair dismissal and discrimination.

Whistleblowing claims are increasingly being used by senior executives (particularly if they hold a regulated/financial or health and safety function) as a negotiating factor in increasing any settlement package. Senior executives who also make qualifying 'protected disclosures' to certain categories of person (i.e. employers) are also protected against dismissal and suffering certain detriments. Senior executives who disclose information which, in their reasonable belief, is made in the public interest and tends to show one or more types of wrongdoing (as set out in statute), are entitled to bring claims in an Employment Tribunal for uncapped compensation (and unlike ordinary unfair dismissal claims, there is no minimum length of service requirement).

SENIOR EXECUTIVES WHO ARE ALSO DIRECTORS

If the senior executive is also a director of the company, then it is important to take into account the following:

1. The senior executive should resign from any directorships held in the company and any associated companies. Usually this will be included as part of the settlement agreement.

2. The listings rules require a listed company to notify a Regulatory Information Service of the removal, retirement or resignation of a director as soon as possible and by no later than the end of the business day following the decision.

3. Invariably an announcement is agreed as part of the

settlement terms. However, if settlement terms cannot yet be agreed the announcement should still take place. The overriding obligation is to issue the announcement as soon as possible and this cannot be postponed due to arguments over the announcement wording or the terms of any settlement package.

4. Shareholder approval of the termination payment may be required in a general meeting.

5. If the senior executive holds shares for the company as a nominee or as a qualification, such shares should be transferred as the company directs. Again, this should be part of the settlement agreement. Settlement sums may have to be disclosed in the company accounts and, if the company is a quoted company, settlement sums will need to be identified in the directors' remuneration report. A listed company must have a remuneration policy approved by its shareholders every three years. Further, the company must set out on its website what payments a director has received or may receive in the future.

6. Irrespective of whether the company is listed or not, announcements should be agreed if possible. It goes without saying that the contents of any announcements should not be libellous or misleading, and they should be consistent with any agreed reference (which are increasingly limited to confirming job title and dates of employment).

SHAREHOLDER APPROVAL

It is unlawful for a company to make "a payment for loss of office" to a director unless the payment has been approved by a resolution of the members of the company. If approval is not obtained, the director is deemed to hold the payment on trust and the directors responsible for making the payment will be liable to the company for the amount paid. However, this does not usually present a problem in practice because the requirement for shareholder approval does not cover "payments made in good faith" arising out of an existing legal obligation, for example a PILON, damages for breach of contract or compensation for unfair dismissal or pension in respect of past service.

Shareholder approval is also required in certain other situations such as for a payment for loss of office to a director of the company in connection with the transfer of the whole or part of the undertaking or property of the company. Similarly, payment for loss of office to a director in connection with a share transfer, shares in the company or a subsidiary resulting from a take-over bid.

If a payment is made without having been approved in advance at a shareholders' meeting, any payment is deemed to be held on trust for the company or the shareholders who sold shares as a result of the offer.

REMOVAL AS A DIRECTOR

Terminating a senior executive's employment does not necessarily terminate any directorships that they might hold. As there is no requirement for a director to also be an employee, it will invariably be necessary to obtain the senior executive's resignation from any directorships that they hold at the time their employment is terminated or provide for their removal as a director if an agreement cannot be reached.

As long as the individual remains a director, they will be entitled to attend board meetings and access minutes and other paperwork related to their appointment as a director.

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AUSTRALIA

THE APPROACH

Employment in Australia is relatively highly regulated, with significant protections and legal avenues available for employees. Therefore, employers must take care when terminating the employment of executive employees to avoid operational, financial, litigation, and statutory non-compliance risks.

In deciding to terminate an executive's employment, employers must consider the business' policies and whether they need to be followed in the particular circumstances, the litigation risks arising from termination, the best approach to affecting the termination, and whether there are any legislative requirements relating to the termination or a mutual separation.

In many circumstances, it is beneficial for employers to seek a mutual separation with an executive instead of unilaterally terminating their employment. This decreases the risks of litigation and disruption to the business and can assist in managing the reputational risks.

However, it is not always practicable, in the interests of the company, or otherwise appropriate to agree on a mutual separation or settlement. In these circumstances, it is critically important for employers to consider the legal obligations and risks arising from termination.

This paper outlines a brief and non-exhaustive summary of the law and relevant considerations when terminating executive employees in Australia.

SOURCES OF EMPLOYMENT LAW

The main source of employment law in Australia is legislation, which exists at State, Territory and Federal level.

The most relevant legislation that applies to private sector employers is the *Fair Work Act 2009* (Cth). The application of this legislation to foreign employees and employers can be complicated, but generally, it will apply to employees whose primary place of work is Australia (even if they are employed by an overseas employer).

In addition to legislation, more specific employment rights are contained in industrial (and quasi-legislative) instruments called 'modern awards', which apply to employers across certain industries and/or employees performing certain roles, and 'enterprise agreements', which are a form of collective agreement. Executive employees are often too senior to be covered by a modern award or enterprise agreement, but this should be checked and confirmed as part of the termination consideration.

The employment relationship will also be governed by a contract of employment, which can outline terms and conditions of employment, provided they are more beneficial than those prescribed in legislation or industrial instruments. In some cases, implied terms can affect the termination risks (in particular, reasonable notice of termination – see below).

The interaction between the various sources of employment rights and entitlements can be complicated and must be carefully considered at the time.

WHY CAN THE EMPLOYMENT BE TERMINATED?

Generally, an executive employee's employment can be terminated for any reason, provided it is not an unlawful reason.

In Australia, executive employees are often excluded from the unfair dismissal regime (see below). As such, it is not usually necessary for employers to show that they have a valid reason for termination – e.g., because the employee was a poor performer, had engaged in bad behaviour or conduct, or that there were business-related reasons. However, it is unlawful to terminate an employee's employment for, among other things, one of the protected discriminatory reasons or because the employee has (or has exercised) a 'workplace right'. Workplace rights are broadly defined and include matters such as statutory entitlements (such as parental leave or sick leave),

industrial rights (e.g., union membership or engaging in industrial action) or, importantly in the context of senior executives, if the employee has made a complaint or inquiry about their employment.

Although an employer is not required to provide a reason for termination, it is almost always best practice to do so, as it can help in the defence of a '*general protections*' claim, which is discussed further below.

Moreover, if the employee has access to the unfair dismissal regime, an employer would need a valid reason for dismissal in order to defend any claim. An executive employee will be able to make an unfair dismissal claim if they earn less than the '*high income threshold*' (currently $167,500 AUD) or if a modern award or enterprise agreement covers their employment. This is discussed further in the 'statutory claims' section below.

HOW CAN THE EMPLOYMENT BE TERMINATED?

In Australia, employers can terminate an employee's employment unilaterally. There does not need to be any agreement with the employee or any other party.

Employers are technically required to give written notice of termination that specifies the termination date unless the termination is for serious misconduct. Although a termination that is only communicated verbally may still be effective to terminate the employment relationship (although the employment agreement should be checked for any notice requirements), failing to provide written notice is a breach of the requirements of the *Fair Work Act*. Therefore, it is always recommended to provide written notice of termination.

Employees must receive notice or a payment in lieu of notice (unless the termination is for serious misconduct). There are statutory minimum notice periods (1 to 5 weeks depending on the employee's length of service and age), but most executives will have a longer period specified in their employment agreement. If an employee is paid in lieu of notice of termination, their employment is terminated with immediate effect. In some circumstances, a delay in payment could delay the effective termination date. This could be an important consideration in relation to things such as incentive schemes and vesting dates.

If an employee engages in serious misconduct, they can be summarily dismissed without any notice or pay in lieu (subject to any terms to the contrary in the employment agreement). Proving serious misconduct can be difficult, as it is generally a high bar. Serious misconduct includes conduct that is wilful or deliberate behaviour that is inconsistent with the continuation of the employment contract; conduct that causes a serious and imminent risk to a person's health or safety or the reputation, viability, or profitability of the business; theft, fraud, assault, or sexual harassment in the course of employment; intoxication at work; or the employee refusing to carry out a lawful and reasonable instruction.

PROVIDING NOTICE, MAKING A PAYMENT IN LIEU, OR IMPLEMENTING GARDEN LEAVE

Whether a business should provide notice of termination, make a payment in lieu of notice or place the executive on garden leave is a business decision that depends significantly on whether the executive's ongoing employment or presence at the workplace presents risk – and possibly whether continued employment will trigger any additional benefits or entitlements.

Having the executive work during their notice period can be beneficial if they are able to positively contribute to the business during this time, such as by providing a proper handover and continuing valuable work. This option should generally only be pursued if the executive's continued presence in the workplace will not cause any ongoing risk to others and the business (e.g., if there are no concerns the executive may take and misuse confidential information, or there is no risk of harm to other employees (e.g., if the termination related to bullying or sexual harassment allegations made by another employee)).

If there are any concerns about the executive's ongoing presence in the workplace, a business can (subject to the terms of the employment agreement) make a payment in

lieu of notice that brings the employment relationship to an end immediately, or place the executive on garden leave during the notice period.
Placing an executive on garden leave can be an effective restraint of trade, as they continue to owe employment obligations during this time and are unable to work for a competitor. However, as the employment relationship continues during garden leave, there are still risks to the business, such as if the executive is injured (potential workers' compensation) or they engage in poor conduct that reflects badly on the business or for which it may be vicariously liable.

Employers must consider if they have a right (usually contractual) to place the employee on garden leave. If not, a garden leave direction might create the risk of a repudiation or constructive dismissal. If there is a repudiation of the employment agreement, then the employee will not generally be bound by their contractual post-employment obligations.

A payment in lieu of notice is a common way to effect the termination of an executive's employment and can reduce any risks arising from their ongoing presence or employment. It also allows the executive to immediately find alternative employment, subject to any post-employment restraints.

REDUNDANCY

Although less common for executive employees, any employee can be made redundant if the employer does not need their role to be performed by anyone.

If an employee is dismissed because of redundancy, they are entitled to statutory redundancy pay, which is on a sliding scale from 4 to 16 weeks' pay (i.e., their base pay – which is not capped) based on the employee's length of service with the employer.

An employee dismissed because of a genuine redundancy is not entitled to make an unfair dismissal claim (assuming they are otherwise eligible to do so). If challenged, the employer would need to prove the genuineness of the redundancy, including that it consulted and considered redeployment of the employee.

In addition, there may be consultation obligations imposed by modern awards, enterprise agreements, an employment agreement or company policies that an employer must follow when making redundancies. Some of these obligations may create actionable rights and entitlements that an employee can enforce if they are breached.

POTENTIAL CLAIMS IN AUSTRALIA

Like in the UK, in Australia all employees have:

- **Contractual rights** - largely governed by the contract of employment but are also subject to certain implied terms; and
- **Statutory rights** - derived from Australian legislation, such as the right not to be unfairly or unlawfully dismissed or discriminated against for certain proscribed reasons.

There may also be some common law rights, established by case law and precedent, but these generally only supplement and rarely go further than rights conferred by contract and statute.

CONTRACTUAL CLAIMS

Employees may have contractual claims against their employer in relation to the termination of their employment if the employer:

- did not comply with contractual obligations for the termination (e.g., contractual notice periods); or
- failed to pay an employee's contractual entitlements (which could include those under incentive plans, as well as the employment agreement).

The employer should check if the employee has an up-to-date employment contract (i.e., for their current position). If not, the employee may be able to claim an entitlement to 'reasonable notice' of termination – which is an implied contractual term. Reasonable notice can be up to 12 months (or possibly more).

As mentioned above, all employees must be provided (or paid in lieu of) notice of termination, unless the

termination is for serious misconduct. There are statutory minimum notice periods, but they are usually supplanted by longer contractual notice periods for senior and executive employees.

An employee can pursue a contractual claim against the employer if it fails to provide (or pay in lieu of) the contractual notice period. This can occur if an employer summarily dismisses an employee for serious misconduct when it did not have a right to do so. The compensation that could be ordered in such a claim is generally limited to the amount the employee would have been paid if the employer had made a payment in lieu of notice.

An employer must also ensure it complies with any other contractual obligations or requirements for termination, as an employee may otherwise be entitled to damages for a breach or repudiation of the contract.

Other claims can arise if the employer has not paid entitlements due (or allegedly due) under bonus or other incentive schemes. The terms and conditions (or rules) of these schemes should be carefully drafted to make clear what is triggered (or forfeited) on termination – including if there are 'good' or 'bad' leaver arrangements. Of course, this should be carefully considered as part of the termination consideration.

STATUTORY CLAIMS

The most common statutory claims relating to termination of employment are unfair dismissal and general protection claims.

Unfair dismissal

As briefly mentioned above, a person is '*protected from unfair dismissal*' and eligible to bring a claim if they earn less than the '*high income threshold*' (currently $167,500 AUD) or a modern award or enterprise agreement covers their employment. This is generally uncommon for executive employees. The employee must also have worked for more than 6 months for the employer.

To be able to defend an unfair dismissal claim (if one can be made), a business will need to ensure it follows a procedurally fair termination process, which includes:

- having a valid reason for the termination (this can be performance, conduct or capability related);
- notifying the executive of the reason for the termination;
- providing the executive with an opportunity to respond to reasons related to their capacity or conduct;
- ensuring the executive has prior warnings if the reason for termination related to their unsatisfactory performance;
- not unreasonably refusing a support person; and
- following termination procedures that are appropriate for the size of the business and its human resources capabilities.

If the termination relates to allegations about the executive's conduct, those allegations should generally be investigated to minimise unfair dismissal risks. In addition, the executive should have an opportunity to respond to the allegations and proposed termination before the final decision is made. A business should keep careful records of the disciplinary / termination process and the decision maker's reasons for any termination.

The remedies for a successful unfair dismissal claim are reinstatement or compensation (capped at the lower of 6 months' pay or 50% of the high income threshold – currently $83,750 AUD). This cap generally acts as a disincentive for executives (assuming they are eligible to make a claim) and they will usually look for an alternative claim – see below.

General protections claims

Because most executives are not protected from unfair dismissal, or because of the cap on compensation, the most common termination claim from senior employees (assuming the contract has been complied with) is a general protections claim. A general protections claim alleges that the termination was for a proscribed and, therefore, unlawful reason.

All employees in Australia have specified statutory '*general protections*' in relation to their employment. These general protections make it unlawful for any person (e.g., employer) to take adverse action (e.g., termination of employment) against another person (e.g., employees)

because:

- the person has or exercises (or to prevent them from exercising) rights:
  - under workplace laws and instruments (i.e., modern awards and enterprise agreements);
  - to initiate or participate in processes or proceedings under workplace laws and instruments; or
  - to make complaints or inquiries about their employment or to seek compliance with a workplace law;
- the person is a member of a union or engages in industrial action; or
- the person has a protected attribute or characteristic (e.g., sex, race, age, disability etc).

A unique trait of general protections claims is that there is a presumption that the business took adverse action for the unlawful reason unless it can prove otherwise. This is referred to as the '*reverse onus of proof*'.

Therefore, while it is not necessary to provide a reason for termination (if the employee is not protected from unfair dismissal), it is best practice that a reason be given (at least in a summary way) to minimise the risks of a successful general protections claim. In other words, if no credible and lawful reason is given, it is easier for the executive to allege it was for an unlawful reason – and the employer must then prove otherwise.

It is also important that that relevant documents are created that support the lawful reason. To the contrary, documents (including emails) suggesting some other reason can be problematic in any defence.

If an employee alleges that there has been a breach of their general protections, they can also join to the proceedings, the person(s) who made the decision to take the adverse action on the basis that they are involved in and accessorily liable for the employer's contravention.

The remedies in general protections matters include reinstatement (if the employee has been dismissed), compensation (both financial loss and non-financial loss, such as hurt, humiliation and distress) and civil penalties that may be paid to the employee. There is no limit to compensation in these claims – which is one of the reasons they are so attractive to dismissed executives (along with the reverse onus of proof).

AVOIDING AND SETTLING TERMINATION CLAIMS

To ensure a smooth exit and avoid termination disputes, employers will often seek to negotiate a mutual separation with an executive.

Generally, the employer should advise the employee of the impending termination decision, or actually terminate the employment, and then make a without prejudice offer for a mutual separation.

A mutual separation offer typically involves terms such as:

- the option for the employee to resign rather than be unilaterally terminated;
- additional ex gratia payments or payments under bonus and incentive schemes that the employee would not have otherwise been entitled to because of the termination;
- agreed internal and/or external public announcements;
- mutual releases of liability for all claims related to the employment and termination;
- mutual confidentiality obligations in relation to the settlement; and
- mutual obligations to not disparage or make adverse comments about the other party.

If the employer wants to enforce restraint of trade obligations, it may be appropriate to renegotiate and agree on the terms of the restraint in any mutual separation agreement or at least to reiterate that such obligations in the employment agreement continue and must be complied with. This is because restraint obligations that are agreed at termination (especially in return for additional termination payments) may be easier to enforce than obligations agreed at the commencement of employment.

If an employee has already been dismissed and makes a claim against the employer, the parties can still reach a resolution to settle the claim. The above terms for a mutual separation are substantially the same as the terms

that could be negotiated to settle a claim, except that it is not always possible to change the characterisation of the termination to resignation and there must be a term that the employee discontinue any claims already commenced.

RESTRAINTS OF TRADE AND INJUNCTIONS

Restraints of trade (often referred to as restrictive covenants or non-competes/solicitation obligations in other countries) are contractual obligations that prevent an employee from taking certain actions after their employment has ceased.

Restraints often include obligations to not solicit employees, clients, or customers from the former employer, and to not undertake work for a business that competes with the former employer.

In Australia, the starting point for all restraint obligations is a presumption that they are void as being contrary to public policy. However, a court will enforce a restraint if the obligations go no further than what is reasonably necessary to protect the business' legitimate business interests. Recognised legitimate business interests include:

- maintaining a stable workforce;
- protecting trade secrets and confidential information;
- protecting customer, client and supplier relationships; and
- protecting goodwill.

In determining whether a restraint is reasonable to protect legitimate business interests, a court will consider the ordinary customs of the industry in which the employer operates, the nature of the employment, any consideration (i.e., payment) given for the restraint, the period of time imposed, the scope of the restraint (i.e. non-solicitation and / or non-compete obligation) and the geographical and temporal extent of the restraint.

It is not necessary (nor common) for there to be any consideration or payment during a restraint period; however, this can assist with demonstrating that the restraint is not unreasonable and that there is less prejudice to the employee if the restraint is enforced.

Even if a restraint goes no further than is reasonably necessary to protect a legitimate business interest, courts are quick to find that a restraint will be invalid if there is any uncertainty in its terms. It is, therefore, critical that restraints are clearly defined and drafted.

Unlike in many other jurisdictions, a common feature of many restraints in Australia are cascading variables for the geographical and time limits of the restraint. For example, a cascading restraint may state that the restraint obligations continue for multiple periods after termination (e.g., 12, 9, 6 and 3 months). The purpose of cascading variables is to provide a court with options as to which restraint period etc to enforce.

Despite the popularity of cascading restraints, if too many are included, they could increase the risk that the entire restraint will be determined to be void for uncertainty. Employers should give very careful consideration to these matters when drafting restraints – including whether a single period (or area) is appropriate.

The position is also different in New South Wales because of the existence of particular legislation which gives the courts there some flexibility when it comes to enforcing restraints.

If an employee breaches (or intends to breach) a restraint, the former employer can seek an injunction or possibly damages.

If an employer wants to obtain an injunction to prevent the former employee's breach, it must act quickly. This usually involves seeking undertakings from the former executive to comply and failing that, seeking 'interlocutory relief' in the form of an interlocutory injunction (pending the court's decision on final relief).

To obtain an interlocutory injunction, an employer needs to demonstrate:

- there is a 'serious question to be tried' or that it has made out a 'prima facie case' that it would successfully obtain final relief (i.e., that the restraint is valid and enforceable, and the person is likely to breach the restraint); and

- that the balance of convenience favours the granting of an injunction (i.e., whether the consequences of breach or threatened breach justify the prejudice caused if the injunction is granted).

RESTRICTIONS ON TERMINATION BENEFITS

Similar to the position in the UK, the Australian *Corporations Act 2001* (Cth) prohibits companies from giving termination benefits to certain executives and directors. Upon termination of any senior executive or director, employers should consider and ensure they are not breaching these laws.

The termination benefits regime in the *Corporations Act* is a complex set of provisions. By way of high level summary:

- There is a general prohibition on the payment or provision of benefits in connection with a person's retirement (i.e., termination benefits) from a '*managerial or executive office*'.
- A person may hold a '*managerial or executive office*' and, therefore, be subject to the restriction on termination benefits if:
  - for an entity listed on the Australian Stock Exchange – the person's details were included in the directors' remuneration report for the previous financial year; and
  - for any entity (listed or non-listed) broadly speaking the person is a director of the company or any related body corporate.
  - A person is also caught if they held such an office in the 3 years before termination.
- Termination benefits is a broad concept that includes any payments, property, or interests and rights, and can include things such as automatic or accelerated vesting of shares or options, payments in lieu of notice, the transfer of property, restraint payments, ex-gratia payments and out-of-court settlements, among others. Statutory payments are usually excluded (e.g., statutory redundancy pay, accrued leave payments) plus certain others described in the *Corporations Regulations 2001* (Cth).
- Termination benefits can only be paid or provided if they are approved by shareholders (which is similar to the position in the UK) or fall within a relevant exemption and are below the relevant monetary cap (generally one year's base salary).
- Some of the relevant exemptions include:
  - benefits given under an agreement made before the person held the position as consideration for agreeing to hold the position, provided the value of all benefits is less than the relevant cap;
  - a payment for past services, provided the value of all benefits is less than the cap; and
  - benefits that must be paid to avoid a contravention of a law.
- A breach of these restrictions will result in any benefits given to the executive being held on trust for the business and subject to immediate repayment. The business may also be liable for significant penalties for a breach of the *Corporations Act*.

Whether benefits are likely to infringe the restrictions in the *Corporations Act* or fall within a relevant exemption can be complex and is very fact dependent. Legal advice should always be sought about the provision of termination benefits to executives that may be caught by the restrictions in the *Corporations Act*.

EXECUTIVES WHO ARE ALSO DIRECTORS

Similar to the position in the UK, if executives are also directors of the company, the employer should:

- ensure the executive resigns any directorships on termination – ideally the employment agreement includes an automatic resignation mechanism on termination of employment, otherwise this can be agreed at termination);
- make appropriate and timely disclosures to regulatory authorities (such as the Australian Securities and Investments Commission and to the market if listed on the Australian Stock

Exchange) as necessary; and

- seek shareholder approval as necessary for any termination payments (discussed above).

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in Australia. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at October 2023.

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AUSTRIA

THE APPROACH

The termination process under Austrian law is similar for all kinds of employees, including senior executives. There is, however, a notable difference in the level of protection against termination that senior executives enjoy (as opposed to "regular" employees). Terminating senior executives usually requires special attention, especially as pertains to issues around non-competition, non-solicitation of suppliers, customers and employees and confidentiality.

Key points to consider include the following:

- Contract review and legal advice: As with any other termination, a thorough review of the employment agreement is indispensable. Employment agreements with executives may contain special provisions on the termination process and/or complex and comprehensive benefit entitlements. A thorough contract review and seeking advice from local counsel enables the company to quantify its financial and risk exposure.

- Communication and handover of responsibilities: A senior executive who is removed from office might feel a mix of shock, disappointment, and uncertainty about their future career prospects and financial stability. Companies will need to strike the appropriate balance between protecting the company's business secrets and ensuring business continuity. The parties will commonly enter into a mutual termination agreement, which could include terms around garden leave, handover of responsibilities and restrictive covenants.

- Post-contractual covenants: Employment agreements with executives and other senior employees will likely include restrictive covenants, especially if their position is associated with a high level of responsibility and gives them broad access to business-related information which requires protection. Restrictive covenants may include a prohibition to work in a competing business after the end of employment, as well as customer and employee non-solicitation clauses. Non-compete clauses are unenforceable if the company gave notice of termination to the employee (other than for cause). The only way to uphold the clause in such a case is by declaring to do so at the latest when giving notice of termination and by paying the employee's remuneration (including any bonus and other benefits) for the term of the non-compete clause. Whether the non-compete is upheld in the event of a mutual termination agreement is a matter of negotiation between the parties. If the non-compete is unenforceable, the company may not be adequately protected against the departing senior executive engaging in competing activity post-termination of their employment.

HOW CAN THE CONTRACT BE TERMINATED?

The termination of an executive's employment relationship does not differ significantly from the termination of employment agreements in general.

The employer can terminate the employment relationship by mutual consent, by unilateral notice of termination or by termination for cause with immediate effect. The latter requires misconduct on the employee's part that is considered so severe that the employer cannot reasonably be expected to carry on the employment relationship even until the end of the notice period.

Unilateral terminations of employment do not require any specific reason. They are therefore fairly straightforward, save for in certain cases.

(e.g., where employees enjoy general or special termination protection, see below).

In the case of senior executives, the company may prefer concluding a mutual termination agreement. Such an agreement can be concluded with effect from any date, i.e., without taking into account otherwise mandatory notice periods. The advantage of a mutually agreed termination is also the possibility to settle all claims arising from the employment relationship, leaving little room for subsequent disputes.

A voluntary severance payment may be feasible, depending on the level of risk the employee poses in terms of termination protection or if the employment relationship is intended to end before the earliest possible termination date.

WORK COUNCIL'S INVOLVEMENT FORMALITIES

If the termination involves a "regular" employee who is not a company director or an "executive employee" (please also see the section on "General termination protection" below) and a works council is established, the employer must comply with a preliminary procedure. The company must inform the works council one week prior to giving notice of termination to the employee. The works council is entitled to request a consultation with the company within one week and may comment on the planned termination.

Any notice of termination given prior to informing the works council or before the end of the one-week period is legally ineffective (unless the works council has already commented on the termination before the end of the one-week period).

Whilst the works council cannot prevent the employer from giving notice to employees, its statement determines the extent to which employees (or the works council itself) may challenge the termination in court.

In the event of a termination by mutual consent, the employee is entitled to request time to consult with the works council before consenting to the agreement. If so, the employer and the employee cannot conclude a mutual termination agreement for the first two working days from the employee's request.

There are broadly no specific formalities for employment-related documentation. However, the applicable collective bargaining agreement or the employment agreement may require that employment documents be "in writing" or "in written form". Documents in written form always require a wet ink signature or a qualified e-signature. Mutual termination agreements with pregnant employees, employees on parental leave (and four months thereafter) or parental part-time, employees performing military or civil service and apprentices always require the written form.

As a matter of good practice, both the termination letter and/or the mutual termination agreement should be in writing for documentation purposes, notwithstanding the legal requirements. The notice of termination becomes effective (and the start of the notice period is triggered therefore) once received by the employee. If the company offers a mutual termination agreement along with the termination letter, the employee should be given an adequate period of time to reflect on the terms of the agreement.

In terms of personal requirements, any person who has the legal authority to act on behalf of the company is authorised to give notice (e.g., managing director). Also, other persons within the company who are authorised to make decisions in relation to employment matters can give notice (e.g., the HR-manager or a person vested with a power of attorney). The specific person(s) authorised to give notice on behalf of the employer may vary depending on the

structure and internal policies of the company.

NOTICE PERIOD AND WRONGFUL DISMISSAL

The statutory notice period for a unilateral termination by the employer is between six weeks and five months, depending on the employee's length of service. However, when hiring an executive employee, it is common to agree on longer notice periods. This is permissible as long as the employee's notice period is not longer than the employer's notice period, and does not exceed six months. Special rules apply to directors of Austrian public companies.

The notice of termination becomes effective at the end of a calendar quarter, but the parties can agree that the 15th and/or the last day of a calendar month are also possible effective termination dates. The applicable collective bargaining agreement may also provide special provisions around terminations of employment.

If the company gives untimely notice, i.e., in breach of the employee's statutory, collective or contractual termination provisions, the employee is entitled to compensation (*Kündigungsentschädigung*) so that he is placed in the same position as if he had been duly terminated.

PAYMENT IN LIEU OF NOTICE

In Austria, employers cannot unilaterally opt for payment in lieu of notice. Either party, except where there are solid grounds for the termination, must comply with the applicable notice period and effective termination date in each individual case.

However, the parties may decide to terminate the employment relationship by mutual consent at any time, i.e., with effect as of any date chosen by the parties and without any specific notice period. Instead of serving the notice period, the parties may agree on a lump sum payment equivalent to the remuneration that the employee would have earned during the notice period.

Although such an agreement is usually not more favourable for the employer in terms of the financial burden, this type of early termination can serve several purposes.

On the one hand, it can facilitate a smoother transition, especially if the employer is concerned about the misuse of company resources, disclosure of confidential information or the impact of the separation on other employees. Some companies may also be subject to internal policies regarding headcount limits and will therefore need to remove departing employees from their payroll before they are able to fill the vacancy.

On the other hand, an early termination can be beneficial for departing employees who have already secured a new job and can then start in their new role without delay.

POST-CONTRACTUAL RESTRICTIVE COVENANTS

A post-contractual non-competition clause requires an agreement, which is usually already included in the employment agreement. It can also be agreed during the employment relationship (e.g., as part of a mutual termination agreement), although the employee must not be under any pressure to assume this obligation.

Without an agreement to this effect, there are no post-contractual restrictions mandated by law. Employees are therefore free to work for competitors or establish a competing business, although they continue to be bound by their duty of confidentiality in respect of business information which they acquired at their previous employer.

According to Austrian law, non-compete clauses are enforceable if they:

- pertain to the employer's business sector;
- do not exceed the term of one year after the end of employment;
- do not pose an excessive impediment for the employee's professional advancement; and
- the employee's gross monthly salary exceeded a certain statutory threshold (value for 2023: EUR 3,900) at the time of termination.

The enforceability of the clause further depends on how the employment ended:

- If the employee gave notice of termination, without the company having given him good cause for doing so, the non-compete clause is enforceable (without any compensation by the company). The same is true if the company terminated the employee for cause.
- If, on the other hand, the company gave the employee notice of termination other than for cause, the non-compete clause is generally not enforceable.
- Finally, if the employment was terminated by mutual consent, the enforceability of a post-contractual non-compete is up for negotiation between the parties.

In terms of the remedies available in the event of a breach, the company can require that the employee refrain from further breaches and that he provide compensation for any damages incurred to the company. If, however, the parties agreed on a contractual penalty for breaches of the non-compete clause, the company can only demand payment of such penalty (but no further claims for damages and no injunctive measures). The contractual penalty may not exceed six net monthly salaries and may be reduced by the court if deemed excessive. The company should therefore carefully consider which option best serves its interest in each individual case. If the company seeks an injunction and additional damages, it will, however, face a more onerous burden of proof.

If the company gave notice of termination, it can uphold the non-compete clause by (i) so declaring at the latest when giving notice of termination and by (ii) paying the employee's full remuneration (including any bonus and other benefits) for the term of the non-compete clause.

Non-solicitation obligations of employees and other associates are agreements that prohibit the departing employee from enticing away the company's staff after the termination of the employment relationship. The nature of employee non-solicitation clauses is somewhat controversial under Austrian law, but the prevailing opinion is that these are not subject to the statutory limitations on non-competition clauses (e.g., business sector, duration of the obligation, remuneration limit).

An employee non-solicitation clause may be combined with a non-competition and/or supplier or customer non-solicitation clause. A supplier or customer non-solicitation clause prohibits the departing employee from entering into business relations with these stakeholders for a certain period after termination of the employment relationship. Supplier or customer non-solicitation clauses are subject to the same restrictions as non-competition clauses.

The employment agreement usually also includes the obligation to keep business or trade secrets strictly confidential after the end of the employment relationship even after the end of the employment relationship. Non-disclosure agreements relating to genuine business and trade secrets are not subject to a time limit and are enforceable regardless of the type of termination.

GENERAL TERMINATION PROTECTION

While the termination process is quite similar for all kinds of employees, there is a notable difference in the legal protection that senior executives enjoy against termination. The Austrian Labour Constitution Act (*Arbeitsverfassungsgesetz*) expressly excludes not only company directors but also "executive employees" (*leitende Angestellte*) from termination protection.

Executive employees represent the employer's side and are vested with the authority to exercise (some of) the employer's functions. Regarding personnel matters, an executive employee is usually authorised to hire or terminate employees at their own discretion without prior consent of a higher-ranking level (albeit subject to certain company guidelines, such as budget or headcount limit). Individuals are, however, not considered executive employee if they merely conduct initial interviews with applicants, propose new hires or carry out other preparatory recruitment activities.

Individuals who are not company directors or executive employees enjoy general termination protection if they have been working in businesses with five or more employees for at least six months. If so, the employee can challenge the termination, in particular on the grounds that it is (i) socially unjustified or that (ii) there is a proscribed motive for the termination (e.g., if the termination was a retaliation for the employee raising justifiable claims against the company).

Employees of more advanced age are more likely to challenge their termination on the grounds that it is socially unjustified, arguing that they will struggle to find a comparable employment opportunity on the job market. The company should be able to prove that it had (i) business-related reasons (e.g., lack of orders, decline in sales, deficiencies in the supply of raw materials) and/or (ii) reasons relating to the employee personally (e.g., breach of employee's duties, prolonged or frequent sick leave, poor operating performance) for the termination.

The company would prevail if, on a balance of interest, the court is convinced that the company's interests in terminating the employment relationship outweigh the interests of the employee in retaining his position. If, on the other hand, the employee prevailed, he would need to be reinstated in his position and his remuneration would need to be paid as if the employment had not been terminated. Usually, these procedures end with a settlement between the parties.

DISCRIMINATION, SPECIAL TERMINATION PROTECTION AND WHISTLEBLOWING

Under Austrian employment law, there are special regimes of employee protection which apply irrespective of the company's headcount or the employee's position and seniority within the company.

Firstly, terminations must not be discriminatory (i.e., based on gender, age, sexual orientation, religion or ethnicity). When challenging the termination on these grounds, the employee could either ask to be reinstated in his job position or claim damages.

Further, certain groups of employees (pregnant employees, employees on parental leave and parental part-time, works council members, disabled employees as well as employees performing military or civil service) enjoy special termination protection. These employees can only be dismissed with prior approval from the competent court or public authority (as applicable), which is given only for a limited number of reasons. Since these approval

procedures are rather time-consuming and the outcome is uncertain, it is common for employers to offer the protected employee a voluntary severance in return for the employee's consent to terminate the employment by mutual agreement.

According to the EU Whistleblowing Directive and the transposed Austrian Whistleblower Act ("*HinweisgeberInnenschutzgesetz*") any measure, including termination of employment, taken in retaliation against an eligible whistleblower is legally invalid. In the event of reversible retaliatory measures such as suspension, termination of employment or withholding of a promotion, affected whistleblowers may request to be (re)instated in the appropriate position. They may also claim compensation for financial losses and personal impairment suffered in the event of (partially) irreversible retaliatory measures such as coercion, intimidation, measures that require medical treatment. The exact sum must be determined on a case-by-case basis, with the company bearing the burden of proof that the action taken was not linked in any way to the report.

SENIOR EXECUTIVE WHO ARE ALSO DIRECTORS

If the employee is also a company director, the removal from office does not simultaneously terminate the employment relationship and *vice versa*, unless otherwise agreed in the employment agreement. Commonly, employment agreements of directors include a clause according to which the removal or resignation from office also constitutes a notice of termination of the employment relationship.

Directors of public companies can be removed from office by the supervisory board only for good cause, whereas the shareholders of a private company may remove a director from office at any time without cause and without prior notice; a simple majority of votes is sufficient.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in Austria. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at August 2023.

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BELGIUM

THE APPROACH

In Belgium, different options are available for an employer when considering dismissing a senior executive. The option ultimately chosen will depend on: the company's objectives (e.g., must the dismissal take place by a certain date?), the senior executive's role (e.g., is a hand-over of tasks required?), the reasons and circumstances for termination (e.g., a dismissal due to redundancy or performance-related issues may be treated differently), etc. An important element to keep in mind with dismissals in Belgium, and particularly for the dismissal of a senior executive, is to prepare for the (potential) dismissal costs, as different factors (e.g., special dismissal protection) can play a significant role in the total cost for the company (or at least in the settlement offer that could be made).

The use of a settlement agreement is common in Belgium, especially for senior employees. While some employers prefer to proceed with the dismissal as intended and then wait for the employee's reaction before possibly entering into negotiations, when dealing with senior executives most employers prefer to first informally negotiate the dismissal (amongst other reasons, to already agree on the amounts to be paid) before proceeding officially with the dismissal and then entering into a settlement agreement immediately afterwards. The middle way is sometimes to notify the dismissal and then present the senior executive with a settlement proposal immediately afterward. For the senior executive to agree to sign a settlement agreement, the proposal will usually have to include more than the statutory minimum entitlements.

To validly sign a settlement agreement, the employee does not have to be assisted by a trade union representative or outside counsel. However, in practice, senior executives usually seek independent legal advice. Direct negotiations between the parties are not conducted on a 'without prejudice' basis and, in principle, the employee could always use the elements of such negotiations and the information disclosed during those in legal proceedings (should the negotiations fail). Therefore, it is recommended to accompany all documents and exchanges with the appropriate reservations regarding the settlement offer's validity, nature, and conditions. By contrast, direct negotiations between the respective parties' counsel take place on a protected basis.

It is worth noting that even if the parties first negotiate the employee's exit, a settlement agreement cannot be entered into with the employee if the notice has not started or if the employer has not officially notified its decision to terminate the contract in the case of an immediate termination. Informal discussions will therefore require trust between parties.

Finally, the employer must always pay attention to the language regulations that exist in Belgium. All official communications between an employer and its employees must be drafted in Dutch, French or German, depending on the employer's location. Depending on the region where the employer is located, non-compliance with the language regulations may be as extreme as the document (e.g., notice letter) being null and void, which for a dismissal can sometimes have dire financial consequences for the employer.

HOW CAN THE CONTRACT BE TERMINATED?

As a general rule, an open-ended employment contract can be terminated at any time either subject: to working a prior notice period (option 1) or with immediate effect (option 2).

Depending on the option chosen, different formalities apply. Except in specific circumstances (e.g. for an employee representative in the works council), the employer does not need any prior authorisation (e.g. from a court or administrative body) to dismiss a senior executive.

If option 1 (working a prior notice period) is chosen, then the employment contract continues to be performed during such a notice period. When an employer serves notice on the senior executive, that notice must be given in the correct language and in writing, either by:

- a registered letter, which is treated as effective notice on the third working day after it has been posted; or
- delivery by a bailiff. This method is normally

only necessary in urgent cases.

The notice period runs from the first day of the week (i.e., Monday) following that in which the notice has been become effective. In practice, if notice is given by registered letter, it should be sent at the latest on Wednesday so that the notice starts on the Monday of the following week.

Any notice of termination must clearly specify the commencement date and the duration of the notice period but not the end date. Specifying the end date can make the notice ambiguous and may affect its validity: this date cannot be determined precisely because of the possibility that the employment contract could be suspended by law (e.g., due to holidays or sickness), and the notice period could be extended as a result.

The 'suspension' of the notice period (and the uncertainty about when the notice period will come to an end) is the main reason why employers much less frequently choose this option 1 over option 2. Option 1 is mainly considered by the employer if a handover of the senior executive's tasks is crucial or as part of a negotiation strategy to have the senior executive sign a settlement agreement (e.g., in return for not being obliged to perform the entire notice period).

Finally, the senior executive has the right to work during their notice and can only be released from serving the notice ("garden leave") if he/she explicitly agrees to doing so. If there is no explicit agreement, then there is a risk of a constructive dismissal. In Belgium, a period of garden leave will more often than not be agreed upon in a settlement agreement concluded after the notice starts. This is also a reason why, for senior executives, option 2 is more often chosen over option 1 as there is no guarantee that the employee will agree to the garden leave, which could threaten confidentiality (as the senior executive would continue to have access to business transactions, contracts, and trade secrets during the notice). This option is sometimes also used as a way to prevent the executive from competing with the employer as the employee is in principle prohibited from competing with the employer while the employment contract is still in force (regardless of any non-compete clause included in the agreement).

When the employer terminates the employment contract with immediate effect (option 2) (or with insufficient notice), it will be liable to pay the employee in lieu of notice corresponding to the salary (and benefits) that the senior executive would have received if the employer had terminated the employment contract by giving (sufficient) notice. This option is easy to implement, and no formalities apply. The dismissal becomes effective as soon as it is communicated to the senior executive. Even though no legal formalities apply, in practice and for reasons of proof, a termination letter is handed over to the senior executive who is then asked to date and sign a copy for receipt. Should he/she refuse to do so for some reason, the letter is sent the same day by registered post.

Finally, the employment contract can be terminated by combining both previous options: this starts with giving notice and then changes to an immediate termination of the contract by paying in lieu of notice ("PILON") for the remainder of the notice period.

In the event of a serious cause (i.e., a fault so serious that it makes the continuation of the working relationship immediately and definitively impossible), the senior executive may be dismissed without any notice or a PILON. However, the employer must observe the following strict formalities:

- it must dismiss the employee within three working days of the day it became aware of the serious facts; and
- it must inform the employee, by registered post, of the reasons for his/her dismissal at the same time, or within an additional period of three working days.

POTENTIAL APPLICABLE TERMS IN BELGIUM

All employees in Belgium have:

- Statutory rights – derived from the federal and regional (labour) legislation (e.g. the Employment Contracts Act), such as the right to a minimum notice or PILON, and the right not to be unfairly dismissed or discriminated against for certain prescribed reasons;
- Industry-specific rights – derived from collective bargaining agreements concluded within the applicable industry (industries are organised in so-called 'joint committees', in which both representative employer's associations and trade union are represented), such as specific dismissal

formalities (e.g. in some sectors an employer can only dismiss an employee for personal and/or performance reasons after first issuing two written warning letters or after following a specific dismissal procedure) or additional compensation in the case of dismissal; and

- Contractual rights – largely governed by the (written) contract of employment but also subject to certain implied terms (such as the concept of 'use'); those rights are only valid to the extent that they are more favourable for the senior executive than the statutory and industry specific rights (e.g. a contractual notice period that is longer than the statutory minimum notice period).

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

The concept of 'termination at will' is not something that applies in Belgium. All employees under an open-ended employment contract, irrespective of their seniority, are entitled to receive minimum notice periods (or corresponding PILON) that are set out in legislation and will depend on their length of service and, for white-collar employment contracts older than 2014, on the senior executive's level of remuneration (see below).

If the notice served by the employer on the senior executive would be deemed null and void (e.g., it does not contain the mandatory information), then the employment contract will be terminated without notice and the employer will be liable to pay the senior executive a PILON.

It is also possible (but not very common) that employment contracts set out a longer notice period in which the employee would have a notice period that is longer than the statutory minimum. If the employer would terminate the contract by only complying with the statutory minimum notice period (or statutory minimum PILON), then the employer exposes itself to a claim for a (complementary) PILON corresponding to the difference between the statutory notice period notified/paid and the contractual notice period that would have been due.

If the employer would unilaterally modify the terms and conditions of the employment contract with the senior executive, then the latter may consider, under certain circumstances, that the employer has unilaterally and substantially modified an essential element of the employment contract, and so that would entitle him/her, if correctly invoked and in due time, to consider his/her employment contract terminated with immediate effect and to claim the payment of a PILON; however, this a risky strategy for the employee because if he/she were found by the court to be in the wrong, then he/she will responsible for the termination and owe a PILON to the employer.

Similarly, if the employer would be in breach of its contractual obligation(s), then the senior executive could, amongst other things, seek the employment contract's judicial termination or directly invoke, under certain conditions, that the employer has therefore demonstrated its intention to end the contract. If the labour court finds that the claimed shortcoming warrants the employment contract's termination, then the senior executive will in principle be awarded damages for a sum corresponding to the amount of the PILON that would have been due if the employer had dismissed the employee.

If the employer wrongfully dismisses the employee for serious cause (i.e., if a labour tribunal would find that the employer had not proved the reasons for the dismissal or if the formalities were not complied with), then a PILON will be due to the employee as if the employer had dismissed the employee with immediate without serious cause. However, there is neither a right nor an obligation to reinstate the senior executive.

"Golden Parachute" clauses, although rare in Belgium, are worth checking to ensure that the senior executive is not entitled to receive any additional payment and/or benefits in the event of termination. Given their level of seniority within an organisation, senior executives may also benefit from other contractual provisions outside their contract of employment, such as bonus or commission schemes, long term incentive plans or other equity arrangements. These documents and the rules they set out will also need to be factored into termination discussions.

STATUTORY CLAIMS

Belgian legislation on employment and labour law is extensive and very protective towards employees in general, and specifically regarding dismissal.

Deviations from such provisions are not allowed, unless they are more favourable to the employee. Waivers of claims are strictly regulated.

MINIMUM STATUTORY NOTICE PERIOD

Notice periods are fixed by law for open-ended employment contracts taking effect from 1 January 2014. These notice periods only depend on the employee's seniority. They are expressed in numbers of weeks.

For open-ended contracts that took effect before 1 January 2014, i.e., before the Belgian labour law reform on notice periods entered into effect, the notice period to be observed comprises two parts that must be added up. The first part ('step 1') is based on the employee's seniority acquired before 1 January 2014 and will be calculated according to transitional arrangements; the second part is based on the employee's seniority since 1 January 2014 and is calculated on the basis of the new rules ('step 2').

Sector- or company-level collective bargaining agreements must also be reviewed to verify whether longer notice periods apply.

PAYMENT IN LIEU OF NOTICE

If the option of a dismissal with immediate effect is chosen or in the case of a wrongful dismissal, then a PILON must be paid. This PILON is calculated on the basis of the 'on-going' remuneration and the monetary value of (fringe) benefits acquired under the contract (e.g. private use of a company car or mobile phone, hospitalisation insurance, supplementary pension plan) for the duration of the notice period that would have had to be served.

'On-going' remuneration means the remuneration to which the employee is entitled to at the time of termination (with immediate effect) of the employment contract. If the remuneration and/or the benefits are (partially) variable, then the rule is that the average variable pay of the last twelve months of employment prior to the dismissal must be taken into account. Inclusion of equity-based incentives (e.g. share options, RSUs, SARs) is controversial and often the subject of many discussions between the parties.

OUTPLACEMENT

In addition, the employer must offer outplacement in writing to all those employees who are entitled to a notice period or PILON of at least 30 weeks, regardless of the age of the employee. Employees who are not entitled to a notice period or PILON of at least 30 weeks but who are at least 45 years old and have at least one year of seniority within the company, will also benefit from outplacement.

Outplacement is a package of accompanying services and advice that, following the employer's instructions, are provided by a service provider, individually or in a group, to enable an employee to find a job with a new employer or to develop a professional activity on a self-employed basis within the shortest possible time.

If the contract is terminated with a PILON, then the employer may deduct four weeks' salary from the PILON to cover the costs of outplacement.

REDEPLOYMENT MEASURES FOR ONE THIRD OF THE NOTICE PERIOD

Since 1 January 2023, employees with a notice period (or PILON) of at least 30 weeks are given the right to take-up 'employment-enhancing measures' (e.g. additional outplacement, training or coaching) during the notice period or after payment of the PILON with a value equal to the employer's social security contributions on the salary for one third of the notice period or on one third of the PILON (minus four weeks for the outplacement).

These measures will therefore be financed by the employer's social security contributions on the salary for one third of the notice period or on one third of the PILON, which will be deducted by four weeks for regular outplacement.

If the employee would be dismissed with a notice period, then he or she has the right to be absent from work (with pay) during the notice period as from the beginning of this notice period to follow these redeployment measures. If the employee would be dismissed with immediate effect by payment of a PILON, then the employee should remain

available to follow these redeployment measures.

OTHER END OF SERVICE CLAIMS AND LIABILITIES

After the termination of the employment contract, the senior executive may also be entitled to the following payments:

- Salary (and possibly commissions) until the last day of employment. In Belgium, a copy of the payslips of the last 12 months is usually required to make a proper calculation of the dismissal's total cost;
- Pro-rated end-of-year premium (to be verified in the collective bargaining agreement at sector-level);
- Departure holiday pay (holiday pay for unused days of holiday, and an advance on holiday pay for the following year's accrued days of holiday);
- Remuneration for public holidays that fall within 30 days of the termination date, provided that the employee has not yet found a new employer;
- Prorated eco-vouchers (to be verified in the collective bargaining agreement at the sector-level);
- Under certain conditions, a 'clientele indemnity' if the senior executive has the status of a sales representative (i.e. an employee whose function mainly consists of prospecting and visiting clients to negotiate or conclude contracts on behalf of his/her employer). Such a 'clientele indemnity' will be a payment that is equal to the salary of three months if the sales representative was employed during a period of between 1 to 5 years and will be increased by one month's salary for each started additional period of five years of seniority;
- Under certain conditions, older senior executives who are at least 60 years or above (or exceptionally 58) may be entitled to a monthly company supplement from their former employer on top of their future unemployment benefits as from the end of the notice period or period covered by the PILON until they reach their retirement age.

INJUNCTIONS AND RESTRICTIVE COVENANTS

All employees are by law bound by confidentiality obligations and restrictions from unfair competition after the end of their employment contract, without the need for specific restrictive covenants.

However, additional restrictive covenants are fairly common for senior executives. In Belgium, the most common post termination restrictions are:

<u>Non-compete clauses:</u>
They are very strictly regulated under Belgian law: the employees must reach a certain salary threshold, prohibited activities must be well-defined, their territorial scope must be strictly defined, their duration must be limited (or at least reasonable), etc., and these conditions depend on the type of non-compete clauses (regular non- compete clause, "international" non-compete clause, non-compete clause for sales representative).

Most importantly, except for the clause for sales representatives, non-compete clauses must include the payment of a 'non-compete indemnity' to the employee equal to at least 50 per cent of the salary corresponding to the duration of the non-compete provision, unless the employer waives the application of the clause within 15 days after the employment contract definitively ends (e.g. if the non-compete obligation is applicable for 12 months, then a 'non-compete indemnity' corresponding to six months' salary must be paid).

When dismissing a senior executive, it is important to know that a non-compete clause will not apply in the case of dismissal, except if the contract includes an international non-compete clause that explicitly provides its application for a dismissal. Therefore, if the employer would like its senior executive to be bound by a non-competition restriction after a dismissal, it will often have to enter into negotiations with the employee to include such a post-contractual restriction in a (settlement) post- termination agreement (bearing in mind that such a restriction will need to be sufficiently financially compensated for the employee to agree to it), without any guarantee before the dismissal that the employee will agree on this point.

<u>Non-solicitation, non-dealing and non-poaching clauses</u>

These entail a restriction on approaching and/or enticing away: customers, suppliers, employees, or external consultants of the (former) employer either during the employment relationship and/or during a certain period after the termination.

Unlike the non-compete clause, a non- solicitation clause is not explicitly regulated under Belgian law. Based on the principle of 'freedom of labour and commerce', employees are, in principle, allowed to approach other customers, suppliers, employees, or external consultants of the former employer provided that such actions cannot be qualified as unfair or disloyal poaching.

The question whether an employee's freedom of labour and commerce can be contractually restricted with a non-solicitation clause remains debated in case law, and it might be possible that a labour court considers such a clause as null and void depending on the wording of the clause and the extensiveness of the restrictions it places on the employee.

For any breach of the restrictive covenants, the employer may refer the matter to the labour courts to obtain an (ex parte) injunction against the senior executive and/or financial compensation. Financial compensation can be determined in law by way of lump sum damages (e.g., the breach of a non-compete clause) or as provided for in the covenants (e.g., a lump-sum amount of damages for the violation of a post-termination confidentiality clause). Otherwise, the employer has to demonstrate the extent of its damages (reputational damage, loss of contracts, etc.). In legal proceedings, the labour tribunal will first verify whether the clause that the employer seeks to see enforced against its former employee meets all legal requirements.

MANIFESTLY UNREASONNABLE DISMISSAL AND UNFAIR DISMISSAL

Any dismissed senior executive with at least six months' seniority has the right to request the specific reasons that have led to his/her dismissal. This must happen within a specific timeframe following the dismissal. When an employer does not respond by registered letter to this request within two months, it is liable to pay the employee a lump-sum civil fine equal to two weeks' remuneration.

In addition, the termination of an open-ended contract of at least six months must not be 'manifestly unreasonable'. A dismissal will be considered 'manifestly unreasonable' if it presents no link with the employee's behaviour, skills or with the so-called 'operational requirements of the employer' (i.e. economic reasons) and if the dismissal would not have been decided upon by any other normal and reasonable employer if they were faced with the same facts. If a dismissal is considered 'manifestly unreasonable', then the employee may claim compensation of three to 17 weeks' salary. The amount of the compensation payment depends on the unreasonableness of the dismissal.

A senior executive may also introduce a claim for a so-called "unfair dismissal" under the general civil law principle of abuse of right by the employer when exercising its right to dismiss the employee. In such a case, the employee has to prove that the employer committed a fault in exercising its right, his/her damages, and the causal link between the fault committed by the employer and the damages. It is currently being debated whether and under what circumstances such damages could be cumulated with the damages for manifestly unreasonable dismissal.

REDUNDANCY

Where (multiple) redundancies are planned to take place, the employer should verify if (i) any sector-level provisions provide that prior information and consultation or any other formal process with the employee representatives should be complied with prior to the dismissals taking place or (ii) if the redundancies qualify as a collective dismissal, in which case the strict legislation on collective dismissals applies and the employee may be entitled to redeployment damages, collective redundancy damages and/or a closure damages on top of the notice/PILON.

DISCRIMINATION, WHISTLEBLOWING AND OTHER STATUTORY CLAIMS

A dismissal can be considered discriminatory if it is based

on one of the 'criteria' protected by law (e.g. age, sexual orientation, religious and philosophical conviction, handicap, health condition, sex, ethnic origin) and if no legitimate ground(s) for justification exist(s) for this difference in treatment. It is up to the employer to prove that there was no question of discrimination if the employee invokes facts from which it may be presumed that there has been direct or indirect discrimination. If the employer fails to do so, then the employee may claim a lump-sum payment for discrimination equal to six months of salary on top of the PILON or claim the full compensation of his/her damages provided he/she can prove their extent. It is currently being debated whether and under what circumstances such damages for discrimination could be cumulated with the damages for manifestly unreasonable dismissal.

Whistleblowing claims are increasingly being used by senior executives (particularly if they hold a regulated/financial or health and safety function) as a negotiating factor in increasing any settlement package. Recent legislative changes have introduced a strict protection mechanism to prevent retaliation against whistle-blowers. If the senior executive can demonstrate that his/her dismissal was taken as a retaliatory measure during the protection period, then he/she will be entitled to additional damages of between 18 and 26 weeks' remuneration. Such damages cannot be cumulated with the damages for manifestly unreasonable dismissal.

In general, it is always important to verify that the senior executive does not benefit from a specific protection against dismissal. If the answer is positive, then the employer (i) will, in most cases (e.g. employees on maternity leave, employees that have filed an official complaint for moral or sexual harassment at work, employees with reduced working hours in the context of a so-called 'time credit') have to be able to demonstrate that the dismissal is not linked to any ground for which the employee enjoys a protected status or (ii) will, in very specific and limited cases, have to follow a preliminary procedure to have the dismissal recognised first (e.g. a candidate or elected member within the works council, a prevention advisor). However, the fact that the employee is protected against dismissal never prevents the employer from dismissing the employee. The consequences of not respecting such protection are only pecuniary in nature.

SENIOR EXECUTIVES WHO ARE ALSO DIRECTORS

If the senior executive is also a director of the company, then it is important to take into account the following:

1. A senior executive's mandate as a director, as the case may be, is separate from his/her role as an employee of the company. This mandate may not be exercised under a contract of employment. Therefore, the termination of a senior executive's employment contract does not necessarily terminate any directorships that they might hold.
2. The senior executive should resign from any directorships held in the company and any associated companies at the time their employment is terminated. Usually this will be included as part of the settlement agreement. If the senior executive refuses to resign voluntarily, then the shareholders can resolve to dismiss the director (in principle, by a simple majority vote unless otherwise provided in the Articles of Association or any applicable shareholders' agreement). Unless otherwise provided in the Articles of Association, the general assembly can terminate the mandate of a director for legitimate reasons, without notice or severance pay.
3. As long as the individual remains a director, he/she will be authorised to represent the company in accordance with the Articles of Association and be entitled to attend board meetings, access minutes and other paperwork related to his/her appointment as a director.
4. The resignation or dismissal of a director of a Belgian company has to be filed with the Office of the Clerk of the Enterprise Court and published in the Annexes to the Belgian State Gazette.
5. Settlement sums may have to be disclosed in the company accounts and, if the company is a listed company, settlement sums will need to be identified in the directors' remuneration report. A listed company must have a remuneration policy approved by its shareholders. With every material change and at least every four years, the remuneration policy is submitted to the general assembly for approval. Further, the

company must publish the remuneration policy on its website.

6. Irrespective of whether the company is listed or not, announcements should be agreed if possible. It goes without saying that the contents of any announcements should not be libellous or misleading, and they should be consistent with any agreed reference (which are increasingly limited to confirming job title and dates of employment).

SHAREHOLDER APPROVAL

Unless the Articles of Association (or, as the case may be, the resolution in which the director was appointed) provide otherwise, the general assembly may, at the time of termination, grant severance pay to the senior executive in his/her capacity as a director. However, the Articles of Association may provide that the mandate of a director can only be terminated subject to a notice period or the granting of a severance payment. In listed companies, shareholder approval of the termination payment will be required if the severance package of a director, a member of the management board or the supervisory board (or a person in charge of the management or in charge of the day-to-day management), exceeds t month's remuneration (and, if the severance package exceeds 18 months' remuneration, the shareholders may only approve it upon a unanimous and reasoned opinion of the remuneration committee).

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CALIFORNIA

Terminating an executive's employment in California is certainly not as complicated as doing so in the UK. However, termination of an executive employed in California still comes with its own careful considerations. Below are some factors that any employer in California should consider during every stage of an executive's employment.

HIRING SENIOR EXECUTIVES – EMPLOYMENT IS GENERALLY "AT WILL"

California is an "at-will" employment state. This means that, absent a written contract to the contrary, an employer can fire an executive at any time, for any reason, with or without reason, as long as the reason is not discriminatory.

Because of this, some executives will prefer their employment to be delineated in an employment contract that constrains employee termination to "for cause" and includes circumstances under which employees can be lawfully terminated. While this is restricting, some employers will also prefer their executives to enter into employment agreements to specify the terms, outline the payments and benefits to which the executive will be entitled on the executive's termination of employment and restrict the executive's competitive activities following termination of employment (more on this below).

Further, certain employment agreements of the senior executives of public companies must be publicly disclosed and are therefore afforded scrutiny by shareholders and the media alike. Whether an executive employment agreement is necessary depends on the nature of the employer's business and the executive's role. However, it is rarely recommended that an employer lose the protection of the "at will" nature of employment afforded by California law. Accordingly, employers can choose to draft "offer letters" that emphasize the at will nature of an executive's employment, but still describes the terms of the employment and restricts the executive from unfair competition following his or her separation from the employer.

EMPLOYER'S ENFORCEABILITY OF NON-COMPETE PROVISIONS

It is certainly understandable that employers seek to secure agreements from executives not to compete if and when the employment relationship ends. The purpose is to lessen, or entirely eliminate, competition with the employer by someone who is knowledgeable about the employer's business practices, strategies and confidences that would enable the executive to "compete" on extremely advantageous terms.

While employers certainly can prohibit executives from engaging in competitive practices while they are employed, most states will not allow contracts against post-employment competition. In California, employment policies that prohibit competition by former executives (e.g., a covenant not to compete) are unenforceable in California unless an employee's non-compete is covered by a narrow statutory exception (see California Business and Professions Code §§ 16600). A non-compete provision may only be enforced if they are executed in conjunction with the dissolution or sale of a business by (1) a business owner, (2) members of limited liability company or (3) partners in partnership (Bus. & Prof. Code §§ 16601 – 16602). Otherwise, a non-competition agreement will not be enforceable and should not be included in any offer letter or employment contract. In fact, terminating an executive for refusing to sign a covenant to not compete is a violation of public policy.

However, the good news is that employers can prohibit "unfair competition" by former executives. The concept of unfair competition is based on the public policy that competitors must conduct themselves in a fair and lawful manner.

For example, unfair competition can include an executive using a former employer's trade secrets or confidential customer lists. If an employer wants to include an unfair competition clause in its offer letter or employment agreement with an executive, the clause, to be effective, should include only conduct amounting to unfair competition and be limited in duration, territory and job description. Any overreaching in this clause could jeopardize the validity of the clause. Remedies for a violation of unfair competition clauses

could include injunctive relief, actual damages for lost profits, damages based on unjust enrichment, liquidated damages, and punitive damages.

CONSIDER WHETHER TO AGREE OR NOT AGREE TO ARBITRATE CLAIMS?

Another key factor employers must consider from the outset of hiring an executive is whether it should have the executive sign an arbitration agreement. Arbitration is often a favourable method of resolving disputes for all parties as it is quick (compared to the frequent two-year delay in California's state courts), confidential and the ruling is determined by an experienced arbitrator (as opposed to a jury of twelve lay persons – often non-executive employees). As of February 2023, California employers can require executives to waive, as a condition of employment, the right to litigate claims under California's Fair Employment and Housing Act (FEHA) and the California Labor Code. As codified in California Government Code §12940 the FEHA is California's primary law that provides employees with protection from discrimination, retaliation and harassment in employment.

SENIOR EXECUTIVE TERMINATION

Document, Document, Document

Given the plaintiff-friendly nature of the state's employment laws, California is a heavily litigious state (in fact it is the sixth most litigious state in the US according to the Employment Opportunity Commission). Considering that California is the most populous state in the US and arguably has the most protections for employees, it is up to employers (and their counsel) to thoroughly evaluate the risks of terminating an executive well before the executive is notified. Proper and ample documentation of an employer's reasoning for severing the employment relationship with an executive employee is the essential to minimizing the threat of litigation.

For example:

Is an executive making comments to an employee that the employee has reported to be harassing in nature? Document this in writing and promptly investigate the claims.

Is an executive making comments to an employee that the employee has reported to be harassing in nature? Document this in writing and promptly investigate the claims.

Has an executive told you they have a disability? Document this in writing and engage in a good faith interactive process with the executive to determine whether a reasonable accommodation is available.

Usually considered to be unique to the US a person's employment is often tied to their identity. Because of this, when an executive feels they are wrongfully terminated, it is rare they will simply "move on" and have the benefit of striking first (e.g. filing a publicly available Complaint for Damages in court). Employers must be sure they have documented the true, lawful reason for termination to alleviate any doubt of pretext or discriminatory animus. Failure to properly document can be a costly mistake, as discussed below.

CONSIDER THE COSTS ASSOCIATED WITH DISMISSING A SENIOR EXECUTIVE (EVEN IF CARRIED OUT CORRECTLY)

California is known as the West Coast state with the Hollywood sign, the Golden Gate Bridge, for having the most lawyers, and also the state with unimaginable runaway jury verdicts. While this is likely in part to employee friendly politics and cities (e.g., Los Angeles, San Francisco), it is also in part to the punitive damages available for private employers. Punitive damages (sometimes referred to as exemplary damages) are often included in claims for discrimination (often one of the most significant areas of legal risk for US employers) and are awarded to punish an employer-defendant for the purpose of deterring future wrongdoing.

Unlike federal law in the United States, punitive damages are

not subject to statutory caps in California and require a plaintiff to prove by clear and convincing evidence that defendant behaved in a manner that constitutes oppression, fraud or malice (California Civil Code § 3294).

For illustration, in 2022, a plaintiff, a former Senior Vice President of defendant, alleged he was retaliated against and wrongfully terminated after working four decades at the company (Rudnicki v. Farmers Insurance Exchange, 2022 WL3097795). His termination came just prior to a class action settlement, stemming from a lawsuit filed by female attorneys at the firm who alleged gender discrimination. The former executive alleged that the company had been concerned about what might be revealed about their gendered pay practices if he testified and terminated him instead. The plaintiff's suit alleged wrongful termination, retaliation, in addition to age and disability discrimination. While most of the claims were dismissed during pre-trial litigation, the retaliation claim prevailed at trial with jurors determining that the company violated the California Fair Employment and Housing Act.

The executive was awarded $5.4 million in compensatory damages and $150 million in punitive damages.

Beyond complying with applicable state laws and documenting an employer's lawful, non-discriminatory reason(s) for terminating an executive, California employers should also consider the benefits of entering into a separation agreement with the executive including a release and waiver of claims provision. While the separation agreement may be costly, release of claims provisions are valid (subject to certain restrictions) and are well worth the costs involved compared to the cost of future litigation. Additionally, it is always recommended that employers have Employment Practices Liability Insurance, to the extent they can afford to do so, to mitigate the stressful costs associated with litigation.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in California. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at March 2023.

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DENMARK

MANAGING DIRECTOR OR SALARIED EMPLOYEE?

In terms of senior executives, Danish employment law generally distinguishes between (i) salaried employees and (ii) managing directors. Salaried employees are covered by mandatory Danish employment law whereas managing directors, as a clear starting point, are subject to freedom of contract. Thus, the legal status of managing directors and senior executives who are salaried employees is governed by different rules.

The legal status of a salaried employee is mainly governed by the Danish Salaried Employees Act. As a general rule, senior executives who are not managing directors will be considered salaried employees.

Managing directors are, as a general rule, not protected by the provisions laid down in the Danish Salaried Employees Act or other mandatory Danish employment legislation since managing directors are, in principle, not employed in a subordinate position and consequently not considered employees. It is not the title, but the actual responsibility of the position that is decisive for a person having the status of a managing director. Usually, a managing director is registered as the managing director of the company with the Danish Business Authority, refers directly to the board of directors, and is in charge of the daily management of the company. In some instances, persons who are employed by a company without holding the position of managing director do not enjoy protection under mandatory Danish employment legislation either, e.g., in the event that they are major shareholders in the company.

THE APPROACH

In Denmark, there are a number of ways in which the dismissal of a managing director or salaried employee can be executed. Much will depend on the circumstances and reason for the termination, the risk of claims, and whether there are reputational and regulatory issues to consider. Some employers will prefer to unilaterally terminate the managing director or salaried employee; others may want to explore settlement by entering a severance agreement as a way of mitigating the risk of potential claims and future litigation - or simply because the working relationship with the managing director or salaried employee has been good and the employer wishes to acknowledge this.

The use of severance agreements for senior executives - both managing directors and salaried employees - is common in Denmark. Usually, a severance agreement finally settles all claims a senior executive might have against a company with regard to the executive service or employment relationship and its termination. However, the Danish courts can amend or set aside a severance agreement in accordance with the Danish Contracts Act if it is deemed unfair - especially if it favours the company to a large extent.

HOW CAN THE CONTRACT BE TERMINATED?

Pursuant to the Danish Salaried Employees Act, the termination of an employment contract must be given in writing. In Danish legal practice, the requirement of a written termination has not been considered as a condition of validity but rather as a strict rule on the burden of proof.

On the other hand, the termination of an executive service contract can be communicated either verbally or in writing.

However, it is good practice to both give the termination verbally and in writing, i.e., have a meeting with the senior executive explaining the basis for the termination and handing over a termination letter. Due to considerations of proof, the termination letter should be printed in two copies, both to be signed by the company and the senior executive.

POTENTIAL CLAIMS IN DENMARK

All employees - including senior executives who are salaried employees - in Denmark have:

- Contractual rights - governed by the contract of employment; and
- Statutory rights - derived from mandatory employment legislation, such as the right not to be unfairly dismissed or discriminated against for certain specified reasons.

All managing directors in Denmark have:

- Contractual rights - governed by the executive service contract; and
- Possibly statutory rights - derived from mandatory statutory legislation, such as the Danish Act on Restrictive Employment Covenants and possibly the Act on Prohibition against Discrimination in respect of Employment. However, as managing directors are subject to freedom of contract, only a few statutory rights are applicable.

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

The concept of 'termination at will' does not apply in Denmark. All salaried employees are entitled to receive the minimum notice period set out in the Danish Salaried Employees Act, which strongly depends on the length of service. The parties may agree in writing that the employee's term of notice is extended, provided that the company's term of notice is extended accordingly.

As managing directors are not governed by mandatory Danish employment legislation, the executive service contract will set out the notice period. A managing director will usually be entitled to a notice period of either 6 or 12 months, typically twice the notice period of the company.

If the executive service or employment contract is terminated in breach of the notice provisions, the company exposes itself to a claim of compensation equivalent to the payment which should have been paid to the managing director or salaried employee during his/her notice period.

Irrespectively of the above, a company is entitled to terminate a salaried employee or managing director without notice due to the employee's or managing director's breach of contract. Termination without notice due to breach of contract requires that the breach has been 'material'. A material breach might for instance be if the mutual loyalty obligation is violated, the managing director or salaried employee starts a competing business during the term of the executive service or employment relationship, or if the managing director or salaried employee unjustly enriches him-/herself at the company's expense. Isolated episodes of abnormal behaviour may also constitute a material breach. In order for a breach of contract to be material, it requires gross negligence from the managing director or salaried employee. The fact that the managing director's or salaried employee's commercial decisions have caused the company losses is not sufficient to establish a breach as long as the managing director or salaried employee has acted within his/her authority.

If a company wishes to plead a material breach of the contract, the company must respond without delay to the breach causing the termination without notice of the contract. If the company does not respond without delay, the company may not be able to plead a material breach of the contract due to inactivity.

As a general rule, a wrongful dismissal does not make the termination invalid. However, the employer may be required to pay compensation due to wrongful dismissal. The amount of such compensation is determined with due regard to the period of service of the employee and any other circumstances of the case.

PAYMENT IN LIEU OF NOTICE

In Denmark, payment in lieu of notice is uncommon and may only be agreed upon in a severance agreement. Thus, an employer may not unilaterally impose payment in lieu of notice as the employee has the right to remain employed throughout his/her notice period. Payment in lieu of notice may also impact the employee's duty of loyalty towards the company in the notice period, the possibility for the company to instruct the employee to take holiday in the notice period, the employee's right to unemployment benefits, etc. Instead, the company may opt to release the employee from his/her duties during the notice period.

WHAT CONSTITUTES DAMAGES FOR WRONGFUL DISMISSAL?

The party who has neglected to fulfil the obligations set forth in the executive service contract or employment contract must indemnify the other party for any loss suffered in this respect.

The general rule is that a managing director or salaried

employee who is wrongfully dismissed without notice is entitled to claim damages representing the pay and benefits that he/she would have received during his/her regular notice period.

Thus, the level of damages payable is the same as if the employee had been dismissed with regular notice, including:

- Bonuses - salaried employees are entitled to a proportionate share of their bonus. For managing directors, it depends on the executive service contract whether a claim for damages includes the value of bonus.
- Pension scheme benefits - if the managing director or salaried employee is entitled to employer-paid pension contributions, it shall be included in a claim for damages.
- Loss of other benefits such as a company vehicle, free mobile phone, computer, which the managing director or salaried employee shall be compensated for by receiving a monthly amount corresponding to the monthly value for tax purposes.
- Accrual of holidays accrued during notice period and holiday allowance – employees accrue holiday during their notice period and holiday allowance must be paid for any untaken holiday. Managing directors accrue holiday in accordance with their executive contract.

In addition, a wrongful dismissal may have an impact on how the managing director or senior employee is treated under an applicable stock option program in terms of good- and bad-leaver provisions.

LOYALTY OBLIGATION AND RESTRICTIVE COVENANTS

During the term of the employment, managing directors and salaried employees are subject to a general obligation of loyalty towards the company, implying, inter alia, that the managing director or senior employee is not entitled to perform competing business. This loyalty obligation also applies during a period of notice, including a possible release period. This means, inter alia, that an employee who is released from his/her duties - and who is basically entitled to commence new employment - may not perform competing business until after the expiry of the release period.

In Denmark, the most common post-termination restrictions are:

- **Non-compete** – prevents an employee or former employee from taking a financial interest in a competitor to the company during the employment and for a defined period of time after the employment has ended.
- **Non-solicitation** - prevents a former employee from having business relations with or being employed by customers or clients of a former employer.

Non-hire clauses, i.e., agreements that a company concludes with other companies or with an employee with the intention of preventing or restricting the specific employee or other employees from obtaining employment with another company, are prohibited under the Danish Act on Restrictive Covenants.

Non-competition and non-solicitation clauses are regulated in detail by the Danish Act on Restrictive Covenants. This act lays down conditions for the validity of the restrictive covenants, e.g., the length of the employment relationship prior to the enforcement of the restrictive covenant, compensation during the enforcement period, and the duration of the covenant.

As a clear starting point, the Danish Act on Restrictive Covenants only applies to restrictive covenants entered into with employees. This means that the provisions of the act, as a general rule, do not apply to managing directors. However, one exception applies in this respect: A non-competition clause entered into with a managing director is regulated by section 11 (1) of the Danish Act on Restrictive Covenants regarding upholding of the non-competition clause in the event of termination. Pursuant to Section 11 (1) of the Danish Act on Restrictive Employment Covenants, a managing director or a salaried employee will only be bound by the non-competition clause if one of the following conditions are met:

1. the termination is justified by the managing director's or salaried employee's circumstances (e.g., unacceptable behaviour, performance, or absence due to illness); or
2. the managing director or salaried employee terminates his/her contract without this being justified by the company's failure to fulfil its obligations.

STATUTORY CLAIMS

Danish employment legislation establishes a number of statutory rights that seek to protect employees or groups of employees irrespective of the contractual position that may have been agreed between the parties. Much of this legislation implements EU law and such rights are, therefore, common throughout the EU although the method of implementation by individual member states may differ.

Salaried employees are specifically protected under the Danish Salaried Employees Act which, for example, prohibits unfair dismissal. As a general rule, managing directors do not enjoy such statutory rights as executive service relationships are subject to freedom of contract.

UNFAIR DISMISSAL

As mentioned above, salaried employees are protected against unfair dismissal. To qualify for this protection, the salaried employees must have been continuously employed by the company or organisation for at least one year.

An unfair dismissal claim may arise where an employer terminates an employee without the termination being reasonably justified by the circumstances of the company or the conduct of the employee. As a clear starting point, a dismissal with reference to an employee's lack of performance will only be justified in case the employee has received a prior written warning. If the termination is deemed unfair, the employer must pay compensation to the employee. The amount of such compensation is determined with due regard to the period of service of the employee and any other circumstances of the case, but it may not exceed the salary of the employee for a period corresponding to half of the term of notice which the employee is entitled to. If the employee is over 30 years of age at the time of notice of termination, the compensation may, however, amount to up to three months' salary. If a salaried employee has been continuously employed in the undertaking for at least 10 years, the compensation may amount to up to four months' salary. After 15 years' continuous employment in the company or organisation, the compensation may amount to up to six months' salary. In this respect, the monthly salary comprises ordinary pay, any bonus, pension contribution, value of free car, telephone, etc.

Managing directors, however, are not protected against unfair dismissal. Thus, the employer's scope for terminating a managing director is therefore broader.

SENIORITY-BASED SEVERANCE ALLOWANCE

Generally, a managing director is not entitled to financial compensation on termination of the employment relationship unless otherwise agreed.

Pursuant to the Danish Salaried Employees Act, a salaried employee who is dismissed by the employer after continuous employment of 12 or 17 years is entitled to compensation corresponding to respectively one- or three-months' salary. Such compensation is not payable until the expiry of the term of notice.

PRO-RATED BONUS

Pursuant to Section 17a of the Danish Salaried Employees Act, a salaried employee who is subject to a bonus scheme and whose employment relationship is terminated during a bonus accrual period shall be entitled to a pro-rata share of the bonus payment that he/she would have received for the bonus accrual period if he/she had remained employed with the employer, having regard to the length of his/her service in the bonus accrual period.

Managing directors, however, do not have a claim for pro-rated bonus unless otherwise agreed upon.

HOLIDAY ALLOWANCE

Salaried employees are covered by the Danish Holiday Act. Usually, the company will notify a dismissed employee to take accrued holiday during the notice period. If the employee is being released from his/her duties, the employer may consider almost all accrued holiday to be taken in the release period in accordance with the Danish Holiday Act.

The company is obliged to pay holiday allowance for unused holiday to the Danish Holiday Account in accordance with the applicable rules in this respect. Holiday allowance constitutes 12.5 per cent of the employee's remuneration qualifying for holiday allowance.

Whether a managing director is entitled to holiday allowance for untaken holiday will depend on the individual executive

service agreement. Usually, this is not the case.

DISCRIMINATION

Various Danish non-discrimination and equal-treatment regulations prohibit discrimination in connection with termination of employment.

The most important are:

(i) the Danish Act on Prohibition against Discrimination in respect of Employment which prohibits discrimination on the basis of race, colour, religion, political opinion, sexual orientation, age, disability, or national, social, or ethnic origin; and

(ii) the Danish Act on Equal Treatment of Men and Women as regards Access to Employment and Maternity Leave, etc. which prohibits discrimination on the basis of sex.

If an employee is terminated in contravention of the protection afforded in the above-mentioned acts, the employee may claim compensation. Depending on the circumstances, the compensation may correspond to between 6- and 12-months' salary.

It cannot be excluded that managing directors are covered by the above-mentioned act as well. The Danish Act on Prohibition against Discrimination in respect of Employment is highly relevant as regards age discrimination, and if a managing director is terminated on the basis of having reached a certain age, it cannot be excluded that a Danish court may find that the managing director is covered by the Act on Prohibition against Discrimination in respect of Employment and that he/she will be entitled to a compensation equivalent to 9 to 12 months' salary.

In cases of potential discrimination, a shared burden of proof applies. This means that even though the company terminates the contract on another basis than age, the company will still be obliged to prove that the termination was not based on age if the managing director can demonstrate factual circumstances that give rise to a presumption of discrimination. However, to date, there are no court decisions regarding the question whether managing directors are indeed covered by the Act on Prohibition against Discrimination in respect of Employment.

REDUNDANCY

If a managing director or salaried employee is made redundant, the managing director or salaried employee has the same rights as they would have in relation to any other dismissal, e.g., notice period, statutory claims, etc. As a general rule, redundancy is a fair reason for dismissal. The managing director or salaried employee is not entitled to any statutory redundancy payment.

Special rules on mass redundancy apply where a restructure takes place involving the potential redundancy of (i) at least 10 employees in a company normally employing more than 20 and less than 100 employees, or (ii) at least 10 per cent of the number of employees in a company normally employing at least 100, but less than 300 employees, or (iii) at least 30 employees in a company normally employing 300 employees or more. If the special rules on mass redundancy are applicable, the company is required to engage in a hearing and consultation process with the employees and ensure proper adherence to procedures, which also involves notifying the relevant government authorities. If a company does not comply with the statutory rules, this does not entail that the redundancies of salaried employees or managing directors become invalid or that the terms of notice are prolonged as any possible extension of their notice can be included in their regular notice period. However, it may have financial consequences in the form of a fine and the employees may be granted compensation.

REMOVAL OF THE MANAGING DIRECTOR

The authority in a company to dismiss a managing director is linked to the corporate body who also has the authority to appoint a new managing director. In private limited liability and public limited liability companies with a board of directors or a supervisory board, the authority lies with the board of directors or the supervisory board, whereas in limited liability companies without a board of directors, it is the general meeting that appoints and dismisses the managing director.

When terminating a managing director, the director shall be deregistered as managing director with the Danish Business Authority.

However, according to Danish corporate law, a company must have a management board. Hence, a new managing director must be registered with the Danish Business Authority. It is, however, possible to elect an interim managing director if the details of the new managing director are not yet in place. The interim managing director could for example be any of the company's members of the board.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in Denmark. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at September 2023.

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FINLAND

THE APPROACH

In Finland, dismissal of a senior executive can be executed through a termination process provided in the Finnish employment legislation, or through a termination agreement. The circumstances determine which process serves a certain situation better. Before dismissals for a reason deriving from the employer can be executed, larger companies have an obligation to negotiate. On the other hand, if the employer does not have this obligation and there is a vast disagreement regarding the terms of a settlement agreement, the statutory termination process may be a faster way to terminate the employment.

The employer and the employee may jointly agree on terminating the employee's employment by termination agreement. The risk of later disputes can be reduced or even excluded if a separate termination agreement is concluded with the employee. An agreement may also speed up and make the termination process easier. If the agreement is concluded, the normal termination process does not need to be followed. A termination agreement is therefore especially useful when it is unclear whether proper grounds for termination exist, or if there is need to reach a quick solution as the Finnish statutory procedure is rather long in duration.

As the Finnish employment legislation does not recognize the procedure of agreeing on termination of employment or a statutory severance payment, the necessary formal legal requirement can be derived from case law. The principle is that the employer and employee may freely negotiate the terms and conditions of a termination agreement, but the terms and conditions must be reasonable. Usually, the main terms and conditions of a termination agreement are that the employer shall pay the employee an extra compensation for the termination and after the employer has paid the compensation, neither party shall have any claims related to the employment against the other party. The amount of compensation may be freely negotiated. It could be, for example, anything from one to (10) months' salary, depending on the circumstances and the risks of the case for both parties. The employee needs to be given a chance to consider the termination agreement for some days in order to avoid the risk of the employee claiming invalidity.

The Finnish employment legislation is mostly of a peremptory, i.e., obligatory, nature and the employer and the employee may not derogate from the regulation even at the consent of the employee.

As a consequence of the above-mentioned, the Employment Contracts Act and other employment legislation also apply to employees in managerial positions and senior executives. Therefore, even if the employer and the employee have signed a manager's agreement, the employment contract can be terminated only on the grounds that are provided in the law, if a termination agreement is not concluded.

It should be noted that in Finland, many fields of industries have one or various collective agreements which are also in principle applied to senior executives and managers. The collective agreements usually contain provisions regarding termination of employment contract.

Some of the collective agreements are unilaterally binding, which means that even if the employer is not part of the union that has concluded the collective agreement, the collective agreement and its provisions shall bind the employer. Therefore, it is highly important that the employer is aware of whether any collective agreements are applied to its employees, and whether the provisions cause changes or extra requirements to the dismissals.

HOW CAN THE CONTRACT BE TERMINATED?

If the employment is terminated through settlement agreement, in practice, one party offers the other party a termination agreement to conclude. If the other party, after having had a reasonable time to consider the terms, agrees to the agreement, the employment ends as was agreed in the settlement agreement.

If the termination of any employee, including senior executives, is not based on termination agreement, dismissing requires a statutory termination ground and the statutory termination process needs to be followed. The termination process varies depending on whether the employment will be terminated for a reason deriving from the employer or for grounds related to the employees' person.

Dismissal on grounds related to the employees' person

Prior to terminating the employment contract on grounds relating to the employee's person, the employer shall in principle need to issue a warning to the employee and the employee should then be given a chance to amend their conduct. The time the employee needs to be given after the warning to improve their conduct depends on the nature of the breach and circumstances, but it could be from a few weeks to a few months, but it must be a reasonable time.

The employer must effect termination of the employment contract within a reasonable period after being informed of the existence of the grounds related to the person of the employee or the right to terminate will be lost.

Before the employer terminates an employment contract on grounds related to the employee's person, the employer shall provide the employee with an opportunity to be heard concerning the grounds for termination. The employee is entitled to resort to an assistant when being heard. After the employee has had an opportunity to be heard, the employer must find out whether it is possible to avoid giving notice by placing the employee in other work.

If the reason for giving notice is extremely grave, the employer is entitled to terminate an employment contract with immediate effect regardless of the applicable period of notice or the duration of the employment contract (cancellation of employment contract). In this situation, no warning needs to be given before the termination. Neither does the employer have to find out whether the employee can be placed in other work. This is a situation where an exceptionally serious breach is committed. The grounds must be carefully considered before the employment relationship is cancelled and the employer needs to give the employee an opportunity to be heard before the cancellation.

Dismissal for a reason deriving from the employer

The procedure to terminate employment contracts on financial and productional or reorganizational grounds (i.e., when the work is diminished for a reason deriving from the employer's actions) depends on whether the Act on Co-Operation within Undertakings applies, that is: whether the employer has 20 or more employees.

When the employer employs at least 20 employees, it is obliged to complete change negotiations provided in the Act on Co-operation within Undertakings before it can make its decision to dismiss employees. Therefore, it is essential that the change negotiating process is started when the employer considers dismissing one or more employees for reasons that derive from the employer. This process applies even when the employer would only consider terminating a single employee, whether the employee is a senior executive or not.

The negotiations are held between the employer and the representative of the employees, or the employees if they do not have a representative. If the senior executive is the only employee to whom the measures concern, the employer and the senior executive may negotiate without the representative.

At least five days prior to the start of the negotiations, the employer must submit a written proposal for the negotiations, which includes certain necessary information to negotiate on the subject (e.g., time of the first meeting and the subject of the negotiations).

In the negotiations, at least the grounds, effects and options for the measures targeted at the employees must be discussed. In addition, options for limiting the employees affected by the measures and for mitigating the negative consequences of the measures for the employees, as well as proposals and alternative solutions made by the employees' representative or the employee, must be discussed.

Helping employees find new employment in the event of possible termination is an important part of the change negotiations. If the employer is planning to dismiss at least 10 employees, the employer must submit a draft action plan at the beginning of the negotiations. The action plan shall contain the information and manners to complete the negotiations, as well as measures to help the employees' re-employment. If the employer is considering the dismissal of less than 10 employees, the employer must, at the start of the negotiations, set out the principles to support the employees' voluntary search for other employment or training and participation in the employment services during the notice period.

The negotiations shall go on for either 14 days or six weeks, depending on the number of employees the plans concern, and the employer may effect the terminations after the

obligation to negotiate has been fulfilled.

If the employer does not employ at least 20 employees, it does not need to comply with the above-mentioned six weeks or 14 days change negotiation obligation. Therefore, the dismissing process is far shorter and simpler and may be carried out only in one day, although it is customary to allow a few days to complete the process.

Before the employer dismisses the employee, the employer must explain to the employee to be dismissed the grounds for termination and the alternatives. If the dismissal concerns several employees, the explanation may be given to the employees' representative or, if none has been chosen, to the employees collectively. This may be done in either written or oral form.

NOTICE OF TERMINANATION, NOTICE PERIOD AND THE PERIOD AFTER THE TERMINATION

If the employer considers that the grounds for terminating the employment exist, the employer must deliver the employee a notice on the termination of the employment contract. The notice of termination should primarily be delivered in person. This can be done in writing or orally. If delivering the notice in person is not possible, the notice may be delivered by letter or electronically. The same rules apply to notice irrelevant of the ground for termination.

After giving the notice of the termination to the employee, the notice period must be observed, and the employment relationship terminates on the last day of the notice period.

The applicable notice period when terminating an employment contract can be determined by the Employment Contracts Act, the applicable collective agreement or alternatively the employment contract. The Employment Contracts Act stipulates statutory notice periods. The length of the statutory period depends on the length of the employment relationship before the dismissal and varies from 14 days to six months but the employer and employee may also agree on a notice period. The agreed notice period may not exceed six months. It is quite typical to agree on a three-month notice period in a senior executive position.

Obligation to work and obligation to pay salary

The employee has an obligation to work and the employer has to pay a normal salary to the employee during the notice period. However, the parties may agree that the employee has no obligation to work during the notice period, but the employer cannot be released from the payment obligation and there are no rules for "garden leave" in Finland. However, it is customary to release the employee in a senior level position from the obligation to work for at least part of the notice period.

If the employer has terminated the employment contract on financial or production-related grounds, the employee is entitled to a certain amount of fully paid leave during the notice period in order to find new employment.

An employer is obliged to re-employ its former employees if the employee is dismissed on financial or production-related grounds. The employer is obliged to offer work to this former employee if the employer needs new employees for the same or similar work that the dismissed employee had been doing. Depending on the length of the employment, the re-employment period can be four months or six months. This obligation may be avoided by agreeing on a termination agreement, and therefore employers often try to reach termination agreements even if the grounds for termination exist.

POTENTIAL CLAIMS IN FINLAND

All employees in Finland, including senior executives, are covered by various employment laws, which protect the employee. If an employee considers that their statutory rights have been breached, they may claim compensation for various reasons:

- Compensation for groundless termination of employment – if not agreed, the employment can be dismissed only when statutory termination grounds exist.
- Indemnification for the breach of obligation to change negotiate - If the employer is obliged to complete the change negotiations before it executes the dismissals, breach of the obligation results to obligation to pay indemnification to employees. It is important to note that the indemnification is

payable for the mere breach of the change negotiation procedure, even if the termination itself were legal.

- Discrimination – an employee cannot be dismissed for discriminatory grounds. If the employee is dismissed on the basis of gender (Act on Equality between Men and Women) the employee is entitled to compensation. The employee is also entitled to compensation if the dismissal is based on age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics (Non-discrimination Act). If the choice of employee to be dismissed is done on discriminatory basis, the dismissal can be considered illegal even if the termination grounds otherwise existed.

The most typical claim is the claim for illegal termination, but it is becoming more typical that employees will claim for indemnification and compensation for alleged discrimination at the same time, and the employer will need to respond to multiple claims.

WRONGFUL DISMISSAL

In Finland, the employer can unilaterally dismiss employees only if the statutory termination grounds exist (provided in the Finnish Employment Contracts Act). As mentioned above, the termination grounds may derive from the employee or from the employer.

Grounds related to employee's person

Only a serious breach or neglect of employee's obligations or essential changes in the conditions necessary for working related to the employee's person that render the employee no more able to cope with their work duties can be considered a proper and weighty reason for termination arising from the employee or related to the employee's person. The employer's and the employee's overall circumstances must be taken into account when assessing the proper and weighty nature of the reason.

Reasons for dismissal may include, for example:

- failure to carry out work, or incomplete or negligent performance of work
- breach of loyalty obligations (business and professional secrets, non-competition, etc.)
- unjustified refusal to work- unauthorised absence or failure to observe working hours
- inappropriate behaviour towards the employer or customers

The grounds must always be assessed on a case-by-case basis.

However, employees who have neglected or breached their duties, shall not be dismissed, before they have been warned and given a chance to amend their conduct. Therefore, if the employee has not been given a warning and after the warning a reasonable time to amend their conduct, the employer is not entitled to terminate the employment contract. If the employee repeats the same or similar breach or neglect after the warning, the employer is entitled to terminate the employment contract.

The employer shall, before giving notice, find out whether it is possible to avoid giving notice by placing the employee in other work. If it is possible to place the employee in other work, the grounds for termination do not exist.

As the above-mentioned indicates, the basis to terminating an employment contract due to the employee's person is a serious breach or neglect of their obligations. The employer must give the employee a written warning and find out whether it is possible to place the employee in other work before the termination. If the latter two have not been done, the employer has the right to terminate the employment contract only in cases of very grave breach (cancellation of employment contract).

Certain reasons that cannot be grounds for termination: illness, disability or accident affecting the employee, unless working capacity is substantially reduced thereby for such a long term as to render it unreasonable to require that the employer continue the contractual relationship; participation of the employee in industrial action arranged by an employee organisation or in accordance with the Collective Agreements Act; the employee's political, religious or other opinions or participation in social activity or associations; resort to means of legal protection available to employees.

Dismissal for a reason deriving from the employer:

The employer may terminate the employment contract if the work to be offered has diminished substantially and permanently for financial or production-related reasons or for reasons arising from reorganization of the employer's operations. These are the accepted grounds for redundancies and reorganization.

However, the employment contract shall not be terminated if the employee can be placed in or trained for other duties. This obligation extends also to other enterprises or corporate bodies under the employer's control.

The employer does not have a justified ground for termination when:

- no actual reduction of work has taken place as a result of work reorganization; or
- either before termination or thereafter the employer has employed a new employee for similar duties even though the employer's operating conditions have not changed during the equivalent period.

The employer has the burden of proof for the grounds of termination. If an employee sues the employer for illegal dismissal, the employer must be able to demonstrate that there were legal grounds for redundancy.

UNFAIR DISMISSAL

If the employer decides to terminate the employment of a senior executive, it is important that the grounds are fulfilled. Otherwise, if the employee disputes the termination, the court may order the employer to pay compensation for unjustified termination of an employment contract.

The exclusive compensation must be equivalent to the pay due for a minimum of three months or a maximum of 24 months (30 months for employee representatives).

In addition to having termination grounds, it is important to comply with the termination process as explained above, because employer's procedure in terminating the contract may have impact on the amount of the compensation.

Disputes concerning unfair dismissal are often settled before the court proceedings or even during them, as both parties have the desire to keep the dispute confidential.

RESTRICTIVE COVENANTS

In Finland the employer and the employee may agree on certain post termination restrictions that prevent the employee from benefitting from confidential information relating to the company after their employment has been terminated. Because of their high status in the company, post-termination restrictions are usual among senior executives.

As the restrictions are based on the agreement and thus require the consent of the employee, in practice the restrictive covenants must be agreed on in the employment contract or in the settlement agreement. During the employment it can be difficult to conclude such an agreement.

In Finland, the most common post termination restrictions are:

- **Non-competition.** This prevents an employee from joining a rival employer, establishing a rival business or in any other manner rival with the employer. According to Finnish law, the employer is obliged to pay an employee a compensation from the restriction period. Normally the restrictive period can be agreed to be a maximum of one year but an agreement concerning senior executives may be longer. The agreement does not bind the employee if the employment relationship has been terminated for a reason deriving from the employer.

- **Non-solicitation.** The agreement prohibits an employee from soliciting or attempting to solicit any other person to resign from employment with the employer and a customer of the employer to transfer in respect of any product or service to a customer relationship with a competing company.

- **Confidentiality.** The agreement obliges the employee to keep in confidence all confidential information which they have received during the employment, generally at least the trade secrets of the employer. The agreement also prohibits the employee from exploiting confidential information.

Part of the post-restriction agreements is that if the employee breaches the prohibition, the employee is obliged to pay the employee a fixed contractual penalty or compensate the employer for the caused damage. Ultimately, the court

may order the employee to pay the employee the agreed penalty.

Drafting a restrictive covenant is a matter of careful consideration. It is in the employer's interest that the restriction binds the employee as far as possible. If the restriction is, however, not reasonable from the employee's point of view, it can be considered void and, therefore, it would not bind the employee. It is good to keep in mind that the status of senior executives is typically high, and because of that restrictions may bind them more than the restrictions could bind lower-level employees.

As mentioned earlier, only the non-competition agreement is provided for in the legislation. In practice, the other two (non- solicitation and confidentiality) also limit the employee's possibilities to work in the same field of industry as the employer does. Therefore, if the restrictions prevent the employee's possibility to compete with the employer too much, these two can be considered statutory non- competition agreements. This results to an obligation to pay the employee statutory compensation.

SENIOR EXECUTIVES WHO ARE ALSO DIRECTORS

As described above, the termination grounds and the process
for all persons in employment relationship are the same. It should be noted, however, that the employer's and the employee's overall circumstances must be taken into account when assessing the existence of termination grounds. The employees in managerial positions have more responsibility than employees in lower positions, and therefore, a less severe breach may entitle the employer to terminate the employment contract of a manager than in the case of employees in lower positions.

It should be noted that the managing director of a limited liability company is not in an employment relationship with the company. Therefore, the grounds for dismissing the managing director are not based on the law. Instead, they are agreed in the managing director contract. The managing director can be dismissed through settlement agreement.

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FRANCE

THE APPROACH

The termination of executive employment contracts under French labour law is a multifaceted process, governed by intricate regulations and legal nuances. This comprehensive guide explores the complexities of executive terminations in France, covering methods, procedural details, legal grounds, post-termination restrictions, severance packages, potential legal claims, and recent legal developments.

HOW CAN THE CONTRACT BE TERMINATED?

In accordance with French labour law, terminating the employment contract of an executive employee primarily involves two distinct methods.

The first approach entails the termination of the employment contract initiated by the employer. Such termination necessitates a valid and substantial cause, such as economic difficulties, low performance, disloyalty, or severe misconduct. Regardless of the employee's status and position within the organization, the termination must adhere strictly to the formal procedures outlined in the Labor Code.

The second method is the amicable termination, which can be instigated by either the employee or the employer. Unlike the termination initiated by the employer, this method does not require specific grounds for justification. Instead, it relies on a mutual agreement between the parties to amicably terminate the employment contract. Many executives are terminated using this process due to its advantage of minimizing disputes related to the termination reasons.

INDIVIDUAL TERMINATION AGREEMENTS

Individual termination agreements, while flexible, necessitate compliance with ever-changing labour laws. Employers must remain updated on legislation regarding termination indemnities, social security contributions, and tax implications. Adherence to administrative forms (Cerfa) and Labor Administration approval processes is mandatory.

Procedure for Amicable Termination Agreements

a. Initial Negotiation: The process begins with open dialogue between the employer and the executive. Both parties outline their expectations, including severance packages, notice periods, and potential post-employment restrictions. Skilled negotiators, often HR professionals or legal representatives, facilitate this discussion.
b. Drafting the Agreement: Once terms are agreed upon, a formal agreement is drafted. This document outlines the agreed severance amount, date of departure, confidentiality clauses, non-compete and non-solicitation clauses, and any other pertinent details. The agreement must comply with French labor laws and regulations.
c. Cerfa Form Submission: A specific Cerfa form, detailing the termination agreement, is submitted to the Labor Administration for approval. This step ensures that the agreement adheres to legal standards and that both parties have consented freely. The Labor Administration reviews the agreement within a stipulated timeframe.
d. Cooling-Off Period: After the agreement is signed, a mandatory 15-day cooling-off period starts. During this time, either party can retract their consent, ensuring that the decision to terminate the contract is thoroughly considered.
e. Final Approval and Implementation: If neither party retracts their consent during the cooling-off period, the agreement is considered final and approved after a new 15-working days period during which the administration can decide not to approve the termination. Silence of the administration at the end of this deadline is deemed approval and the employer processes the agreed severance payment, and the employee's departure is executed as per the terms outlined in the agreement.

Benefits of Amicable Terminations

Amicable termination agreements offer various benefits to both parties involved. For employers, they provide a

predictable and expedited resolution, reducing the risk of lengthy legal battles and potential reputational damage. Executives benefit from negotiated severance packages and the ability to transition smoothly to new employment opportunities without the stain of contentious terminations.

While amicable terminations offer flexibility, legal safeguards are crucial. Employers must ensure that agreements comply with labour laws, protecting both parties from future legal disputes. Legal experts specializing in employment law play a vital role in constructing agreements that balance the interests of both employers and executives, ensuring a fair and legally sound resolution.

TERMINATION AT THE INITIATIVE OF THE EMPLOYER

Terminating an executive's employment contract at the employer's initiative requires a substantial cause. Employers must meticulously follow formal procedures outlined in the Labour Code. Specific justifications such as economic challenges, disloyalty, or severe misconduct must be clearly documented. A comprehensive analysis of case laws and precedents can aid employers in justifiable terminations.

Termination for personal grounds

There are mainly two kinds of personal grounds for dismissing an executive, which may include:

- **Disciplinary grounds:** Dismissing an executive for disciplinary grounds must be based on facts arising from the employee's misconduct (simple, serious or gross) and brought to the employer's attention no later than 2 months before the invitation to the pre-dismissal meeting;
- **Non-disciplinary grounds:** These arises from reasons other than employee misconduct, such as professional incompetence, poor performance, repeated or prolonged absences due to health or other non-work-related issues, etc.

Redundancy

An executive may be made redundant. Article L. 1233-3 of the French Labour Code defines redundancy as the termination of an employee for one or several reasons disconnected from the employee, resulting from the termination or transformation of a job position or a modification, refused by the employee, of a material element of their employment contract for economic reasons, such as serious economic difficulties, reorganization of the company to safeguard its competitiveness, technological change or definitive and complete business closure.

In companies with at least 50 employees, if a redundancy project affects a minimum of 10 employees within a 30-day period, the employer is required to initiate a job-saving plan. This involves a formal and stringent consultation process with its works council, a tough negotiation with its labour unions when possible, and obtaining prior approval from the Labour administration to terminate employment contracts.

RESTRICTIVE COVENANTS

Freedom of trade and freedom of work are constitutional rights, but they are not absolute. If individuals may set up their own business or work with a competing business they can't unfairly compete with their former employer (e.g., encouraging clients to join the new business). Consequently, after the termination of the employment relationship, French case law sets limits as to the way an employee may compete against his/her former employer, even in the absence of a non-compete clause in his/her employment contract. When such limits are infringed, the employee may be sued for unfair competition.

Further, the employment contract may put certain post termination restrictions on the employee, most often to stop him/her from using or benefitting from confidential information relating to the company after his/her employment has been terminated or to work with a competing business.

In France, the most common post termination restrictions are:

- **Non-compete**: prevents an employee to compete against his/her former employer;

- **Non-poaching:** restricts the employee's ability to deal with customers or clients of his/her former employer. To be valid these clauses

should (i) be drafted in precise terms to avoid being redefined as a non-compete clause (ii) not impose a general prohibition, unlimited in time and space, without any financial compensation.

These clauses can be enforceable so long as they are provided for in the employment contract and are valid clause.

Non-compete clauses

Non-compete clauses are the most common post-termination restrictive covenants in employment contracts, particularly for executives. French courts mainly focus on whether the covenant prevents the employee from continuing his profession and earning a living. More particularly, judges make sure that the covenant not to compete:

- does not unreasonably restrict the legitimate rights of the employee to find a new job;
- is reasonably limited in time and place;
- is limited to what is reasonably necessary to protect the employer's business; and
- provide for a financial compensation to the employee (minimum 25% of the employee's gross salary per month when the amount is not precise in the CBA).

It is critical that any restriction be carefully drafted, always having regard to the employer's specific and legitimate interests to be protected and which give reasonable ground to restraint the employee's freedom to work considering what is generally accepted as reasonable in the relevant business. When faced with a non-compete clause that they deem excessive, courts may modify its scope of application to avoid declaring it void. This may occur when courts find that the non-compete does not allow employees to find a position consistent with their skills and experience. In this case, they may blue-pencil the duration and geographical scope of the non-compete clause as well as the prohibited activities listed therein.

SEVERANCE COST

All employees in France have:

- Contractual rights: the employment contract may contain some provisions on the severance pay (*golden parachute*) or the length of the notice period;
- Collective bargaining rights: the applicable collective bargaining agreement may regulate many aspects of the employment contract's termination, such as specific provisions on the dismissal procedure, the severance pay and the length of the notice period.
- Law rights: French Labour Law regulates all aspects of the termination of an employment contract.

The rules that are most favourable to the employee must be applied among these three sources.

The dismissed employee is entitled to the following minimum package:

- Paid vacation indemnity (in case of untaken vacation);
- A notice period indemnity;
- A severance indemnity;
- Portability of the employee's benefits: in any event the employee can also continue benefiting of the health insurance and death and disability insurance during a limited period of 12 months.

The severance indemnity is only due to employee with at least 8 months of length of service at the date of the notification of the dismissal (except in case of a dismissal for serious or gross misconduct). According to the Labour Code, the minimum severance pay is equal to:

- 1/4 of the average monthly salary per year of service up to 10 years of service, and;
- 1/3 of the average monthly salary per year of service above 10 years of service.

Severance pay is calculated on the basis of the employee's average salary (often including bonuses) during the last 12 months of employment or the last 3 months if it is more favourable for the employee.

The collective bargaining agreement applicable may provide for a different method of calculating the severance pay, depending on the employee's status. In this case, the company must use the method most favourable to the employee.

NOTICE PERIOD

Although the purpose of an indefinite term employment contract is to establish permanent employment, it may be terminated by either the employee or the employer at any time, subject to sufficient notice.

The length of the notice period varies according to the type of dismissal, the applicable collective bargaining agreement, the professional category to which the employee belongs and the employee's seniority. In practice, notice period is usually between one to three months. Generally, executives are entitled to a three-months' notice period.

During the notice period, the employment contract remains effective and binding on both parties. The employee must continue to work and to receive his usual remuneration until the end of the notice period.

Payment in lieu of notice is possible in France, meaning that the employer can release the employee from work during the whole or part of the notice period. The employee will then be able to work with another company and will get a double remuneration (i.e., his prior notice indemnity and the remuneration paid by his new employer). No notice period is due in case of dismissal for serious or gross misconduct.

UNFAIR DISSMISSAL

The concept of "termination at will" is not applicable in France. Under French law, employees may only be terminated for "just or good cause" i.e. for an objective and reasonable reason. If not, the employee may claim for reinstatement in his job, but this requires the employer's agreement. In general, employees only claim in court for a compensation for unfair dismissal (*indemnité de licenciement sans cause réelle et sérieuse*).

The judge will grant a compensation according to a scale provided by Article L. 1235-3 of the French Labour Code depending on the length of service of employees. Thus, damages for unfair dismissal are capped before French Labour Courts from at least 1 to 2 months' gross salary for an employee with 1 year length of service, to a maximum of 20 month's gross salary for an employee with length of service is at least 29 years. This scale does not apply when the judge finds that the dismissal is null and void notably on the ground of a violation of a fundamental right, bullying, harassment, discrimination, etc.

DISCRIMINATION, WHISTLEBLOWING AND OTHER STATUTORY CLAIMS

French Labour Law has implemented a number of rights that's seek to protect certain employees or groups of employees due to their situation, particularly with regard to a dismissal. The French Labour Code provides that the following dismissal are null and void:

- In violation or retaliation for the exercise of a fundamental right such as freedom of speech or the right to sue;
- In retaliation for a complaint of discrimination or harassment or for engaging in protected whistleblowing activity;
- on grounds of discrimination such as age, origin, sex, sexual orientation, gender, marital status or pregnancy, ethnic group, race, political opinion, trade unions activity, religious beliefs, physical appearance, surname, place of residence, state of health, etc. (Article L. 1132-1 of the French Labour Code lists all the discriminatory criteria);
- on grounds of pregnancy: during her pregnancy and the maternity leave, the employee is protected against discrimination based on her pregnancy status.
- of a protected employee: Union representatives and more generally employees having a representative function for their colleagues, in particular works council members, are protected against termination. They cannot be dismissed without the prior written approval of the French labour administration.

In the event of a dismissal that is null and void, the labor courts have authority to cancel the dismissal and order the employee's reinstatement even if the employer objects. The employee who is reinstated after the cancellation of his dismissal is entitled to salary and paid leave for the entire period of eviction from the company, unless if he/she has held another job during this period.

In the absence of reinstatement, the employee's compensation may not be less than 6 months' salary, regardless of the employee's seniority or the size of the workforce.

SENIOR EXECUTIVES WHO ARE ALSO DIRECTORS

When it is, in principle, possible to combine an employment contract with a corporate office, the law expressly prohibits this in the following companies:

- A member of the board of directors of a public limited company (*société anonyme*) may not conclude an employment contract (conversely an employee may become a member of the Board; that is, the employment contract must precede the corporate office);
- A managing partner of a general partnership company (*société en nom collectif*) or a limited partnership company (*société en commandite simple*) or a limited-stock partnership company (*société en commandite par action*) may not hold both an employment contract and a corporate office.

In all other situations, it is only possible to combine an employment contract with a corporate office, if the following three conditions are met:

- The individual must perform technical duties as an employee distinct from those performed as a director;
- The duties performed as an employee must be compensated by separate remuneration;
- The individual must fulfil their duties under a subordinate relationship (i.e., they must receive orders and directives and may subject to sanctions for failure to comply). In practice, the higher the seniority of the director position is, the more challenging it will be to establish a relationship of subordination.

Otherwise, the employment contract must be suspended for the entire duration of the corporate office. The consequence of this suspension is that the salary will not be paid, and no unemployment insurance rights will be acquired.

REMOVAL AS A DIRECTOR

The termination of an executive's employment contract does not necessarily result in the termination of any directorships that they might hold. The removal as a director is governed by the French Commercial Code for each type of corporate office and type of company. There are only two kinds of removal: the "at will" removal (*ad nutum*) and the removal based on just cause (*revocation pour juste motif*).

Directors in a general partnership company, a limited partnership company, **a** limited liability company and the chief executive officer, deputy chief executive officer, and members of the management board (*directoire*), in a public limited company may only be dismissed for just cause (e.g., misconduct of the director or a divergence of views on company policy).

In all the other types of companies, a director can be removed at will without grounds, notice period or compensation. However, they must be given the opportunity to explain themselves before being removed.

In any case, the removal of the director should not be conducted under abusive conditions (such as brutal or injurious removal), which could include actions that damage their reputation or honour. The removal process must also adhere to the principle of loyalty, allowing the director the opportunity to defend themselves. Failure to observe these principles could lead the director to seek damages compensating the prejudice suffered. These damages can be substantial, especially considering the typically high remuneration of directors. Moreover, in practice, contracts often incorporate penalty clauses that allow the director to receive a compensation if the conditions for removal are abused.

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GERMANY

THE APPROACH

In Germany, the termination of one or several employees has to be well prepared: Generally, there are various formal steps to take before you can validly terminate the employment. Most of the employee protection laws do not differentiate between senior employees and others. Formal steps to take into account might include issuing of warning letters, negotiations with or at least information of the Works Council (if existing), possible participation of authorities and – last but not least – serving of a wet-ink signed termination letter to the employee.

However, even if the employer took all necessary steps before terminating an employment contract, it is very common to find a settlement with the employee. Such settlement would most likely include the payment of a severance. Such severance payment is often economically more reasonable than fighting in court on the validity of a termination. A smooth preparation and following the formal steps of a termination may still lead to a more satisfying solution for the employer in the negotiation process. The amount of the severance would vary between half a monthly salary and one monthly salary for each year of service and may be used to settle any other possible dispute in the employment relationship (i.e. amount of bonus, outstanding payments of salary etc.).

If there is no time for the formal steps or if a rough review of the situation has made it clear that the employer cannot validly terminate the employment contract, it is also common to approach the employee directly with a request for mutual termination of the employment contract. Also, in such case, the key topic of the termination agreement would be the amount of the severance payment.

WHAT ARE THE FORMAL REQUIREMENTS TO TERMINATE AN EMPLOYMENT CONTRACT?

An employment contract can only be terminated in writing – meaning a termination letter with a wet-ink signature needs to be served to the employee.

In some cases, there might also be additional formal requirements agreed upon in the employment contract that have to be followed, i.e. handing over of shareholder's decision in case of termination of a Managing Director. Such agreement should be followed to avoid the risk of invalidity of the termination.

Additionally, it has to be carefully checked who is authorized to provide the wet-ink signature on the termination letter to avoid a rejection due to unknown authority (§ 174 of the Civil Act, *Bürgerliches Gesetzbuch - BGB*). For employees, we recommend the signature of the Managing Director. For Managing Directors, the relevant body should explicitly name a person to process with the termination letter.

In case, the relevant person is located outside of Germany, this formal requirement often leads to a delay in the termination process.

POTENTIAL CLAIMS IN GERMANY

When employees received a termination letter by the employer, they might raise the following claims:

- **Reinstating of employment** – If the employee is not willing to accept the termination, he will have to file a claim in labour court within three weeks after receiving the termination letter. The claim would be directed to continuing the employment relationship.
- **Claims based on the employment contract** – As soon as the employment relationship is terminated, employees tend to claim all possible additional payment based on the contract.

WHEN IS THE TERMINATION OF AN EMPLOYMENT CONTRACT VALID?

If an employer wants to terminate the employment contract with immediate effect, he must give notice of an extraordinary termination. An extraordinary termination would only be valid if it is unreasonable for the terminating party to continue the employment relationship until the lapse of the termination period. Usually, such reason would be the serious breach of contract that destroys the trust of the terminating party, i.e. criminal offenses. However, in every individual case, the interest of the terminating party as well as the terminated party need to be weighed. Additionally, an extraordinary termination is only possible within two weeks from the moment that the terminating party knows about all the fact that are the basis for the termination.

If an employer wants to terminate without such an extraordinary reason, the employer would always have to respect the relevant termination period. The statutory termination period for employees generally is four weeks to the 15th or the end of a calendar month. The termination period for the employer depends on the duration of service of the employee and varies between four weeks to the 15th or the end of a calendar month (at the beginning of the employment) to seven months to the end of a calendar month (after 20 years of service). During a probation period of a maximum of six months, such termination periods can be reduced to 14 days for both parties. Employment contracts often state a longer duration for the termination period – and often require the employee to respect the termination periods that are applicable for the employer.

A termination would be invalid if the employer would contradict some basic rules of law, i.e. try to avoid valid claims from the employment by terminating the contract (so called "*Maßregelungsverbot*").

In case the Act against Unfair Dismissal (*Kündigungsschutzgesetz – KSchG*) is applicable to the employer's plant, the employer may only terminate the employment relationship for cause. The Act against Unfair Dismissal is applicable if the plant employs more than 10 employees (part-time employees count only 0.5 or 0.75 depending on the number of hours they work) and the individual employment has lasted for more than six months.

If these requirements are met, the employer can only terminate the employment relationship for three reasons:

- tasks no longer exist (i.e. due to restructuring)
- employee is unable to perform the tasks anymore (i.e. due to illness)
- employee's behaviour cannot be tolerated anymore.

All of these reasons are future-oriented and require that the employment relationship will not be acceptable in the future. A termination can never be a punishment for the past.

Therefore, in order to explain a termination with the loss of the tasks, the employer would have to proof in detail, why these tasks no longer exist in the company. Also, the employer would have to compare the relevant employee with similar employees in terms of social criteria (duration of service, age, obligation to support family and possible disability). After such comparison, the employer would only be allowed to terminate the employee who is strongest according to the social criteria (meaning: the youngest with the least service duration, no kids and no disability). This person might not be the one whose tasks are no longer performed. In such a case, the employees would have to be transferred to the remaining tasks. Finally, a termination based on such restructuring would only be valid if there are no other open positions in the firm that the relevant employee could take over – even if such position would be on a lower level.

To base a termination on the employee's inability to perform the requested tasks in the future, the employer has to proof why such performance in the future cannot be expected. Most often, this kind of termination is used if an employee is ill. In such case, the employer must explain why he foresees that the employment relationship cannot be continued. After such prognosis, the interests of employer and employee needs to weighed. According to the case law of the Federal Labour Court, a negative prognosis can be given due to a long-term illness if the employee is not expected to return to work in the near future. In case of various short-term illnesses, the employer would have to proof that the employee has been unable to work for more than 6 weeks in each of the three years before. In any case, the employee would be able to contradict this prognosis by explaining why his illness cannot be expected to have a negative influence on the employment

relationship in the future. This can be done by releasing the doctor from his/her obligation to confidentiality and stating that the past illness has been cured and will not affect the employee in the future.

Finally, the behaviour of the employee in the past could lead to a negative prognosis for the future and therefore, be a basis for a termination of the employee: The employer must serve the employee with a formal warning for a breach of contract in the past and the employee must continue with a similar breach of contract. The formal warning may given orally or in writing whereas we strongly recommend that it be in writing for evidential purposes. In such a formal warning, the employer would have to explain how the employee has breached his or her obligations under the employment contract, ask the employee to cease such breach of contract in the future, and explain that a continued breach of contract may have consequences for the employment relationship. If these formal requirements are met and the employee continues to breach the contract, the interests of the employer and the employee will be weighed. Depending on the seriousness of the breach, formal warnings may have to be repeated to build up the negative prognosis before a termination is possible.

SPECIAL PROTECTION AGAINST DISMISSAL

Certain groups of employees are specially protected against dismissals. For certain employees, the employer needs to get prior approval for the termination from the relevant authority. These groups include

- Severely disabled employees as well as persons, named equal to severely disabled
- Pregnant employees and employees on maternal leave
- Employees on or seven weeks before parental leave

Termination of these groups of employees without the prior consent of the relevant authority would be invalid.

Additionally, employees in certain offices can only be terminated with immediate effect. The most relevant offices with a special protection against dismissal are:

- Membership in works council
- Data protection officers

Lastly, when planning to terminate various employment relationships at the same time, the need to make a declaration of mass termination to the relevant employment agency beforehand has to be reviewed. According to § 17 KSchG such declaration is necessary when reaching a certain number of terminations within a period of 30 days. The relevant number depends on the total number of workers employed in the plant and varies between 5 and 30. If the employer fails to hand in the declaration of mass termination to the relevant employment agency prior to serving of termination letters, all terminations would be invalid.

PARTICIPATION OF THE WORKS COUNCIL

In case a Works Council is established within the plant that the affected employee(s) work at, such Works Council must be consulted before any notice of dismissal is served.

Before any termination of employment, the employer must inform the Works Council on the planned termination as well as the reasons for such termination (§ 102 Works Constitution Act, *Betriebsverfassungsgesetz - BetrVG*). If the employer wants to hand over an extraordinary termination, the Works Council has to react within three days. For a planned ordinary termination, the Works Council has a week to react. If the Works Council does not react to the information within the given time limits, the approval is assumed. If the Works Council denies approval of the termination, the employer can still terminate the employment relationship. However, the employee could ask for continued employment as long as a possible claim against such termination is not decided upon.

In case, the employee wants to terminate the employment relationship of a member of the Works Council, the Works Council has to actively approve such termination (§ 103 BetrVG). In this case, the expiry of a deadline without a reaction does not constitute deemed consent. If the Works Council denies this approval, the employer has to go to court to replace such approval with a court ruling.

If the employer is planning a larger restructuring, such restructuring might be considered a change of business according to § 111 BetrVG. In such case, the employer would

have to negotiate with the Works Council on a Reconciliation of Interest and a Social Plan before being able to start the restructuring. In the Reconciliation of Interest the planned restructuring is described and agreed upon in detail whereas the Social Plan includes all the compensation. Concerning both documents, employer and Works Council need to start serious negotiation with the aim to find an agreement. In case, the negotiations fail, they need to continue in front of a special reconciliation board. In case employer and Works Council fail to reach an agreement, the reconciliation board will rule on the Social Plan whereas the negotiations on the Reconciliation of Interest will end inconclusively. Works Councils often try to use this process to delay any kind of restructuring, especially when it involves redundancies. This is why we recommend an intensive preparation as well as a clear step plan to get to the end of the negotiations.

RESTRICTIVE COVENANTS

In Germany, the most common post termination restrictions are:

- **Confidentiality** – prevents the ex-employee to use confidential information outside of the employment relationship.
- **Non-compete** – prevents an ex-employee from joining a rival employer for a defined period of time after employment has ended. Such non-compete would have to be agreed upon in writing and would only be valid up to a maximum of 24 months. Also, the scope of such non-compete needs to be chosen carefully to avoid invalidity. Finally: for the non- compete to be valid, the employer would have to pay to the employee a compensation of at least 50% of the employee's last average monthly salary.
- **Non-solicitation** - restricts the ex-employee's ability to contact customers or clients of a former employer with a view to obtaining their business; such agreement must also be reviewed very carefully, as it may only be valid if the employer pays a compensation – depending on the extent of such restriction and its effect on the employee's freedom of occupation.
- **Non-dealing** – restricts the ex-employee's ability to deal with former customers or clients after termination of employment. Again, compensation may have to be paid if the employee's freedom of occupation is too restricted.
- **Non-poaching** – this seeks to prevent ex-employees poaching former colleagues.

If such post-contractual agreements were not included in the employment contract, they cannot be enforced later against the will of the employee. The exemption is confidentiality, which arises from the employment contract itself and is regarded as a statutory duty of the employee.

If no post-contractual restrictions have been agreed in the employment contract, the employer should consider sending the employee on Garden Leave during the termination period. By this, the employee is no longer involved in the day to day business and his or her knowledge about clients, prices and colleagues will diminish during the time of the Garden Leave. This also protects the employer.

CLAIM FOR SEVERANCE

When an employment relationship is validly terminated, there are only very limited legal options for an employee to claim a severance payment.

Such severance payment could be agreed upon with the Works Council in a Social Plan. Also, the employer could have offered it directly with the serving of the termination letter to avoid court proceedings against the termination.

However, as mentioned before, it is very common in Germany, to settle any legal dispute surrounding terminations by agreeing on a severance payment. The amount paid in such case depends on the legal risks on both sides. However, it would probably vary between half a monthly salary and one monthly salary for each year of service. Any such settlement would also be used to finalise any other possible dispute (i.e. amount of bonus, outstanding payments of salary etc.).

SPECIAL SITUATION FOR DIRECTORS

If a company wants to terminate the employment relationship with a director, some special aspects need to be taken into account.

First of all: The relevant body to terminate the employment relationship would be the shareholder's meeting or the advisory board. A fellow director would not be able to decide on his colleague's dismissal in his own. This means that additional time would have to be allowed for the relevant bodies to take a formal decision.

The Act against Unfair Dismissal does not apply to directors. This is why a director of a "*Gesellschaft mit beschränkter Haftung – GmbH*" can be terminated without any reason at any time. However, the company would have to respect the termination period agreed upon in the employment contract. These termination periods are usually very long to compensate for the lack of a protection against termination. If the service contract shall be terminated with immediate effect, the same rules apply to directors as to the employees (see above).

Directors of an "*Aktiengesellschaft – AG*" can only be terminated with immediate effect. An ordinary termination is usually not possible as the director of an AG is generally appointed for a limited time.

Please note: The service contract and the position in office are two different legal relationship that are not necessarily connected. This means that different steps might be taken to terminate the service relationship and the office at the same time.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in Germany. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at October 2023.

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GHANA

INTRODUCTION

The 1992 Constitution of the Republic of Ghana, the Labour Act, 2003 (Act 651) (the "**Labour Act**") and the Labour Regulations, 2007 (LI 1833) (the "**Labour Regulations**"), as well as case law, regulate employer-employee relationships and are applicable to all employees, including senior executives except the Army, the Police, Fire Service and the Prisons Service .

Under Ghanaian law, the definition of dismissal is judge-made (not defined in legislation). The Ghanaian courts have adopted the common law meaning of dismissal. Thus, in Ghana, a dismissal occurs when an employer ends or terminates the employment relationship owing to the proven wrongful act of the employee, such as negligence, misconduct or dishonesty. Under Ghanaian law, dismissal and termination are two distinct concepts, although they are often used interchangeably. Termination involves ending an employment relationship for reasons (other than those stated above for dismissal) which are provided for under the Labour Act as "fair termination". For the purposes of this article, a reference to dismissal means all forms of termination, including dismissal.

THE APPROACH

The manner in which a senior executive may be dismissed depends on the reason for the dismissal and other surrounding circumstances.

To dismiss an employee, including a senior executive, as a result of a misconduct, the Labour Act requires the wrongful act to be proved through a disciplinary procedure provided in an employment agreement, employee handbook or other employment document. The Labour Act is silent on what should constitute a disciplinary procedure. The only requirement is that the process is fair and gives the employee (i) reasonable notice of any allegations or charges levelled against the employee; and (ii) the opportunity to make any statements in respect of the allegations of misconduct levelled against the employee, in oral or written form. The disciplinary proceedings must also be transparent and unbiased. An employee who is dismissed could lose all their employment benefits.

The employer or the senior executive may also terminate the employment contract by giving notice to the other party in accordance with the employment contract (if the contract provides express provisions on termination on notice). For senior executives, the notice period is usually three months. In the absence of a contractual notice period, the Labour Act provides minimum notice periods, as follows:

(i) in the case of a contract of three years or more, one month's notice or the payment of one month's pay in lieu of notice;
(ii) in the case of a contract of less than three years, two weeks' notice or the payment of two weeks' pay in lieu of notice; or
(iii) in the case of contract from week to week, seven days' notice or the payment of one week's pay in lieu of notice.

In recent times however, it has become more common for parties to an employment contract with senior executives to terminate the employment relationship by mutual agreement to ensure confidentiality and reduce the risk of litigation against the employer. The negotiated terms under a mutual separation typically include the date of termination, severance pay, as well as any undertakings by the senior executive to waive any claims against the employer.

The employer's negotiating power depends on factors including, the senior executive's length of employment, the risk of litigation, and reputational risk. The employer, under a mutual separation, is required to obtain the approval of a labour officer at the Labour Department of the Ministry of Employment prior to a mutual termination. The labour officer, before giving his approval, must ensure that the employee has freely consented to the mutual termination, and that all liabilities between the parties have been satisfied. This requirement is not complied with in practice. Instead, to protect the employer, it is common practice for the mutual separation agreement to provide that the senior executive obtained independent legal advice and freely

and voluntarily executed the agreement.

HOW CAN THE CONTRACT BE TERMINATED

The dismissal of the senior executive must comply with the terms of their employment agreement. The dismissal may be communicated orally or in writing although it is typically done in writing.

Senior employees who are dismissed are paid their contractual benefits including bonuses unless the dismissal is due to misconduct.

POTENTIAL CLAIMS IN GHANA

Employees in Ghana have the following rights:

- **Contractual rights** – these are governed by the employment agreement, the conditions of service or collective agreement, and any other terms and conditions which govern the employment relationship.
- **Statutory rights** – these are derived from the Constitution, the Labour Act, the Labour Regulations and other laws.
- **Common law rights** – these are established by case law and precedent from Ghanaian courts, and common law jurisdictions which have persuasive effect.

CONTRACTUAL CLAIMS AND WRONGFUL TERMINATION

Although, the concept of "termination at will" applies in Ghana, this is not usual in contracts of senior executives. Senior executives receive the minimum statutory notice of one month for termination. Often however, their employment contracts set out longer periods of about three months' notice.

If a senior executive's employment is terminated in breach of his/her contractual notice, the senior executive may institute an action against the employer for wrongful termination or wrongful dismissal at the National Labour Commission ("**NLC**") or the High Court. *Wrongful termination or wrongful dismissal arises where termination or dismissal is done in a manner inconsistent with an employment contract or other employment document such as terminating an employment without complying with the requisite notice periods*. The only exception is where the employer is entitled to terminate a senior employee's employment summarily due to gross misconduct. For example, if "*the employee does something that threatens the existence of the business or harms the reputation of the employer"* and the employee's act is deemed to be so grave that the employer is entitled to bring the employment to an immediate end without going through any disciplinary process. Examples of such conduct are dishonesty, criminal or violent conduct and insubordination.

In the absence of an ability to terminate summarily, if the employer does so, a court may require the employer to pay the senior executive an amount consisting of the salary and benefits the senior executive would have received had their employment not been terminated wrongfully. This will be calculated from the date of termination to the date of judgment.

PAYMENT IN LIEU OF NOTICE

If expressly provided in the employment agreement, either party is entitled to make a payment in lieu of notice ("**PILON**") which will terminate the employment agreement with immediate effect. PILON clauses are in respect of the senior executive's entire remuneration made up of their basic salary and all other benefits which are due to them as a result of their employment.

If the company terminates by paying the senior executive in lieu of notice in circumstances where there is no PILON clause in the employment agreement (and without agreeing to do so with the executive) the senior executive could make a claim of unlawful termination against the company.

WHAT CONSTITUTES DAMAGES FOR BREACH OF CONTRACT?

If successful in an action for wrongful dismissal or termination, the senior executive will be awarded damages at the court's discretion based on their salary and other conditions of service for a reasonable period.

INJUNCTIONS AND RESTRICTIVE COVENANTS

It is common for senior executives to have post-termination restrictions in their employment agreements to prevent them from doing certain things after termination. An employer can apply to the court for an injunction to enforce such restrictions.

In Ghana, the most common post-termination restrictions are:

- Non-compete/restraint of trade – this prevents an ex-employee from joining a competitor for a defined period of time;
- Non-solicitation – this prevents an ex-employee from using a former employer's customers or contacts for personal gain;
- Non-poaching – this prevents an ex- employee from engaging employees of the former employer.

The court has the discretion to grant injunction notwithstanding the facts and circumstances of the case. With regard to restraint of trade in particular, Ghanaian courts are influenced by English courts which consider whether the restraint of trade provision seeks to protect the employer's legitimate business interest and whether the restriction is reasonably necessary to protect that interest. In Ghana however, it is not common for the courts to enforce these post- termination restrictions.

Other provisions an employer may consider to protect its interests are confidentiality and garden leave. Garden leave has the effect of limiting the executive's access to the company's documents, contacts, etc while maintaining the senior executive on the employer's payroll. If garden leave is not expressly provided for in the executive's employment agreement, this can be offered to the senior executive and negotiated as part of the terms of settlement. Employers must bear in mind that any restrictions proposed to the senior executive above what is provided for in their employment agreement may result in negotiations for a higher severance pay.

UNFAIR TERMINATION

Unlike the United Kingdom, there is no statutory qualifying period. Unless otherwise contracted, the protection is triggered as soon as the employee is employed.

Generally, a termination may be deemed to be unfair if (a) the reason for the termination is not fair or (b) the termination was not done in accordance with a fair procedure or the provisions of the Labour Act. Termination of a senior executive which is based on any of the following grounds is deemed to be fair: incompetence, misconduct, redundancy or a legal restriction prohibiting the senior executive from performing the work they have been employed to do. The Labour Act further defines unfair termination as termination which is based only on any of the following reasons:

- that the employee has joined, intends to join or has ceased to be a member of a trade union or intends to partake in trade union activities;
- that the employee has filed a complaint or participated in proceedings against the employer involving alleged violation of the Labour Act or any other law;
- the employee's gender, race, colour, ethnicity, origin, religion, creed, social, political or economic status;
- the pregnancy or absence from work on maternity leave of a female employee;
- the disability of the employee;

- the temporary illness or injury of the employee certified by a recognised medical practitioner;
- that the employee does not have the current level of qualification required for the employee's work which is different from the qualification that was required at the commencement of the employment; or
- the employee refused or expressed an intention to refuse to do his normal work due to his participation in a lawful strike unless the work is necessary to protect life, personal safety or health or to maintain equipment.

A case of unfair termination may also be brought by a senior executive who terminates their employment without notice due to ill-treatment by the employer (the employer creating conditions that make it impossible for the senior executive to continue in the employment also known as constructive dismissal) or failure of the employer to take action on repeated complaints of sexual harassment of the senior executive in the workplace.

Note that the employee has the initial burden of satisfying the courts of the unfairness of the termination. Once this is done, the burden shifts to the employer to produce evidence to justify the termination.

Whatever the reason is for dismissal of a senior employee, mutual separation is always open to the employer as the best option to avoid claims of unfair termination by a senior executive.

AWARD FOR UNFAIR TERMINATION

A successful claim by a senior executive of unfair termination to the NLC entitles the senior executive to (a) an order to be reinstated from the date of the termination; or (b) an order to be reemployed either in the work for which the senior executive was employed prior to the termination or in other suitable work on the same terms and conditions; or (c) an order for compensation. An order for reinstatement or reemployment is however rare. The court will however award damages at its discretion irrespective of whether the company paid the senior executive all of their entitlements in terminating the employment.

REDUNDANCY

A senior executive may be made redundant (as a result of a restructuring, merger, closure of business, etc) in which case they will be entitled to a statutory notice period of 3 months and redundancy pay. The Labour Act does not specify the criteria/method for determining the quantum of redundancy pay which employers are required to pay. If the redundancy pay has not been previously agreed in an employment contract, an employee handbook or company policy, the employer and the senior executive are required to negotiate the redundancy pay and the terms and conditions of such payment. In practice, senior executives are paid 1 to 3 months' salary for each year served as redundancy pay.

The Chief Labour Officer of the Labour Department must also be given notice of the redundancy and in practice, be informed when parties conclude the redundancy.

SENIOR EXECUTIVES WHO ARE ALSO DIRECTORS

The dismissal of a senior executive does not automatically terminate any directorship positions they may hold in the company. It is common and advisable for their employment agreement to require them to resign as a director in the event of a dismissal. If this is not the case, this requirement can be included as part of the terms of the settlement agreement in the case of a mutual separation. Otherwise, they can be removed by the shareholders of the company in accordance with the Companies Act, 2019 (Act 992).

A company's constitution may make provision for benefits payable to a director including compensation for loss of employment as director. This means that it must have been approved by a special resolution of the shareholders (75% of votes cast). Settlement terms for

the senior executive position may require shareholder approval in a general meeting.

The Ghana Stock Exchange (GSE) Listing Rules require a listed company to prepare announcements for release by the GSE immediately following a change in directorship. A change in directorship is also considered to be material information which must be disclosed to the public. Disclosure may be withheld if negotiations are still ongoing, and an agreement- in-principle has not been reached. However, immediate public announcement must be made if there are rumours about the information withheld and if required by the GSE.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in Ghana. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at November 2023.

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HONG KONG

THE APPROACH

In Hong Kong, termination of employment is generally speaking a straightforward affair, as the major point of concern in terms of due process is simply compliance with the notice provision in the employment contract. When it comes to the dismissal of a senior executive, however, many employers typically consider negotiating a settlement (also known as a separation agreement), especially if the employer wants to "give face" to the executive (as is common in many Asian cultures), and if the circumstances and reason for termination allow for such possibility. Settlement is also commonly resorted to by employers in Hong Kong whereby in exchange of (usually) an enhanced termination package, the senior executive would agree to release and waive any potential claims they have against the employer. In practice, it is very common for senior executives to depart from their employer after entering into settlement.

Unlike the UK, there is no statutory framework or other regulatory guidelines specifically governing settlement agreements, and principles of contract under common law would apply, meaning the employer and senior executive are free to agree on the terms of the settlement. This means that as long as there is an offer, acceptance of that offer, and consideration, the settlement agreement will be binding on both parties. Having said that, terms in the settlement agreement that seek to limit or restrict any party's statutory rights (e.g., an employee's right to receive a certain statutory payment) or prevent a party from fulfilling its legal or regulatory obligations, are generally unenforceable, and could render the settlement agreement void in its entirety if there is no severing mechanism in the settlement agreement.

Like the UK, it would be in the employer's interests for settlement negotiations to be conducted on a without prejudice basis, so that the employer does not have to disclose settlement conversations in future litigation. However, without prejudice protection may not always be available, as the projection would only apply if, for instance, the parties, objectively speaking, contemplated or might reasonably have contemplated that litigation would follow if they could not agree. Similar to the UK, any communications regarding settlement should also be marked subject to contract, so that there is room for negotiation until the settlement agreement is signed by all parties (and therefore legally binding).

HOW CAN THE CONTRACT BE TERMINATED?

Hong Kong law does not stipulate the method in which termination of an employment should be communicated to an employee. Termination of an employment contract can therefore be communicated verbally or in writing. More often than not, however, a senior executive's employment contract would require the termination notice to be in writing. It would therefore be prudent to do so in writing in order to avoid unnecessary contention over such technicality.

Termination is a relatively simple process in Hong Kong when compared to other jurisdictions, as both the employer and employee are entitled under the Employment Ordinance to terminate the employment contract at any time provided that they comply with the contractual notice requirement (or in the absence of such language in the employment contract, the statutory minimum period). As discussed in further detail below, employers are not required to provide reasons when terminating an employee, although an employee who has been employed for not less than 24 months at the time of termination is entitled to protection from termination of employment for an "invalid" reason with regards to the Employment Ordinance, and there are circumstances where it is unlawful to terminate an employee (such as when the employee is on statutory paid sick leave or pregnant – as discussed in further detail below).

POTENTIAL CLAIMS IN HONG KONG

All employees in Hong Kong have:

- Contractual rights - largely governed by the contract of employment but are also subject to certain implied terms;
- Statutory rights - derived from the laws of Hong

Kong, such as the right not to be unreasonably and/or unlawfully dismissed; and

- Common law rights - established by case law and precedence, such as the right to a safe working environment.

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

There is no concept of "at-will" employment in Hong Kong, meaning that, provided a termination is not for unlawful reasons, an employer may terminate an employee's employment contract at any time provided that the notice period stipulated in the employment contract is complied with (unless the situation warrants summary dismissal). If an employer terminates a contract of employment without serving the requisite notice or payment in lieu of notice, or where a summary dismissal is not justified, the termination will be deemed to be a wrongful repudiation of the contract, entitling the employee to make a claim of wrongful dismissal and to receive termination entitlements and potentially damages. However, damages are usually limited to what the employee would have received by way of net remuneration had the requisite notice been given.

Similar to the UK, an employee may also bring a claim of constructive dismissal where the employer has committed a repudiatory breach, whether through its actions or omissions, so as to entitle the senior executive to resign in response with immediate effect and seek damages to reflect any losses that he/she has sustained due to such action or omission on the part of the employer. The repudiatory breach must be 'fundamental' and one that also demonstrates that the company no longer intends to be bound by one or more of the senior executive's contractual terms.

PAYMENT IN LIEU OF NOTICE

Unlike in the UK, Hong Kong law provides both the employer and the employee the right to terminate the employment relationship at any time by making payment in lieu of notice. Therefore, regardless of whether the employment contract expressly stipulates such a right on the part of the employer and/or the employee, this is a statutory right available to both parties and which cannot be contracted out of.

There is also no room to negotiate how payment in lieu of notice is calculated. Where the notice period is expressed in days or weeks, the formula is as follows:

the average daily wages earned by the employee in the 12-month period preceding the day when termination notice is given

X

number of days in the notice period for which wages would normally be payable to the employee.

If the notice period is expressed in months, the formula is as follows:

the average monthly wages earned by an employee in the 12-month period preceding the day when termination notice is given

X

number of months in the notice period.

The point to note when calculating average daily or monthly wages is that (i) the periods for which the employee was not paid full wages or any wages at all (such as a statutory sickness day), and (ii) the sums paid to the employee during such periods, must be excluded from the calculation.

WHAT CONSTITUTES DAMAGES FOR BREACH OF CONTRACT?

Where a senior executive has been wrongfully dismissed as the requisite notice has not been given, he will be entitled to damages at common law. Although, as a theoretical alternative, the employee may elect to sue upon a quantum meruit in common law for the value of the work that has actually been performed and for which the employee has not been paid.

Similar to the UK, if the action is for a breach of contract, the senior executive is under an obligation to take

reasonable steps to mitigate any loss, such as finding other employment. A failure to do so means that the senior executive may only recover nominal damages from the employer. If alternative employment is found, any earnings therefrom will be set off against any damages recoverable from wrongful dismissal. Having said that, even if mitigating steps are not undertaken, the senior executive would still be entitled to the statutory award of damages for wrongful termination, whereby the employer would have to pay to the senior executive a sum equal to that which would have been payable had the contract been terminated by the making of a payment in lieu of notice.

Damages awarded for wrongful dismissal at common law are generally confined to pecuniary loss, and are usually loss of earnings, being the amount the employee would have received in wages and benefits (therefore including allowances, commissions, bonuses, and other benefits such as pension fund contributions, insurance coverage, tax reimbursements, and share options) for the period until the employment contract could have been terminated validly, less the amount he/she could reasonably be expected to earn in other employment.

The senior executive's right to claim statutory compensation for wrongful dismissal does not preclude him/her from claiming damages under common law, but this would always be subject to the rule against double recovery.

INJUNCTIONS AND RESTRICTIVE COVENANTS

An injunction, in the context of a restrictive covenant, is an equitable in personam remedy by which a person is ordered to refrain from doing a particular act or thing. Senior executives are usually prohibited, by way of restrictive covenants, to make use of or benefit from confidential information / trade secrets acquired during their office in the company after their termination. To enforce such restrictive covenants, the company will have to make an application to the Courts.

In Hong Kong, the following restrictive covenants relating to employment are common:

- **Non-compete** – prevents an ex-employee from joining or setting up as a competitor to the former employer;
- **Non-solicitation / anti-poaching** – prevents an ex-employee from approaching the former employer's employees, customers, clients, or suppliers;
- **Non-dealing** – prevents an ex-employee from dealing with the former employer's employees, customers, clients, or suppliers.

When considering whether to grant an injunction, similar to the UK, Hong Kong Courts are bound to consider the doctrine of 'restraint of trade' – these covenants are prima facie unenforceable unless it is reasonable. The former employer bears the burden of proving that the restriction protects a legitimate interest of the employer, which is considered by the law to be capable of being protected, and that the restriction does not go beyond what is reasonably necessary. The Courts will not enforce any restraint which purports to go beyond the scope of the said interest, taking into account the duration, scope, and geographical restriction imposed. It is noteworthy that if the senior executive is wrongfully dismissed, the employer company cannot enforce the restraint clause.

Where an employment contract fails to qualify the restrictive covenants (e.g. geographic scope), the Courts will not attempt to re-write the contract so as to make it enforceable by imposing limitation themselves. Therefore, restrictions must be carefully drafted in order to be enforceable.

It is also not uncommon to find a 'garden leave clause' in an employment contract relating to senior executives, as this would substantially reduce the senior executive's exposure to the employer's business and confidential information. Commonly, the garden leave period overlaps with the senior executive's notice period, during which the company continues to pay him/her a normal wage but does not require the senior executive to work. The clause would also typically require the senior executive not to have any contact with any of the employer's or group company's clients and employees, and not to attend the employer's or any group company's premises. If a senior executive is subject to a garden leave clause and put on garden leave during the notice period, the period of the restrictive covenant would generally be

reduced by the duration of the garden leave, or else the employer may find it difficult to justify and enforce the restrictive covenant against the senior executive.

STATUTORY CLAIMS

The Employment Ordinance distinguishes between 'unreasonable' termination and 'unreasonable and unlawful' termination. Although the employer is not required to provide any reasons to the employee regarding the termination of employment, an employee who has been employed for not less than 24 months and who has been dismissed other than for a valid reason specified in the Employment Ordinance (which in summary are: the conduct of the employee; the capability or qualifications of the employee for performing his/her work; redundancy or other genuine operational requirements of the business; statutory requirements, and other substantial reasons) may claim unreasonable dismissal against the employer. A separate section below discusses unreasonable dismissal in further detail, but for completeness, below is a summary of the most relevant points about unreasonable and unlawful termination which employers should be aware of.

Separate from the aforementioned 'unreasonable' dismissal, there will be an 'unreasonable and unlawful' termination where an employee is dismissed other than for a valid reason as specified in the Employment Ordinance, and the dismissal is in contravention of the law (e.g. dismissal of an employee who is on statutory paid sick leave, or is pregnant and/or on maternity leave; or dismissal due to the employee possessing an attribute that is protected by Hong Kong's discrimination ordinances). The section titled "Discrimination, Whistleblowing and Other Statutory Claims" below delves into further detail in this regard.

UNREASONABLE DISMISSAL

Provided that the senior executive has been continuously employed by the company for not less than 24 months, he/she may only be dismissed by reason of any of the following:

1) his/her conduct,
2) his/her qualifications/capability to perform the kind of work which he/she was employed to carry out,
3) redundancy or other genuine operational requirements of business of the employer,
4) the fact that the senior executive or the employer or both of them would, in relation to the employment, be in contravention of the law, if the senior executive were to continue in the employment of the employer; or
5) any other reason of substance (e.g., carrying out the employment would be in contravention of the law).

Please note that the following paragraphs do not deal with redundancy, which is covered by a separate section below.

If the reason for the termination by the company of the senior executive is due to the senior executive's conduct that is short of misconduct, the questions the company should ask itself before proceeding with the termination is whether the company has previously clearly communicated with the senior executive about its concerns with his / her conduct, and also whether there is any internal disciplinary procedure that has to be followed by the company before implementing the termination.

If the reason for the company wanting to part ways with the senior executive is because of the latter's inability to perform to the level desired by the company, again, before proceeding with the termination, the company should ask itself whether there has been sufficient prior communication to the executive about such performance issues and the company's concerns, and whether the company is bound to follow any internal procedures relating to work performance (such as putting the senior executive on a performance improvement plan – which is not something that is regulated in Hong Kong).

More often than not, the reason behind the company wishing to terminate the senior executive is due to personality clash. This technically does not fall under one of the statutorily prescribed 'valid' reasons for termination of employment, and employers should therefore consider whether it is possible to rely on one of

the 'valid' reasons prescribed under statute, in order to minimise the risks of the senior executive making a claim of unreasonable dismissal.

It is common for senior executive employment contracts to stipulate that the senior executive would not be entitled to receive payment of bonuses (or pro-rated portions thereof) if the senior executive is being terminated for reasons to do with his /her conduct or performance, so it is important for the employer to ensure that all reasonable prior communication and all necessary internal procedures have been complied with before implementing the termination, or else the risks of the senior executive bringing a claim of unreasonable termination would be substantial.

In this regard, there is somewhat of a noticeable 'trend' in Hong Kong for senior executives to make claims of anti-avoidance where they claim that the company terminated them in order to avoid paying them a certain sum (e.g. a bonus, and/or statutory long service payments which are only payable if an employee has reached five years of service) which they would have been entitled to, if they were not being terminated for the reason alleged by the company. As Hong Kong courts have previously confirmed that there is an implied 'anti-avoidance' term in employment contracts whereby employers should not terminate an employment contract so as to deprive the employee of statutory or contractual entitlements, this is something companies should take into account when deciding how to separate with a senior executive.

Further, in reality, there are many instances where the situation is not so black-and-white, which is why many employers in Hong Kong would choose to enter into settlement negotiations with the senior executive, in order to minimise the risks of future litigation and to facilitate a smooth departure and transition of the senior executive's role.

Award for Unreasonable Dismissal

In the unfortunate event that the senior executive prevails in his / her claim of unreasonable dismissal, the Labour Tribunal would typically make an award of terminal payments, which mean the statutory entitlements under the Employment Ordinance and any other payments under the senior executive's employment contract which the senior executive is entitled to but has not yet been paid upon dismissal (e.g. any bonuses that have not been paid due to the termination of employment), and the entitlements which the senior executive might reasonably be expected to be entitled to under the Employment Ordinance had he / she been allowed to continue his employment (e.g. statutory long service payment which is payable if an employee has reached five years of service). Therefore, practically speaking, if the employer had already fully paid to the senior executive all terminal payments due to him / her, the senior executive would not be able to claim anything else from the employer. For completeness, technically speaking, another remedy for unreasonable dismissal is an order by the Labour Tribunal for reinstatement of employment or re-engagement, but these options would require the employer's agreement, and cannot be imposed by the Tribunal unilaterally onto the employer.

If the company wishes to consider the route of entering into settlement with the senior executive, the package offered should take into account the amounts which the senior executive would receive if he / she were to prevail in his / her claim of unreasonable dismissal (see above). As the senior executive may consider such a package to merely contain what he / she is 'entitled to' in any event, the company would have to consider whether there are any other enhanced benefits the company could offer (e.g., allowing the senior executive to keep his / her employee shares beyond the termination; extending medical insurance coverage).

Apart from financial incentives, and depending on the reasons for the exit, a senior executive may also request for a mutual non-disparagement clause in the settlement agreement. It is also common for a senior executive to want to agree in advance on the wording to be used by the company in its internal and external announcements regarding the senior executive's departure, subject to any regulatory requirements that may apply.

REDUNDANCY

If a senior executive is made redundant, provided he / she has been employed continuously for not less than 24 months, he / she is entitled to not only receive contractual notice but also a statutory severance payment (which is capped at HK$15,000 (approx. GBP1,500) per year of completed service). Unlike in some other jurisdictions, Hong Kong law does not require require any investigation into the fairness of the redundancy selection process, there is also no legal requirement on the employer to give any prior warning and undertake any prior consultation with the affected employee.

Although there is a cap to statutory severance payment, some employers have policies setting out how the company would pay employees who are being made redundancy. If such policies are in place, the company should ensure that it applies the same policy to the senior executive so as to ensure fair treatment.

It is also worth noting that even though this will be abolished from 1 May 2025 (referred to in this paragraph as the "Transition Date"), employers under Hong Kong law have the statutory right to offset the amount of statutory severance payable to an employee against the balance of the employee's "MPF" account which is derived from the employer's contributions. As background, the Mandatory Provident Fund Scheme (usually known in its abbreviated form of MPF) is Hong Kong's mandatory pensions saving scheme, whereby employers and employees are respectively required to make periodical (usually monthly in the case of monthly-paid employees) contributions of no more than HK$1,500 (approx. GBP150) to the employee's MPF account held with the employer. Beginning from the Transition Date, employers can no longer use the accrued benefits derived from their MPF contributions to offset an employee's statutory severance payment. However, if the senior executive has been in the employer's employment before the Transition Date, the employer can continue to use the accrued benefits derived from its MPF contributions (irrespective of whether the contributions are made before, on or after the Transition Date, and irrespective of whether the contributions are mandatory or voluntary) to offset the pre-transition portion (but not the post-transition portion) of statutory severance payment.

DISCRIMINATION, WHISTLEBLOWING AND OTHER STATUTORY CLAIMS

It is unlawful to terminate an employee:

a) when an employee is on statutory paid sick leave;
b) when an employee is pregnant and/or on maternity leave;
c) when the employee is suffering from a work related injury before having entered into an agreement with the employer for the employee's compensation or before the issue of a certificate of assessment; or
d) the termination is due to the reason of the employee's (i) giving evidence or information in any proceeding or inquiry in connection with the enforcement of labour legislation, industrial accidents or breach of work safety regulations; (ii) involvement in any trade union or its activities; or (iii) disability, gender, marital status, pregnancy, breastfeeding status, race, or family status (i.e. any of the protected characteristics under Hong Kong anti-discrimination law).

Therefore, even if the reason for termination falls under one the previously mentioned 'valid' grounds in the Employment Ordinance, if the termination falls short of summary termination and the senior executive falls within any of the aforementioned protected categories, it would be unlawful to terminate the senior executive's employment, and the senior executive would in such an instant be entitled to bring a claim of unreasonable and unlawful dismissal. Possible remedies include an award by the Labour Tribunal of terminal payments and/or award of compensation not exceeding HK$150,000 (approx.. GBP15,000). In practice, if the employer is insistent upon separating with the senior executive in such circumstances, settlement would typically be the preferred route.

Importantly, unlike the remedy of unreasonable dismissal, which is only available to employees who have been employed for at least two years continuously, there is no such service period requirement for an employee who wishes to bring a claim of unlawful and unreasonable dismissal.

In addition to bringing a claim of unreasonable and unlawful dismissal or constructive dismissal (as applicable), a senior executive who believes his/her termination is due to his/her disability, gender, marital status, pregnancy, breastfeeding status, race, or family status (i.e. any of the protected characteristics under Hong Kong anti-discrimination law) may lodge a complaint with the Equal Opportunities Commission (the "EOC") or being his/her case directly to the District Court. Although the EOC does not have the power of adjudication, it has the power to provide legal assistance to complainants whom the EOC believes has a case, so as to help the complainant escalate the case to the District Court.

In terms of pecuniary remedies in discrimination proceedings, the District Court may order the respondent to pay damages for any losses which the claimant has suffered due to the respondent's conduct, which could include damages for injury to feelings and loss of past and future earnings and benefits (such as retirement benefits). Although less common, punitive, or exemplary damages may also be awarded. There is no cap to the amount of damages which could be awarded.

Whistleblowing has become increasingly common in Hong Kong in recent years, and it is no surprise that senior executives use potential whistleblowing claims to negotiate for a higher settlement package. Although Hong Kong does not yet have a comprehensive framework protecting whistleblowers, such protection is scattered across different statutes. For example, under the Employment Ordinance, an employer cannot terminate an employment by reason of the employee giving evidence in proceedings or enquiry for the enforcement of the Employment Ordinance, or in any proceedings or enquiry in relation to safety at work; and under the discrimination ordinances, it is unlawful for a person ("discriminator") to discriminate against another person ("person victimised") on the ground that the person victimised has brought proceedings against the discriminator or given evidence or information in connection with proceedings brought by others against the discriminator.

SENIOR EXECUTIVES WHO ARE ALSO DIRECTORS

In the event that the senior executive holds a director position within the company, it is crucial to consider the following when dismissing the senior executive:

- To avoid causing disruption to its operation, the company should ensure that the senior executive would resign from all offices he/she holds in the company and/or any related entities before his/her departure. Typically, the settlement arrangement would include the resignation letter, so as to avoid future disputes as to what wording should be used in the resignation letter.
- The listing rules require a listed company to publish an announcement as soon as practicable in regard to the resignation, re-designation, retirement or removal of a director.
- The listed company must disclose in the announcement the reasons given by or to the director for the resignation or removal. This includes, but not limited to, any information relating to his/her disagreement with the board, as well as a statement whether or not there are any matters that need to be brought to the attention of the holders of securities of the listed company.
- Ideally, the content of the announcement would be mutually agreed upon by the company and the outgoing director. The company should ensure that the announcement is factually accurate and avoid making any confusing or libellous statements regarding the resignation or removal.
- Where the senior executive also holds a qualification share or any shares on behalf of the company as a nominee, the senior executive should transfer the shares in the manner as directed by the company before his/her departure.

SHAREHOLDER APPROVAL

Generally speaking, a company must not make any payment for loss of office to a director or former director of the company (or of its holding company) unless a shareholders' resolution of the company (and/or its holding company) has been obtained before the payment.

REMOVAL AS A DIRECTOR

Termination of a senior executive does not automatically remove him/her from his/her office as a director of the company. In Hong Kong, the removal of director is a formal process that offers the director an opportunity to be heard on the resolution and to make written representation.

In order for a removal of director to be effective, the members must agree to it by a simple majority agree to it.

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ITALY

THE APPROACH

In Italy, an executive hired with an open-ended contract can be dismissed for the following reasons:

(i) For cause, without any advance notice. An executive's dismissal may be deemed for cause in cases of particularly serious misconduct that definitely undermines the executive's fiduciary relationship with his or her employer. In such case, a disciplinary procedure must be followed by the employer before serving the dismissal. In this case, the employer must promptly deliver to the executive a written description of his/her misconduct or gross negligence; then, the executive has the right to provide his/her justifications within a specific deadline, usually of 5 days (or the timeframe set out under the applicable National Collective Bargaining Agreements ("**NCBAs**")). The executive can also request a meeting with the employer if he/she wants to orally provide his/her justification. After the justification or after the executive's failure to provide the justification within the abovementioned deadline, the employer can dismiss him/her.

(ii) For justified reason (so called "giustificatezza"): such reason can be related to the employer's economic, organisational and production-related needs (*i.e.*, the need to suppress a position, due to an internal reorganisation process) or due to misconduct or negligence by the executive (although not as serious as a just cause of dismissal). In particular, the reasons that may ground an executive's dismissal – considering his/her role within company's organisation and the strong trust relationship between him/her and the employer – are wider than the ones that could ground the dismissal of other employees. Notice period is due in such case.

Please also note that a fixed-term employment contract with an executive can be terminated, before the expiration of the term, only for just cause, otherwise the executive would be entitled to all of the outstanding remuneration until the term.

Before a dismissal, the risk of claims should be considered, along with the reputational and regulatory issues, as well as the possible costs of the dismissal.

It is also possible to terminate the employment contract with a settlement agreement between the employer and the executive. According to Italian law (Article 2113 Italian Civile Code) waivers/settlements concerning individual's employment rights provided for by mandatory rules (such as the right to challenge change of duties or of place work) shall be invalid and unenforceable unless the relevant agreement is executed before a competent body, the so-called 'protected venues' (*e.g.* labour court, trade union commissions, Territorial Labour Inspectorates, Certification Commissions). If not executed before the protected venues, the waivers/settlements will be considered invalid and can be challenged within 6 months from (i) the date of termination of employment or (ii) from the date of the waiver/settlement if agreed post termination of employment. If executed with these procedures, the settlement agreements can be the most effective way to dismiss an executive where there are multiple factors/risks to consider.

The employer and the executive may undertake within the settlement agreement to not disclose information/terms concerning the employment relationship and its termination.

HOW CAN THE CONTRACT BE TERMINATED?

According to Italian law, the dismissal must always be served in writing. In particular, the employer shall print the dismissal letter on company's letterhead (the letter must be duly executed by a company's representative entrusted with the necessary powers to dismiss the executive).

The dismissal letter shall be sent to the executive's address with registered letter with return receipt by the executive via mail or, as alternative, shall be hand delivered. To this purpose, it will be necessary to print

and sign two copies of the dismissal letter: one copy shall be delivered to the executive and the other one shall be duly signed by the executive for receipt and stored by the employer as evidence of the relevant delivery.

We suggest delivering the dismissal letter during a meeting to be held in person at the company's premises, at the presence of the executive, the employer (or his/her delegate) and a witness.

The dismissal communicated verbally is null and void. In this case, the executive can claim to be reinstated as explained below.

POTENTIAL CLAIMS IN ITALY

The executive, who considers that they have been unlawfully or unfairly dismissed, must challenge the dismissal (by a written letter sent to the employer with proof of receipt) within 60 days of the date of the dismissal. Then, the executive must file a claim before the Labour Court within the following 180 days.

As an alternative to the claim before the Labour Court, by 30 days from the dismissal, the executive may start the specific alternative dispute resolution panel set forth under the applicable NCBAs.

PAYMENT CONNECTED TO THE TERMINATION OF AN EXECUTIVE

Based on the rules governing the executives' employment relationship (including those set forth by the NCBAs), upon termination due to dismissal by the company, the executive is entitled to receive the following mandatory payments:

- TFR (**statutory severance indemnity**). In general terms, the TFR is a portion of employees' wages which is set aside by the employer and generally paid to the employees in a lump sum upon termination of their employment, regardless of the reasons of termination (i.e., even in case of dismissal for just cause or resignation). Each year, the employer sets aside or pays to pension funds – based on the employee's choice – approximately 7.4% of the total pay of each employee, including fixed and variable salary, fringe benefits and any other compensation on a non-occasional basis. Such amount – annually appreciated according to a legally guaranteed yield rate – will be paid to the employee upon termination of the employment relationship or it will be available to the employee based on the applicable rules of the pension fund where TFR has been contributed to.
- **other minor statutory entitlements** (such as unused paid holidays, pro rata of the 13th salary instalment, etc.);
- unless the dismissal is based on just cause, the **notice period** set forth by the NCBA or the corresponding indemnity in *lieu.* The notice period varies depending on the applicable NCBA and on the seniority of the executive. For example, according to NCBAs of Executive of Industrial Sector and Trade Sector, the notice ranges from a minimum of 6 months to a maximum of 12 months. It is possible to exempt the executive to perform his duties during the notice period. In such case, the employer, in lieu of notice, will pay the relevant indemnity to the executive, to be calculated on the basis of a total compensation rule, i.e. by taking into account: fixed salary, the average amount of bonuses paid over the last 3 years, and monetary value of benefits, if any. Such indemnity in lieu of notice is subject to social security contributions and triggers also the payment of the relevant TFR accrual.

In addition to the above-mentioned severance payments, there should be considered also other **further indemnities provided by the contract** and due, for example, to non-compete covenants or non-solicitation agreements or golden parachutes. Such additional severance pay-outs are subject to the limitations provided for listed companies and banks.
Executives may also benefit from other contractual provisions, such as bonus or commission schemes, long term incentive plans or other equity arrangements, car allowance, or other premiums. These

amounts shall be considered in the calculation of the indemnity in lieu of the notice period and on the other indemnities described above (e.g. supplementary indemnity).

CONSEQUENCES OF UNFAIR DISMISSAL

Moreover, executives are entitled to a **supplementary indemnity** in the event their dismissal is considered as unjustified.

According to the NCBA, the dismissal of an executive is lawful provided that it is "justified"; based on prevailing case law, whether or not the dismissal is "justified" shall be ascertained on a case-by-case basis, taking into consideration two main rules: (a) on the one hand, the employer shall act in good faith (for example, it may not implement a reorganisation on purpose, i.e. for the sole purpose of dismissing the employee, it being necessary that business/organisational reasons in support exist and can be alleged); and
(b) on the other hand, the employer may not ground the dismissal on retaliatory/discriminatory reasons.

Therefore, if the executive challenges the dismissal before the Labor Court and the dismissal is deemed "unjustified" by the Court, according to the NCBA the Court shall award damages (the "**Supplementary Indemnity**") to the executive (on top of the notice period and on the mandatory payments described above).

The Supplementary Indemnity is provided by the NCBA and varies depending on the length of service and, in some cases, on the executive's age.
For example:

- according to NCBA of Executive of Industrial Sector, the supplementary indemnity ranges from a minimum of four to a maximum of 24 monthly salary.
- according to NCBA of Executive of Trade Sector, the supplementary indemnity ranges from a minimum of four to a maximum of 18 monthly salary. In addition, the supplementary can be increased by an additional four or five monthly salary, depending on executive's age.

Given the regime governing the dismissal of executives and considering the employer's strict burdens in terms of proof, the Company may evaluate the possibility - in the framework of the implementation of a dismissal, to approach the executive in order to reach a mutual termination of the employment relationship, by offering to the executive an exit package.

This option could offer the advantage to obtain the executive's consent to the termination of his employment relationship and the waivers to any potential claim related to the employment relationship (it can be evaluated to include also waivers concerning the performance and termination of the Corporate Office) by means the execution of a settlement agreement, against the payment of a lump sum (i.e., incentive to leave, which is not subject to the payment of social security charges and benefits from a lower tax rate).

In this scenario, it could be reasonable to consider for the purpose of the exit package, on top of the mandatory payments connected to the termination and the notice period indemnity, an amount approximately equal to the medium amount of Supplementary Indemnity that could be awarded by the Court.

CONSEQUENCES OF DISMISSAL NULL AND VOID

The dismissal shall be considered **null and void** in the following cases:

- discriminatory dismissal (for a reason that relates to age, sex, race, disability, sexual orientation, gender reassignment, etc.);
- oral dismissal;
- retaliatory dismissal;
- dismissal during pregnancy/paternal leave; or
- dismissal of the executive who reported an employer's misconduct through the

whistleblowing channel.

Only in case of null and void dismissals (*i.e.* discriminatory dismissal, oral dismissal, dismissal during pregnancy/paternal leave or retaliatory dismissal), the executive is entitled to obtain the **reinstatement as well as the payment of compensation for the salary and social security lost as a result of the dismissal up to the date of reinstatement** (this indemnity amounts to a minimum of five months' salary). However, the executive may waive the right to reinstatement, electing to receive (in lieu of reinstatement) an additional compensation equal to 15 months' salary.

INJUNCTIONS AND RESTRICTIVE COVENANTS

Executives are the highest category of employees and are considered as the *alter ego* of the employer. Therefore, executives have access to confidential information regarding the company. That being said executives could have post termination restrictions in their contracts to prevent them from performing certain activities for a period of time after their employment has ended which can be enforced through the Courts by obtaining an injunction.

In Italy, the most common post termination restrictions are:

- **Non-compete** – executives can be forbidden to compete with their former employer also after employment termination. According to Italian Law, non-compete covenants are valid and enforceable only if they:
  - (i) are set forth in writing
  - (ii) provide for a specific and fair consideration that has to be paid to the executives. Generally, the compensation should be in the range of 30% of the employee's gross remuneration if the territory includes Italy and in the range of 40-50% the employee's gross remuneration if the territory includes Italy and other countries. According to case law, the compensation cannot be symbolic and must be proportionate or the restriction as well as determined or determinable.
  - (iii) are limited in territory and scope; and
  - (iv) have a duration which does not exceed five years.
- **Non-solicitation** – such covenant restricts the ex-executives' ability to attempt to contact/establish any business relationship with customers/clients or employees of the former employer. For such covenants the compensation is not mandatory but is customary.
- **Non-disclosure** - a contract or clause that establishes that the sensitive or business information an executive may obtain during the employment relationship will not be made available to any other employer.

According to case law, in order to assess the validity of these covenants, it is necessary to check whether their terms, extents and conditions prevent or not the executive from finding another employment and/or violates the executive's right to preserve his/her professionalism.

Please note that the violation of the above- mentioned covenants can ground a request for damages by the employer or the request to the executive of pay a fixed and predetermined penalty (if it has been previously agreed).

In addition, the employer can also enforce these restrictions by seeking an injunction of the Courts which suspends the unlawful behaviour of the executive.
Therefore, the covenants must be drafted carefully, in order to comply with Italian regulation and case law.

REDUNDANCY

If an executive is redundant, the employer can dismiss him/her for reasons related to the company's economic, organisational and production-related needs (*i.e.*, the need to suppress a position, due to an internal reorganization process).

Furthermore, please also note that in case the employer:

- employs more than 15 employees (including executives); and
- dismisses at least five employees (including executives) in the same establishment, or at different establishments located in the same province within a period of 120 days,

the employer must follow a mandatory procedure provided by the law, also involving Trade Unions and local authorities.

DISCRIMINATION, WHISTLEBLOWING AND OTHER STATUTORY CLAIMS

As anticipated, the discriminatory or retaliatory dismissal is null and void and may imply the reinstatement of the executive. Discrimination may arise for example, if the employer terminates a senior executive for a reason that relates to age, sex, race, disability, sexual orientation, gender reassignment, marriage and civil partnership, pregnancy and maternity/paternity, or religion or belief.

Whistleblowing claims can be used by executives (particularly if they hold a regulated/financial or health and safety function) as a negotiating factor in increasing any settlement package. Executives who report employer's misconduct through the whistleblowing channel cannot be discriminated against.

Furthermore, according to Italian law, such dismissal shall be presumed to be retaliation and is considered null and void, unless the employer is able to demonstrate to the Courts that the measure was instead fully unrelated to the whistleblowing.

EXECUTIVE AND DIRECTOR. REMOVAL AS A DIRECTOR

Terminating an executive's employment does not necessarily terminate any directorships that he/she might hold and termination of the employment relationship is not a just cause of revocation of the director from his/her office.

As long as the individual remains a director, they will be entitled to attend board meetings, access minutes and other paperwork related to their appointment as a director. In addition, the ex- executive is entitled to receive the compensation as director if provided.

If the relationship as director is terminated, the following scenarios may arise:

- the director resigns from any directorships held in the company and any associated companies;
- the company proceeds with the revocation of the Corporate Office.

However, as a general remark, note that under Italian law, should the revocation be unjustified, the company could be exposed to a request of damages compensation. Damages are ordinarily calculated on the basis of the compensation the director would have received until the final term of his/her office or, in the absence of any compensation (and of a valid waiver to it), they could be established by a competent Court. Should the directorship be on an open-term basis, the directors can be revoked at will, but if there is no just cause of revocation, then the director will be entitled to damages compensation (usually in the range of 6-12 months unless there are particular termination covenants).

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IRELAND

THE APPROACH

In Ireland, there are various ways in which a senior executive's employment can be terminated. Like in the UK, much will depend on the circumstances, and reasons for termination, the role of the senior executive, the risk of claims and whether there are reputational and regulatory issues to consider. The right to natural justice and fair procedures is enshrined in the Irish Constitution, so it is essential to have clearly defined and fair processes in place when seeking to terminate a senior executive. A negotiated severance agreement between a company and a senior executive exiting the business, in both contentious and non-contentious exits, is common in Ireland. Employers favour the use of severance agreements to secure a waiver against any further actions/claims which a senior executive may take against the company, to expedite the process of exiting a senior executive from the company, and to agree other relevant terms relating to the termination (for example, post termination restrictions).

For a severance agreement to be enforceable in Ireland, there must be informed consent on the part of the senior executive, and the senior executive should be advised that they should take independent legal advice in relation to the severance agreement and given the time and opportunity to take such advice. Best practice is to insist on the senior executive actually taking such independent legal advice, to make a contribution towards the senior executive's legal costs in this regard, and to expressly refer to the lawyer in question, and to the contribution towards costs, in the body of the severance agreement. Like in the UK, severance negotiations should ideally always be conducted on a without prejudice basis to ensure that settlement conversations are not disclosed in future litigation. However, in Ireland, unlike in the UK, there is no statutory framework in place to allow for protected conversations between employers and senior executives not covered by the without prejudice rule. In Ireland, without prejudice conversations can only happen between lawyers, or directly between the employer and the employee where they are discussing settlement of a legal action (which is either brought or reasonably apprehended). Accordingly, conversations relating to potentially agreeing severance terms must be handled very carefully.

Severance agreements do not, however, work in every instance so employers must understand what encompasses a fair dismissal in Ireland, as well as the potential claims that may arise if dismissals are deemed to be procedurally and/or substantively unfair.

HOW CAN THE CONTRACT BE TERMINATED?

The employment contract can be terminated by giving the requisite notice provided for in the employment contract, or statutory minimum notice, whichever is greater. Any provision in the employment contract which provides for shorter notice periods than the minimum statutory periods have no effect. This does not prevent an employer or senior executive from waiving their right to notice. In cases where the senior executive is dismissed for gross misconduct, they may be dismissed summarily (i.e. without notice).

POTENTIAL CLAIMS IN IRELAND

All employees in Ireland have:

Contractual rights – express terms set out in the employment contract and certain implied terms arising from custom and practice;

Statutory rights – derived from the laws of Ireland, such as the right not to be unfairly dismissed or discriminated against; and

Common law rights – established by case law and precedence, arising from repudiatory breaches of contract; and

Constitutional rights – enshrined under the Irish Constitution.

A senior executive may succeed in bringing a claim under

either common law or statute for wrongful/unfair dismissal, but not both. While the remedies under statute may be greater, the statute of limitations to bring a claim under common law is considerably longer.

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

The concept of 'termination at will' does not exist in Ireland. Save for cases of gross misconduct, all employees are entitled to receive notice of termination of employment. As long as the employer gives notice which is sufficiently long to satisfy the contract and statute, the contract is, from a contractual perspective, lawfully and validly terminated from a notice perspective. This is the case even where the employer's entitlement to terminate the contract on notice has not been expressed in writing, as an employer is entitled to terminate the employment relationship by giving reasonable notice, under common law.

Unless there are constitutional considerations arising in the manner of the termination of a senior executive's employment, at common law it is essentially just a matter of contract (the courts have endorsed the principle under common law that the contract of employment can be terminated for good reason, bad reason, or no reason, provided it is terminated on notice. Wrongful dismissal at common law, therefore, is either: dismissal in breach of contract, or dismissal in violation of constitutional rights. Damages which may be recovered by a senior executive for a breach of contract are limited to actual loss suffered as a result of the wrongful dismissal. This is generally limited to an employee's right to notice – either their express contractual notice, or reasonable notice if the contract is silent as to notice.

PAYMENT IN LIEU OF NOTICE

The contract of employment should provide for the company's right to pay in lieu of notice ("PILON"). If the right to PILON is provided for by the contract of employment, the company effectively has the ability to terminate the senior executive's contract with immediate effect (by PILON). The company does not need the senior executive's consent to do this. An exception arises in cases of redundancy. Strictly speaking, all employees being made redundant are entitled to two weeks' statutory redundancy notice which should not be paid in lieu (technically, it is an offence to do so). However, where a senior executive is signing a severance agreement waiving all claims against the company, in exchange for an ex-gratia payment, most employers take a commercial decision to pay in lieu of the full notice period. Alternatively, the employer can place the senior executive on garden leave for two weeks and then pay in lieu of the balance of notice.

If the right to PILON is not reserved in the contract of employment, the company would need the senior executive's consent to PILON. However, in practice, senior executives tend to be happy to accept PILON even where it is not expressly provided for in the contract of employment as it allows for an earlier exit. It is open to an employer to provide in the contract of employment that PILON is calculated based on basic salary only. Where the contract is silent on the calculation of PILON, then PILON should be based on full remuneration (including bonuses, pension contributions etc).

WHAT CONSTITUTES DAMAGES FOR BREACH OF CONTRACT

Damages which may be recovered by a senior executive for a breach of contract are limited to actual loss suffered as a result of that dismissal. Generally, this means it is limited to the amount of notice in the employment contract. Typically, this is a sum equivalent to the total remuneration which the senior executive would have earned from the contract from the date of dismissal to the end of the contract, or the notice period. This includes salary, benefits-in-kind, share options, lunch vouchers, commission not yet paid, and company pension contributions and any other forms of remuneration earned by the senior executive that have not yet been paid.

There have been attempts to expand the scope of damages payable in wrongful dismissal claims. Sometimes this is done by adding an additional head of claim, for example, adding a personal injuries claim for psychological injuries due to work related stress. In very exceptional cases, exemplary damages may also be awarded by the court if it finds that a company is guilty of mala fides, which is quite difficult to prove. Generally, the view of the Irish courts is that exemplary / punitive damages are inappropriate in a breach of contract claim.

STATUTORY CLAIMS

There are a number of statutes which are particularly relevant to employers who are seeking to terminate the employment of a senior executive. These include, but are not limited to, the Unfair Dismissals Acts 1977 to 2015, the Employment Equality Acts 1998 to 2015, the Redundancy Payments Acts 1967 to 2014, and the Protection of Employment Act 1977.

UNFAIR DISMISSAL

The primary statutory protection for any employee in their employment is the right to not be unfairly dismissed. This applies to junior and senior employees alike, but to qualify, the employee needs to have been continuously employed by the employer for at least one year (unless the dismissal arises out of pregnancy or matters connected therewith, the exercise of rights under maternity, adoptive, parental, force majeure, or carer's leave, the making of a protected disclosure, or for trade union membership or activity). A claim must be brought within 6 months of the dismissal (this timeframe may be extended to 12 months if there was reasonable cause for the delay).

To effect a fair dismissal of a senior executive, employers must ensure that the dismissal meets the fairness requirements substantively and procedurally. The reason for dismissal will usually inform what procedural fairness requires in each instance. In all cases, employers should be seen to consider, and should actively consider, whether the sanction of dismissal is proportionate in the circumstances. An employer must be able to show that they considered lesser sanctions for the senior executive prior to deciding to dismiss.

To fairly dismiss a senior executive, the reason for the dismissal must be due to (a) the capability, competence or qualifications of the senior executive performing work of the kind they were employed to do; (b) conduct; (c) redundancy; (d) the employer being prohibited by statute from continuing to employ the individual; and/or (e) other substantial grounds which justify the dismissal.

In cases of gross misconduct, it is open to the employer to summarily dismiss the senior executive for cause without providing notice. However, employers still need to comply with fair procedures by investigating the alleged gross conduct and carrying out an appropriate disciplinary hearing.

Award for Unfair Dismissal

An aggrieved dismissed senior executive can refer a complaint to the Workplace Relations Commission ("WRC") in the first instance, an independent statutory body which deals with employment and equality related complaints. The WRC can order the reinstatement of the senior executive, the re-engagement of the senior executive to their previous position or a reasonably suitable position, or compensation of up to two years' remuneration (limited to the senior executive's actual financial loss). Given that the employment relationship is based on mutual trust and confidence (which can often be broken where a senior executive has been dismissed), compensation awards are common and reinstatement or re-engagement is very rare.

Irish unfair dismissals legislation places an onus on the employee to mitigate any loss post-dismissal.

Like in the UK, employers may consider entering into severance agreements with senior executives in lieu of following a formal process (or at the end of a formal process). There are tax reliefs available which can be applied to a termination payment. The basic relief which a senior executive can avail of entitles them to the first €10,160 of the payment tax free together with €765 for each year of complete service. In addition to the basic relief, a senior executive may claim another €10,000 tax free (the 'increased exemption'), where the senior

executive is not a member of an occupational pension (superannuation) scheme, or irrevocably gives up their right to receive a lump sum from the pension scheme and has not made any claims in respect of a lump sum received in the previous ten tax years. Other tax reliefs may also be available and may be more beneficial for the senior executive, such as the Standard Capital Superannuation Benefit. Some elements of severance pay may or may not be taxable depending on their contractual status.

INJUNCTIONS AND RESTRICTIVE COVENANTS

Injunctive relief may be sought by a former employer where it believes that a senior executive has breached post-termination restrictions, or has unlawfully used company confidential information after their employment has been terminated. Injunctive relief may also be sought by senior executives seeking to restrain their dismissal pending the substantive hearing of their common law claim. To secure this relief, the senior executive must show that there is a serious issue to be tried, that damages would not be an adequate remedy, and that the balance of convenience lies in favour of granting an injunction. This is a high bar to satisfy, but that does not mean it is not met in practice. Given that employment-related injunctions are often mandatory in nature, the Irish courts tend to place a lot of emphasis on a requirement to establish a strong case that the senior executive will succeed at trial. If an injunction is sought, acting swiftly is a necessity since any material delay may defeat an application for an injunction. It is worth noting that injunctions are not granted to employees who are dismissed by reason of (genuine) redundancy, or performance.

Restrictive covenants (particularly non-competition clauses) are notoriously difficult to enforce in Ireland. The view taken by the Irish courts is that they constitute an unlawful restraint of trade and are against public policy. As such, the shorter and more narrowly defined they are the more likely they are to be enforceable. Many senior executives will have clauses in their contracts which prevent them from doing certain things post-employment for a specified period and in a specified location. Typically, these include:

Non-solicitation clauses preventing the senior executive from soliciting or approaching clients or customers of their former employer;

Non-dealing clauses preventing the senior executive from dealing with clients or customers;

Non-competition clauses preventing the senior executive from working for a competitor or starting a competing business for a particular period of time in a particular location; and

Non-poaching clauses preventing the senior executive from soliciting employees of a certain level from their old employer.

Post-termination restrictions should go no further than strictly necessary to protect the company's legitimate business interests and should be reasonable having regard to the specific nature of the role. If there is a less restrictive way of protecting the company's legitimate business interest, this should be considered. Restrictions should be limited in terms of the time limit, geographic scope and type of activity to be restrained in the first instance. In respect of non-competition restrictions, 12 months would be the absolute maximum that would generally be enforceable against a senior executive.

To enforce a post-termination restriction, the employer may consider taking legal action if there is a real risk of serious commercial damage. However, in any court action, there is the risk of significant legal costs. The company could sue the senior executive for breach of contract or seek injunctive relief. Whether the Irish courts will enforce post-termination restrictions will be on a case-by-case basis and will depend on the particular circumstances. The senior executive's constitutional right to earn a livelihood must be balanced against the business interests of the company.

REDUNDANCY

Senior executives whose roles are redundant may be dismissed by reason of redundancy. A senior executive

who is dismissed by reason of redundancy and has two years' continuous service will be entitled to a statutory redundancy payment. Statutory redundancy payments are calculated as two weeks' normal remuneration for each year of continuous and reckonable service plus one week's normal weekly remuneration (often referred to as a bonus week). The weekly wage for the purposes of the calculation of a statutory redundancy payment is currently subject to a ceiling of €600 per week. If the total amount of reckonable service is not an exact number of years, the "excess" days must be credited as a proportion of a year.

Employers often pay an enhanced/ex-gratia redundancy payment, although subject to the following comment, there is no statutory or legal requirement to do so. If there is no written policy/agreement in relation to enhanced/ex-gratia redundancy payments, but there is either an oral agreement or a custom and practice of paying a certain level of enhanced redundancy, then the employer may find itself bound by that oral agreement or custom and practice.

The company also needs to consider whether a redundancy amounts to a collective redundancy. Where in 30 consecutive days, the number of proposed redundancies is:

- At least 5 where the number of employees is between 20 and 49;
- At least 10 where the number of employees is between 50 and 99;
- At least 10% of the number of employees where the number of employees is between 100 and 299; and
- At least 30 where the number of employees is 300 or more,

this will amount to a collective redundancy.

There are additional statutory steps that must be taken in a collective redundancy which include notifying the Minister for Enterprise, Trade and Employment, and carrying out a minimum 30 days information and consultation process with representatives of the employees potentially impacted. Where employers fail to follow the statutory requirements during a collective redundancy when making a senior executive redundant, the senior executive may be awarded up to four weeks' remuneration should they bring a claim. Employers in breach of their information and consultation obligations shall also be guilty of an offence and liable on summary conviction to a fine not exceeding €5,000.

DISCRIMINATION, WHISTLEBLOWING AND OTHER STATUTORY CLAIMS

A senior executive may take a claim for discriminatory dismissal which, generally speaking, must be brought within 6 months from the date of discrimination (which may be extended if there is reasonable cause for the delay). There is no minimum service requirement to bring a claim under this legislation. There are nine protected grounds in the legislation, which are gender, civil status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller Community. Complaints relating to discriminatory dismissal from a senior executive are made to the WRC. The WRC can order the reinstatement of the senior executive, the re-engagement of the senior executive to their previous position or a reasonably suitable position, or compensation of up to two years' remuneration or €40,000, whichever is greater, for the effects of discrimination. Importantly, compensation for discriminatory dismissal is not limited to financial loss.

Irish whistleblowing legislation protects employees who are dismissed as a result of making a protected disclosure. Employees dismissed for having made a protected disclosure may be awarded compensation by the WRC of up to a maximum of five years' remuneration. However, this may be reduced by up to 25% where investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure. A senior executive who claims to have been dismissed wholly or mainly for having made a protected disclosure may apply to the Circuit Court for an injunction to restrain the dismissal, within 21 days of dismissal. The requirement to have one year's continuous service does not apply to lodging a claim

for unfair dismissal relating to the making of a protected disclosure.

Senior executives may also have recourse to the industrial relations framework in Ireland where they can refer a trade dispute to the WRC for investigation. There is also no minimum service requirement to bring an industrial relations claim. An employer may object to the investigation of the dispute. This leaves it open to the senior executive to refer the matter to the Labour Court (which may convene a hearing without the employer's involvement). An Adjudication Officer or the Labour Court will issue a recommendation and may recommend that an amount of compensation be paid to the senior executive or an appropriate action be taken. However, these recommendations are not legally enforceable and would be relatively uncommon at senior executive level.

SENIOR EXECUTIVES WHO ARE ALSO DIRECTORS

Like in the UK, there are several considerations that employers should keep in mind when dismissing a senior executive who is also a director, such as:

Ensuring that the timing of the resignation of the director coincides with the termination of their employment;

Ensuring that the constitution of the company or the statutory process for the removal of directors is followed;

Confirming whether the senior executive holds shares in the company, and what will happen to these shares;

Preparing a severance agreement which provides (where applicable and desired) that the senior executive will resign from any directorship held in the company and any associated company, details of any announcement to the public and/or staff as required, and how any shares that the senior executive holds will be dealt with; and

Ensuring that the correct filings are made in the process of removing the director. For example, a Form B10 must be filed in the Companies Registration Office when a director is removed from office.

SHAREHOLDER APPROVAL

Where conflict with a director arises, usually the easiest way to manage the situation is to seek to have the director resign his position voluntarily, in return for a severance package, if possible. Any severance package offered to a director may require shareholder approval.

A company's constitution may make provision for the removal of a director. However, in the absence of such provision, and where an amicable resolution is not possible, a director may be removed from office by the procedure set out under Irish company law which provides that where a shareholder proposes to remove a director, they must give notice of 28 days that an ordinary resolution is to be proposed and a copy of that resolution must be sent to the relevant director. The director in question is entitled to make representations in writing to the company when they receive notice of the intended resolution. An ordinary resolution is passed by a bare majority of the shareholders.

Irish company law gives the members of the company ultimate control, in that they can remove a director of the company at any time by ordinary resolution in a general meeting. This power cannot be removed by the constitution of the company or in any agreement between the director and the company.

REMOVAL AS DIRECTOR

The dismissal of an executive director is governed by employment law in addition to company law. Further, if the director is also a shareholder, depending on the circumstances, they may also have a remedy for oppression in the conduct of the company's affairs under minority protection. As well as adhering to substantive and procedural fairness from an employment perspective to fairly the dismiss the senior executive as an employee, employers should consider any steps that may be required to facilitate the removal of the senior executive as a director.

constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at February 2024.

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JAPAN

THE APPROACH

In Japan, there are several different ways in which an executive can exit. Determining whether the status of the executive in question is an employee, director, executive officer, or a hybrid of these is essential for establishing their legal standing. Upon this determination, considerations for contract termination or other forms of treatment can be made.

Particularly when executives are considered employees, they receive significant protection under employment and labour laws. In such cases, employers need to consider legal restrictions on dismissal, frameworks for making dismissal decisions, and dismissal procedures while evaluating the risks relating to human and material costs and information management for the specific case at hand. This assessment helps in considering the feasibility of dismissal or alternative measures. Given that Japan does not have a system for monetary dismissal, it is advisable to carefully consider the risk of a dismissal being deemed an unjust dismissal.

Under Japan's legal framework, the concept of "at-will dismissal" does not exist, and the threshold for the validity of dismissals is generally very high. Therefore, to minimize the aforementioned costs and risks, methods that encourage peaceful resignation through encouragement are commonly utilized. The success rate of obtaining resignation through encouragement can vary significantly based on how it is conducted, and the content of the resignation package offered. Thus, it is crucial to design and choose appropriately in light of the executive's specific situation, including years of service, contribution to the organisation, career history, and nature of confidential information held.

THE POSITION OF EXECUTIVES IN JAPAN

In Japan, the term senior executive typically refers to employees holding high-ranking positions within an organization, with corresponding treatment of and authority granted to them.

However, among senior executives, some are appointed as directors in addition to their role as employees. These are "Employee-directors" involved in management under the Corporation Act. Employee-directors are subject to both company law regarding their status as directors and employment/labour law regarding their status as employees. While directors can be dismissed by resolution of a shareholders' meeting, the termination of their employment status must comply with employment/labour law regulations, including dismissal restrictions.

Moreover, there are cases where individuals are treated as "employee-executive officers," entrusted with the authority to execute decisions made by the board. While not directly involved in management, employee-executive officers may enter into contracts for specific business purposes. In such cases, their status as executive officers follows general principles of civil law, and they do not receive the protections of employment/labour law (although they remain subject to employment/labour law regarding their status as employees). Executive officer positions can be relatively easily terminated under civil law, but the dissolution of their employee status still requires adherence to employment/labour law regulations.

CONSIDERATIONS WHEN NOT EXECUTIVES ARE NOT EMPLOYEES

When employees are promoted (or transition) to directors or executive officers, they may terminate their employment and enter into a delegation agreement with the company regarding their involvement in management and carrying out of business. Alternatively, there are cases where individuals join a company as directors or executive officers without taking on employee status. In such cases, employers dismiss them relatively easily. Furthermore, the likelihood of bearing costs exceeding the compensation for the remaining term of their anticipated tenure is low, making it easier to predict termination expenses.

However, even with these non-employee directors, if the facts indicate that they are under the employer's control and supervision, then courts or other government agencies may recognise them as employees, making them

subject to employment/labour law. In such instances, simply dismissing directors and executive officers may not be sufficient, as compliance with employment/labour law regulations, such as dismissal restrictions, may be necessary for their departure.

Regarding whether directors or executive officers have employee status, the following factors are primarily considered:

- The presence or absence of authority to execute duties under the law and the company's articles of incorporation;
- Their actual role in business operations;
- Whether they are subject to the orders and supervision of the more senior directors ("Representative Director" in Japan);
- Whether the company controls when and where they work;
- The circumstances of their appointment;
- The nature and amount of compensation they receive;
- The parties' understanding of the position.

HOW CAN THE CONTRACT BE TERMINATED?

When executives have employee status, methods for terminating an employment contract include the following:

- Mutual resignation - Termination of the employment contract by agreement between the parties.
- Resignation - The employee unilaterally terminates the employment contract.
- Retirement based on labor contracts or work rules - Retirement due to the expiration of a leave of absence period, mandatory retirement, expiration of the contract term, etc.
- Dismissal - The employer unilaterally terminates the employment contract.

Dismissals can be broadly categorized into those based on the employee, such as lack of capability, poor attitude or misconduct, and those based on business reasons. There is no system that allows dismissal in exchange for statutory compensation for any of the above listed methods of termination in Japan. Therefore, when an employer intends to dismiss an employee, it is crucial to examine the validity of the dismissal carefully in light of the specific circumstances.

On the other hand, if an executive does not have employee status, then as mentioned before, it is possible to terminate the contract by holding a general shareholders' meeting and passing a resolution to dismiss the director, or by dismissing the executive officer (generally this is at will).

RESIGNATION AND MUTUAL RESIGNATION

For mutual resignation or resignation, as long as it is the executive's genuine intention to resign, this exit will be considered legal or valid. However, if the executive's resignation is the result of coercion or improper encouragement by the employer, the genuineness of the intention to resign can be denied, and the effectiveness of the mutual resignation or resignation may later be deemed invalid.

Except in special circumstances such as during maternity leave, an employer is free to encourage an employee to resign as long as it is done in a diplomatic and proper way. In Japan, this method is often used to achieve an employee's resignation peacefully without resorting to dismissal. On the other hand, encouragement to resign that exceeds the bounds of appropriateness in its method or manner can often lead to labour disputes, relating to, for example, mental health issues caused by work and damages claims. Therefore, it is appropriate when approaching discussions regarding voluntary resignation to consider carefully in advance the specific details, resignation conditions, responsible parties, interview times, interview frequencies, etc.

RETIREMENT BASED ON LABOR CONTRACTS OR WORK RULES

For specific types of retirement reasons, it is permissible to predefine these in employment contracts or work rules, and to treat the occurrence of such reasons as automatic retirement. In workplaces employing more than ten employees, the creation and distribution of work rules are

legally mandated, and the properly distributed work rules become part of the employment contract (the Labour Standards Act, Article 89; the Labour Contract Act, Article 7). Therefore, employers with workplaces employing more than ten people typically treat employees collectively based on retirement reasons specified in the work rules.
One of the primary specific reasons for retirement is mandatory retirement. In Japan, it is legal to treat employees as retired upon reaching a specific age of 60 or older as defined in the work rules, becoming effective at the end of their birth month (Act on Stabilization of Employment of Elder Persons, Article 9). However, even if the retirement age is set at 60, employers are legally obliged to continue employment until the age of 65, although now based on a new one-year renewable fixed-term employment contract (although simply extending the retirement age to 65 or abolishing it altogether is also possible). Thus, for senior executives nearing retirement age, it is useful to consider the necessity of contract termination before this time and other issues, taking into account the remaining period until retirement.

Another important reason for retirement is automatic retirement upon expiration of a leave of absence period. Sick leave is usually granted for periods ranging from two or three months to one year, depending on years of service, and if an employee cannot return to work by the end of this period, they are treated as retired. In practice, the expiration of a leave of absence period critical to employment often leads to labour disputes over the decision to return to work. Especially for executives, retirement due to the expiration of a leave of absence period can affect their future career and job-seeking activities, so providing a transition support package to process the resignation smoothly and amicably as a mutual resignation is also common.

DISMISSAL

Dismissals can broadly be categorized into two main types: "ordinary dismissal," which is based on a party's breach of the obligations in the employment contract, and "disciplinary (advisory) dismissal," which is the sanction for violation of company rules. Furthermore, ordinary dismissals are further divided into dismissals based on the employee's lack of suitability for the position, the responsibility of the employee, and dismissals for business reasons (redundancy dismissals) by the employer.

Regarding ordinary dismissals, it is fundamental to (1) assess any legal restrictions on dismissal, and (2) examine, in light of the individual circumstances, whether the dismissal can meet the factors of objective reasonableness and social adequacy (as per the Labour Standards Law, Article 19 and the Employment Contract Act, Article 16). However, for redundancy dismissals, given that they are the company's responsibility, special considerations (to be discussed later) established by case law need to be examined. For regular employees, in addition to points (1) and (2), it is necessary to consult with a labour union if the employee is a member of one. For executives, this consideration is usually unnecessary, as employees in these kinds of positions are generally not union members. Furthermore, upon deciding on a dismissal, it is also necessary to carry out correct dismissal procedures, such as (3) providing a notice of dismissal or payment of a dismissal allowance.

On the other hand, disciplinary dismissal is a disciplinary sanction for serious violations of company rules. The framework for examining (1) dismissal restrictions and (2) the objective reasonableness and social adequacy, is essentially the same as for ordinary dismissals. However, disciplinary dismissal, being the most severe sanction within the employment relationship and often leading to the non-payment of severance pay, has a higher threshold for validity compared to ordinary dismissals (the Labour Standards Act, Article 19 and the Employment Contract Act, Article15, Article16). Additionally, issues such as lack of capability or health problems generally do not constitute violations of company rules and thus are not grounds for disciplinary dismissal. Such issues are addressed through ordinary dismissal or medical leave. For executives, disciplinary dismissal not only significantly tarnishes their career (with the risk of being dismissed from a new position if the fact of disciplinary dismissal is concealed and they join a new company), but also leads to the non-payment or reduction of what could be a substantial severance allowance. Regarding the dismissal procedures, along with (3) immediate dismissal, there are also cases where, with the approval of the Labour Standards Inspection Office, payment in lieu of notice (PILON) is not provided. These kinds of treatment significantly increase

the potential for dispute and conflict. Therefore, in cases where the validity of a disciplinary dismissal is not completely certain, opting for an ordinary dismissal with full payment of severance or handling it as a negotiated resignation is often considered.

FIXED-TERM EMPLOYMENT CONTRACTS

For executives with a fixed-term contract, the considerations for dismissal differ from those without a fixed term. To terminate a fixed-term employment contract, the employment during the contract period is particularly strongly protected, requiring "unavoidable reasons" for termination, which is a higher hurdle than for the termination of permanent contracts (the Employment Contract Act. Article 17). Therefore, to terminate the contract of a fixed term executive, unless there are extremely serious issues, it is usual to either negotiate a resignation agreement or not to renew the contract upon its expiration (termination of employment). However, even in fixed-term employment, attention is needed if (1) the renewal process is neglected and it can be regarded as a de-facto permanent contract, or (2) the contract is repeatedly renewed, creating a reasonable expectation of continued employment. In these cases, non-renewal at the end of the contract period requires the presentation of circumstances that are of the same or similar level to those required for dismissal of a permanent contract (the Employment Contract Act, Article 19).

In the case of Japanese entities of multinational companies, it is often the case that fixed-term employment contracts of two or three years, are concluded. However, unless the employee is an executive with special expertise, employees have the right to resign after one year (the Labour Standards Act14 and 137), making it disadvantageous for employers to enter into fixed-term employment contracts exceeding one year. Therefore, when concluding a fixed-term employment contract with an executive, it is recommended to make the term one-year and to review performance and conduct before deciding on renewal.

DISMISSAL RESTRICTIONS

Even when circumstances seem sufficient to dismiss an executive, if there are dismissal restrictions, the dismissal cannot be carried out. In practice, particular attention needs to be paid to dismissal restrictions during maternity leave before and after childbirth and leave due to work-related injuries. Dismissals during such kinds of leave and within 30 days after the end of such leave are prohibited by the Labour Standards Act, Article 19. Additionally, dismissals during childcare or nursing care leave are likely to be treated as unfair treatment and it is prudent to refrain from such actions. In addition, discriminatory dismissals based on nationality, creed, or social status are also, of course, prohibited (the Labour Standards Act, Article 3). In the rare case that an executive is a leader within a labour union, the dismissal could also be restricted as an unfair labour practice under the Labour Union Law.

REQUIREMENTS FOR DISMISSAL

The legal requirements for the validity of a dismissal are the objective and reasonable grounds for dismissal and its social adequacy (the Employment Contract Act, Article 16). The framework for judging the validity of a dismissal is referred to as the "doctrine of abuse of right to dismiss".

Objective and reasonable grounds for dismissal are typically assessed by determining whether there are grounds for dismissal stipulated in the employment contract or work rules. The main reasons for dismissal defined in employment contracts or work rules are as follows. However, it is important to note that these factors are not sufficient merely because the relevant facts exist; the issues must be particularly serious, such as the severity of the problem or a lack of improvement despite warnings and guidance.

- Lack of capability or poor performance
- Poor work attitude
- Lack of cooperation
- Misrepresentation of qualifications
- Causing issues with the running of the company
- Physical or mental condition making it impossible to carry out the employee's duties.
- Misconduct (actions that become the subject of disciplinary actions)

On the other hand, the social adequacy of dismissal considers whether it is appropriate to expel the employee from the company in light of the specific case. The following circumstances are primarily considered regarding social adequacy:

- The degree of remorse
- The possibility of future improvement (whether there was warning and guidance by the employer)
- The impact on the workplace
- The purpose and manner of the problematic behaviour
- The employer's compliance with legal and internal rules on dismissal procedures.

POOR PERFORMANCE

Generally, to lawfully dismiss an employee for poor performance, it is necessary not only that the poor performance reaches a significant level, but also that the employer has made sufficient efforts to provide improvement guidance and can adequately demonstrate this. However, in the case of mid-career executives, it is often judged that they are employed on the assumption that they possess the requisite skills and experience. This has led to court cases where dismissal for poor performance is more readily deemed valid for mid-career executives compared to regular employees or those promoted to executive positions.

In the recruitment or promotion of executives, it is crucial to clearly define the expected abilities, performance, and achievement in job descriptions or similar documents. This clarity helps to make clear whether the performance meets the expectations.

For mid-career hires, setting a probationary period of three to six months can also be an effective strategy to assess if the performance aligns with the employer's expectations. Denying permanent employment at the end of or during the probationary period is generally easier to justify than a dismissal after permanent employment has been confirmed, lowering the threshold for validity. Using the probationary period to assess potential employees can be a viable strategy. However, establishing a probationary period might also make it more difficult to later dismiss an employee for poor performance after they have been permanently hired. Therefore, addressing performance issues within the probationary period is advisable.

POOR WORK ATTITUDE OR LACK OF COOPERATION

Similar to cases of poor performance, grounds for dismissal for poor work attitude or lack of co-operation requires proving the severity of the issue and whether the employer has provided any guidance.

However, when compared to poor performance, it is often understood that attitude issues can be more down to the individuals own decisions, making claims for dismissal based on these grounds more readily accepted by courts. When the cause of poor performance can be attributed to poor work attitude or lack of cooperation, emphasising these latter reasons can often be an effective strategy. Particularly for executives, who are expected to lead by example, this approach can be more easily argued than for regular employee.

REDUNDANCY DISMISSAL

Redundancy dismissal refers to the termination of employment as a method of personnel reduction due to business closure, changes to business strategy, management failings, changes in management policy, etc. Since redundancy dismissal primarily arises not from the fault of the employees but at the convenience of the company, its validity is strictly determined. However, in case law relating to multinational companies, some flexibility has been shown with regard to redundancy dismissals, taking into account that those who work for multinational companies can find it easier to change jobs when compared to those at domestic Japanese companies.

In practice, the following must be considered for a redundancy dismissal:

- The necessity of personnel reduction;
- The rationality of the selection process;
- Efforts to avoid dismissal;
- The appropriateness of dismissal procedures;

For executives, due to their relatively high compensation packages within the company and from the perspective of reducing personnel costs, the necessity of personnel

reduction and the rationality of selection tend to be more easily argued.

Next, for efforts to avoid dismissal, which are especially emphasized in redundancy dismissal, it is necessary to scrutinise whether appropriate measures such as asking for voluntary resignation/retirement, encouragement to resign or retire, and whether personnel transfers have been made or at least considered before the dismissal. Especially for executives in cases of personnel reduction, offering a resignation/retirement package and looking for voluntary resignations or encouraging resignation is considered practically mandatory unless the company is facing a management crisis. Although there are no legal provisions for the resignation package, it generally includes some or all of payment of a severance lump sum according to years of service, buying out annual paid leave, granting gardening leave, providing outplacement services, and assisting with reference checks. When offering a resignation package to an executive, designing it with the idea of "supporting a smooth transition to a desired new position" and proceeding with discussions accordingly is key to success.

Lastly, regarding the appropriateness of dismissal procedures, the need for a process of consultation between labour and management must be especially emphasized. However, for non-union employees, the extent to which careful discussions and care were provided by the employer for the employees targeted for dismissal is examined.

DISMISSAL PROCEDURES

Dismissal procedures can broadly be divided into (1) whether the procedural rules related to the dismissal decision have been followed, and (2) whether the notification of dismissal and payment of allowances stipulated by the Labour Standards Act have been made after the decision to dismiss.

(1) There is no explicit legal provision detailing the procedural rules for dismissal decisions, allowing employers to design a system relatively flexibly. However, verifying facts with all parties involved, including of course the person to be dismissed, and providing an opportunity for an explanation are the minimum requirements. If an employer does not follow the dismissal procedures set out in work rules or labour agreements, there is a risk that the dismissal could be deemed invalid for this reason.

(2) The procedural rules after the decision to dismiss are specified by the Labour Standards Act. When dismissing an employee, the employer in Japan must adhere to Article 20 of the Labour Standards Act, which stipulates that they must either provide a 30-day prior notice of dismissal or offer a payment equivalent to 30 days' average wages, known as payment in lieu of notice (PILON). If the notice period falls short of 30 days before the actual termination date (resignation date), the employer is required to compensate the employee for the remaining days up to 30. The average wage used for calculating the PILON is determined by dividing the total salary paid over the last three months by the number of calendar days in that period (the Labour Standards Act, Article12).

This straightforward dismissal procedure of offering either 30 days' notice or PILON remains consistent regardless of factors such as length of service, position, duties, or employment status, even if the individual is an executive employee.

It is important to recognise that in Japan, the notice period and PILON are minimum procedural requirements set forth by the Labour Standards Act. Adhering to these requirements does not automatically validate the dismissal itself. Assessing the validity of the dismissal is based on whether it demonstrates objective rationality and social fairness, taking into account the specific circumstances of each case.

RISKS RELATED TO DISMISSAL

When a dismissal is contested, the following legal risks can be considered:

- Request for confirmation of employee status - if the court determines the dismissal as an invalid "unfair dismissal", the employee's resignation is not recognised. Regardless of whether the employer decides to reinstate the employee, they are obliged to continue paying the salary in principle.

- Claim for back pay - In cases where the validity of the dismissal is contested, along with the request for confirmation of employee status, there is often a claim for the salary for the period from the dismissal until the dismissal is deemed invalid. For instance, if it takes 2 years for the court to decide the dismissal is invalid, a claim for 2 years' worth of salary may be accepted.
- Claims for damages due to unfair dismissal - If the manner or method of unfair dismissal is significantly unjust, claims for damages may be granted in addition to claims for back pay. There are cases where only damages for unfair dismissal are contested, without claiming for employee status or back pay, and substantial amounts may be awarded.

Even if a dismissal is deemed unfair, it is often difficult for an employer to reinstate an employee once dismissed. In such instances, employers might be compelled to settle in court by paying a settlement sum in addition to back pay as compensation for agreeing to the resignation. The settlements range in these situations, depending on the employer's financial capacity, duration of the dispute, and the employee's preference and are typically between 1 to 4 years' salary (averaging 2 to 3 years' salary). In settlements with high-compensation executives, in addition to the said amount, the payment of severance as stipulated by company regulations may also be necessary, which could increase the total settlement amount.

Moreover, in disputes involving dismissal, securing a non-disclosure agreement or a non-compete agreement with the executive at the time of resignation becomes challenging, raising concerns over the risk of information leakage or misuse by the executive who had access to confidential information.

Considering these risks, in cases where the validity of dismissal is unclear, efforts are often made to negotiate voluntary resignation or retirement as a method to achieve a peaceful agreement.

ENCOURAGING VOLUNTARY RESIGNATION

When there is a high risk of dismissal, consideration of redundancy dismissal, or even where redundancy is not being considered but there is a desire to promote a peaceful departure, then choosing voluntary resignation or encouraging resignation through retirement becomes the option.

For encouraging retirement, to avoid any illegality in the employer's statements, it is advisable to prepare a script and consider the responsible person, interview time, and number of interviews. Especially during encouragement to resign or retire, employers may want to point out the negative aspects of the targeted employee’s performance or attitude, but it is better to consider the individual's feelings and state something neutral like: "There seems to be a mismatch between the company's direction and your expectations, making it difficult for us to provide the career path you're looking for. If you wish to pursue a more favourable career elsewhere, the company wants to support you as much as possible." This can lead to a smoother resignation process by proceeding from a supportive perspective. If the individual reacts negatively to the retirement encouragement, it is best to avoid arguing and instead listen attentively to their concerns.

The resignation package can be freely designed based on factors such as years of service, the individual's contribution to the company, the company's financial capacity, alternatives to continuing employment, and the need for a confidentiality agreement. Especially for executives, the package might include provisions for garden leave or assistance with reference checks to prevent information leakage and considering future employment opportunities. Generally, for cases with no grounds for dismissal, a generous package should be designed considering the years of service. However, for cases where dismissal could be warranted, but the employer chooses to proceed with a resignation in consideration of the employee’s future, offering such a package may not be necessary.

When agreeing on resignation terms, creating an agreement to finalize the facts and date of resignation is crucial. To prevent disputes, it is advisable to include in the resignation agreement that payment will be made upon fulfilling all obligations listed, after necessary legal tax and insurance deductions.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in the UK. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at February 2024.

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KENYA

INTRODUCTION

Kenya's Constitution, which was modelled largely on South Africa's constitution, also entrenches fundamental rights and contains provisions that protect all employees, irrespective of seniority and confers on everyone the right to fair labour practices and the right to fair administrative action. These and other employment related protections are also enshrined in the Employment Act No. 11 of 2007 and various regulations made thereunder.

The Employment and Labour Relations Court (ELRC), is a specialized court with the status of the High Court established to determine disputes relating to employment and labour relations in Kenya. Appeals from decisions of the ELRC lie at the Court of Appeal which is generally the final forum of appeal although disputes involving the interpretation or application of the constitution, or which are certified as a matter of general public importance may be appealed to the Supreme Court.

THE APPROACH

Being a commonwealth country, whose legal system is derived from the common law system, and whose constitutional law is modelled heavily on South Africa's constitution, Kenya's legal system, and employment law requirements are similar in many respects to that in the UK and in South Africa.

As such, many of the strategies employed concerning executives in the UK or in South Africa will be equally applicable to the termination of executives in Kenya, subject to local conditions.

Courts place equal emphasis on fair/lawful grounds for termination of employment and on both the process and procedure followed by an employer in carrying out a termination of employment.

Even where an employer has lawful or fair reasons for conducting a termination, if the correct process and procedure is not followed, Courts are still likely to find the employer liable for unlawful or unfair termination.

In all instances of termination therefore, the employer must have a fair, valid and justifiable reason for termination and must comply with the relevant termination procedure set out in law.

If an employer fails to follow the procedure set out in the Act, or its internal policies (if any), or if the employer fails to prove that the grounds for termination are justifiable, the termination will be deemed to be unfair or unlawful and the courts may award damages of up to 12 months' salary and/or reinstatement. Where the claim by the employee raises constitutional issues, the damages awarded may he higher.

From an employment law perspective, the legal regime in Kenya does not distinguish between termination of senior executives and termination of other cadres of employees.

The nuances that exist in the termination of senior executives derive from contractual provisions and from corporate law in instances where the senior executives are also directors of the company. The manner in which the dismissal of a senior executive can be executed also depends on the reasons for the termination.

HOW CAN THE CONTRACT BE TERMINATED?

In similarity to the UK and South Africa, Kenya does not recognize the concept of "termination at will". Courts place equal emphasis on fair/lawful grounds for termination of employment and on both the process and procedure followed by an employer in carrying out a termination of employment. Even where an employer has lawful or fair reasons for conducting a termination, if the correct process and procedure is not followed, courts are still likely to find the employer liable for unlawful or unfair termination. In all instances of termination therefore, the employer must have a fair, valid and justifiable reason for termination and must comply with the relevant termination procedure set out in law.

DISCIPLINARY PROCEEDINGS

An employer is entitled to terminate an executive's employment summarily (i.e., without notice) if the executive has acted in material or gross breach of their contract (i.e. the breach is sufficiently egregious that it would entitle the company to terminate the contract summarily). However, termination of employment on the basis of misconduct should be considered after the employer has given the executive a genuine opportunity to defend himself or herself.

The practice that is developing with reference to decisions of the Employment and Labour Relations Court (ELRC) is that the employer writes to the executive asking that the executive shows cause as to why the executive's employment should not be terminated on grounds of misconduct. The idea is to give the executive a reasonable and fair opportunity to respond to the allegations of misconduct.

At the point of issuing the letter to show cause to the executive, the employer should explain to the executive the reason(s) for which the employer is considering terminating the executive's employment.

On the hearing day, the employer will be required to present to the executive evidence of the alleged misconduct. The employer should then give the executive an opportunity to explain and make representations in response to the allegations raised against the executive and the executive shall be entitled to have another employee present during this explanation. It is also advisable that the employer ensures that the proceedings of the hearing are recorded and signed by all the parties present since this would act as evidence that the procedure set out in the Employment Act has been complied with.

The employer should then inform the executive of the date on which it shall render its decision on the matter. The employer is required to consider the representations made by the executive and on the assigned date inform the executive of its decision.

Except in cases of summary dismissal on grounds of gross misconduct, the executive would be entitled to receive the minimum notice under the Employment Act (i.e., one month) or *payment in lieu* of notice. Usually, by contract, executive notice periods are longer than the minimum one-month notice period set out by law and usually range between three to six months.

TERMINATION BY MUTUAL AGREEMENT

In general, the use of mutual separation agreements in terminating executive employment contracts is becoming increasingly common in Kenya. Such termination by mutual agreement is not expressly provided for under Kenyan employment law but has emerged as a practice based on the contractual agreement between an employer and employee. It is crucial that the employer is not seen to have coerced the executive to resign as this may be considered constructive dismissal which may be deemed to be an unfair termination of employment.

For evidentiary purposes, it would be prudent for the employer to document and record all the negotiations held with the executive leading up to the mutually agreed termination. It is also advisable, that the employer also informs the executive of the executive's right to seek independent legal advice on the process prior to concluding the negotiated settlement.

The payment given to an executive in a mutual separation is agreed between the parties and is usually higher than the minimum prescribed pay in other methods of termination. When assessing the payment, the company will need to consider the following:

- Bonuses – compensation for loss of bonus (including for discretionary bonuses if these are paid as a matter of custom and practice).
- Share options – the issue here usually being options that would have vested during the relevant period of notice had such notice been given.
- Pension scheme benefits - compensation for loss of this can be considerable, for example under a defined benefit pension scheme.
- Loss of other benefits such as a company vehicle, private medical insurance, permanent health insurance and life assurance.
- Accrual of holidays during notice period – most companies do not allow this; however, it is often a matter for discussion between the parties.

- "Golden Parachute" clauses – although rare these days, it is worth checking to ensure that the senior executive is not entitled to receive a payment and/or benefits in the event of termination following a takeover.

Once negotiations on the mutual termination have been concluded, the employer and executive should enter into a written mutual termination and settlement agreement signed by both parties. The written agreement should preferably also be witnessed on behalf of each of the parties. It is advisable to ensure that the mutual separation agreement is carefully drafted to protect the interests of the employer and to acknowledge the executive's free-will and consent in order to minimize chances of the executive subsequently claiming that they were coerced or constructively dismissed from employment.

POTENTIAL CLAIMS IN KENYA

All employees in Kenya have:

- Constitutional rights - such as the right to fair labour practices and fair administrative action.
- Contractual rights - the employment contract largely governs these but may be subject to implied terms, internal policies and practices.
- Statutory rights - these rights are derived primarily under the Employment Act and regulations.
- Common law rights – which are established by case law and precedence.

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

If an employer fails to follow the procedure set out in the Employment Act, or its internal policies (if any), or if the employer fails to prove that the grounds for termination are justifiable, the termination will be deemed to be unfair or unlawful.

An executive who is unlawfully dismissed may claim damages representing the paid benefits they would have received had they been able to work during the full notice, subject to the obligation to mitigate their loss by seeking alternative employment. However, the ELRC generally awards employees compensation of up to 12 months' salary and/or reinstatement. If the termination raises constitutional issues such as discrimination, the damages awarded may be higher.

Kenyan courts are generally reluctant to grant orders for specific performance or reinstatement in employment contracts unless there is a compelling justification and ordinarily happens more in the civil service than in the private sector. Where a claim by an employee raises constitutional issues (e.g., discrimination), the damages awarded may he higher.

PAYMENT IN LIEU OF NOTICE

Under Kenyan law, either party is entitled to make a payment *in lieu* of notice ("**PILON**"), which would allow for immediate termination. Unlike the UK, PILON payments in Kenya are not for basic salary only and cover the total cost of employment because of the definition of statutory remuneration. In essence, the executive is entitled to receive a payment equivalent to all the contractual benefits they would have received had they worked the full notice, e.g., bonus, car allowance, LTIP share options, any other premiums, and any other medical and other pension benefits.

INTERDICTORY RELIEF AND RESTRICTIVE COVENANTS

An interdict (injunction) is an order from the court that restrains a party, most often an executive, from using or benefiting from confidential information relating to the company after their employment has been terminated. Most executives will have post-termination restrictions in their service agreements to prevent them from doing certain things after terminating their employment and using company information. The company can seek protection by seeking an order in the ELRC. Similar to South Africa, the most common post-termination restrictions for executives are:

- Non-compete/restraint of trade prevents an ex-employee from joining a competitor employer for a defined period, usually 12 to 18 months, after employment has ended.

- Non-solicitation restricts the employee's ability to contact customers or clients of the former employer to obtain their business. non-dealing also restricts the ex-employer's ability to deal with former customers or clients after the termination of employment.
- non-solicitation/poaching prevents ex-employees from soliciting employees to leave the company.

The legal principles underpinning the concept of restraint of trade in Kenya are set out in the Contracts in Restraint of Trade Act ("**CRT Act**"). The CRT Act provides that the High Court shall have power to declare the provision or covenant to be void where the court is satisfied that, having regard to the nature of the profession, trade, business or occupation concerned, and the period of time and the area within which it is expressed to apply, and to all the circumstances of the case, the provision or covenant is not reasonable either in the interests of the parties or in the interests of the public.

The court will not enforce a restraint of trade provision which is unreasonable with respect to the interests of the parties concerned or the interests of the public. The court would consider the following key matters in determining whether or not a restraint of trade provision is reasonable:

a) the nature of the profession, trade, business or occupation concerned;
b) the period of time which the restraint is expressed to apply;
c) the area within which the restraint is expressed to apply; and
d) all the circumstances of the case.

Experience and expertise garnered from working for a particular employer cannot be reasonably restrained without stunting such an executive's career. Therefore, in order to be enforceable, such restraint must seek to restrain the use of only that which is uniquely that employer's secret and not knowledge and skill which can be acquired by learning, experience or development in technology.

An employer seeking to enforce such a restraint would be required to demonstrate that the nature of the secrets or information that the executive gained access to and the manner in which the executive is likely to divulge or use the same in the executive's current employment to the detriment of the ex-employer.

Where the ex-employer and the executive are in the same line of business the ex-employer must show that the executive is possession material or classified information which if used at the executive's new workplace would prejudice or harm the exe-employer's business interest.

It is therefore important for employers to make sure that they can prove their restraint of trade provisions are not unreasonable (based on the general tests set out above) and are essential to protect their legitimate interests.

REMOVAL AS A DIRECTOR

Terminating an executive's employment does not automatically terminate any directorships that they may hold at the company or other companies within the group as a consequence of their office.
As there is no requirement for a director to be an employee, it will invariably be necessary to obtain the executive's resignation from any directorships they hold when their employment is terminated, alternatively to remove them in terms of the Companies Act.

For as long as the executive remains a director, they are entitled to attend board meetings access minutes and other paperwork related to the appointment as a director, unless there is a conflict of interest.

A director cannot be suspended from their fiduciary duties in the same manner as an employee provided that they still sit in the board of the company.

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LATVIA

THE APPROACH

From the employer's perspective, the process of terminating employment, especially with a senior employee, should be aimed at concluding a mutual agreement on termination. The mutual agreement significantly reduces (if not excludes) any risk of litigation, and it is usually the most cost and time effective option for the employer.

The structure of the process largely depends on the possible grounds for termination and circumstances of the case. Usually, it is advisable to fully prepare for issuing a termination notice by taking all the procedural steps (e.g., collecting evidence and requesting explanations in the case of employee's fault or taking a decision on redundancy and performing evaluation of employees, etc.) and only then offer the mutual agreement to the employee as a better alternative. It is very common to include a higher compensation in the mutual agreement in comparison to what the employee would receive as the statutory minimum in the case of a unilateral termination by the employer in cases when the employment relationship is not terminated due to the employee's fault (severance pay). Other benefits may also be included in the agreement on termination, for example, the employee's right to keep the company's laptop, phone, health insurance, or other items.

At the same time, it is not mandatory to include any compensation in the mutual agreement. Moreover, the notice periods are not applicable in case of the termination agreement – layoff can be immediate, or the parties may agree on termination any time in advance. Presence of the employee's attorney or other representative is not mandatory in negotiations of the mutual agreement, and it is not mandatory for the employee to seek independent legal advice.

HOW CAN THE CONTRACT BE TERMINATED?

The termination of an employment contract can be communicated only in writing by giving a notice of termination. The notice must include circumstances that are the basis for termination of the employment contract. The easiest way is to send the notice, signed with a qualified electronic signature, to the employee's e-mail address if such form of communication is agreed in the employment contract. Otherwise, the notice may be delivered through traditional means – in person, via court bailiff or post office.

However, before giving the notice of termination, several other important steps may have to be taken. They vary depending on the grounds for termination, while the two most important ones include inquiring in writing whether the particular employee is a member of a trade union and requesting written explanations from the employee in case the employment relationship is terminated on one of the grounds relating to the employee's fault.

If the employee has been a member of any trade union for more than six months, in most cases a consent of the trade union is required. If the trade union informs the employer that it does not consent, which usually is the case, then the only way to achieve unilateral termination is to bring a claim before court. Up until the final judgment, the employee continues to work with the employer.

Please note that employment may also be terminated, based on the mutual agreement between the employee and the employer, at any time and without indicating any reasons (even if there were such).

POTENTIAL CLAIMS IN LATVIA

In Latvia, all employees have:

- Contractual rights – governed by the contract of employment, collective bargaining agreement, the employer's internal policies, etc., providing various benefits or a higher protection to the employee than the statutory minimum.
- Statutory rights – derived from the laws of Latvia, such as the right not to be unfairly dismissed or discriminated against for certain prescribed reasons, the right to a safe workplace, the right to an annual leave, etc.

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

"Wrongful dismissal" as a separate concept does not exist in Latvian law since we do not emphasize whether a claim is

contractual or statutory, and in any case most of the claims relating to dismissal arise from the law.

Notice periods for each of the grounds of termination are defined in the law, and they range between an immediate dismissal and one month's notice, depending on the grounds. Longer notice periods may be agreed in the employment contract, but it is rarely done so. The main reason for that is the nature of all termination grounds, which warrants a relatively fast layoff from the employer's perspective.

Apart from the employer's obligation to pay a salary for the entire notice period, the law is not clear on other consequences of breaching the notice period itself. However, according to the case law, a breach of the notice period alone is unlikely to lead to invalidation of termination as a whole, especially if the salary is paid for the correct notice period. If the employee lodged a complaint to the State Labor Inspectorate, they are likely to consider it an administrative violation and impose a fine on the employer.

In addition to notice periods, the law also specifies an amount of the severance pay (average earnings of one to four months), depending on the length of service, which must be paid in case the termination is based on grounds not related to the employee's fault. It is quite common to agree on a higher amount of severance pay in employment contracts with senior employees or executives. If the employer does not disburse the severance pay in a timely fashion (usually it must be done on the last day of employment), then the employee will have a claim for the severance pay and for any damages that were caused by the employer not fulfilling its payment obligations.

Finally, it is important to note that the employment contract cannot provide additional grounds of termination, other than those defined in the Labour Act. Therefore, if the employment contract is terminated on additional grounds provided in the contract, a senior executive will have a right to appeal it based on the breach of the law.

PAYMENT IN LIEU OF NOTICE

The concept of "payment in lieu of notice" is not recognized in Latvian employment law. The only situation where the employment contract may be terminated before the expiry of the notice period is if the parties agree on that. In that case, it is not mandatory to pay to the employee salary proportionate to the remaining notice period, but it is common to agree on some compensation.

If the employer cannot employ the employee during the notice period (e.g., could be in the case of redundancy when the position has been already liquidated and, therefore, the employer does not have any work to offer)) and the employee does not agree to an earlier termination, legal provisions relating to idle time may be applied as a workaround. In cases of idling, while the employee formally is considered employed, the employer does not give any work assignment to the employee, but the employer still pays salary for that. However, please note that in certain cases the employee could consider idle time as bullying.

In cases when the reason for termination is the employee's fault, the employer may suspend him/her from work until the last date of employment. In case of the suspension, the employer is not obliged to pay the salary.

WHAT CONSTITUTES DAMAGES FOR WRONGFUL DISMISSAL?

The general rule is that a senior executive who is wrongfully dismissed is entitled to claim compensation for the entire period of absence from work due to the wrongful dismissal, in the amount of the average earnings of the senior executive. Average earnings are calculated from the salary, additional payments, and bonuses received in the last six calendar months before the dismissal and are awarded by the court when the judgement to either reinstate the senior executive back to the position or terminate the employment relationship (if the senior executive so requests) is made.

The purpose of the above compensation is to ensure that the senior executive does not lose income because of the wrongful dismissal. The senior executive can mitigate his or her loss by attempting to seek alternative employment while the proceedings before the court are pending. If he or she does so, then the compensation entitlement is reduced by the remuneration received by the senior executive after the commencement of alternative employment.

If the senior executive received an unemployment benefit after wrongful dismissal, and the court determines that the

dismissal was wrongful and orders the employer to pay the compensation, the senior executive will be required by the state to return the paid unemployment benefit.

In addition to the above, the senior executive is also entitled to claim other contractual payments and benefits before the court if such benefits were specifically agreed upon in the employment contract but were not received because of the wrongful dismissal, e.g., bonuses, guaranteed salary increases, pension scheme benefits, etc.

If any other damages were incurred by the senior executive because of the wrongful dismissal, they must be proven pursuant to the general proceedings for compensation of damages, i.e., by proving the existence of damages and their amount, as well as a causal link between the employer's wrongful dismissal and the damages caused to the senior executive.

RESTRICTIVE COVENANTS

Most senior executives have post-termination restrictions in their employment contracts to prevent them from undertaking certain activities for a fixed period of time after their employment.

In Latvia, the most typical post-termination restrictions include:

- Confidentiality Agreement: This prevents a former employee from disclosing confidential information, including trade secrets, to third parties after employment ends. Such agreements can have either a fixed term or be indefinite.
- Non-Compete Agreement: This restricts a former employee from joining a competing employer or business for a maximum period of two years after termination of the employment. Non-compete agreements may include constraints on employment, providing services, and engaging in business activities related to the former employer's area of business operations. Such restrictions may apply to both paid and unpaid activities. A fixed monthly compensation must be paid to the former employee for complying with the non-compete agreement.
- Non-Solicitation Agreement: This limits the former employee's ability to contact or engage customers, clients, employees, or cooperation partners of the former employer for the purpose of inducing them to leave. Non-solicitation is broadly a part of the non-compete agreement and is subject to the same legal provisions, including the compensation for compliance.

In addition to these traditional restrictive covenants, new types are emerging, such as cooperation and non-disparagement agreements. A cooperation agreement obliges the former employee to collaborate with their previous employer, especially if an investigation or similar proceedings requiring their assistance are initiated after the termination. Non-disparagement agreements prohibit employees from making false defamatory, derogatory, or disparaging statements about their former employer.

Contractual penalties are often stipulated, which the former employer may seek to enforce in the event of a breach. It should be noted that Latvian courts reserve the right to reduce these penalties if they are found to be disproportionate to the agreed restriction or obligation. Engaging in corrupt practices in relation to the penalties is prohibited, and the previous employer is generally not allowed to benefit unreasonably from such penalties. Contractual penalties should correlate closely with the harm caused by the breach. In practice, it has become more popular to specify a penalty range, the exact amount of which is determined when a breach occurs.

Moreover, Latvian courts have greater latitude concerning non-compete agreements, adopting an approach similar to the blue-pencil doctrine. Specifically, courts may rewrite the limitations set forth in a non-compete agreement if they are found to be excessive and go beyond what is reasonably necessary to protect legitimate business interests. As a result, a care must be taken when drafting non-compete restrictions, particularly regarding their scope and duration.

UNFAIR DISMISSAL

Pursuant to the Labour Act, an employment relationship may be terminated only on the basis of the grounds provided in the law, as well as pursuant to a specific procedure also provided in the law. This applies to all employees, including senior executives.

An employee may bring an action in court for an invalidation of a notice of termination (i.e., unfair dismissal) within one month from the day of receipt of the notice of termination. Please note that several presumptions apply as

to the day of receipt, based on the chosen mode of delivery for the notice.

Part of the grounds for termination provided in the law relate to the employee's fault or lack of ability to perform work (e.g., *the employee has significantly violated the employment contract or the specified working procedures without a justifiable reason*), and the other part relates to the changes made at the company or not directly related to the employee's behaviour (e.g., redundancy, long-term sickness). In case of the employee's claim for wrongful dismissal, the employer has the burden of proof with respect to the grounds for termination indicated in the notice.

Apart from this, an unfair dismissal occurs also when the employer has grossly breached the procedure for termination of employment. The procedure varies depending on the grounds for termination applied, and some of the most common mistakes are as follows:

- Missing deadlines provided in law (e.g., the employer may terminate employment only within one month of establishing the employee's violation);
- Not requesting explanations prior to termination;
- Not asking for the trade union's consent;
- In case of redundancy, evaluating employees incorrectly (e.g., not evaluating all closely similar positions) or not objectively, etc.

If the employee succeeds with the claim, the employee is reinstated in the previous position, and the employer is obligated to pay salary for the whole period of *the forced absence from work*. In case the employee worked at a less-paid job during litigation, the employer must reimburse the difference between salaries.

Of course, it is possible to reach a settlement during the court proceedings. In such cases, usually some compensation is paid to the employee and the employment relationship is recognised as terminated.

REDUNDANCY

A senior executive may be laid off based on redundancy in the same way as other employees. Pursuant to the Labour Act, the redundancy process is not based on the behaviour or performance of the employee, but instead is well-grounded by urgent economic, organizational, technological and other measures at the undertaking. Pursuant to case law, economic, organizational and the like measures at the undertaking may be a reason for redundancy only where they are urgent.

Namely, in case of a dispute, a company will have to prove that the applied measures were urgently necessary in order to ensure the company's business activities, because the company's obligation is to ensure that operation of the company is financially and economically efficient and consistent with good governance and does not cause undue economic, financial or other consequences for the company.
The Labour Act states that the termination notice shall be issued one month in advance and a company is obliged to pay severance pay, the amount of which depends on the length of service of the specific employee (average earnings of 1 to 4 months). It is also possible that an employment contract provides a higher amount of severance pay in case of redundancy, but it is not an option very often used (mainly applied to the highest-level senior executives).
Pursuant to the Labour Act, shortly before issuance of the termination notice, the company shall clarify whether or not the senior executive has been a member of a trade union for more than 6 months. In such case, the company will have to request the trade union's consent. If such consent is not given, the employer has to bring an action in court for termination of the employment relationship.

Senior executives have a right to appeal the termination notice in court in case there are reasons to consider that the grounds for termination were not related to the urgent economic, organizational, technological and other measures at the undertaking. In such cases, the company will have an obligation to prove that the termination notice was legally founded and the formal process for issuance of the termination notice was observed.

In case the number of the employees to be dismissed reaches a threshold provided in the Labour Act, a procedure of a collective redundancy shall apply. The threshold provided in the Labour Act depends on the number of employees at the company and the number of employees to be dismissed. In such cases, the law requires a notification and consultation process with the representatives of employees, as well as information of the local municipality and the State Employment Agency prior to the termination of employment relationships.

DISCRIMINATION, WHISTLEBLOWING, AND OTHER STATUTORY CLAIMS

The Labor Act provides for a prohibition of discrimination and the principle of equal rights. Therefore, an employee has the right to appeal to the court if he/she believes that the employment relationship was actually terminated for other reasons that can be recognized as discriminatory, for example, due to gender, race, religion, sexual orientation, etc. In such cases, the claim shall be brought to the court within one month term from the date when the employee has received the notice of termination. The employee will claim that it was unfair dismissal, because the real grounds for dismissal do not correspond with the ones indicated in the notice. The burden of proof will be placed on the employer. This means that the employer will have to prove that there were grounds for termination of the employment relationship pursuant to the provision of the law and no discrimination occurred. The employee is entitled to claim reinstatement to the position, payment of the remuneration for the whole period of the forced absence from work, as well as a compensation for moral damages, if requested. Claims related to discrimination issues are quite often related to moral damages.

Pursuant to the Whistleblowing Act, whistleblowers are protected against adverse effects caused by whistleblowing. This protection also includes protection against a dismissal. Therefore, if a senior executive considers that the true reason for termination of the employment relationship was due to submitting a whistleblower report, he/she may claim recognition of the termination notice as illegal. In such cases, the burden of proof is placed on the employer. The employee is entitled to claim reinstatement to the position, a payment of the remuneration for the whole period of forced absence from work, as well as compensation for moral damages, if requested. Such claims are not brought often. This is likely due to the fact that use of the whistle-blowing mechanism is not yet popular in Latvia.

SENIOR EXECUTIVES WHO ARE ALSO MEMBERS OF THE MANAGEMENT BOARD

First of all, it is important to note that in Latvia the routine management of a business company (private limited (SIA) or public limited (AS) company) is ensured by a management board (board of directors), whereas monitoring of the performance of the management board is entrusted to a supervisory board (in case of a SIA – a supervisory board is not required). Any other person who has a position at the company – managing director, CEO etc.– are employees, unless such person is appointed to the management board.

Therefore, if a senior executive is appointed to the management board, in case of a company's wish to terminate the legal relationship with this senior executive, a question could arise regarding what status this senior executive has. This is an extremely important question, since the process for termination of the legal relationship depends on it. It is worthwhile to note that usually it is not advisable to create a situation where the senior executive is also appointed to the management board, specifically for the avoidance of the said dual status of this person at the company. If the senior executive is appointed to the management board, the employment relationship shall be terminated immediately (usually it is done by a mutual agreement).

Pursuant to case law, where one person holds the status of a member of the management board and an employee simultaneously, it should be evaluated whether such person is really in a relationship of subordination to have the status of the employee (this applies to the senior executives who are not appointed to the management board too). If the relationship of subordination is not established, the provisions of the Commercial Act are applied to a termination of the legal relationship with the member of the management board.

SHAREHOLDER APPROVAL

Payment of any compensation to the member of the management board depends on the reason for withdrawal from the position, as well as the provisions of the management contract. Quite often management contracts with members of the management board contain provisions on payment of compensation in case of a withdrawal from the

position which is not the fault of the members of the management board. In such cases, no approval of shareholders is required. If the compensation is not paid upon termination of the legal relationship, the member of the management board may claim the payment thereof, as well as possible losses. It is not possible to claim reinstatement to the position.

In case the management contract does not contain such provisions, the rest of the board or shareholders may adopt a respective decision on payment of the compensation for the withdrawal from the position, but it is not mandatory, and the member of the management board cannot claim payment of such compensation.

REMOVAL AS MEMBER OF THE MANAGEMENT BOARD

The law does not require approval of the shareholders in cases of terminating employment relationships, whereas in cases of terminating the legal relationship with a member of the management board, the shareholder's decision is required in limited liability companies. In cases of public limited companies, the supervisory board is responsible for recalling a member of the management board from the position, if they have a serious reason for it.

As mentioned above, if there is a situation where a senior executive holds a position as an employee and a member of the management board, termination of the employment relationship and withdrawing as a member of the management board are required. If an employment relationship is terminated, whilst the member of the management board is not recalled from his/her position, he/she still has all rights and authorizations.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in Latvia. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at August 2023.

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LUXEMBOURG

THE APPROACH

In the Grand-Duchy of Luxembourg, there are a number of ways in which the dismissal of a senior executive can be executed. Much will depend on the circumstances and reason for termination, the role of the senior executive, the risk of claims and whether there are reputational issues to consider. Some employers will prefer to go to courts, and make it a matter of principle; others may want to explore settlement or termination by mutual consent as a way of mitigating against the risk of future litigation. More often than not, when it comes to senior executives, a negotiated settlement or termination by mutual consent is the usual method for exiting them from the business, but of course complications can always arise and awareness of rights and obligations are essential before embarking on a dismissal process.

The use of settlement agreements is common in Luxembourg and provides the ability to find an end to the employment relationship in a way that is beneficial to both parties. Negotiations should always be conducted in a confidential manner and on a "without prejudice basis", meaning that an employer does not have to disclose settlement conversations in future litigation. Any communication regarding a settlement should also be marked as a draft and flagged as "privileged correspondence" until the settlement agreement is signed by all parties (and therefore legally binding). However, settlements are not always appropriate. They cannot be concluded for instance if there is no existing or no likely risk of dispute between the parties. While settlement agreements may not be suitable for every dismissal, they are certainly worth bearing in mind in the context of the following issues.

HOW CAN THE CONTRACT BE TERMINATED?

According to the Luxembourg Labour Code, the termination of an employment contract must be communicated in writing. However, verbal dismissal will also have effects, although they will be deemed irregular for being in breach with the process set up by the Luxembourg Labour Code.

Under Luxembourg employment law, an employment contract, whether concluded for a limited or an indefinite period of time, can be terminated either: with notice, with immediate effect, or by mutual consent. Employers must follow a specific procedure, which varies according to the type of dismissal, as provided for by law.

An employer employing at least 150 employees (sometimes less depending on what has been negotiated in the collective bargaining agreement, if any, or in the case of "economic and social unity") must organise a pre-dismissal meeting with senior executives prior to the termination of their employment contracts (either with notice or with immediate effect). During the meeting, the employer must indicate to the senior executive the exact reason(s) for the planned dismissal and give such senior executive the opportunity to be heard.

Dismissal with notice period

Employers who dismiss employees must provide them with a notice of termination and, as the case may be, a mandatory severance pay called a departure allowance (indemnité de départ). The duration of the notice period and the amount of the severance pay; if any, depend on the seniority of the senior executive.

Senior executives dismissed with a notice period are entitled to a statutory minimum notice period of two months, which increases with length of service to up to six months. Senior executives who have more than five years seniority are also entitled to a severance pay of one-month salary, which increases with length of service to up to 12 months and is tax free. The employment contract or applicable collective bargaining agreement can specify a longer notice period or an increased severance pay. Shorter notice periods can apply if the employment is terminated during a trial period. The employer can release senior executives from work (garden leave) for all or part of the notice period.

Dismissal with immediate effect

Senior executives dismissed for gross misconduct are not entitled to notice periods, severance indemnities and unemployment benefits. Such dismissal must take place within the month following the date on which the employer became aware of the underlying cause (i.e. the date the gross misconduct was discovered by the employer). After this deadline of one month, the employer is presumed to have

forgiven the senior executive's behaviour. However, a later fault committed by the senior executive can lead to the revival of an earlier fault, in that an employer can use repeated faults as a motive for dismissal with immediate effect, since repetition makes faults more serious.

Termination by mutual consent

An employment contract, whether concluded for a fixed or indefinite period of time, can also be terminated by mutual consent by way of a termination agreement, which is in principle tailor made.

The termination agreement must be made in writing and in duplicate, and must be signed by both the employer and the senior executive.

Given their level of seniority within an organisation, senior executives may also benefit from other contractual provisions, such as bonus or commission schemes, long term incentive plans or other equity arrangements. These documents and the rules they set out will likely need to be factored into termination discussions.

If termination by mutual consent is the preferred route, then the package on offer is likely to be the main driving factor in achieving a swift and amicable solution, especially considering that, by signing such agreement, the senior executive will not be entitled to unemployment benefits.
There will need to be a quantification of basic entitlements such as salary and contractual benefits, whether bonus payments are being forfeited, and the impact of termination on share options and equity arrangements, if applicable.

PAYMENT IN LIEU OF NOTICE

Payment in lieu of notice (PILON) is not provided for nor authorised by the Luxembourg Labour Code. It can be admitted only in the context of a termination by mutual consent.

POTENTIAL CLAIMS IN LUXEMBOURG

All employees in Luxembourg have:

- Contractual rights - largely governed by the contract of employment but are also subject to certain implied terms;
- Statutory rights - established by the Luxembourg laws, such as the right not to be unfairly dismissed or discriminated against for certain prescribed reasons; and
- Case law rights - derived from case law, such as the right to be notified of a formal warning before such warning can be taken into account to justify a dismissal.

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

If a senior executive's contract is terminated in breach of the Labour law provisions, then the company exposes itself to a claim for wrongful dismissal (be it for non-complying with the dismissal process or for dismissing without good cause).

According to the applicable Labour law provisions, a senior executive who is dismissed with notice period may, within one month of the notification of dismissal, ask to be provided with the reasons for the dismissal. Within one month of receipt of the request, the employer must provide the senior executive with the reasons for the dismissal.
Employers dismissing senior executives with immediate effect shall provide the reason(s) of the dismissal in the termination letter.

Upon receipt of such reasons, the dismissed senior executive has three months to challenge the dismissal before the court or to formally contest the dismissal vis-à-vis the employer. If the senior executive formally challenges the dismissal with their employer, they will have one year from when they lodged the formal complaint to challenge the dismissal in court.

If the senior executive files a claim before the labour court, the court will analyse whether the dismissal was regular and whether it was fair. If the court rules that the dismissal process was not followed, it will declare the dismissal irregular and if it does not consider the dismissal justified, it will declare it unfair, thereby entitling the senior executive to damages.

In the event of irregular dismissal, the senior executive will be entitled to compensation equivalent to one month's salary. In the event of unfair dismissal, the amount of the damages awarded by a court depends on the actual prejudice (material and moral) suffered by the senior executive as a result of the termination of their employment.

WHAT DAMAGES FOR UNFAIR DISMISSAL?

The general rule is that a senior executive who is unfairly dismissed is entitled to claim compensation for moral and material damage.

In the event of unfair dismissal, the amount of damages awarded by a court depends on the actual loss suffered by the senior executive as a result of the employment termination.

A distinction is made between material loss and non-material loss (moral loss).

Material loss

The period between the date of termination and the date on which the senior executive has either found new employment or should have found new employment constitutes the "reference period", which the labour court sets in the event it declares the dismissal to be unfair.

If the senior executive has been unable to find new employment, the courts set the reference period based on other criteria, such as the duration of the notice period (if the senior executive was on garden leave during the notice period, that time will be deducted from the reference period) or the senior executive's seniority, age, expertise and ability to find new employment, as well as the employment market.

During the reference period, the senior executive is entitled to damages for an amount equal to the remuneration they would have earned had they not been dismissed.
Unemployment benefits or income derived from a professional activity conducted by the senior executive during the reference period must be set off against the amount of damages. If the dismissed senior executive lives in Luxembourg, they will be entitled to unemployment benefits from the Luxembourg State. For cross-border commuters, the Luxembourg State will pay the first three months of unemployment benefits to the relevant foreign public employment service.

If the termination is declared unfair, the employer will be ordered to reimburse the unemployment benefits awarded to the senior executive to the Luxembourg State or to the relevant foreign employment service during the reference period.

Moral loss

In addition to material damages, the senior executive may be awarded damages to compensate for non-material loss suffered (i.e. moral damages). The key criteria for assessing these damages are the circumstances surrounding the termination and the inconvenience it caused to the senior executive (for example, in light of their seniority, age or ability to find new employment, or if the dismissal was particularly vexatious). This assessment is made by the courts on a case-by-case basis and on a discretionary basis.

In addition, the senior executive may claim what they would have legally entitled to should the employer had complied with the Luxembourg legal provisions in this respect (such as for instance, payment compensating the notice period the senior executive was deprived of, payment for overtime, payment for accrued but non taken holidays, share options claim or bonus payment).

UNFAIR DISMISSAL

An unfair dismissal claim may arise where the company terminates a senior executive's employment without a good reason and/or without providing the reasons for the dismissal withing the one-month deadline in the context of the dismissal process. The reasons for dismissal shall be precise, real and serious. For a dismissal with notice period, they can be:

- of a personal nature (related to the employee personally); and/or
- reasons associated with the operational necessities of the business (redundancy).

For a dismissal with immediate effect, they can only be of a personal nature. In such context, the misconduct(s) must render a continuation of the employment relationship immediately and definitively impossible.

Whatever the reason might be, there are essentially three options – either a) follow a formal process, b) negotiate a termination by mutual consent or c) dismiss the senior executive and enter into negotiations discussions to conclude a settlement agreement.
If a formal process will be followed, consideration needs to be given as to whether there are internal policies or procedures governing the management of disciplinary actions. Is there an appetite for patience within the business,

will official warnings be given or the chance for the senior executive to improve? What has been discussed with the senior executive already and what else could be invoked to support the dismissal?

The circumstances surrounding the dismissal will be factored into a future labour court's assessment of whether the dismissal was fair. In case a termination by mutual consent could not be signed and a dismissal was notified, the employer may avoid the court's assessment by signing a settlement agreement.

SETTLEMENT AGREEMENTS

Settlement agreements (transactions) are used to terminate an ongoing dispute or prevent a dispute from emerging. To be valid, settlement agreements in the framework of labour, litigations must be concluded in writing and reciprocal concessions must be made by each party.

In practice, settlement agreements are largely used to settle disputes at the end of the employment relationship or to prevent them from emerging.

Usually, the main concession done by the employer is the payment of a lump sum. The value of the employer's concessions may not only be financial and may include the transfer of company property such as a mobile phone, laptop or company car but also granting a longer notice period or providing vocational trainings, for instance. In exchange, the senior executive usually waives their right to be provided with the reasons of their dismissal and releases the company from all claims and causes of action which they might have against it (i.e. waive their right to introduce legal actions for irregular or unfair dismissal).

Another major factor to consider will be the tax treatment of any termination payments. There is a tax exemption for termination indemnities paid in the context of a settlement agreement or a termination by mutual consent up to a cap of twelve times the social minimum wage for unqualified workers, corresponding currently as of 1 January 2023 to EUR 28,648.80, without the need for prior approval and to the extent the employee is not eligible for retirement or early retirement pension.

Depending on the reasons for the exit, a senior executive may also want to agree on the wording of a reference or company-wide announcement in advance. Once the settlement agreement has been drawn up, all communications relating to it should be marked as "privileged" and on a "without prejudice" basis, to avoid the content being disclosed in future litigation.

REDUNDANCY

Senior executives may be made redundant in the context of a redundancy scheme. Collective redundancies are defined as dismissals made by the employer, for reasons not inherent to the employees concerned (usually economic reasons), affecting:

- at least seven employees over a period of 30 days; or
- at least 15 employees over a period of 90 days.

Before initiating collective redundancies, an employer must inform the staff representatives (if any, if none then the concerned employees) about the planned collective redundancies and hold negotiations with them with a view to reaching agreement on a redundancy scheme. For the purposes of negotiating a redundancy scheme, the employee representatives are the staff delegation (a body representing staff that is mandatory for all undertakings with 15 or more employees) and, in certain circumstances, trade unions. The Luxembourg unemployment agency (Agence pour le développement de l'emploi) and the Luxembourg labour inspectorate (Inspection du travail et des mines) are involved in the process and shall be notified.

The negotiations must encompass means of avoiding or reducing the redundancies, and of mitigating their consequences with accompanying measures, aimed, in particular, at redeploying or retraining redundant employees and returning them to the labour market immediately.

The parties have 15 calendar days to agree on the terms and conditions of a redundancy plan. If no agreement on a redundancy scheme has been reached after 15 days from the commencement of negotiations, the parties must draw up a document setting out their respective positions on the various issues that were negotiated and submit it to the public labour authorities. Then, within three days, the parties must jointly refer the matter to the National Conciliation Office (Office National de Conciliation – "ONC"). Within two days of being notified, the ONC will invite representatives of the parties to a meeting, which must take place within three days of the invitation. The conciliation process, aimed at brokering agreement on a redundancy

scheme, lasts no more than 15 days from the first meeting.

The employer may not notify employees affected by the planned collective redundancies before a redundancy scheme is agreed upon or, where agreement is not possible, before the end of the conciliation process involving the ONC. Any notice of redundancy issued before the agreement is signed, or before the process ends, is null and void, and any senior executive dismissed in these circumstances can obtain a court order to this effect under an expedited procedure. Any redundancy occurring before the process ends is also deemed unfair.

As with an individual dismissal, the statutory notice period for collective dismissals is determined pursuant to the senior executive's seniority. For an individual dismissal, the employer must provide a notice period of at least two months. However, in the case of a collective redundancy, an extended notice period of at least 75 days is provided by the Labour Code, without prejudice to any other longer notice period provided by other statutory or contractual provisions (e.g. a collective bargaining agreement). The Labour Ministry may even extend such minimum notice period to 90 days if issues relating to the collective dismissals are not resolved within the initial timeframe. For senior executives who have been working for the company for over five years, the applicable notice periods are the same as for individual dismissal (i.e. four months for an employee with seniority between five and 10 years, and six months for an employee with seniority above 10 years).

In addition to the statutory benefits (e.g. notice periods and severance pay), the redundancy plan may also include other benefits not required by law that the employer chooses to grant to the terminated senior executives.

Such extra-legal benefits might be additional payments determined pursuant to the senior executives' age and/or seniority, outplacement or professional training measures, child allowances, etc.

RESTRICTIVE COVENANTS

Most senior executives will have post termination restrictions in their employment agreements to prevent them from doing certain things for a period of time after their employment has ended which can be enforced through the courts by obtaining an injunction.

In Luxembourg, the most common post termination restrictions are:

- Non-compete – prevents an ex-employee from engaging as an independent in a competing business for a defined period of time after employment has ended;
- Non-solicitation – restricts the ex-employee's ability to contact customers or clients of a former employer with a view to obtaining their business;
- Non-poaching – this seeks to prevent ex-employees poaching former colleagues.

Under Luxembourg employment law, a non-competition clause included in an employment contract is a clause pursuant to which an employee commits, for a specified period of time after the termination of the employment relationship, not to engage as an independent in an activity that is similar to the activity of their former employer, so as not to impact the employer's interests.

In order for a non-competition clause to be valid and binding, several conditions must be met regarding its form, geographical scope, personal scope and material scope.

Companies may have to enforce these restrictions by seeking an injunction in the courts in case they are aware that the senior executive is breaching their obligations in this respect.

A non-competition clause can never prevent a senior executive from entering into an employment relationship with another employer that is in competition with the former employer. It can only prevent an employee from independently engaging in an activity that is similar to the activity of their former employer.

In the absence of such a clause, the general principle of good-faith performance of a contract, set out in the Luxembourg Civil Code, applies following the end of the employment contract. According to this principle, the former senior executive is obliged to exhibit a degree of discretion and proper behaviour – both of which imply that they are prohibited from entering personally into direct competition with the former employer following the end of the employment contract.

The company will want to ensure that it is protected so far as possible in terms of its own business interests. This will invariably mean ensuring that confidentiality is maintained,
and that consideration is given to placing the senior executive on garden leave. Garden leave has the effect of reducing the senior executive's exposure to business transactions, contacts and trade secrets.

The principle of non-solicitation and non-poaching of employees and customers may be derived from general principles of loyalty to the employer and the prohibition of unfair competition. Non-solicitation and non-poaching clauses can be included in an employment contract, but should not excessively infringe a former senior executive's rights and freedoms. Furthermore, such clauses should be limited in time.

DISCRIMINATION, WHISTLEBLOWING AND OTHER STATUTORY CLAIMS

A discrimination complaint may arise for example, if the company terminates a senior executive for a reason that relates to origin, skin colour, sex or gender, sexual orientation, gender reassignment, gender identity, family situation, health status, disability, customs or beliefs, political or philosophical views, trade union activities.

It is also unlawful to discriminate on the grounds of fixed-term or part-time employment status. Often, such claim arises in the context of an unfair dismissal claim.

The labour courts may award compensation calculated by reference to any financial loss that a senior executive may have suffered as a result of the discrimination (including their termination), which may also include compensation for moral damage.

Whistleblowing claims are likely to increase due to the new EU law on the protection of whistle-blowers which shall be published soon. Senior executives who disclose information which, in their reasonable belief, is made in the public interest and tends to show one or more legal breaches and are victims of retaliation, are entitled to bring claims in labour courts.

SENIOR EXECUTIVES WHO ARE ALSO DIRECTORS

If the senior executive is also a director of the company, then it is important to take into account the following:

1. The senior executive should resign from any directorships held in the company and any associated companies. Usually this will be done in a separate agreement following the dismissal or included as part of the settlement agreement in case the employee challenged their dismissal or included in the termination by mutual consent agreement. An announcement may be agreed as part of the exit strategy.
2. The senior executive may either resign on a voluntary basis, unless this will cause harm to the company, and the general meeting of shareholders acknowledges such resignation or the senior executive may be dismissed as director by a decision of the general meeting of shareholders with or without cause.
3. If the senior executive holds shares for the company as a nominee, such shares should be transferred as the company directs. Again, this should be part of the settlement agreement, if any or of an exit agreement. Settlement sums may have to be disclosed in the company accounts and, if the company is a listed company, settlement sums will need to be identified in the directors' remuneration report. A listed company must have a remuneration policy approved by its shareholders each time it changes or otherwise be submitted to the general meeting of shareholders at least every four years for a consultative vote. Further, the company must set out on its website at all times the currently applicable remuneration policy.
4. Irrespective of whether the company is listed or not, announcements should be agreed if possible. It goes without saying that the contents of any announcements should not be libelous or misleading, and they should be consistent with any agreed reference (which are increasingly limited to confirming job title and dates of employment).

SHAREHOLDER APPROVAL

A director does not have any right to a "payment for loss of office" unless the director services agreement entered into with the director provides for such payment. It should be noted that any kind of remuneration for a director will require the prior approval of the general meeting of shareholders of the company. A payment for loss of office would qualify as remuneration of the director.

REMOVAL AS A DIRECTOR

Terminating a senior executive's employment does not necessarily terminate any directorships that they might hold. As there is no requirement for a director to also be an employee, it will invariably be necessary to obtain the senior executive's resignation from any directorships that they hold at the time their employment is terminated or provide for their removal as a director by the general meeting of shareholders, if an agreement cannot be reached.

As long as the individual remains a director, they will be entitled to attend board meetings, access minutes and other paperwork related to their appointment as a director.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in Luxembourg . They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at May 2023.

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MAURITIUS

THE APPROACH

In Mauritius, the legislative framework provides for the same statutory procedures for termination, regardless of the employee's salary or position within an organisation. Similarly, the statutory grounds for termination apply to all employees, with a possible exception, as set out below. Depending on the nature of the dispute, employment matters can be lodged before the Industrial Court, the Supreme Court at first instance the Employment Relations Tribunal, the Redundancy Board or the Commission for Conciliation and Mediation. Disputes arising out of termination are likely to be adjudicated before Industrial Court (in a claim for severance allowance), the Supreme Court (in a claim for contractual damages) or before the Employment Relations Tribunal (in a claim for reinstatement).

Since its enactment in 2019, the Workers' Rights Act serves as the legislative framework for termination of employment, and the grounds for termination under this statute can be broadly categorised as follows:
Termination for misconduct;1
Termination for misconduct subject to criminal proceedings;
Termination for poor performance; and
Redundancy.

The above substantive grounds for termination have formed part of statutes for decades, such that there is a rich body of case law on these. Case law has further recognised that breach of the bond of trust between the employer and the employee may constitute a valid ground for termination of employment, especially of a senior employee. However, in most cases, breach of trust is considered together with misconduct.

Under our laws, the notions of justified and unjustified dismissal are used, and the specific procedures to be followed depend on the grounds for termination.

The Workers' Rights Act 2019 mandates that every employee must be given an opportunity to answer any charges made against them before any decision for dismissal is made. This takes the form of a disciplinary hearing, chaired by an independent person, who in practice usually is a barrister. The disciplinary hearing follows a letter of charges which contain the matters upon which the employer seeks the explanations of the employee. In most instances, the letter of charges would have been preceded by an internal investigation. A senior executive is in practice assisted by a barrister when appearing before a disciplinary committee.

There are procedural safeguards under the Workers' Rights Act and developed by case law. Further, the employer has to abide by strict timeframes to issue the letter of charges and to hear the explanations of the employee.

Any dismissal made in violation of these procedural requirements is considered an unjustified dismissal, even if the employer has a valid substantive reason for dismissal. Procedural failures are thus sanctioned on their merits, transforming the dismissal into an unjustified one.

Settlement agreements are possible at any stage of the process. In the case of senior employees, in practice negotiations take place between counsel acting on behalf of each party. Settlement agreements are a preferred mode of termination of employment of senior executives to mitigate reputational and litigation risks. The contents, format and legal effects of settlement agreements are governed by the Workers' Rights Act and the Civil Code.

HOW CAN THE CONTRACT BE TERMINATED?

Notice of termination in Mauritius can be conveyed verbally or in writing and may be given at any reasonable time. Given their level of seniority, senior executives may also benefit from other contractual provisions, such as bonus or equity participations. Upon termination of their contract, these provisions will also have to be considered in the balance.

[1] Although this ground has been termed as "misconduct under our laws, case law sets out that the test is whether the employee has committed an act of gross misconduct.

POTENTIAL CLAIMS IN MAURITIUS

Employees in Mauritius have:

- Contractual rights – these are governed by the employment contract but may be subject to implied terms;
- Statutory rights – these rights emanate from the Workers' Rights Act 2019 and the Employment Relations Act 2008; and
- Common law rights.

In the context of a dismissal, two (2) regimes can be applied: the one provided under statute and the other provided for by common law. If the claim is made under Workers' Rights Act 2019, the issue is whether severance allowance at the prescribed rate is payable. If a referral is made under the Employment Relations Act, the issue is whether the employee should be reinstated in their former position. If a claim is made before a common law jurisdiction, the question becomes whether the employee is entitled to contractual damages.

WRONGFUL DISMISSAL

The concept of "at will" termination does not apply in Mauritius. All employees, irrespective of their seniority, can only be dismissed for cause and after the employer has followed all prescribed procedures.

If a contract of employment is terminated without cause or in breach of prescribed procedures, for example, in the absence of one of the prescribed grounds for termination or in breach of a statutory delay, the employee may become entitled to initiate a wrongful dismissal claim against the employer.

Under the statutes (the Workers' Rights Act and the Employment Relations Act), two (2) remedies may be available to an employee. The latter may seek severance allowance before the Industrial Court or reinstatement by applying to the Ministry of Labour and thereafter to the Employment Relations Tribunal. The Employment Relations Tribunal may still order severance allowance if the case for reinstatement is not made out. The quantum of severance allowance is prescribed under the Workers' Rights Act at three (3) months' remuneration per year of continuous employment. Remuneration encompasses a wide array of payment made to the employee in consideration for their services. Severance allowance as prescribed under the Workers' Rights Act may be payable only if the employee has completed at least twelve months of continuous employment with the employer.

An employee may also seek contractual damages against the employer. This usually takes place when the employee was employed on a contract of fixed duration. The claim of the employee is likely to amount to what they would have earned had they been in employment for the entire duration of the contract. The Courts will then need to undertake an assessment of damages based on contractual rules.

An employee may also file a wrongful dismissal claim when they have been constructively dismissed. In such cases, the burden lies with the employee, who must demonstrate, on the balance of probabilities, that the employer's conduct, objectively judged, repudiated the contract.

PAYMENT IN LIEU OF NOTICE AND TERMINATION AGREEMENTS

Under the Workers' Rights Act 2019, any party may, in lieu of giving notice of termination of agreement, make a payment to the other party equivalent to the remuneration the employee would have earned had he remained in employment during the period of notice. This would allow immediate termination, subject to the termination being lawful.

Minimum notice under applicable laws is of one month. It is however customary to find notice periods of 3-6 months for senior executives.

RESTRICTIVE COVENANTS AND INJUNCTIONS

Post termination restrictions can form part of a senior executive's contract of employment to limit or prevent them from engaging in certain activities for a period of time after their employment has ended. The most common method of enforcement is by way of injunction before a Judge in Chambers. In Mauritius, these are usually done on a without notice basis.

Examples of restrictive covenants include:

Non-compete clauses

To be enforceable, these clauses should be restricted in time and make mention of a geographical limitation. In Mauritius, a geographical limitation covering the whole country is usually deemed enforceable. If the employee undertook duties overseas, the geographical limitation may include foreign jurisdictions which should however be limited. They should not be overly broad to the extent that they prevent employees from earning a living, and they must serve the fundamental purpose of protecting the employer's legitimate business interests. The enforceability of non-compete clauses in Mauritius is based on case law, and the Courts will assess their validity on a case-by-case basis. Thus far, Courts have stated that financial compensation is not a condition precedent for the lawfulness of the enforceability of such clauses.

Non-solicitation clauses

These generally pertain to the non-poaching of the employer's employees and of the customers and suppliers. Non-solicitation clauses normally do not have specific geographical restrictions, but they can be enforced as long as they are reasonable and necessary to protect the employer's interests. They need to have a time limit.

UNJUSTIFIED DISMISSAL UNDER THE WORKERS' RIGHTS ACT 2019

The Workers' Rights Act 2019 established the procedures that must be followed when terminating employment. Failure to adhere to the statutory process, as outlines in the Act, would result in the termination being considered unjustified. These procedures are applicable to all employees', including senior executives, ensuring a consistent and standardised approach to employment terminations in Mauritius.

For instance, an employer cannot terminate an employment agreement on grounds related to alleged misconduct unless:

The employer has, within ten days of the day on which he or she becomes aware of the alleged misconduct, notified the employee of the charge made against him or her. In case an investigation had to be carried out, this 10 (ten) days' time limit starts to run as from the end of the investigation;
the employee has been afforded an opportunity to answer any charge made against him or her in relation to his or her alleged misconduct;
the employee has been given at least seven (7) days' notice to answer any charge made against him or her;
the employer cannot, in good faith, take any course of action other than termination; and
the termination is effected not later than seven (7) days after the employee has answered the charge made against him or her.

AWARD FOR UNJUSTIFIED DISMISSAL

Where an employee has been in continuous employment for at least twelve (12) months with the employer, severance allowance may be awarded by the Industrial Court or the Employment Relations Tribunal if the termination is deemed unjustified.

Continuous employment is a key concept that allows employees to obtain various benefits. Thus, eligibility for severance allowance depends on the accumulation of twelve (12) months of continuous employment as defined under the Workers' Rights Act 2019.

Severance allowance is calculated as follows:

- For every interval of twelve (12) months of employment, a severance equivalent to

remuneration of three months.

- For an additional period that is less than twelve (12) months, a sum of one-twelfth of the sum calculated in the above point is multiplied by the number of months the worker has additionally worked and is paid along with the above sum.

REDUNDANCY

Similarly, while redundancy is considered a potentially fair reason for dismissal, it is crucial to follow a fair process when implementing it. The general rule is that an employer who employs a minimum of fifteen (15) employees, or has an undertaking with a minimum annual turnover of MUR 25 million, cannot terminate the employment of an employee without following the procedures laid down under the Workers' Rights Act.

An employer considering redundancy must first explore all possible alternatives to redundancy. This must be made in consultation with the senior executive. The alternatives set out under the Workers' Rights Act include restrictions on recruitment, retirement of employees beyond the retirement age, reduction in overtime, a transfer to a different role or a movement across the group in which the employer operates. In case the redundancy ends up in a dispute, the employer will need to show that it actively, and in good faith, consulted with the senior executive to find alternatives to redundancy. During the consultation process, the employer is also expected to explain to the senior executive the reason(s) for redundancy.

Grounds for redundancy include restructuring of the organisation, economic reasons or technological change.

The employer and the senior executive may reach a settlement agreement at any time during the process.

If no alternative to redundancy is found and no settlement agreement reached, the employer must give written notice to the Redundancy Board at least 30 days before the intended retrenchment, outlining the reasons for it. The Board shall then consider the case.

If the board determines that the termination is unjustified, it may order the employer to pay severance allowance or may order reinstatement with the consent of the senior executive. However, if the retrenchment is deemed justified, it will award thirty (30) days' wages as indemnity *in lieu* of notice.

STATUTORY PROTECTION

The Workers' Rights Act 2019 includes provisions relating to the protection of employees against termination of employment. An agreement shall not be terminated by an employer by reason of –

(i) race, colour, caste, national extraction, social origin, place of his origin, age, pregnancy, religion, political opinion, sex, sexual orientation, gender, HIV status, impairment, marital status or family responsibilities;

(ii) absence from work during maternity leave and for the purpose of nursing her unweaned child;

(iii) temporary absence from work because of injury or sickness duly notified to the employer and certified by a medical practitioner;

(iv) performance at work being affected as a result of an injury sustained out of and in the course of work, where the worker produces a medical evidence from a Government medical practitioner that he has not fully recovered from the injury;

(v) becoming or being a member of a trade union, seeking or holding of trade union office, or participating in trade union activities outside working hours or, with the consent of the employer, within working hours;

(vi) in good faith, filing a complaint, or participating in proceedings, against an employer, involving alleged breach of any terms and conditions of employment; and

(vii) exercising any of the rights provided for in this Act or any other enactment, or in any agreement, collective agreement or award.

A breach of these provisions would automatically render the termination unjustified.

REMOVAL AS A DIRECTOR

Senior employees acting as directors cannot be suspended from their fiduciary duties whilst the employee is on suspension from their employment duties. In case of termination of employment, senior employees may be removed as directors in accordance with the Company's Constitution. When the termination takes place through a settlement agreement, it is customary that the senior employee's resignation from any directorship be also agreed upon, and the resignation letter be annexed to the settlement agreement. It is however crucial to ascertain whether appointment on the board was a fundamental element of the employment relationship. In such a case, a removal as director in the absence of termination of employment may amount to a constructive dismissal.

In the case of senior executives, employers should also bear in mind their obligations towards regulators. This is particularly important in certain heavily regulated industries like banking and insurance. The employer may have to keep the regulators informed of any suspension, particularly if suspension – and indeed termination – has as root cause deceit or the senior executive's involvement in any act of fraud and dishonesty.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in Mauritius. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at November 2023.

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NAMIBIA

INTRODUCTION

The Namibian labour laws are principally constituted both by the Roman-Dutch Common Law and the Labour Act, 2007. Accordingly, there are two principal legal sources to any employment relationship. These are the contractual law aspects, mainly governed by the Common Law, but affected by the provisions of the Labour Act, 2007; and the employment law aspects, governed extensively by the Labour Act, 2007, and which overrides the contract entered into between an employer and an employee to the extent that it is inconsistent with the Labour Act, 2007. Namibia is similar in many respects to South Africa, and many of the strategies applicable to termination of executives in South Africa will be applicable to Namibia, subject to our local employment laws.

COMMON LAW

The Common Law still regulates the very basic aspects and assumptions underlying the rights and duties between an employer and an employee. Since, historically, an employment contract was classified as a lease of personal services, these Common Law rights and duties are that the employee must personally perform his services; the employee must serve the employer competently; the employee must act in good faith towards the employer; the employee must accept lawful and reasonable orders from the employer; the employer must provide safe working conditions for the employee and the employer must pay the employee the agreed remuneration.

LABOUR ACT, 2007

The Labour Act, 2007, which is a comprehensive piece of legislation, regulates the following principal matters, to wit, fundamental rights, which include the prohibition of child labour, forced labour, discrimination and sexual harassment, and the freedom of association in the workplace; basic conditions of employment; health, safety and welfare of employees; unfair labour practices; regulation of trade unions and employer organisations; strikes and lock-outs; prevention and resolution of disputes through conciliation and arbitration; labour institutions, which include the Labour Advisory Council; Committee for Dispute Prevention and Resolution and Essential Services Committee; Wages Commission; Labour Court; Labour Commissioner; and the Labour Inspectorate.

It must be noted that the Labour Act, 2007 constitutes a substantial body of law governing all employment relationships in the Republic of Namibia, with a specific emphasis on the rights of the employee and basic conditions of employment. It is the principal and most important statute on employment matters in Namibia.

Various regulations have been made under the predecessor legislation to the Labour Act, 2007, which survive, and the most important of which are the Regulations on the Health and Safety of Employees at Work, 1997, which inter alia regulate various workplace and machinery safety matters.

Section 1 of the Labour Act, 2007 defines the term "employee" as meaning any person who works for another person and who receives or who is entitled to receive remuneration, or who in any manner assists in carrying on or conducting the business of an employer. By extension, the definition of an employee also applies to an executive.

Independent Contractors

Notwithstanding the wide definition of "employee" in the Labour Act, 2007, Namibian law still recognises the concept of an independent contractor. In order to distinguish between an employee and an independent contractor, the Namibian law will look at the substance rather than the form of any agreement entered into between parties to a contract purporting to establish the legal relationship of an independent contractor. There have, in the past, been various tests and considerations applied by the Namibian courts to distinguish between an employee and an independent contractor, which looked at, *inter alia*, the nature of the tasks performed by the contractor, the freedom of action by the contractor, the magnitude of the contract amount, the manner of payment of the contractor, the power of dismissal by the employer, the circumstances under which the payment of the reward may be withheld by

the employer or the control and supervision by, and subjection to the orders of the employer.

In 2012, the Labour Act 2007 was amended by introducing a new section 128A, which now provides for a legal presumption that until the contrary is proved, an individual who works for or renders services to another person, is presumed to be an employee of that other person, regardless of the form of contract or the designation of the individual, if any one or more of the following factors are present, to wit, the manner in which the individual works is subject to the control or direction of that other person; the individual's hours of work are subject to the control or direction of that other person; in the case of an individual who works for an organisation, the individual's work forms an integral part of the organisation; the individual has worked for that other person for an average of at least 20 (twenty) hours per month over the past three months; the individual is economically dependent on that person for whom he or she works or renders services; the individual is provided with tools of trade or work equipment by that other person; the individual only works for or renders services to that other person.

FORMALITIES

No formalities are required under either the Common Law or the Labour Act, 2007 in respect of the appointment of an employee or the entering into a contract of employment. Accordingly, a person can become an employer or an employee under an oral, a written or a tacit agreement.

TERMINATION OF EMPLOYMENT

Under Namibian law an employer and an executive may by consensus agree to terminate their employment relationship. In this regard, they may in their employment contract agree on a fixed term of employment, but section 128C(1) of the Labour Act, 2007 contains a presumption that an executive is employed indefinitely, unless the employer can establish a justification for employment on a fixed term.

TERMINATION BY EXECUTIVE

An executive may at any time terminate an employment agreement by notice. Please see our further comments on termination by notice below.

TERMINATION BY EMPLOYER

In terms of the Labour Act, 2007 it is not possible for an employer to terminate the employment of an executive without a valid and fair reason. Consequently, and although the Labour Act, 2007 deals with termination of an employment contract by notice, an employer will still be required to have a legally recognised valid and fair reason when invoking any contractual provision to terminate such employment contract by notice. Where termination of employment is allowed, it is usually only possible in the case of misconduct, upon disciplinary action involving a fair hearing (commonly referred to as "dismissal"); and in the case of retrenchment, if such retrenchment takes place in accordance with the provisions of the Labour Act, 2007.

UNFAIR DISMISSAL – SECTION 33

Dismissal of an executive on account of misconduct is only possible following a disciplinary hearing, which will ordinarily be an internal hearing. The basic elements and requirements for a fair disciplinary hearing are adequate notice to the executive; presence of the executive at the disciplinary hearing; entitlement to representation; impartiality of the presiding officer; minutes to be kept of the disciplinary hearing; and the decision by the presiding officer must be made on the evidence without reference to the executive's disciplinary record. More substantially, the misconduct of the executive should, on the facts and circumstances, warrant a dismissal, and should generally be consistent with the policies and previous conduct of the employer. If the executive is aggrieved by a decision to dismiss him or her, the executive may, within 6 (six) months of his dismissal register a dispute with the Labour Commissioner. The dispute resolution procedure is set out hereinafter.

RETRENCHMENT – SECTION 34

The Labour Act, 2007 prohibits the dismissal of executive without a valid and fair reason. Section 34 of the Labour Act 2007 recognises the re-organisation or transfer of a business as a valid reason for dismissals (for the sake of convenience herein referred to as "retrenchment"). In order to effect retrenchments, the employer is required to inform the Labour Commissioner of the intended dismissals; the reasons for the reduction in the workforce; the number and categories of employees affected; and the date of the dismissals.

The employer is required to disclose all relevant information necessary for the trade union or workplace representatives to engage effectively in the negotiations over the intended dismissals, but the employer is not required to disclose information if it is legally privileged, if any law or court order prohibits the employer from disclosing it, or if it is confidential and, if disclosed, might cause substantial harm to the employer.

The employer is required to negotiate in good faith on alternatives to dismissals; the criteria for selecting the employees for dismissal; how to minimise the dismissals; the conditions on which the dismissals are to take place; and how to avert the adverse effects of the dismissals. An employer's selection criteria must either be agreed or must be fair and objective. An employer may inform the executive of the intended dismissals in less than four weeks if it is not practicable to do so within the four week period required. If the employer and the executive are unable to reach agreement during the negotiations, either of them may, within one week after the periods referred to above, refer the matter to the Labour Commissioner, who is required to appoint a conciliator to assist the parties to resolve their dispute. The conciliator is required, as soon as is reasonably possible, to convene a meeting of the parties to the dispute, and may convene additional meetings up to a maximum of four weeks from the date that the dispute was referred to the Labour Commissioner. During the various periods referred to above, the employer may not dismiss executive unless the dispute has been settled "or otherwise disposed of". There is currently uncertainty as to what exactly is meant by the phrase "*otherwise disposed of*". Section 34 of the Labour Act, 2007 contains a prohibition, criminalisation and relevant sanctions related to what is referred to as a "*disguised transfer or continuance of an employers operation*".

TERMINATION ON SALE OR TRANSFER OF BUSINESS

The Namibian Common Law regards employment contracts to be of a highly personal nature, and consequently restricts the free cession and delegation of rights and obligations under such contracts. The Namibian Labour Act, 2007 contains no automatic termination or transfer provisions providing for the termination of employment or the transfer of employment contracts upon the transfer of an employer's business to another person. Section 32 of the Labour Act, 2007 merely provides for the automatic termination of employment in the case of the death, sequestration or liquidation of an employer or where the employer is a partnership, upon the dissolution of the partnership.

Accordingly, in the case of a sale of a business taking the form of a sale of the business assets, the legal position is unless the seller terminates the employment relationship with its executive, the sale of the business assets will not have any legal effect on the employment relationship between the seller and its executive; to the extent that the purchaser of the business assets would be willing to continue engaging the further services of the seller's executive, this would require the purchaser to enter into new employment contracts with the executive; and in this regard, section 34 of the Labour Act, 2007 specifically allows for the dismissal of employees on account of the re-organisation or the transfer of the business of an employer, and we refer to the further details of the retrenchment procedure referred to herein. Such dismissal would have to be based on the redundancy of the executive.

In the case of a sale of a business taking the form of a sale of shares in a company, the legal position is if the employment relationship between the company and its executive remains in all respects unaffected; and there are no requirements for either the selling entity or the company to consult or negotiate with the executive of the employing company, and the executive have no

rights to be heard in relation to the sale of shares.

INCIDENTAL MATTERS ON TERMINATION

Section 35 of the Labour Act, 2007 requires an employer to pay severance pay to any executive who has completed 12 (twelve) months of continuous service if the executive is "*dismissed*".

We wish to point out that in contradistinction to the previous Labour Act, 1992 the expression "*dismissal*" – which was previously only used in the context of disciplinary action for misconduct – is used in the Labour Act, 2007 also in the context of retrenchments. Severance pay is payable at the rate of at least one (1) week's remuneration for each year of continuous service with the employer.

DISPUTE RESOLUTION

Part B of Chapter 8 of the Labour Act, 2007 provides for dispute resolution procedures. The principal dispute resolution procedures are conciliation and arbitration.

CONCILIATION

In terms of section 81 of the Labour Act, 2007, a "dispute" for the purposes of conciliation is a dispute of interest a dispute referred to the Labour Commissioner under section 45 of the Affirmative Action (Employment) Act, 1998; and a dispute referred by the Minister of Labour or the Labour Court to conciliation. Conciliation is conducted by conciliators in the employment of the public service, appointed by the Minister of Labour for that purpose. The Labour Commissioner assigns the conciliators so appointed by the Minister of Labour to the relevant dispute. In terms of section 82 of the Labour Act, 2007, Conciliation takes place whereby any party to a dispute is entitled to refer such dispute to the Labour Commissioner, and the referral must be served on all other parties to the dispute. If the Labour Commissioner is satisfied that the parties have taken all reasonable steps to resolve or settle the dispute, he must refer the dispute to a conciliator (to attempt to resolve the dispute through conciliation), determine the place, date and time for the first conciliation meeting, and inform the parties to the dispute accordingly. The Conciliator must attempt to resolve the dispute within 30 (thirty) days of the date that the Labour Commissioner received the referral of the dispute, or within such longer period as agreed to in writing by the parties to the dispute. Representation by office bearers of trade unions or employer's organisations, co-employees and, in the case of juristic persons, employees of such juristic persons is allowed, but legal practitioners are only allowed to represent parties in a conciliation if the parties to the dispute agree, or if the arbitrator is satisfied that the dispute is of such complexity that it is appropriate to allow legal representation and the other party to the dispute will not be prejudiced thereby. A conciliator must issue a certificate that a dispute is unresolved if the conciliator believes that there is no prospect of settlement at that stage of the dispute; or the 30 (thirty) day period has expired. When issuing the certificate that a dispute is unresolved, the conciliator must, if the parties have agreed, refer the unresolved dispute for arbitration.

ARBITRATION

In terms of section 84 of the Labour Act, 2007, a "dispute" for the purposes of arbitration is a complaint relating to the breach of a contract of employment or a collective agreement; a dispute referred to the Labour Commissioner under section 46 of the Affirmative Action Act 1998; a dispute of interests which remains unresolved, and which is referred to arbitration, as set out above and a dispute that is required to be referred to arbitration under the Labour Act, 2007, which includes, inter alia, disputes referred to in sections 38, 47 and 51 of the Labour Act, 2007, concerning the non-compliance, contravention, application or interpretation of basic conditions of employment; chapter 4 of the Labour Act, 2007, dealing with health, safety and welfare of employees; and chapter 5, dealing with unfair labour practices. Arbitration is conducted by arbitrators in the employment of the public service, appointed by the Minister of Labour for that purpose. The Labour Commissioner assigns the arbitrators so appointed by the Minister of Labour to the relevant dispute.

Any party to a dispute may refer such dispute to

arbitration only within six months after the date of dismissal, if the dispute concerns dismissal within one year after the dispute arising, in any other case and the referral must be served on all other parties to the dispute. The Labour Commissioner must refer the dispute to an arbitrator (to attempt to resolve the dispute through arbitration), determine the place, date and time for the first arbitration hearing, and inform the parties to the dispute accordingly. Unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before commencing arbitration. The arbitrator – may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly; and must deal with the substantial merits of the dispute with the minimum of legal formalities. Representation by office bearers of trade unions or employer's organisations, co-employees and, in the case of juristic persons, employees of such juristic persons is allowed, but legal practitioners are only allowed to represent parties in an arbitration if the parties to the dispute agree, or if the arbitrator is satisfied that the dispute is of such complexity that it is appropriate to allow legal representation and the other party to the dispute will not be prejudiced thereby. The arbitrator may make any appropriate arbitration award, including an interdict; an order directing the performance of any act that will remedy a wrong a declaratory order; an order of reinstatement of an employee; an award of compensation; an order for costs, but only against a party that acted in a frivolous or vexatious manner by proceeding with or defending the dispute, or during the proceedings. The arbitrator must issue a signed award within 30 (thirty) days of the arbitration proceedings, giving concise reasons. An arbitration award is binding and becomes an order of the Labour Court on filing the award in the Labour Court.

APPEAL AND REVIEWS

A party to a dispute may, within 30 (thirty) days of the award having been served on such party, appeal to the Labour Court against an arbitrators award on any question of law alone in the case of an award in a dispute initially referred to the Labour Commissioner in respect of fundamental rights in terms of section 7 of the Labour Act, 2007, on a question of fact, law or mixed fact and law.

A party to a dispute who alleges a defect in any arbitration proceedings may, within 30 (thirty) days of the award having been served on such party, apply to the Labour Court for an order of reviewing and setting aside the award. For the purpose of section 89 of the Labour Act, 2007, "defect" means that the arbitrator (i) committed misconduct in relation to the duties of an arbitrator, or (ii) committed a gross irregularity in the conduct of the arbitration proceedings, or (iii) exceeded the arbitrator's powers; or the award has been improperly obtained.

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NORWAY

INTRODUCTION

In Norwegian law, Employment Contracts, like other types of contractual relationships, can be terminated by either party.

The Norwegian Working Environment Act (WEA) is the main Act regulating the employer/employee relationship, including the rules of hiring and terminating employees. The Act is binding for all companies with employees. The Norwegian labour market is characterised by a strong governmental influence, and the requirements as to what constitutes a justified termination are generally strict.

The dismissal of an employee has to be justified on the grounds of either the employee, (e.g. poor work performance) or the company (e.g. a need to rationalise the business). The employer has the burden of proof and must consequently be able to document that there are sufficient grounds for dismissal in each case. It is therefore quite challenging to legally terminate employment.

The WEA generally does not in principle differentiate between dismissal of various positions in the company and applies equally to the company's senior executives. However, the WEA has a specific provision regarding the General Manager in a company, which is described further below.

The WEA therefore imposes limitations on which grounds the company can terminate the senior executive's employment relationship, as these ground needs to be objectively justified.

It is only a minority of termination and dismissal cases that end up in court and disputes are usually settled amicably through termination agreements.

However, it is essential to note that the provisions of the WEA safeguard the rights of senior executives, and any pre-agreement where they waive these rights under the WEA is deemed not to be binding. However, once termination has occurred, both parties have the freedom to negotiate and enter into agreements.

Therefore, if an employer wishes to terminate the employment of a senior executive according to Norwegian law, it is crucial for the employer to be well-versed in the WEA's rules regarding termination/dismissal and the associated procedures.

EMPLOYER'S TERMINATION RIGHTS TOWARDS THE SENIOR EXECUTIVE

The employment continues until it is terminated, either by the employee or by the employer.

If the employer terminates employment by notice, it has to be objectively justified. This could be due to the employee's lack of suitability for the work (for example, poor work performance or unethical conduct) or a need to rationalise the business (for example, downsizing or restructuring within the company).

A specific discretionary overall assessment must be conducted, taking into account the grounds for termination and any breaches of the employment contract. This involves a concrete, discretionary balancing of the interests of the employer and the employee. The assessment of the requirement of objectively justified cause depends on whether, following a comprehensive evaluation of the needs of both parties', termination is deemed reasonable and appropriate. The criteria for justified termination are stringent.

Despite all employees being afforded the same protection against termination, irrespective of their position within the organisation, legal precedents have established that greater expectations may be placed on senior executive compared to subordinates. Given the heightened performance standards and the imperative for a trusted employee, the protection against termination for senior executives may be diminished.
Furthermore, it is important to differentiate between dismissals (termination with notice) and summary dismissals (termination without notice), as these

represent distinct methods of ending an employment relationship.

If an employee is dismissed, they are entitled to work throughout the notice period as specified in the employment contract. Typically, a three-month notice period is the most commonly agreed upon duration. However, there are statutory minimum notice periods that must be adhered to:

1. 1 month of not a longer period is agreed upon.
2. 2 months if the employee has been with the same enterprise for 5 consecutive years.
3. 3 months, if the employee has been with the same enterprise for 10 consecutive years.
4. 4 months, if the employee has been with the same enterprise for 10 consecutive years and the employee has reached the age of 50.
5. 5 months, if the employee has been with the same enterprise for 10 consecutive years and the employee has reached the age of 55.
6. 6 months, if the employee has been with the same enterprise for 10 consecutive years and the employee has reached the age of 60.

In the case of a summary dismissal, the employee must cease work immediately. For a summary dismissal to be lawful, the employee must be found guilty of a gross breach of duty or another serious violation of the employment contract. This typically involves serious violations of the employment contract, such as disloyal involvement in a competing business or financial misconduct such as theft or embezzlement.

EMPLOYEE WITH ADDITIONAL PROTECTION AGAINST DISMISSALS

There are no general categories of employees who are completely protected against dismissals. There are, however, categories of employees that have particular protection against dismissals. These categories of employees and their protection are as follows.

7. Employees on sick leave: An employee, who is wholly or partly absent from work due to accident or illness may not be dismissed for that reason during the first 12 months of absence. However, the employer retains the right to dismiss the employees on alternative grounds. In the event of a dismissal while on sick leave, the employer's burden of proof is heightened, necessitating a higher degree of certainty regarding the grounds for a dismissal.
8. Pregnant employees: The pregnant employee is afforded the same protection against a dismissal as an employee on sick leave. Similar to the provisions for sick leave, termination based on pregnancy is prohibited, requiring the employer to demonstrate a high probability of the grounds for dismissal.
9. Employees on maternity/paternity/adoption leave: If an employee is lawfully dismissed during maternity/paternity/adoption leave the notice remains valid but does not take effect until the employee returns to work. Consequently, the notice period is extended by a corresponding duration.
10. Employees on military service: Dismissal based on absence due to military service is prohibited. Similar to the regulations for pregnant employees, if termination occurs during military service, the employer must provide highly probable grounds for the dismissal, thereby bearing a heightened burden of proof.

TERMINATION PROCEDURE

The company must adhere to specific procedural requirements when terminating an employment relationship. It is important to note that in cases of redundancies additional obligations such as consulting with employee representatives and notifying the authorities may also be necessary.

Prior to reaching a final decision regarding the dismissal of a senior executive, the employer should, to the extent it is practically possible, engage in consultations regarding the grounds for dismissal with the senior executive. The senior executive may bring an elected employee representative to the consultation meeting if he or she desires.

Upon deciding on termination, certain criteria must be

met regarding the content of the notice of dismissal. First and foremost, the notice must be provided in writing. The termination notice should also be delivered in person or to the senior executives 's specified address. It should include information about the senior executives 's right to request negotiations, file a lawsuit, and details about the right to remain in their position. Failure to meet these requirements could render the termination invalid.

Following the delivery of the notice, senior executives have two weeks to request negotiations if they dispute the notice.
There is no statutory entitlement to receive a redundancy payment in the event of redundancy. However, it is common for employers to offer the senior executives redundancy payments to avoid time consuming legal disputes.

If senior executives initiate legal proceedings alleging that the employment termination was procedurally incorrect or unwarranted, and seek compensation or reinstatement in their position, they may remain in their position until a binding court decision is reached. Depending on the court's time schedule and the possibility to appeal, this process could extend up to one to several years.

CONSEQUENCES OF UNFAIR DISMISSAL/SUMMARY DISMISSAL

The consequence of a dismissal being deemed unfair is its nullification, resulting in the senior executive retaining their position within the company. If the senior executives have been absent from their post, they have the right to return and resume their previous duties.

Senior executives can also seek compensation for unfair dismissal under the regulations of the WEA, without the requirement of proving fault on the part of the employer. If they initiate legal proceedings claiming that the termination was procedurally incorrect, unwarranted, or invalid, they may be entitled to compensation for both financial and non-financial losses. Compensation claims can be pursued in addition to claims for invalid termination or as an independent remedy.

The amount of compensation depends on various factors, including the senior executive's economic loss both presently and in the future, the circumstances surrounding the termination, their age, seniority, length of employment and the financial stability of the employer.

Financial losses incurred up to the final judgment, including expenses for legal representation and lost wages during their absence from the post, are typically covered by compensation. However, if the senior executive has obtained alternative employment during this period, deductions may be considered.

The senior executive also has a duty to mitigate losses, and their efforts to actively seek alternative employment may impact the overall assessment of compensation.

Contributory factors to the termination by the senior executive may lead to a reduction in the compensation amount.

Regarding non-financial losses, legal precedents require the termination to deviate from the "ordinary case" for compensation to be awarded. Factors such as the employer's conduct, recklessness, undue offensiveness, excessive dissemination of information about the senior executive, and adherence to procedural rules are considered. According to legal precedents, compensation for non-economic loss will rarely exceed 100,000 Norwegian kroner.

If the termination is not deemed invalid, claims for compensation from the senior executive must be pursued under general tort law principles. This would typically be applicable in cases involving allegations of discrimination, bullying, and/or harassment.

COMPENSATION CLAIMS FROM A SENIOR EXECUTIVE WHO HAS TERMINATED THE

EMPLOYMENT CONTRACT DUE TO SERIOUS BREACH OF DUTY OR OTHER SIGNIFICANT DEFAULT

The senior executives 's right to terminate the employment contract is not explicitly outlined in the WEA. However, legal precedent has established that such a right is derived from general contract law principles governing the termination of contractual relationships, which are applicable in the realm of an employment as well. Nevertheless, this presupposes that the employer has committed a serious breach of duty or other significant default, indicating a high threshold for termination.

In the event that senior executives exercise their right to terminate the employment contract, provided the conditions are met, this termination will trigger an obligation for the employer to compensate the senior executives for any economic damages incurred as a result of the breach, including potential future loss of income.

TERMINATION AGREEMENTS AS AN ALTERNATIVE TO A FORMAL TERMINATION PROCEDURE

As mentioned initially, the provisions of the WEA safeguard the rights of senior executives, and any pre-agreement where they waive these rights under the WEA is deemed not to be binding. However, once termination has occurred, both parties have the freedom to negotiate and enter into agreements. It is crucial to highlight that if the employer proposes a termination agreement before formally initiating the termination process, the company should refrain from expressing a definitive decision to terminate the senior executive.

However, it is entirely possible for the company to initiate negotiations with the senior executives offering a termination agreement prior to a formal termination. It is crucial that the negotiations leading to a termination agreement adhere to the principles outlined in the WEA, and the agreement is reached without undue pressure. Failure to meet these standards may render the agreement invalid.

Termination agreements can serve to prevent potential conflicts between employers and senior executives. This is particularly valuable in situations where the employment relationship is already tense or challenging, saving time and resources that would otherwise be expected in a termination process and preserving a positive reputation. For senior executives, such agreements offer the opportunity to conclude the relationship amicably, normally combined with a financial compensation.

It is essential to recognise that until the employment relationship officially ceases, and the senior executive resigns, the employer remains obligated to fulfill contractual and statutory obligations, such as outstanding wages and holiday pay.
In addition to regular salary during the notice period, severance pay is commonly agreed upon between the parties. Severance pay is a salary for a specified period without corresponding work duties.
It is also important to clarify whether the senior executives wholly or partially have the right to any performance-based bonus up to their resignation termination date. While this may be clear from any existing bonus policies, it should be explicitly addressed in the termination agreement, including the timing of any bonus payments.
In the event that the senior executives have had legal representation in connection with the negotiations of a termination agreement, it is common for the employer to cover the senior executives 's legal costs, either fully or partially. This provision should be explicitly stated in the termination agreement if applicable.

SPECIAL PROVISION IN THE WORKING ENVIRONMENT ACT REGARDING THE GENERAL MANAGER

An employer may enter into an agreement with its general manager (applies to the general manager only) in which the general manager waives his or her employment protection rights against a severance payment. This enables the employer to terminate the employment without any justified reason ("without cause"), and without having to risk a long and time-consuming termination process with the general manager. The waiver is normally included in the employment contract but may also be entered into in a separate agreement. If the general manager has not waived his protective rights, he or she will retain the standard employment protections against dismissals as a regular employee.

The employer may also enter into a written agreement with the general manager of the undertaking stipulating that any disputes arising from the termination of the employment relationship shall be resolved through arbitration.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in Norway. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at February 2024.

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POLAND

DIFFERENT FORMS OF EMPLOYMENT

The applicable laws regarding termination of cooperation between a senior executive and the company depend on the form of employment. There are two principal legal forms of employment in Poland: employment regulated by the Polish Labour Code and engagement based on civil law contracts regulated by the Polish Civil Code. Employment means a relationship under which an employee undertakes to carry on work of a specific type for the employer, under their direction and supervision and at a place and time designated by the employer, and the employer assumes an obligation to hire an employee for remuneration. Such form of employment is often applied form of cooperation between a senior executive and a company.

TERMINATION OF THE EMPLOYMENT CONTRACT

Under Polish Labour law, a contract of employment may be terminated by mutual agreement of the parties, by statement of will of one of the parties with notice, by statement of will of one of the parties without notice or upon the expiry of a contract term. The above also applies to senior executives.

There is no doubt that the most desirable method for terminating an employment contract is by mutual agreement of the parties, because such method mitigates the risk of future litigation. However, it often depends on the circumstances. In this way, the contract may be terminated at any time agreed by the parties. The date of termination of the employment contract may be the date of signing the agreement or any later date. The termination agreement should include all issues related to the employment between the senior executive and the employer that must be resolved upon its termination.

Contrary to the termination agreement, termination of an employment contract with or without notice is strictly regulated in the Labour Code and involves a number of requirements that must be complied with.

FORMAL ISSUES

A statement of will terminating a contract irrespective of whether it is made with or without notice must be in writing. Signing a document is sufficient to comply with the written form requirement. It is also possible to make such a statement by electronic means and append it with a qualified electronic signature (which is equivalent of a written form).

However, a statement of will terminating an employment contract which is not in writing (or which is not made electronically with a qualified electronic signature) is invalid. Such a declaration will be effective, but in violation of the provisions of the Labour Code, which may constitute the basis for a senior executive to appeal to the Labour court.

When it comes to other formal issues, the employer must inform the employee about their right to appeal to the Labour court. Such information should be included in the document containing the employer's statement to terminate the employment contract.

PRINCIPLES OF REPRESENTATION

If the employer is an organisational unit, any actions under labour law should be taken by the person or authority that manages the unit, or by any other assigned person. These may be persons authorised to represent the company in accordance with the company's articles of association or statute or a person/persons authorised to carry out activities in the field of Labour law other than through the statutory principles of representation, e.g., through a power of attorney.

REASON JUSTIFYING THE TERMINATION

The employer's statement on termination of a fixed-term employment contract or an employment contract concluded for an indefinite period or on termination of an employment contract without notice should specify the reason justifying the contract termination.

No reasons for terminating the employment contract need be given, if the contract is terminated as a result of the agreement of the parties.

As regards the reason for terminating the employment contract, how it is formulated is important from the perspective of potential employee claims, because the dispute before the court takes place within the limits of reason specified by the employer justifying the termination of the employment contract. From this point of view, the employer should have clear evidence that supports the reason specified in the notice to terminate the employment contract.

The reason justifying termination must be justified, specific (descriptive), accurate and true. When terminating the employment contract, the employer cannot provide a reason in a general way. The employer should refer to specific circumstances that justify terminating the contract. The reason justifying the termination must be included in the notice to terminate - it cannot be given only in a subsequent letter addressed to the employee.

The courts have a different approach to the reasons justifying termination of the employment contract in relation to senior executives than to rank and file employees. When terminating an employment contract with a senior executive, the employer is not so restricted when indicating a specific reason justifying the termination. This is due to greater demands placed on employees in such positions. At the same time, these persons bear the increased responsibility for failing to fulfil or improperly fulfilling their duties.

Termination of the employment contract may also be justified by reasons which are not related to the employee, such as the employer's organisational changes. In case of redundancy (termination for reasons not related to the employee), if there are at least two employees employed in a particular position and only some of them are to be made redundant, an employer must establish criteria of selection for dismissal. Such criteria must be objective and cannot be discriminatory. The criteria are assessed by a labour court if the employee appeals. There is no list of such criteria specified by law, however, in its judgments the Polish Supreme Court has noted in particular the following criteria: work performance, qualifications, work skills, employee availability, professional experience and seniority at a given employer (although seniority cannot be the sole criterion for selecting an employee to be made redundant). Also, an employee's high salary cannot be the only selection criterion. Criteria which relate to an employee's personal, financial or family situation can only be ancillary. These include, for example: family situation, other earnings, employment of both parents at the same employer, disability, raising a child/children alone, or ability to find a new job.

NOTICE PERIOD

'Termination at will' does not apply in Polish Labour law. The provisions of the Polish Labour Code indicate minimal notice periods that must be met on the termination of an employment contract with notice. The notice period for an indefinite-term or fixed-term contract of employment depends on the length of service with the employer. The parties may specify a different notice period in the employment contract than that specified by Labour Code provisions, but it must be more favourable for the senior executive. This is because in Polish Labour law, the principle of employee preference applies in relation to senior executives and notice periods are often longer than those specified by the Labour Code.

When specific conditions are met, notice periods may be shortened. This may happen if an indefinite-term or a fixed-term contract of employment is terminated with a declaration of the employer's bankruptcy or liquidation, or for other reasons not attributable to employees. In such case the employer may reduce the three-month notice period for the purpose of earlier contract termination, but to a period no shorter than

one month and the employee will be entitled to compensation equal to the amount of remuneration due for the remaining part of the notice period.

It is also possible to shorten the notice period by agreement of the parties. In such case, the termination of the employment contract still remains termination with notice of the contract made under notice (and not termination by mutual consent). In other words, the contractual shortening of the notice period does not mean that the parties conclude an agreement on termination of the employment contract.

Notwithstanding the above, the employer may release the employee from having to work during the notice period, while retaining the right to remuneration.

TERMINATION WITHOUT NOTICE

Under the Polish Labour Code, terminating a contract without notice is only permissible in the cases specified in the Code. In particular, the employer may terminate a contract of employment without notice through the fault of the senior executive in case of serious breach of the employee's basic duties. For example: violation of a non-competition clause or intentional use of an official position by a senior executive for private purposes, involving the use of the employer's financial resources.

Termination without notice through the fault of the employee may also occur when a criminal offence is committed by the senior executive during the employment contract term, if it prevents the employee's further employment in the current position and if the offence is obvious or declared by a court in a final and non-appealable judgement.

In the event of the employee's culpable loss of the qualifications necessary to carry out the work in the position held, the employer may also terminate a contract without notice through the fault of the employee.

The employer may also terminate a contract of employment without notice when there is no fault on the part of the senior executive, due to the senior executive's incapacity to work due to illness or other justified absence from work. The provisions specify after what time of the employee's absence the employer may terminate the employment contract without notice.

TERM

An employment contract cannot be terminated without notice through the fault of the employee after more than one month from the date when the employer is notified of the circumstances that constitute grounds for termination. Exceeding the abovementioned deadline may result in employee claims related to the termination of the employment contract in violation of the Labour Code regulations.

However, it is assumed that the employer may conduct internal explanatory proceedings aimed at determining the circumstances that may potentially constitute a reason justifying termination of the employment contract without notice. Conducting internal proceeding prolongs the monthly period referred to above.

Termination of the employment contract with notice is not limited in time although it is assumed that the reason specified in the employer's statement justifying the termination of the employment contract must be valid, i.e. the reason that has lost its relevance as a result of later circumstances cannot be considered to justify the termination of the employment contract.

LIMITATIONS ON THE ADMISSIBILITY OF TERMINATION

When terminating an employment contract with an employee, it should be considered whether there are any restrictions on terminating such a contract, which include the employee being on leave or other justified absence of the employee, pre-retirement age, the employee's pregnancy, the exercise of rights related to parenthood or performing specific functions related to representing employee interests.

Although rare in relation to senior executive positions,

termination of an employment contract may involve the notification or consultation with a trade union or obtaining consent to terminate the employment contract from the company's trade union representing the employee.

Failure to notify, consult or obtain the required consent may constitute grounds for the senior executive to appeal to the Labour Court against the declaration of termination of the employment contract.

UNJUSTIFIED OR UNLAWFUL TERMINATION

The senior executive may legitimately appeal to a Labour Court against the employer statement to terminate the employment contract if the termination is unjustified or violates the provisions on terminating employment contracts. Depending on the situation, the senior executive may be entitled to raise the following claims: recognition of ineffectiveness of the notice, reinstatement of the employee to work on the previous terms and conditions (if the contract has already been terminated), or compensation.

The compensation awarded shall be the amount of remuneration due for the period from two weeks up to three months, but in no case lower than the amount of payment in lieu of notice. In the event of termination of a fixed-term employment contract, the term of which was specified in the contract and ended before the decision was issued by the Labour court, or when reinstatement would be inadvisable due to the short period remaining until the end of that term, compensation is due in the amount of remuneration for the time until the end of the term of the contract, but not more than for a period of three months.

If a senior executive contract of employment is terminated without notice in contravention of the applicable provisions on termination of employment contracts without notice, the employee will be entitled to claim reinstatement under the previous terms and conditions or to compensation. The compensation paid will be the amount of remuneration due for the notice period. On termination of a fixed-term contract of employment, the employee will be entitled to compensation being remuneration for the period for which the contract was supposed to last, although in an amount not higher than due for the notice period.

NON-COMPETE

Senior executives are often subject to post termination restrictions, such as non-competition agreements. Post-employment competition agreements are regulated in Labour Code provisions and may be concluded if an employee has access to particularly sensitive information, disclosure of which may cause damage to the employer.

The agreement should define the scope of prohibited activity, the term of the non-competition clause and the amount of compensation due to the senior executive from the employer. Such compensation should not be lower than 25 per cent of the employee's remuneration received prior to the termination of his employment relationship during the period equal to the term of the non-competition clause. A contractual penalty may be stipulated in a post-employment non-competition agreement with the former senior executive in the event of non-performance or improper performance of the obligation to refrain from competitive activities.

NON-DISCRIMINATION

Employees must be treated equally in regard to the termination of an employment relationship, especially without distinction on the grounds of sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, denomination, sexual orientation, employment for a definite or indefinite term or on full-time or part-time basis. A senior executive in respect of whom the employer has violated the principle of equal treatment in employment has the right to a discrimination claim, i.e. compensation equal at least to the amount of the statutory minimum wage, as defined in separate regulations.

COLLECTIVE REDUNDANCY

Collective redundancy is regulated in Act on the Specific Principles for Terminating Employment

Relationships with Employees for Reasons not Related to the Employees Concerned This states that the provisions of this Act apply in cases where it is necessary for an employer who normally employs at least 20 employees to terminate employment relationships for reasons not related to the employees concerned, whether by way of termination with notice or by mutual agreement of the parties, if, over a period of no more than 30 days, such redundancy affects at least 10 employees if the employer normally employs less than 100 employees; 10 per cent of the employees, if the employer normally employs at least 100 but less than 300 employees, 30 employees if the employer normally employs 300 employees or more.

A senior executive whose employment relationship is terminated as part of a collective redundancy will be entitled to a redundancy payment the amount of which depends on the employee's length of service with a given employer.

The amount of such payment cannot exceed 15 times the statutory minimum wage, determined in accordance with separate regulations, effective on the date when the employment relationship is terminated.

If there are collective redundancies at the company, the employer must consult them (to the extent provided by the abovementioned Act) with the trade unions operating at the employer's work place. If there are no trade unions operating at the employer's work place, employee representatives appointed in accordance with the employer's standard procedure shall exercise the rights of trade unions.

If an individual layoff occurs or the parties to an employment contract conclude a termination agreement for a reason not related to the senior executive, if there are no other reasons justifying the termination of the employment [relationships], the senior executive is also entitled to redundancy payment resulting from the abovementioned Act (if an employer normally employs at least 20 employees). In practice, employers often offer employees voluntary severance pay to encourage them to terminate the employment contract by mutual agreement of the parties.

SENIOR EXECUTIVES WHO ARE ALSO MEMBERS OF THE MANAGEMENT BOARD

If the senior executive is also a member of the management board then the following should also be taken into account:

- Dismissal of a management board member from his/her function results in the termination of the organisational relationship and does not automatically terminate the employment [relationship] if the management board member and the company were bound by an employment contract.
- The dismissal of an employee from his/her position as a member of the company's management board constitutes a reason justifying the termination of the employment contract, the conclusion of which was directly related to the employee's appointment to this position.
- In the event of a termination agreement between the member of the management board and the company there should be a change in the composition of the management board.
- Who can represent the employer when terminating the employment contract with a member of the company's management board depends on whether the termination of the employment contract takes place before or after dismissal from the position in the board. If the employment contract with the management board is terminated before dismissal from the board, special representation rules apply, namely the company must be represented either by the supervisory Board or a proxy appointed by a resolution of the shareholders' meeting. On the other hand, if the employee is no longer a member of the management board, it is the management board which is authorised to take any actions on behalf of the company towards persons who have lost their membership.
- The register of entrepreneurs of the National Court Register regarding members of the management board must be updated.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in Poland. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at October 2023.

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RWANDA

INTRODUCTION

With the ratification of the Labour Inspection Convention 1947 in 1980 Rwanda began to develop the national legal framework for employment to meet these standards. Between 2001 to 2023, the legislative branch in Rwanda has passed laws with detailed labour practices and obligations to apply to the vast majority of employees in the country.

In addition to the Labour Laws of 2001, 2009, 2018 and 2023, Rwanda has ratified the Labour Administration Convention of 1978 in 2019, the Tripartite Consultation (International Labour Standards) Convention of 1976 in 2018 and the Collective Bargaining Convention of 1981 in 2018. The most recent developments in Rwandan Labour Law are the inclusion of apprenticeship and internship standard employment contracts and statutory standards of this employment, the recognition and functioning of trade unions and employers organisations, statutory specifications relating to weekly working hours, days and overtime compensation for both the public and private sector, and the introduction of maternity and paternity leave provisions in 2023. These advancements in national employment law were made in harmony and alongside the alterations that Rwanda needed to introduce to give effect to the East African Common Market Protocol.

THE APPROACH

Unlike South Africa and the United Kingdom, Rwanda is a traditionally civil law country. This means that the emphasis of legal practices and principles lies within the codified law and not precedent set by judges when applying the law to cases brought before the courts of Rwanda. Given that case law in Rwanda, is not published with the expediency and urgency of common law countries it follows that lawyers, judges, and legal practitioners alike, operate from the position that decisions may differ on a case by case basis (even where cases may have similar facts), all decisions will be in line with a reasonable and standard understanding of the written law. This differs from the UK and South Africa in so far as judges are free to make decisions and pass judgements based on their individual understanding of the law which will then set a precedent to be followed in later cases and lower courts.

Employment practices and specifics of most employment contracts are determined on a basis of negotiation and the arrangements made by employees and employers, themselves. The provisions within the Labour Law usually act as the floor of the possible terms of employment that can be applied to all contracts in Rwanda. In most terms, the Labour Law acts as a safety net for employees and provides practices that are equally favourable to employees and employers and should the terms of an employment contract be more favourable to the employee, the standard in the Labour Law will cease to apply where this is provided by the Law.

In terms of employment claims in Rwanda, employers must ensure that they do not infringe on the human rights and freedoms given to all by the Rwandan Constitution and the practices and standards included in the Labour Law and any complementary legislation – which may be orders, directives, regulations, guidelines or other laws. Typically, employment claims are either settled amicably such as through conciliation or by courts.

HOW CAN THE CONTRACT BE TERMINATED?

Termination of employment contracts in Rwanda is subject to written notice with reason for the termination, save for termination in case of gross misconduct. The time period in which this notice should be served is dependent on the term of employment served by the employee in question but does not exceed thirty (30) days.

Compensation as a result of termination is not a standard practice. Employers will only pay compensation if the contract was terminated without the serving of proper notice or where termination is the result of economic reasons, technological transfer or sickness. An employee may be entitled to indemnity compensation where his or her employment contract is terminated while the employee has accrued annual leave that has not been taken.

POTENTIAL CLAIMS IN RWANDA

All employees in Rwanda have:

- contractual rights – these rights are entirely derived from the employment contract but may be subject to implied terms statutory rights - these rights are derived primarily from the Labour Law as of 2023, Ministerial Order N° 02/MIFOTRA/22 of 30/08/2022 on occupational safety, employees' and employers' organisations, child employment, employment of a foreigner, the child and circumstantial leave, , Ministerial Order No01/MIFOTRA/23 of 13/06/2023 on working hours and public servants governed by employment contracts, the East African Community Common Market Protocol, and any complementary, regulations, policies, and ratified international laws and standards.
- common law rights – as Rwanda is a predominantly civil law country, the common law rights derived from case law are not sufficiently adjudicated.

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

The Labour Law defines unfair dismissal as the "termination of employment contract by the employer without legitimate reasons or respecting procedures provided for by law". As previously mentioned, the Labour Law sets the minimum standards that all employers are expected to follow should the contractual terms agreed to not exceed those within the Law.

Unlike South Africa, Rwanda does not have different practices depending on the seniority of an employee, the statutory practice is the same for all. Termination notices are to be served at least fifteen (15) days before termination becomes final if the employee being terminated has served for less than one year and at least thirty (30) days if the employee has served for more than one year.

The only case in which an individual employee can be terminated with a different notice period is in the case of gross misconduct. Termination due to gross misconduct requires a written notice to be served within forty-eight (48) hours from the occurrence of evidence of the misconduct leading to termination. An act constituting gross misconduct must be among the acts listed as gross misconduct under the Ministerial Order No 002/19.20 of 17/03/2020 establishing the list of gross misconduct. Employers are allowed to supplement the list of gross misconducts under the Ministerial Order by adding other acts which they consider gross misconduct, subject to approval by the Ministry in charge of labour.

Upon lawful termination, there is no statutory requirement to provide employees with monetary compensation. Nevertheless, should the employment contract include a clause creating an obligation to compensate employees who have been terminated, employers must respect this obligation. The cases in which compensation is required, by law, other than where termination procedures are not followed, are the benefits granted where termination is the result of economic reasons, technological transfer, or sickness. In that case, employees are given terminal benefits in sum of money depending on their average monthly salary and the amount of time they have served within the company. For example, employees with less than 5 years of service are paid two times their average monthly salary – which is the minimum benefit package – while employees who have served more than 25 years are paid seven times their average monthly salary – the highest benefit package.

PAYMENT IN LIEU OF NOTICE

Though the Labour Law of Rwanda is silent on payment in lieu of notice, parties to the employment contract must respect the terms they have agreed to during the notice period. By virtue of the principle of freedom to contract which is recognised under Rwandan law, payment in lieu of notice is acceptable as long as both parties agreed to this as a condition to the termination of an employment contract.

WHAT CONSTITUTES DAMAGES FOR BREACH OF CONTRACT?

The range for damages paid for unfair dismissal provided for in the Labour Law, is between three (3) to six (6) month's salary of the employee who was dismissed. The exception to this general rule is where the employee in question has more than ten (10) years of experience; in that case, the ceiling for the damages paid is nine (9) instead of six.

INTERDICTORY RELIEF AND RESTRICTIVE COVENANTS

Interdictory relief is a remedy which is most of time sought by employers before the intermediate court, chamber for labour and administrative cases, if the employers relies on a restrictive covenant which was included in an employment contact with a former employee, most of time a senior executive of the company. An interdictory relief can also be brought before the commercial court in case the restrictive covenant was enshrined in a standalone contract.

The interdict is an order from the Court that restrains a party, most often a former senior employee from using company's confidential information or proprietary information which they had access to during their employment. In practice, big companies provide restrictive covenants in their employment contracts which most of time cover a period of between six (06) months to twelve (12) months post-employment termination. In Rwanda, the most common post-termination restrictions are:

- Non-compete or restraint of trade which prevent a former employee from joining a competitor employer for a defined period, usually 6 to 12 months, post-employment termination.
- Non-solicitation prevents the employee's from approaching customers or client of the former employer for the purpose of securing business opportunities.

UNFAIR COMPETITION

There is no statutory provision providing for unfair competition in the Labour Law. It is not common practice to prevent the practices of employees in Rwanda, outside of confidentiality clauses that were included in the employment contract to begin with. In fact, the Law relating to Competition and Consumer Protection prohibits any agreements that have the effect of undermining, preventing, restricting or distorting competition. The only forms of protection of employers against competition are those which are included in the Competition Law.

UNFAIR DISMISSAL

All employees are protected against unfair dismissal, regardless of their position in the institution where they are working. The Labour Law defines unfair dismissal as termination without legitimate reason or termination without following the correct procedure outlined in the Law. Under Rwandan law the legitimate grounds for termination include: gross misconduct, misconduct, incompetence based on performance evaluation, economic reasons, technical reasons, technological transfers and sickness. Other than for termination of an employee during their probation period, the notice of termination must include one of the above-mentioned grounds to justify the termination.

In using the above-mentioned grounds to justify termination, an employer must specifically mention the behaviour or actions of the employee that demonstrate whichever reason is used to justify the termination. The actions that constitute gross misconduct are prescribed in the Ministerial Order establishing the list of gross misconduct or/ in addition to any list that is determined by the employer themselves, in a code of conduct that is provided to and approved by the Ministry in charge of Labour.

The other side of unfair dismissal, is the procedural aspect stipulated by law. Notice of termination must be served in writing and in accordance with the time frame in the law depending on the length of service of each employee and in the employment contract.

In Rwanda, unfair dismissal claims must be brought first before the labour inspector where the employer is based prior to seizing the competent court, which is the intermediate court, chambers of administrative and labour cases. The aim of submitting an unfair dismissal claim before the labour inspector is to enable the latter facilitate an amicable settlement between the employee and employer, and the Court can only be seized once the amicable settlement has failed.

AWARD FOR UNFAIR DISMISSAL

The award for unfair dismissal, substantial and procedural alike, under the Labour Law is damages. Where a dismissal is deemed to be unfair, the affected employee will be entitled to damages amounting to at least his or her three (3) month salary and not more than six (6) months' salary. The only exception to this general rule is where the affected employee has served the same employer for more than ten (10) years, in which case the damages awarded may range between three (3) months' salary to nine (9) months. Reinstatement is only provided for in the Law for employees who have been dismissed for economic or technical reasons, however, unlike SA and the UK, this reinstatement is not granted on the grounds of unfair dismissal.

Though the Law does not provide for any other awards, employment disputes may be amicable settled by the employee and employer involved before escalating to the court or Labour Inspector where damages will be awarded. If amicable settlement is successful, both the employer and employee will be contractually obligated to fulfil the obligations they agreed on. In this way, it is possible for employees to be awarded a range of remedies for unfair dismissal as decided in settlement.

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SOUTH AFRICA

INTRODUCTION

South Africa's Constitution entrenches fundamental rights and contains provisions that protect all employees, irrespective of seniority and confers on everyone the right to fair labour practices.

The arrival of democracy in South Africa in 1994 resulted in a tripartite alliance between the Congress of South African Trade Unions (COSATU), the South African Communist Party (SACP) and the African National Congress (ANC). The ANC, as the majority party, passed employment legislation to give effect to constitutional protection.

The Labour Relations Act 66 of 1995 (the LRA) provides for resolving labour disputes by establishing the Commission for Conciliation, Mediation and Arbitration (CCMA), industry bargaining councils, Labour Courts and the Labour Appeal Court. The Labour Appeal Court is generally the final Court of Appeal, although disputes involving constitutional issues may be appealed to the Constitutional Court (CC). In addition, minimum conditions of employment are regulated by the Basic Conditions of Employment Act (BCEA) and the Employment Equity Act (EEA), which outlaws unfair discrimination and provides for affirmative action of previously disadvantaged groups. These three South African employment law pillars apply equally to all employees, from senior executives to the most junior employees.

THE APPROACH

South Africa is similar in many respects to the UK, and many of the strategies employed concerning executives will be equally applicable to the termination of executives in South Africa, subject to local conditions. There is a general tendency in South Africa to place more emphasis on process and procedure than in the UK, and there are several ways in which the dismissal of a senior executive can be executed depending upon the reasons for the termination.

Most employers commence with following due process, and during such process, matters often devolve into without prejudice and off-the-record settlement discussions to mitigate against the risk of future litigation. The risk of litigation and reputational damage is such that, more often than not, a settlement ensues between the company and the executive. The company's leverage to reach such an agreement depends upon the complaint's merits. Employers are well advised to focus on this aspect before discussing settlement.

Settlement agreements are undoubtedly the primary mechanism used to effect a termination. Negotiations are conducted entirely without prejudice and are subject to legal privilege, which means the employer does not have to disclose settlement discussions in future litigation. Provided such discussions are to settle a dispute, it is not essential to confirm their privileged nature, although it would be advisable in most instances to do so.

The South African Labour Courts have developed casuistically particular requirements for an enforceable settlement agreement. Therefore, obtaining legal advice before concluding such a settlement agreement is advisable to ensure enforceability. Separate legal advice by the executive is recommended, but unlike in the UK, it is not a requirement.

HOW CAN THE CONTRACT BE TERMINATED?

The termination of an employment contract in South Africa must be in writing. This is typically also a term and condition of the employment contract and good practice.

Given the seniority of the executives, there are often other contractual provisions and benefits outside of the employment contracts, such as bonus and incentive schemes and additional equity and incentive arrangements, many of which may result in the exercise of discretions, possible malus and clawback and other legal issues that will need to be addressed. Often, there are restraints of trade and non-solicitation agreements which form part of the employment

contract.

POTENTIAL CLAIMS IN SA

All employees in South Africa have:

- contractual rights - the employment contract largely governs these but may be subject to implied terms;
- statutory rights - these rights are derived primarily from the Constitution, the LRA, the BCEA and the EEA;
- common law rights - South Africa has a rich history of Roman-Dutch and common law that will, subject to the Constitution, fill in any conceivable blanks regarding conditions of employment that are not addressed by statute or contract.

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

Unlike the United States of America, South Africa has no "termination at will" concept. All employees, irrespective of their seniority, are entitled to the Constitutional protection afforded to them against unfair labour practices and in compliance with statutory and contractual requirements.

After the first six months, contractual notice is generally a minimum of one month (or payment in lieu of notice), and notice must be reciprocal, i.e. an employer cannot require an employee to provide further notice than the employer is contractually required to do. Executive notice periods vary and are ordinarily between three and six months at a senior level. If an executive's employment contract is terminated without contractual notice, this can be cured by way of a payment in lieu of notice, but it will result in an earlier termination date.

A company is entitled to terminate an executive's employment summarily, i.e. without notice, if the executive has acted in material or gross breach of their contract, i.e. the breach is sufficiently egregious that it would entitle the company to terminate the contract summarily, i.e. without notice. Similarly, an executive may terminate a contract summarily if the company is in breach or the company acts in such a manner to destroy or repudiate the employment relationship. In addition, this form of termination may result in a "constructive dismissal", which entitles the executive to sue for unfair dismissal compensation referred to below.

In the absence of an ability to terminate the contract of employment summarily, either party will have to pay the other an amount that would have placed such party in a position they would have been in had the contract been terminated on notice. Ordinarily, payments made by either party to the other in lieu of notice are based on total cost of employment (TCE) and not base salary and include all payments due to the executive not of a discretionary nature.

PAYMENT IN LIEU OF NOTICE

In terms of the BCEA, either party is entitled to make a payment in lieu of notice (PILON), which would allow for immediate termination. This is an essential consideration where there are restraints of trade covenants which operate in conjunction with notice periods and possibly garden leave, as it can result in an executive limiting the executive's liability in appropriate circumstances. South African courts are generally reluctant to grant orders for specific performance in employment contracts unless there is a compelling justification. Such an order is discretionary. Unlike the UK, PILON payments are not for basic salary only and cover the total cost of employment because of the definition of statutory remuneration. In essence, the executive is entitled to receive a payment equivalent to all the contractual benefits they would have received had they worked the full notice, e.g. bonus, car allowance, LTIP share options, any other premiums, and any other medical and other pension benefits.

WHAT CONSTITUTES DAMAGES FOR BREACH OF CONTRACT?

The general rule is that an executive who is unlawfully dismissed is entitled to claim damages representing the paid benefits they would have received had they been able to work during the full notice, subject to the obligation to mitigate their loss by seeking alternative employment.

INTERDICTORY RELIEF AND RESTRICTIVE COVENANTS

An interdict (injunction) is an order from the Court that restrains a party, most often an executive, from using or benefiting from confidential information relating to the company after their employment has been terminated. Most executives will have post-termination restrictions in their service agreements to prevent them from doing certain things after terminating their employment and using company information. The company can seek protection by seeking an order in the High Court or the Labour Court (both superior courts). In South Africa, the most common post-termination restrictions are:

- non-compete/restraint of trade prevents an ex-employee from joining a competitor employer for a defined period, usually 12 to 18 months, after employment has ended;
- non-solicitation restricts the employee's ability to contact customers or clients of the former employer to obtain their business. non-dealing also restricts the ex-employer's ability to deal with former customers or clients after the termination of employment;
- non-solicitation/poaching prevents ex-employees from soliciting employees to leave the company.

UNFAIR COMPETITION

This is a common law action based on a civil wrong (a tort or delict) arising from the unlawful and wrongful behaviour of the ex-employee in using confidential information and competing unfairly on behalf of a competitor. The advantage of this claim is that it arises in common law and does not require a written agreement.

Depending upon the circumstances of the dismissal, companies will decide whether to enforce these restrictions by seeking an interdict in the Court.

Insofar as restraints of trade are concerned, South African courts have the discretion to decide whether to enforce restraints of trade or not. The Court's willingness to enforce a restraint of trade agreement, similar to the UK, will depend upon whether there is a proprietary interest that the employer seeks to enforce and, more particularly, whether the ex-employer has confidential and other proprietary information that would permit it to compete unfairly on behalf of the new employer against the ex-employer. This confidential information often relates to client lists, pricing methodologies and resources spent by the ex-employer, which permits the employee to take the client from his ex-employer "in his pocket". The position is very similar to the UK, except in South Africa, where the onus is upon the employee to show that the restraint is unreasonable. In the UK, the onus is upon the ex- employer to show that the restraint was reasonable.

There is generally no right to work in South Africa unless working is essential for the employee to develop or retain their skills, e.g. a neurosurgeon, ballerina or apprentice. Accordingly, it is generally possible to send an executive home during the period of their notice or, where expressly provided, to impose "gardening leave". Gardening leave and absence from the office is usually a factor that is considered in conjunction with a restraint of trade agreement to determine its reasonableness. South African courts are generally reluctant to enforce restraints of trade agreements above 18 months, save in exceptional circumstances. There is no requirement in South Africa that a restraint of trade has to be paid for, and it is not a capital payment and is accordingly taxable if it is subject to a payment.

UNFAIR DISMISSAL

Senior executives' primary statutory right is not to be unfairly dismissed. Unlike the United Kingdom, there is no qualifying period of two years, and the executive receives such protection immediately upon employment. In South Africa, even an employee terminated during a probationary period must be fairly terminated, subject to the unfair dismissal provision.

Whilst a party needs to give notice of termination in terms of a contract, the South African unfair dismissal provisions require that there must be a valid substantive reason for the dismissal, and there must be a fair process. It is important to note that both requirements must be present, and even if there is a fair reason for a dismissal, dismissal in the absence of a fair process still constitutes an unfair dismissal.

There are generally three substantive grounds for dismissal in South African law: misconduct, incapacity (which includes poor performance or injury/inability to perform) and redundancy/ retrenchment (reduction in force). Insofar as misconduct is concerned, the nature of the misconduct must be sufficiently serious to justify dismissal. Misconduct dismissals are usually effected on notice unless they are extremely serious, and summary termination is justifiable. Poor performance, like the UK, is subject to performance counselling. However, our courts do not require the same degree of performance counselling when it comes to senior executives because the executive ought to know their performance is inadequate. Redundancy/retrenchment sometimes applies to senior executives where certain positions are restructured (for structural, economic or technological reasons) and the executive's position is redundant.

A fair process needs to be followed. In misconduct cases, this involves a disciplinary hearing. In South Africa, this will require the company to present evidence before a non-involved chairperson and the right of the executive to cross-examine witnesses at the disciplinary hearing. Written statements are insufficient. The retrenchment process usually takes approximately 30 days. It requires that the company consult on the need for the retrenchment, i.e. its justification and the consequences - including the timing, possible alternative employment and an appropriate severance package. Whilst legislation requires a minimum payment of one week's remuneration (TCE) for each complete year of service in addition to notice and other statutory/contractual payments, many companies' policies provide for significantly more, and few companies pay less than two weeks' remuneration for each complete year of service. Accordingly, any settlement will result in an *ex gratia* payment to the executive in addition to such amounts. It is essential that severance pay is not increased (as this is something to be consulted upon) and that any settlement is linked to the *ex gratia* payment. In large-scale retrenchments, the minimum consultation period, absent an agreement of settlement, is 60 days. In appropriate cases, lawful strike action is possible to induce or compel an employer not to proceed with such a settlement.

AWARD FOR UNFAIR DISMISSAL

If a dismissal is substantively and procedurally unfair, the primary remedy of an employee is to receive reinstatement together with back pay from the date of the unfair dismissal unless the employer can show that this is impracticable. Ordinarily, the seniority of executives is such that it often is impractical, and courts are accordingly reluctant to grant the primary remedy or reinstatement.

In the absence of reinstatement and back pay, an employee is entitled to receive their statutory/contractual rights plus a payment equivalent up to a maximum of 12 months remuneration (TCE). By way of a guide, a payment of 3 months' remuneration is often paid to employees who are treated procedurally unfairly, whilst more significant amounts up to the maximum of 12 months apply to executives who are dismissed in a substantively unfair. In the case of an automatically unfair dismissal, i.e. where unfair discrimination based on race, gender, ethnicity, marital status, pregnancy, or exercise of legal rights is concerned, termination based on a protected disclosure, or a failure to have regard to a transfer of business in terms of section 197 of the LRA

(equivalent to the TUPE), a maximum compensation 24 months is provided.

Settlement agreements reached between the parties often consider such factors. It will usually be essential to determine the strength of the company's case and its willingness to proceed with a formal disciplinary process and possibly suffer reputational damage through litigation in determining the settlements that may be paid. Settlements range at an executive level from 6 months to 24 months to avoid litigation.

If the senior executive is also a director of the company, then it is essential to take into account the following:

- Does the senior executive have a contractual right to be appointed a director?
- It is not possible to suspend a director in terms of the Company's Act. Whilst removing a director in terms of the Companies Act is possible, such removal may well constitute a constructive dismissal if there is a contractual right to be a director. Accordingly, many companies will suspend a senior executive in the executive's capacity as an employee but permit the executive to remain as a director pending the outcome of the employment hearing. Once the employment hearing has been finalised and termination has occurred, either as a consequence of a hearing by or by agreement, the Director resigns or is removed.
- Stock Exchange - Johannesburg Stock Exchange rules require a Stock Exchange News Service (SENS) notice to be given arising from a director's removal, retirement or resignation as soon as possible after the decision. Corporate law advice should be taken in respect of such a manner.
- All settlement agreements regarding listed companies are generally reportable,
  must be reported and the amounts paid disclosed.
- Shareholder approval of the payments may be required in the general meeting.
- If the senior executive holds shares for the company, and discretions are exercised in favour of the senior executive, these will need to be reported in the Director's remuneration report, and respect of a listed company approval by the shareholders is usually required.

REMOVAL AS A DIRECTOR

Terminating a senior executive's employment does not terminate any directorships that they may hold at the company or other companies as a consequence of their office. As there is no requirement for a director to be an employer, it will invariably be necessary to obtain senior executives resignation from any directorships they hold when their employment is terminated, alternatively to remove them in terms of the Companies Act.

For as long as the individual remains a director, they are entitled to attend board meetings access minutes and other paperwork related to the appointment as a director, unless there is a conflict of interest. A director cannot be suspended from their fiduciary duties in the same manner as an employee.

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SPAIN

THE APPROACH

The first thing to analyse when approaching the termination of a senior executive is to determine the nature of the relationship with the executive. An executive can be hired through (i) an ordinary employment contract or (ii) a top executive employment contract. More often than not, executive even have had previous positions in the same company and, even if they started through an ordinary employment contract, they now have a different one.

Since each specific contract is subject to different regulations, different formalities must be observed to terminate the contract and, in addition, the consequences of the termination in each case are not the same (particularly in terms of statutory severances).

HOW TO DETERMINE THE NATURE OF THE CONTRACT?

As in many jurisdictions, the nature of the contract obeys to the actual obligations of the parties rather than the name the parties give to the documents signed by them.

While the ordinary contract is the most typical contract in Spain (signed with the vast majority of employees), the executive contract is reserved for a special kind of employees characterized mainly by the fact that the employee (i) is granted with very broad powers of attorney, (ii) reports directly to the management body of the company (not to other employees within the company and (iii) in practice exercise the powers of attorney, not being necessary to ask permissions or authorizations to act on behalf of the company (the powers must not necessarily be absolute, but they should be broad enough so that the executive acts subject only to the management body).

HOW CAN THE CONTRACT BE TERMINATED?

As a general rule and applicable to all kinds of contracts, the termination must be informed in writing and it must obey to a solid reason for termination. Termination without a reason is rare and exceptional and not usually allowed (In case of an ordinary contract, the contract can be terminated by:

- **Disciplinary dismissal**, which must be justified on very serious wrongdoings as envisaged in the collective bargaining agreement (CBA) applicable to the company or the grounds stablished in the law.
    - It must be informed in writing and even though there is not a general rule that requires to allow the employee to present allegations to defend themselves before the termination, some CBAs indeed envisage the need to give the employee the reasons for the potential termination before such termination is served to the employee.
- **Objective dismissal**, which must be justified on reasons of economical, technical, organizational or production nature based on which the company makes redundant the position.

In case of a top executive contract, the contract can be terminated by:

- **Disciplinary dismissal** and objective dismissal as mentioned before.
- **Withdrawal** of the company, which does not need to be justified.

JUDICIAL CLAIMS CHALLENGING THE TERMINATION

Executives can challenge the termination at the labor courts, generally within the 20 days following such termination. The consequences of the termination may be as follows, again, depending on the nature of the contract:

- **Fairness of the termination**: in ordinary employment contracts or top executive contracts, in case of disciplinary dismissal, the employer will not have to pay any severance. In case of objective dismissal, the employer only must pay a statutory severance of 20 days' salary per year of services up to 12 monthly instalments.

In the case of top executive contracts, if the termination is carried out through a withdrawal, the employer must pay the agreed severance in the contract or, in lieu of it, a severance of 7 days' salary per year of services up to 6 monthly instalments and a notice period of 3 months.

- **Unfairness of the termination**: if the reasons for the dismissal are not faithfully proved before the Labour Court or they may not exist, the Company will be obliged to choose either to (i) reinstate the executive in their former position or (ii) pay a statutory severance of:

  - **For ordinary employees:** the general rule is a severance of 33 days of salary per year of service up to a maximum of 24 monthly instalments.

    For employees who started providing services before February 12 2012, the severance for the seniority accrued since the hiring date until 11 February 2012 (tranche 1), at an amount of 45 days of salary per year of service up to a maximum of 42 monthly instalments; and for seniority accrued since 12 February 2012 until the dismissal (tranche 2), at an amount of 33 days of salary per year of service up to a maximum of 24 monthly instalments; both periods with a maximum limit of 720 days of salary, unless than if tranche 1 is higher than 720 days, in which case this higher amount would be applicable (as the applicable limit).

  - **For top executive employees:** the parties can agree if the employee is reinstated (with back pay) or if it is paid the severance agreed in the contract or, in lieu of it, the statutory severance corresponds to 20 days' salary per year of services, up to 12 monthly instalments.

- **Nullity of the dismissal**: This declaration would appear mainly in the following cases:

  - When the cause is of discriminating nature and prohibited by the Spanish Constitution or when it implies the violation of fundamental rights or public liberties of employees (e.g., there have been any harassment situations against the Employee).

  - When the dismissal affects a pregnant employee; during the period of suspension of the contract due to maternity or paternity, risk during pregnancy, adoption or fostering of child, reduction of work hours to care for children or handicapped person or reduction for breastfeeding; and female employees who have been victims of gender violence; employees during the following 12 months since the date of birth, adoption or fostering of the child.

  - **For ordinary employees**, in case that the dismissal would be declared as null and void, the Company must: (i) reinstate the Employee in his work position, (ii) pay the accrued procedural salaries (i.e., the amounts not received from the date of the dismissal to the date of the reinstatement) and (iii) pay additional severances to indemnify the breach of any fundamental rights.

  - **For top executive employees:** the parties can agree if the employee is reinstated (with back pay) or if it is paid the severance agreed in the contract or, in lieu of it, the statutory severance corresponds to 20 days' salary per year of services, up to 12 monthly instalments.

SENIOR EXECUTIVES WHO ARE ALSO DIRECTORS

As a general rule, an employee with a top executive contract cannot hold at the same time a position as director of the company. the idea behind this is that a person cannot be at the same time an employee (following the instructions of the company) and a director (giving instructions on behalf of the company so that other employees follow them).

As a result, whenever a top executive is "promoted" to director and the parties do not agree that the employment contract is suspended while the employee is a director, the commercial relationship as director absorbs the employment contract. As result, the employment contract can be considered as automatically terminated (without pay).

CHALLENGING THE NATURE OF THE CONTRACT

In this context and considering that the consequences of the statutory severances for termination are considerably different depending on the nature of the contract, it is very

frequent that terminated executives, when filing claims to judicially challenge the termination, also challenge the nature of the employment contract.

For instance, employees with a top executive contract tend to argue that, in practice, they did not hold a top executive relationship, e.g., because they did not really exercise the powers of attorney or they reported to other employees to the holding company (not to the management body). With this rationale, executives try to claim the severance corresponding to ordinary employees (which is considerably higher).

TAX AND UNEMPLOYMENT

Unlike other jurisdictions, it is infrequent that executives are terminated by mutual agreement (even though it is legally possible). The main reason behind this is that when the contract is terminated by mutual agreement (i) employees are ineligible to collect unemployment benefits and (ii) whatever severance is agreed between the parties is taxable. In contrast, when employees are terminated unilaterally by their employer, they can collect unemployment benefits and the severance is tax free (within certain limits).

SPECIAL COVENANTS

In addition to most frequent covenants in employment contracts, such as notice periods or special severances agreed, there are some singularities concerning non-compete clauses. The Spanish Supreme Court has considered that if the parties agree a post contractual non-compete, neither party can unilaterally waive the covenant.

Accordingly, unlike other jurisdictions, it is not possible for the company to decide not to pay the executive the compensation for the non-compete, unless the parties mutually agree to change the covenant.

Non-compete agreements require, to be valid, that the employer pays an adequate compensation (which depends on the scope of the restriction to compete), the employer has a commercial or industrial interest in prohibiting that the employee competes, and that the restriction is in force for no more than two years.

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SWITZERLAND

THE APPROACH

Swiss employment law does not have any special regulations for executives, separate from those applying to regular employees. This means that executives are not subject to any specific provisions regarding their compensation, termination, or any other aspects of their employment.

Normally, the main provisions of employment relationships are set forth in a written employment agreement. However, the contractual arrangements are subject to compulsory and (in case of contractual gaps) additional provisions of the Swiss Code of Obligations (CO) and the Swiss Labor Act. Further, collective employment agreements may apply to the individual employment relationship. Therefore, it is very important to review the employment agreements and to determine whether any collective employment agreements were concluded between the social partners (i.e. between employers' organisations or employers and employees' associations), in particular because such collective employment agreements may also apply to executives.

HOW CAN THE CONTRACT BE TERMINATED?

Generally, Swiss employment agreements may be terminated by giving notice (usually in written form). The notice period is normally agreed on in the employment agreement, but cannot be shorter than one month except during the probation period. If the employment agreement does not provide for a specific notice period, the length of the notice period is dependent on the length of service, namely one month during the first year of service (after the probation period), two months from the second and up to and including the ninth year of service and three months thereafter. Agreed-upon notice periods must also be the same for the employer and the employee.

In case the employment contract or an applicable collective employment agreement does not expressly provide otherwise, a termination is only possible to the end of a calendar month. Further, the notice needs to be received before the notice period can start. This means that the termination notice needs to be received by the employee before the end of a month, so that the notice period starts on the first day of the next month. In case the notice is not received before the end of the month, the notice period only starts the month following the receipt of the notice.

In case of a "significant cause" either party can terminate the contract without prior notice resp. without observing any notice period (known as extraordinary termination or summary dismissal). A "significant cause" is considered to be, in particular, any circumstance under which the terminating party can in good faith not be expected to continue the employment relationship.

It is, however, important to distinguish between the termination of employment under employment law and the dismissal under corporate law for members of the management board, even though they are closely related. Each should be treated as separate matters. When it comes to dismissing members of the management board, it is necessary to have a resolution from the competent entity before initiating the termination process under employment law.

POTENTIAL CLAIMS IN SWITZERLAND

In Switzerland, all employees have:

- Contractual rights - which are governed by the contact of employment as well as collective employment agreements.
- Statutory rights –provided for by Swiss law (in particular by the Swiss Code of Obligations).

CONTRACTUAL CLAIMS AND WRONGFUL DISMISSAL

Under Swiss law, an employment contract may basically be terminated by either party at will. However, the law defines certain grounds based on which terminations are considered abusive (article 336 CO). Termination by the employer is considered abusive, in particular if it is based on the following grounds:

- because of a personal characteristic of the employee (e.g. gender, race, age) (generally described as discriminatory dismissal), unless that trait is severely impairing cooperation within the enterprise;

- because the employee exercises a right guaranteed by the Swiss Constitution (e.g. freedom of religion or right to membership in a political party) unless the exercise of such right violates an obligation of the employment contract or significantly impairs cooperation within the enterprise;
- to solely frustrate the formation of claims of the employee arising out of the employment relationship (e.g. a claim for a bonus payment);
- because the employee asserts in good faith claims arising out of the employment relationship;
- because the employee performs compulsory military service, civil service or a compulsory statutory duty (e.g. appearing as witness in a court proceeding etc.);
- because of the employee's affiliation, or non-affiliation, with a union, or because the employee lawfully exercises a union activity (though this is unlikely for executives);
- while the employee is an elected representative in a company institution or in an enterprise affiliated thereto and if the employer cannot prove that he had a justified motive for the termination; or
- in case the employer has not complied with the procedure of consultation in case of collective dismissal.

Furthermore, the Swiss Federal Court ruled that employees may only be fired for poor performance after receiving a warning, though for executive this rule might not apply as new case law indicates. If this procedure is not followed, the termination is considered abusive.

If the employer abusively terminates the employment contract, he has to pay an indemnity to the employee which is to be determined by the judge considering all circumstances, however, may not exceed the employee's wages for six months. In case of non-compliance with collective dismissal procedures the indemnity may not exceed two months' remuneration.

It is important to note that an abusive termination remains in principle valid. The termination as such cannot be challenged even if it's abusive and consequently no reinstatement can be demanded.

PAYMENT IN LIEU OF NOTICE

The employer and employee can mutually decide to terminate the employment agreement at any point. The Swiss Code of Obligations (CO) does not contain any specific provisions regarding a termination agreement, such an agreement, however, requires justification by the interests of the employee (benefits for him) as it results in the non-application of the mandatory provisions protecting against dismissal. In other words, the employment agreement needs to be "fair and balances" in order to be valid. The employee may not waive claims arising from mandatory provisions during the employment relationship (and within a month after the termination of the employment relationship), except under a fair and balances termination agreement. If the termination agreement fails to meet these requirements, it is null and void. The employee's consent thus is necessary for receiving pay in lieu of notice, which is typically arranged through a termination agreement.

SEVERANCE PAY

By law, an employee is only entitled to severance pay if he/she has at least 20 years of service and is at the same time at least 50 years old. The amount of the severance pay corresponds to that of two to a maximum of eight monthly salaries. However, the employer can deduct pension contributions paid during the employment from this amount, so in practice the statutory severance is typically zero (except in some special cases where an employee did not have any pension scheme for a long time, e.g. expats).

Severance pay thus usually can only be claimed if it has been contractually agreed upon. However, severance payments for members of the board of directors, the executive board and the board of advisors of a Swiss listed public limited company are prohibited by law.

WHAT CONSTITUTES DAMAGES FOR BREACH OF CONTRACT?

As mentioned above, an employer who terminates the employment relationship abusively must pay an indemnity to the employee. This is not a compensation for damages as such. The court determines the indemnity taking due account of all the circumstances, though it must not exceed an amount equivalent to six months' salary for the employee. Claims for damages on other counts are unaffected by this.

In determining the amount, particular account shall be taken of the duration of the employment relationship, the severity of the violation of the personality of the dismissed persons, the age of the employee, the conduct of both parties and the financial loss of the employee.

If an employer dismisses the employee without notice in the absence of a significant reason – i.e. although he could have been expected in good faith to continue the relationship – he/she violates the employment contract as well and the employee has a claim for compensation of what he would have earned if the employment relationship had been terminated by observing the notice period. The employee, however, has to mitigate his/her loss by attempting to seek alternative employment.

INJUNCTIONS AND RESTRICTIVE COVENANTS

The parties can agree upon a noncompete clause which will prevent an employee from engaging in any competitive activity after the termination of the employment relationship. Such restrictive covenants have to meet certain criteria in order to be enforceable under Swiss law. The covenant must be in writing and needs to clearly define the restrictions imposed on the employee. The restrictions such as the scope and duration have to be reasonable and proportionate to protect the employee's interests.

Regarding noncompete clauses, an employee can agree to abstain from engaging in competitive activities during their employment and for a certain duration after their employment ends. A noncompete clause that comes into effect after termination is only enforceable if the employee has access to customer data, manufacturing secrets or other confidential business information that could seriously harm the employer if used. The Federal Supreme Court has stated that this is never applicable when the relationship between the client and employer, or between the client and employee, is based on strong personal ties.

The noncompete agreement must be documented in writing and should be reasonably restricted in terms of geographic location, duration, and scope to prevent excessively limiting the employee's future economic opportunities. The maximum duration for a noncompete clause that takes effect after employment ends is three years, with only limited exceptions applying in special circumstances.)

The court may at its discretion limit an excessive prohibition of competition, taking into account all the circumstances including the fact. whether any compensation is paid for it or not.

A prohibition on competition lapses if the employer no longer has a significant interest in enforcing it or the employer terminates the employment relationship, except for gross misconduct or cause.

A new provision (art. 735c CO) that a compensation for executives in listed Swiss companies for a prohibition on competition must not exceed the amount of their average annual remuneration (of the last three business years). A prohibition that is not justified in business terms is also inadmissible and such compensation is only owed if the prohibition on competition is in fact justified by the company's business interests.

The parties usually agree on a contractual penalty in case the employee violates the non-competition clause. By paying the contractual penalty, the employee may (unless otherwise agreed) release himself from the non-competition obligation. The employer can demand an injunction - a direct enforcement of the non-competition clause – only when such is specifically agreed-upon by the parties in writing and justified by the violated or threatened interests of the employer and the behaviour of the employee. The latter requires a particularly disloyal behaviour of the employee.

REDUNDANCY

A senior executive can be made redundant. Although redundancy can be valid ground for termination, it is essential to adhere to a fair procedure. Failure to do so may result in the senior executive having grounds to file a complaint for abusive dismissal and receive compensation. A fair process requires in particular that the employer issues a warning before giving notice to an employee. The Swiss Federal Supreme Court has held that the category of older employees as such does not enjoy any special protection, but that an overall assessment must be made on a case-by-case basis in order to determine whether the dismissal of an older, long-serving employee is abusive. Accordingly, long-serving members of management at an advanced age are, in general, not entitled to an increased duty of care on the part of the employer.

If a mass redundancy takes place– in which an executive may also be involved - certain procedures have to be followed.
Mass redundancies are notices of termination given by the employer to employees of a business within 30 days of each other for reasons not pertaining personally to the employees and which affect:

- at least 10 employees in a business normally employing more than 20 and fewer than 100
  employees
- at least 10% of the employees of a business normally employing at least 100 and fewer than 300 employees;
- at least 30 employees in a business normally employing at least 300 employees

If the employer plans collective dismissals, it shall consult with any works council or, if there is none, with the employees (article 335f CO). It is very important to note that this consultation process needs to be initiated before a decision regarding any dismissals has been made, otherwise the employer has breached the process already. Although there is no decisive case law, the consultation period should be at least 14 days.

Furthermore, the employer needs to notify the cantonal labour office of the planned collective dismissals in writing as well as that he has initiated the consultation process. The employer is obliged to enter into social-plan negotiations if it usually employs at least 250 employees; and intends to terminate at least 30 employees within 30 days for reasons that are unrelated to an individual employee. However, a part of the doctrine argues that there is in any collective dismissal an obligation to negotiate a social plan.

Failure to undertake the correct process can lead to the notice of termination being deemed abusive. The employer is obliged to pay an indemnity to the employee of a sum fixed by the court not exceeding two months' salary.

DISCRIMINATION, WHISTLEBLOWING AND OTHER STATUTORY CLAIMS

Swiss law mandates that employers uphold and safeguard employees' personality rights and privacy Executives cannot be terminated due to their age, race, disability, sexual orientation, religion, their marital status, their family situation or, in the case of female employees, of pregnancy. Such a discriminatory dismissal is considered abusive with the consequence that the employer has to pay an indemnity to the employee. In general, the employee has even in this case no right to reinstatement.

Employees who exercise their rights under the Law on Equality concerning discrimination based on gender get, however, get a special protection. If an employer issues a termination notice after an employee reports discrimination based on gender, the employee can challenge this termination. The employer must then demonstrate to the court that the termination notice was issued for legitimate reasons and not in response to the complaint (reversal of the burden of proof). This protection applies throughout the duration of the legal proceedings related to the discrimination or harassment, as well as for six months following the conclusion of the proceedings. By way of derogation from the general rule, the court may order the provisional reinstatement of the employee for the duration of the proceedings if it appears probable that the conditions for the annulment of the dismissal have been met. An employee who has been unlawfully dismissed in the aforementioned sense is entitled to a continuation of the employment relationship, but may also waive this right and claim compensation for unfair dismissal. The compensation will be assessed by the judge and will consider all the relevant factors but must again not exceed the amount equivalent to six months' salary of the employee.

There is no specific legislation in Switzerland that protects whistleblowers from being dismissed by their employers. Whistleblowers are subject to the general rules outlined in the Swiss Code of Obligations. Due to the absence of specific whistleblowing protections any employee who wants to report misconduct must exercise caution, as any failure to do so may result in the termination of his/her employment contract and possibly also criminal charges. The only protection according to the CO is that employees who have been dismissed abusively may be entitled to compensation of up to six months' worth of their salary.

SENIOR EXECUTIVES WHO ARE ALSO DIRECTORS

If a senior executive is also a director of the company, there is a so-called dual relationship between him and the company meaning that his relationship is subject to both employment law and company law. Even if these two relationships are interconnected they have to be clearly distinguished. Accordingly, there must be a clear distinction between his/her dismissal as executive under employment law and his removal as director under company law; he/she has to be removed from both positions separately..

A senior executive may either resign himself/herself or be removed by the Board of directors. The employment contract with the executive can be terminated by the company in compliance with the contractual or statutory notice periods. The decision to dismiss has to be made by the company's board of directors.

The mandate as director can, however, be terminated at any time (without observing any notice periods). For this decision, the General Meeting of Shareholders is responsible, and not the company itself.

This dismissal is possible without cause; the shareholders do not have to give reasons or justification for their vote. For a director to be removed, the General Meeting must, of course, be convened in accordance with the statutory provisions; in particular, the removal must be listed as an agenda item in the invitation.

A change in management in a listed company must be published (ad hoc disclosure) if it can effectively have a significant impact on the share price. The Board of Directors must furthermore immediately notify the Commercial Register Office to register the change.

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THE NETHERLANDS

THE APPROACH

In the Netherlands, the way a dismissal of a senior executive can be executed largely depends on the circumstances and the reason(s) for the termination. More often than not, a settlement agreement is the preferred route for termination. There is no statutory process that needs to be followed when making use of a settlement agreement, meaning that parties are contractually free in agreeing on the terms of the termination.

In the Netherlands, a distinction should be made between a senior executive (i) being a normal employee and (ii) being a statutory director of the board. Both categories of senior executives have different protections under Dutch employment law and require a different approach when terminating their employment contract.

HOW CAN THE CONTRACT BE TERMINATED?

Termination of a senior executive (not being statutory director)

A senior executive who is not a statutory director enjoys the same employment protection as regular employees. These are:

- Contractual rights. These are governed by the employment contract and any annexed or documents (such as an employee handbook).
- Statutory rights. These are derived from Dutch law, primarily the Dutch Civil Code, such as the right to not be unfairly dismissed and certain minimum employment conditions, such as holidays and minimum wage.
- Collective labour agreement rights. Sometimes a collective labour agreement is applicable, which provides additional rights or sets aside statutory rights.

The concept of 'termination at will' is not applicable in the Netherlands. Under Dutch law, if an employer wishes to unilaterally terminate the employment contract of an employee, permission needs to be sought from either a court or the Labour Office (UWV), depending on the termination ground. The Dutch Civil Code contains the following exhaustive list of what constitutes as a termination ground:

- business economic reasons;
- long term sickness;
- frequent sickness;
- poor performance;
- culpable actions or omissions from the employee;
- conscientious objections;
- a disrupted employment relationship;
- other circumstances; or
- a combination of two or more of the abovementioned grounds (with the exception of the first two reasons).

The termination ground must be substantiated in full, and the employee is given the opportunity to defend him or herself. Permission to terminate will not be granted if a dismissal protection ground applies, such as (during) sickness, pregnancy, or (because of) membership of the works council, or due to parental leave, whistleblowing or discrimination grounds (e.g. age, gender, nationality).

TERMINATION PROCEDURE

Both the Labour Office and the court procedure usually take between 8 – 12 weeks. If the request for termination is granted, the employee is in principle entitled to the statutory severance payment (transitievergoeding), unless the employee acted seriously culpable. The statutory severance payment equals to 1/3rd monthly salary per service year, capped at EUR 89,000 gross (in 2023) or one year's gross annual salary if this is more. If two or more dismissal grounds are combined, the severance payment can be multiplied by the court up to a maximum of 1.5.

If permission for the termination is not granted, the senior executive may not be terminated, and the senior executive must be allowed to continue to work. Both the employer and the senior executive may appeal the decision of the court or the Labour Office.

AWARD FOR SERIOUSLY CULPABLE ACTS OR OMMISSIONS

In case of 'seriously culpable acts or omissions' on the side of the employer, a court may award an additional compensation to the employee if it finds that this is fair considering the circumstances of the termination. Such additional compensation is not capped and may only be awarded in (very) exceptional situations.

NOTICE PERIOD

In addition, if the permission is granted, the applicable notice period needs to be observed. If the statutory notice period applies, the term depends on the years of service:

- less than five years: one month;
- between five years and ten years: two months;
- between ten years and 15 years: three months;
- 15 years or longer; four months.

It is possible that the senior executive's employment contract contains a deviation from the statutory notice period. Such deviation is only valid if the employer's notice period is at least twice the length of the senior executive's notice period. This is not uncommon in practice with regard to senior executives.

USE OF A SETTLEMENT AGREEMENT

As dismissal protection in the Netherlands is relatively high, it can be generally stated that it is difficult and time consuming for an employer to unilaterally terminate an employment contract. For that reason, the use of settlement agreements is very common in the Netherlands, through which the employment contract is terminated by mutual consent. The advantage to this route is that it avoids the uncertainty of whether a court or the Labour Office will allow the termination, and it allows parties to agree on the terms of the termination.

Given their level of seniority, a wide range of employment conditions tend to apply to senior executives, such as bonus or commission schemes, equity arrangements and post contractual obligations. A settlement agreement for a senior executive typically contains at least the following:

- Severance payment. It usually takes additional severance pay to convince the senior executive to agree to settle. The starting point of an offer is usually the statutory severance payment, and may need to be increased substantially, depending on circumstances such as the likeliness of a successful court or Labour Office procedure, and the willingness of the senior executive to come to a mutual termination;

- Garden leave. It is common to agree on garden leave for (part of) the duration of the notice period. Alternatively, a payment in lieu of notice can also be agreed.

- Post termination restrictions. Senior executives are often bound by post termination restrictions such as non-compete, non-relations and non-solicitation clauses. The settlement agreement usually stipulates whether these restrictions are upheld after the termination date.

- Bonus / share plans. Senior executives often participate in bonus and/or share plans. The settlement agreement should in that case stipulate how these topics will be dealt with.

- Legal assistance. The senior executive is usually offered a reasonable amount for the compensation of legal aid in relation to the settlement agreement.

- An announcement or “communiqué”. It is common to agree on the wording of a written announcement to be shared internally and externally regarding the departure of the senior executive.

- Final settlement clause. Such clause determines that parties do not have any claims after the termination, for example regarding wrongful termination.

TERMINATION OF A STATUTORY DIRECTOR

The termination of a statutory director involves aspects of both corporate law and employment law. Statutory directors can in principle – other than regular employees – be terminated without obtaining prior approval of the Labour office or a court. The shareholder should (in line with the articles of association) terminate the board membership of the statutory director in a General Meeting. Such termination of the corporate position automatically leads to

the termination of the employment agreement (after the lapse of the notice period), provided that the board membership and the employment contract are with the same legal entity. This is only different in case dismissal protection applies (see above) or if parties have agreed otherwise. Dismissal protection applies in case (amongst others) the statutory director is sick, unless the sickness was reported after an invitation to the General Meeting was provided to the statutory director. As such, it is common – in order to prevent the statutory director to strategically report

sick – to provide the invitation to the General Meeting simultaneously with confronting the statutory director with the intention to terminate the employment agreement.

General meeting of shareholders

All board members, including the statutory director, must be invited to the General Meeting regarding the intended shareholders decision to terminate the statutory director. Each of them is entitled to cast an advisory vote. In addition, the statutory director has the right to be heard with respect to the intended termination. In order to enable the statutory director to duly exercise these rights, the reasons for the intended termination should be provided well in advance of the General Meeting. In practice, these rights (advisory vote and hearing) are often executed at the same time by the statutory director. If the employer fails to meet these formal requirements, there is a risk that the statutory director will seek the nullification of the shareholders' decision in a court. Like ordinary employees, the statutory director whose employment contract is terminated is entitled to the statutory severance payment, unless their actions were seriously culpable.

The absence of a termination ground will not prevent the dismissal. However, if the statutory director is dismissed without sufficient substantiation of one of the termination grounds in the Dutch Civil Code, the statutory director can claim additional compensation due to an unfair dismissal in court. Such additional compensation is not capped and not subject to a formula, which means that the amount of the additional compensation can be substantial when compared to the statutory severance payment. Unlike regular employees, a statutory director cannot claim reinstatement of the employment agreement.

It is very common to first see if it is possible to reach a settlement agreement with the statutory director. An important aspect of the settlement would be that the statutory voluntarily resigns as a member of the board, meaning that the General Meeting – including all formalities set out above – does not need to take place.

TERMINATION OF A SERVICES AGREEMENT

Senior executives (both statutory and non-statutory directors) sometimes have a services contract instead of an employment contract with the company, in which case they do not enjoy employment protection. In those cases, the services agreement may be terminated in conformity with its own termination conditions, generally by observing a notice period. If the senior executive is also a statutory director, the General Meeting formalities need to also be observed in order to terminate the corporate position of the statutory director.

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UAE

The United Arab Emirates consists of seven Emirates, the two most notable being the Emirate of Abu Dhabi and the Emirate of Dubai. The Labour Law (UAE Federal Law 33 of 2021) applies to most private sector employees across all seven of the Emirates, with two important geographical exceptions, being the financial free zones known as the Abu Dhabi Global Market (**ADGM**) and the Dubai International Financial Centre (the **DIFC**). The remainder of this brochure focuses exclusively on issues in relation to employment relations governed by the Labour Law. Specialist advice should be taken in connection with the dismissal of employees of government or quasi-governmental entities, in connection with individuals employed in the ADGM or in the DIFC, and (in particular) in connection with the dismissal of UAE nationals.

THE APPROACH

An important consideration when dealing with the dismissal of a senior employee is the fact that the vast majority of employment matters in the UAE will include an immigration component. An individual's employer is frequently their immigration sponsor. The vast majority of private sector employees in the UAE are foreigners. When their employment is terminated, they have 30 days to find a new job or to leave the country. When they leave, their spouse and dependents must also leave. For a family who have been building a life in the UAE, having to leave at such short notice can be daunting, and a consideration of this concern should be part of any dismissal decision-making process (and/or settlement discussions). In the past few years, the UAE authorities have started to take some steps to lessen the link between employment and immigration status.

The "Golden Visa" program now allows some individuals to obtain a residency visa on the basis of criteria other than employment (generally via ownership of qualifying real-estate assets). Holders of Golden Visas (plus their dependents) do not need to leave the UAE when dismissed from employment. UAE national employees are also not impacted by immigration considerations in a dismissal context. However, a whole host of special considerations apply to UAE nationals, and those considerations are outside the scope of this brochure. Again, obtaining specialist advice in this area is recommended.

The Labour Law provides that an employment contract can be terminated by either party for a "legitimate reason" with notice. Notice of termination must be given in writing. The parties must follow the notice period set out in the employment contract. The Labour Law specifies maximum and minimum notice periods, and parties are not free to contract out of those standards.

Historically, there was a difference in the UAE between "open ended" contracts of employment and "fixed term" contracts of employment. These differences have now been abolished, and all employers were required to convert all contracts to a fixed term. Notwithstanding this obligation, it is not uncommon to come across open ended contracts. The issues relating to dismissal are, these days, identical.

EMPLOYMENT CLAIMS IN THE UAE

An employee disgruntled with the manner in which their dismissal has been handled is (ultimately) entitled to file a civil claim for damages with the courts of the Emirate in which they were employed. Prior to filing such a claim, the employee must submit an employment complaint. The complaint is submitted to the Ministry of Human Resources and Emiratization (**MOHRE**) or, for some individuals employed in particular free zones, to the relevant free zone authority. Upon receipt of such an employment complaint, MOHRE or the free zone authority will attempt to assist with a mediation process. If the mediation is unsuccessful (and participation in the process on the part of the employer is essentially voluntary), the employee will be given permission to file a civil complaint.

If an employee brings a successful claim for unjustified termination, the court will typically order that they are paid all of their contractual entitlements, plus compensation for the unjustified termination. Such compensation is capped at an amount equal to three months' pay. This is a relatively modest amount, especially in light of the fact that only nominal legal costs are recoverable.

Historically, the UAE courts adopted a paternalistic approach towards employees, and generally awarded the maximum compensation in all employment matters (unless there was clear evidence of bad-faith behaviour on the part of the

employee). Recently, there has been something of a sea
change. It now seems that the courts will be reluctant to award compensation in cases where the full contractual notice period has been honoured. This seems to be the case even in situations where the "legitimate reason" for the termination is of questionable veracity.

PAYMENT IN LIEU OF NOTICE

In the absence of a specific contractual entitlement, employers are not permitted to make payment in lieu of notice. In practice however this prohibition is of limited deterrence to an employer who wishes to remove an employee at short notice. Such a dismissal is likely to attract an employment complaint in any event, and the cap on compensation is unchanged by the fact that there was an offer of payment in lieu of notice.

RESTRICTIVE COVENANTS

The Labour Law recognizes the concept of a non-competition clause. As in other jurisdictions, these must be limited in time and scope in order to be enforceable. As a practical matter, such clauses are extremely difficult to enforce in the UAE. This is largely due to the fact that the UAE courts have a limited appetite for issuing injunctive orders. They will award monetary damages where there is clear evidence that a contractual breach has caused a specific financial loss. In an employment context, it will often be easy to prove that a former employee has breached a non-competition clause. It will also often be easy to argue that the clause was reasonably drafted, and appropriately limited in time and scope. However, it is generally extremely difficult to prove that the breach has caused a specific quantifiable loss.

The fact that non-competition clauses are difficult to enforce is not necessarily common knowledge or readily appreciated by even senior executives in the UAE. It is therefore relatively common for many employment contracts to include a non-competition clause. The waiver or relaxation of such a provision is a part of most employment-dispute settlement discussions.

REDUNDANCY

The Labour Law does not recognize the concept of redundancy. Accordingly, there are no special protections or processes that must be followed when an employer is considering a situation which might be covered by redundancy legislation in other jurisdictions.

DISCRIMINATION

Although the Labour Law includes anti-discrimination language, it is relatively uncommon for employment claims to be based on discrimination arguments. As the UAE is a socially conservative, Muslim majority country, some of the protected characteristics in other countries are not covered by the anti-discrimination legislation in the Labour Law. The cap on compensation is identical in situations where an employment claim includes a discrimination element.

SENIOR EXECUTIVES WHO ARE ALSO THE MANAGER

All UAE companies are required to maintain an annual trade, manufacturing or professional license. The license will name a specific person as the manager. This person has significant practical authority, and is often the only person who can make applications to the various UAE authorities. An employer who is considering the termination of an employee who is named as manager on the company license would be well advised to amend the license (ie appoint an alternative person as manager) before beginning the dismissal process of the first employee. Thought should also be given to the issue of local bank accounts. Many companies will give signing authority over these accounts to one senior executive (who is generally also named as the manager on the license). The local company may become functionally paralyzed if there is an employment dispute and the senior executive ceases to cooperate with the normal operations of the company.

END OF SERVICE GRATUITY

End of service gratuity is calculated on the basis of final salary and length of service in the UAE. It can be a sizable amount for long-serving, highly paid senior executives. Calculation of the gratuity amount can be controversial and may result in an employment complaint in a dismissal situation. Advice should be sought in calculating gratuity amounts and entitlements. Employers who have relocated executives on an international basis will want to avoid situations where employees attempt to "double dip", ie by claiming pension entitlements in their home jurisdictions plus UAE gratuity.

Disclaimer

These materials are 'high level' and for the purposes of a general overview of legal and employment concepts in the UAE. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. This overview is based on the legal position as at October 2023.

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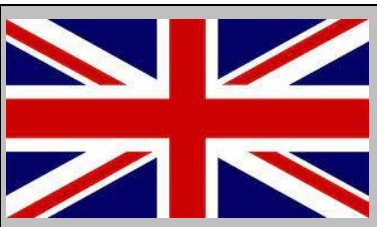
QUICK FIRE QUESTIONS

	 The UK
Can employees be fired 'at will'?	No – employment "at will" is not a UK concept. Employees have a statutory right not to be terminated unfairly or for a discriminatory reason see below. Employees are also entitled to receive notice of termination (unless there is evidence of gross misconduct). There is a statutory minimum notice entitlement, but generally more generous contractual notice will be provided for senior executives. A payment in lieu of notice may be made where the employer wants a swift exit.
Can employees be put on garden leave?	Yes – if the contract is to be terminated on notice, and it contains garden leave provisions. An employee may also be put on garden leave in the absence of a contractual right, but this may be subject to challenge. Garden leave is often used as a way to prevent the executive from competing with the employer.
Are employees subject to termination laws?	Yes – employees with more than two years' service have the right not to be unfairly dismissed, save for certain automatic unfair dismissals including whistleblowing, trade union membership etc which apply irrespective of length of service.
Are there restricted or prohibited terminations?	Yes – employers cannot terminate if there are protected characteristics (such as sex, race, disability discrimination) or dismissals related to trade union membership, health and safety, pregnancy and whistleblowing. Further, a dismissal may be unfair if the employer does not have a fair reason to do so and/or does not follow a fair process.
Are post-termination restrictions enforceable?	Yes – so long as the correct notice has been served / there has been no breach of contract by the employer, there are legitimate business interests to protect (such as goodwill, customer base/employees) and the protection goes no further than is absolutely necessary to protect those interests.
Can parties enter into a settlement agreement?	Yes – settlement agreements are frequently used to exit senior executives. They are particularly advisable where there is a risk of tribunal/high court claims; terms of announcement need to be agreed; to reinforce post termination restrictions or simply to ensure a smooth handover.
Can senior executives be dismissed if they are also a company director?	Yes – however, the company will also need to validly terminate their directorship, which may be included in a settlement agreement, or removal under the Articles of Association.
Is alternative dispute resolution available?	Yes – in particular, ACAS provides arbitration for disputes between an employer and an employee and offers 'early conciliation' between the parties to try to come to an agreement without having to go to tribunal. Mediation is also available in certain circumstances.

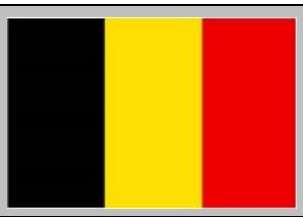
What additional costs could be payable to a senior executive who has been dismissed?	In the UK, employers may have to provide the senior executive with severance pay or packages depending on their contractual entitlements. If the employee has been unfairly dismissed, they may be able to claim a 'basic award' and a 'compensatory award' primarily loss of earnings. If the employee has been discriminated against as well as a claim for loss of earnings (which is uncapped) they are also entitled to claim for injury to feelings and, in certain cases, aggravated damages if there are any aggravating features in the case, although these tend to be relatively low. If the executive is made redundant, the employer may have to pay redundancy pay (statutory and/or enhanced pay).

	 **Australia**
Can employees be fired 'at will'?	No. The Australian position is very similar to the UK: • 'At will' employment is not recognised in Australia. • Employees have statutory rights to not be unfairly or unlawfully terminated (including on discriminatory grounds). • Employees are entitled to receive notice of termination (with statutory minimums that are often exceeded by longer contractual notice periods). • Employers can pay employees in lieu of providing the required notice of termination.
Can employees be put on garden leave?	Yes, generally. The Australian position is quite similar to the UK. Generally garden leave is not explicitly referred to as such in Australian employment agreements, but rather the agreements can include rights for the employer to require the employee not perform their duties, remain away from business premises and return company property, and allow the employer to appoint another person in the executive's position.
Are employees subject to termination laws?	Yes. All employees are protected from unlawful termination that would breach their general protections or discrimination law. Employees that have been employed for more than 6 months and either earn less than the high income threshold or are covered by an enterprise agreement or modern award are also protected from unfair dismissal.
Are there restricted or prohibited terminations?	Yes. It is unlawful to terminate any employee's employment in breach of their general protections (eg their workplace rights, union membership, etc) or for any discriminatory reasons. An employee protected from unfair dismissal may succeed in a claim if the employer does not have a valid reason and/or does not follow a fair process.
Are post-termination restrictions enforceable?	Yes. Post-employment obligations and restraints of trade will generally be enforceable if the employer can demonstrate that the obligations go no further than what is reasonable necessary to protect the employer's legitimate business interests.
Can parties enter into a settlement agreement?	Yes. It is common to enter into settlement / separation agreements or deeds of release for mutual separations or to settle a claim after it has commenced. These agreements can include the characterisation of the termination (eg resignation), payment of additional benefits, discontinuance of proceedings, releases of liability, etc. There is no requirement for lawyer sign off in order to make them binding.
Can senior executives be dismissed if they are also a company director?	Yes. However, the termination of employment will not result in the person being removed as a director unless that is provided for in the employment agreement (or possibly the company constitution). The resignation can be agreed in a settlement agreement or the person can be removed as a director in accordance with the constitution.
Is alternative	No, not specifically.

dispute resolution available?	Employees and employers could agree to private mediation, but there is no general alternative dispute resolution for employment matters. Rather, conciliation usually takes place early on if a claim is made before the Fair Work Commission.
What additional costs could be payable to a senior executive who has been dismissed?	On termination, employers in Australia must pay employees: • any outstanding salary and superannuation (similar to employer pension contributions); • in lieu of notice (if notice is not being served); • any contractual entitlements owed at termination (including those arising out of bonus and incentive schemes, if applicable); and • redundancy pay if the termination is by reason of redundancy. If an employee is successful in any claim (e.g. contractual claim, unfair dismissal or general protections), the employers may also be ordered to pay compensation or damages to the employee.

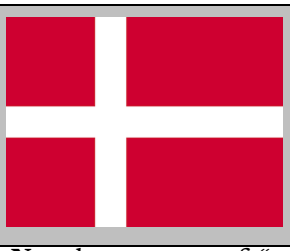
	 **Austria**
Can employees be fired 'at will'?	**No** – even though employment agreements can be terminated without cause, the terminating party must give notice to the other party in accordance with the applicable notice periods and effective termination dates. Neither the concept of employment "at will" nor payment in lieu of notice is admissible in Austria.
Can employees be put on garden leave?	**Yes** – the company may at any time release the employee from their work obligations until the termination becomes effective while continuing to pay their full remuneration. Very few professions are exempt (e.g., apprentices, actors, surgeons) and have a right to employment to prevent the loss or deterioration of skills. During garden leave, all other rights and obligations (e.g., duty of care, non-competition, insurance coverage, private use of company car) remain unchanged. Any outstanding holiday will not count towards garden leave unless agreed between the parties.
Are employees subject to termination laws?	**Yes** – employees (except for "executive employees" and company directors), enjoy general termination protection if they have been working in businesses with five or more employees for at least six months. If so, the employee can challenge the termination, in particular on the grounds that it is (i) socially unjustified or that (ii) there is a proscribed motive for the termination
Are there restricted or prohibited terminations?	**Yes** – terminations must not be discriminatory or based on a proscribed motive. Employees who enjoy special termination protection can only be terminated with prior approval from the competent court or public authority, as applicable.
Are Post-Termination Restrictions enforceable?	**Yes** – if they relate to the employer's line of business, do not exceed one year after termination, do not excessively prevent the employee's professional advancement, and the employee's gross monthly salary was at least EUR 3,900 at the time of termination. The enforceability also depends on how the employment ended: if the employee gave notice, the non-compete clause is enforceable. If the company gave notice (other than for cause) the non-compete is generally not enforceable. For terminations by mutual consent, the enforceability is determined by the agreement between the parties.
Can parties enter into a settlement agreement?	**Yes** – mutual terminations do not require a specific form and can end the employment relationship at any time. Companies may prefer this type of termination if the employee poses a high risk in terms of termination protection or if there are contentious claims between the parties. In addition, mutual terminations can provide legal certainty and prevent reputational damage to the company.
Can senior executives be dismissed if they are also a company Director?	**Yes** – however, the removal from office does not simultaneously terminate the employment relationship and *vice versa*, unless this was agreed between the parties. If no such agreement exists (usually in the employment agreement), the company must also give notice of termination of employment to the senior executive.
Is alternative dispute resolution available?	**Yes** – the employment agreement may include a conciliation clause, which prevents the parties from going to court until they have tried to resolve the dispute through a conciliation procedure. Arbitration agreements are only enforceable if they relate to the employment of company directors. Unlike arbitration, a conciliation agreement does not remove state jurisdiction or give decision-making power to a third party.

What additional costs could be payable to a senior executive who has been dismissed?	In general, the entitlements of senior executives on termination of employment are no different from those of regular employees. However, given the importance of their role and responsibilities within the organisation, employers tend to provide more extensive incentives and benefits. These benefits not only increase the financial burden during the employment relationship, but some may also trigger payment obligations on the part of the employer long after the end of the employment relationship (e.g., defined benefit pension commitments). If the company wishes to secure additional non-disclosure or non-competition obligations, it should be prepared to make additional payments to obtain the employee's consent.

	 **Belgium**
Can employees be fired 'at will'?	**No** – employment "at will" is not a Belgian concept. Employees have a statutory right not to be terminated unfairly or for a discriminatory reason (see below). Employees are also entitled to receive notice of termination or a payment in lieu of notice (unless there is evidence of gross misconduct and strict formalities are complied with). There is a statutory minimum notice/PILON to be complied with. More generous contractual notice is rather rare. A dismissal with immediate effect by PILON may be made where the employer wants a swift exit.
Can employees be put on garden leave?	**Yes** – provided however that the employee agrees (preferably in writing) to such garden leave as employees have the right to work during the notice period. The employee's agreement can only be obtained once the notice has been notified and it is not possible to foresee this in advance in the employment contract. Garden leave is sometimes used as a way to prevent the executive from competing with the employer, as the employee is in principle prohibited from competing with the employer while the employment contract is still in force (regardless of a non-compete clause included in the agreement).
Are employees subject to termination laws?	**Yes** – employees with more than six months' service and an open-ended employment contract have the right that their dismissal is not manifestly unreasonable. Unfair dismissal based on an abuse of right by the employer (which is much rarer today due to the high burden of proof and, usually, limited damages) applies irrespective of the length of service. Certain protected employees cannot be dismissed without first obtaining prior authorisation or following a specific procedure (e.g. a candidate for or elected members of the works council, a trade union delegate, a prevention advisor). If the employer does not comply, then the employee will usually automatically be entitled to an additional protection indemnity, irrespective of the length of service.
Are there restricted or prohibited terminations?	**Yes** – employers cannot terminate if the decision is based on/relates to a protected characteristic (such as sex, race, disability, trade union membership) or a protected status (e.g. parental leave, pregnancy, a harassment at work complaint, whistleblowing). If this would be the case, then the consequences are however only pecuniary in nature (i.e. paying additional protection damage(s)) and there is not an obligation to reinstate the senior executive.
Are Post-Termination Restrictions enforceable?	**It depends** – on the type of post-termination restrictions. A non-compete clause included in the employment contract will never apply in the case of dismissal, except if the contract includes a valid *international* non-compete clause that explicitly provides its application for a dismissal. Post-termination restrictions that are not explicitly regulated under Belgian law, such as non-solicitation, non-dealing and non-poaching clauses will be enforceable so long as they are not disproportionate to the employee's freedom of labour and commerce.
Can parties enter into a settlement agreement?	**Yes** – settlement agreements are frequently used to exit senior executives. They are particularly advisable where: there is a risk of tribunal claims (e.g. an unjustified dismissal); the terms of announcement need to be agreed; to reinforce post termination restrictions; to already agree on prematurely ending the notice period; to agree to garden leave; or simply to ensure a smooth handover.

Can senior executives be dismissed if they are also a company Director?	**Yes** – however, the senior executive will also need to resign (which may be included in a settlement agreement), or the shareholders of the company will need to validly dismiss the senior executive, as a director.
Is alternative dispute resolution available?	**Yes** – After the dispute has arisen, the parties can agree to enter into arbitration, conciliation and/or mediation. These can never be imposed on the parties by a court, and a court can enforce the resolution of the dispute upon the parties' request. It is not possible to agree in advance in the employment contract that future disputes/claims will be dealt with by arbitration, except for the senior executive whose remuneration exceeds EUR 73,571 gross (amount indexed each year on 1 January) and who exercises the day-to-day management of the company or assumes comparable management responsibilities in a division of the company or in a technical business unit.
What additional costs could be payable to a senior executive who has been dismissed?	In Belgium, at the end of employment, employers may under certain conditions have to provide the senior executive with: • A PILON (dismissal with immediate effect), depending on their legal and contractual entitlements. • A pro-rata end-of-year premium and eco-vouchers; • Departure holiday pay (holiday pay for unused days of holiday, and an advance on holiday pay for the following year's accrued days of holiday); • Remuneration for public holidays that fall within 30 days of the termination date, provided that the employee has not yet found a new employer. • A 'clientele indemnity' payment if the senior executive has the status of a sales representative. • For older senior executives who are at least 60 years old or above (or exceptionally 58 years old), a monthly company supplement on top of their future unemployment benefits as from the end of the notice period or the period covered by the PILON until they reach their retirement age. • An outplacement package (i.e. accompanying services provided by a service provider to enable an employee to find a job with a new employer or to develop a professional activity on a self-employed basis within the shortest possible time). • If the employee has been manifestly unreasonably dismissed, then they may be able to claim damages of up to 17 weeks' salary. • If a dismissal procedure set out at the sector-level has not been complied with, the employee may claim additional damages. • If the employee has been discriminated against, then they may be able to claim a lump-sum payment for discrimination equal to six months' salary or claim the full and uncapped compensation of his/her damages provided he/she can prove their extent. • If the employee has a special protected status, then they may also be able to claim a protection payment (the amount will depend on the type of protection, but usually correspond to six months' salary). • In the context of a collective dismissal, the employee may be entitled to a redeployment damages, a collective redundancy damages and/or closure damages.

	 **California**
Can employees be fired 'at will'?	Yes – an employer can fire an employee at any time, for any reason, unless that reason is illegal.
Can employees be put on garden leave?	Yes, although it is not common for an employee to be placed on garden leave by an employer in California.
Are employees subject to termination laws?	Yes - employees are protected by some laws prohibiting termination for certain reasons (e.g., discrimination or retaliation). Employees may have greater protections in their employment contracts.
Are there restricted or prohibited terminations?	Yes - employers cannot terminate on any protected category, in retaliation for a complaint of discrimination or harassment or for engaging in protected whistleblowing activity.
Are post-termination restrictions enforceable?	Yes - employers can prohibit executives from engaging in competitive practices. However, non-compete clauses are unenforceable unless covered by a narrow statutory exception.
Can parties enter into a settlement agreement?	Yes – also commonly referred to as a "separation agreement". Employers are not legally obligated to offer severance payments – these should be well thought out to promote the strategic objectives of the employer.
Can senior executives be dismissed if they are also a company director?	Yes – removal of directors in California is generally allowed by a majority vote of shareholders. A director can also resign at any time and set the effective date and time of their resignation.
Is alternative dispute resolution available?	Yes - Arbitration is often viewed as a more efficient and cost-effective alternative to litigation. Some employers prefer to resolve employment-related disputes by binding arbitration rather than in court and enter into arbitration agreements with their employees.
What additional costs could be payable to a senior executive who has been dismissed?	There is no legal requirement under California law for employers to provide severance pay or packages upon termination. Two basic types of damages can be awarded in California employment law suites: Compensatory damages – to cover out of pocket expenses and actual losses suffered by the plaintiff such as loss of earnings. Punitive damages – awarded in addition to compensatory damages and are designed to punish the employer for grossly negligent or intentional conduct.

	 **Denmark**
Can employees be fired 'at will'?	**No**, the concept of "employment at will" is not applicable in Denmark. All salaried employees are entitled to receive the minimum notice period set out in the Danish Salaried Employees Act, which depends on the length of service (unless there has been a "material" breach of contract). As for salaried employees, the termination of an employment contract must also be given in writing. Employees can also be protected against unfair dismissal and discrimination in connection termination of employment.
Can employees be put on garden leave?	**Yes**, the employer can place the employee on garden leave. There is no statutory right for the employer to pay in lieu of notice, and this may only be agreed upon in a severance agreement.
Are employees subject to termination laws?	**Yes,** employees with at least one year of service have the right not to be unfairly dismissed. Irrespectively of the length of seniority, all employees are protected from termination due to discrimination, see below.
Are there restricted or prohibited terminations?	**Yes,** various Danish non-discrimination and equal-treatment regulations prohibit discrimination in connection with termination of employment. This includes discrimination on the basis of race, sex, colour, religion, political opinion, sexual orientation, age, disability, or national, social or ethnic origin or due to maternity leave. A dismissal may also be unfair where an employer terminates an employee without the termination being reasonably justified by the circumstances of the company or the conduct of the employee.
Are Post-Termination Restrictions enforceable?	**Yes**, as long as the Danish Act on Restrictive Covenants is complied with. This act lays down conditions for the validity of the restrictive covenants including the length of the employment relationship prior to the enforcement of the restrictive covenant, compensation during the enforcement period, conditions of termination and the duration of the covenant. The most common post-termination restrictions are non-compete and non-solicitation. Non-hire clauses are prohibited under the Danish Act on Restrictive Covenants.
Can parties enter into a settlement agreement?	**Yes** - settlement can be explored by entering a severance agreement. This can mitigate the risk of potential claims and future litigation. Severance agreements for senior executives are particularly common to settle all claims a senior executive might have against the company. The Danish courts can amend or set aside a severance agreement in accordance with the Danish Contracts Act if it is deemed unfair.
Can senior executives be dismissed if they are also a company Director?	**Yes** - senior executives like manager directors are generally not protected by provisions in Danish employment legislation as they are not considered employees. They would refer directly to the board of directors who have the authority to dismiss the managing director.
Is alternative dispute resolution available?	**Yes -** the parties may agree to arbitration for disputes that have already arisen or for potential future disputes arising from the executive service or employment relationship. However, if an employer includes arbitration clauses in employment contracts, these provisions should be drafted clearly and unambiguously to avoid any uncertainty regarding their application. If not, a court may rule that the employee is not obliged to resolve the dispute via arbitration.

What additional costs could be payable to a senior executive who has been dismissed?	Generally, a managing director is not entitled to financial compensation on termination of the employment relationship unless agreed otherwise, although a salaried employee dismissed after continuous employment of 12 or 17 years is entitled to a compensation corresponding to respectively one- or three-months' salary. Further, a salaried employee may claim a compensation in case of unfair dismissal or discrimination. Managing directors are not protected against unfair dismissal but can be entitled to claim damages for losses suffered due to wrongful dismissal. Managing directors may also be covered by non-discrimination regulations, as well as redundancy rules.

	 **Finland**
Can employees be fired 'at will'?	No – the employer can fire an employee, in other words, terminate the employee's employment contract only if the statutory termination grounds exist. Generally, terminating an employment contract requires a proper and weighty reason which can be related to the employee's person or the employer's financial or production-related situation, which has caused a diminishing of work. A proper and weighty reason also means that employment contract may not be terminated on discriminatory reasons, for example, reasons related to employee's gender or nationality.
Can employees be put on garden leave?	Yes – the employer can decide that the employee has no obligation to work during the notice period. The employer and the employee can also agree that the employee does not have an obligation to work during notice period. However, even if the employee has no obligation to work during the notice period, the employer cannot be released from its obligation to pay salary until the end of the notice period.
Are employees subject to termination laws?	Yes – the termination grounds but also the termination procedure is provided for in the law. If the termination is based on the employee's person (for example, breach of employee's working duties), the employee must be warned and given a chance to amend its conduct. Also, the employee must be given an opportunity to be heard concerning the grounds for termination before the employer can make its decision whether to terminate the employment or not. If the termination grounds are related to the employer's situation, the grounds must be explained to the employee or employees before the decision to terminate employments are made. If the employer is normally employing at least 20 persons as parties to an employment relationship, the employer must proceed to change negotiations, that might last 14 days or even 6 weeks, before making the final decision concerning termination.
Are there restricted or prohibited terminations?	Yes – the employer may not terminate employee's employment contract for a reason that is related to employee's health, legal protection available to employees, participation in industrial action of a union, and the employee's political, religious, or other opinions or participation in social activity or associations. Terminating an employment contract for discriminatory reasons is also illegal (for example, gender, age, origin, nationality, language, religion). In addition, shop stewards and pregnant employees or employees on family leave have an increased protection against terminations. Certain special conditions must be met before these employees can be dismissed. The collective agreements may also have provisions regarding the selection of the employee to be dismissed.
Are post-termination restrictions enforceable?	Yes - According to the law, the employer and the employee may conclude a non-competition agreement, if there is a particularly weighty reason related to the operations of the employer. However, the post-termination restriction period can be agreed to a maximum of one year, and the employer is obliged to pay compensation to the employee during the post-termination restricted period. In addition, non-solicitation and non-disclosure agreements are possible if the conditions are reasonable and these don't totally restrict the employee to compete with the employer.
Can parties enter into a settlement agreement?	Yes – whatever the reason for the dismissal, the employer and the employee can always agree to terminate the employment relationship. In such cases, it is advisable to conclude a written settlement agreement. However, it is worth noting that the employee may not be forced to agree to the termination agreement, and the terms of the agreement must be reasonable. Normally this means, for example, that the employer pays the employee extra compensation for terminating the employment as the employee waives some of their statutory rights.

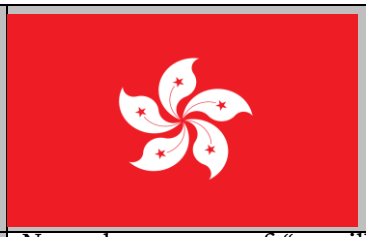
Can senior executives be dismissed if they are also a company director?	Yes – the Finnish Employment Contracts Act also applies to employees in managerial positions, as well as directors. Therefore, the employment contract of a manager or a director can be terminated, but only on the grounds that are provided in the Employment Contracts Act and following the same process that needs to be followed with employees in lower positions. So, the employer must have legal grounds and must follow the appropriate process. However, directors and managers have more responsibility than employees in lower positions, and therefore, a less severe breach may entitle the employer to terminate the employment contract of a manager than in the case of employees in lower positions.
Is alternative dispute resolution available?	Yes – There are a few alternatives to the trial in public court: The arbitration proceeding is available if the employer and employee both agree on the arbitration procedure to solve the matter. However, if the employee disputes the arbitration clause, it may be void, because according to the Finnish Code of Judicial Procedure, the right of an employee to submit a matter to the district court (i.e., public court) may not be restricted by a choice of court agreement. In addition, the arbitration clause can't be deemed unreasonable for the employee. The employee is normally considered as a weaker party and therefore, the employee is protected from agreed unreasonable terms. If the arbitration would prevent the employee's possibility to seek juridical remedy (for example the costs of the arbitration would be too high considering the status of the employee), the arbitration clause can be considered unreasonable. Another alternative to trial that is always available is mediation that is carried out by the public court. Mediation is voluntary, which is why commencement of mediation requires that all the parties to the dispute consent to it. The parties may either together or separately request at the district court that mediation be commenced. The parties to a dispute may also request mediation in a case already subject to legal proceedings. There is also out-of-court mediation. Mediation provided by the Finnish Bar Association and other corresponding procedures constitute out-of-court mediation. If the parties have reached an agreement during out-of-court mediation, the settlement may, upon application, be confirmed as enforceable in the district court.
What additional costs could be payable to a senior executive who has been dismissed?	According to Finnish legislation, there is no need to pay any additional costs to a senior executive. The employer must pay salary during the notice period as well as the final salary to the employee and the final salary must contain all the missing payments, such as holiday remuneration (at the end of an employment relationship, the employee is entitled to holiday compensation instead of annual holiday for any holiday entitlement or holiday compensation earned but not yet received), overtime etc. If the employer wants to restrict the employee from competing with the employer after the employment ends, the employer and the employee can agree on a non-competition agreement. According to Finnish legislation, the employer is obliged to pay compensation for the restriction period. However, if the dismissing is deemed illegal, the court may order the employer to pay compensation for unjustified termination of an employment contract. The exclusive compensation must be equivalent to the pay due for a minimum of three (3) months or a maximum of 24 months. There are also other possible compensation claims, for example, if the employment relationship is terminated on discriminatory grounds, the employer may have to pay compensation to the employee under the Non-discrimination Act. Also, if the employer is obligated to arrange change negotiations before the employee can be dismissed and the employer has neglected to arrange the negotiations, the employer can be ordered to pay indemnification for each employee that had been dismissed before the negotiation obligation had been fulfilled.

	 **Germany**
Can employees be fired 'at will'?	Generally no – Every ordinary termination needs to respect the statutory or possibly longer contractual termination period. Additionally, if the Act Against Unfair Dismissal applies (generally for employers with more than 10 employees in Germany and after an employment of 6 months), a termination is only possible on grounds (operational, behaviour or inability to perform the work) and needs some preparation. Extraordinary terminations with immediate effect are possible in case of gross misconduct.
Can employees be put on garden leave?	Yes – the interest of the employer in the garden leave needs to overrule the interest of the employee in working. That is generally the case if the employment contract is terminated, there is a risk that the employee would damage the employer's interest or the employer has no tasks left for the employee.
Are employees subject to termination laws?	Yes – next to general prohibitions (like non-discrimination laws), employees in companies with more than 10 employee and a duration of service of more than 6 months can only be terminated on grounds (operational, behaviour or inability to work).
Are there restricted or prohibited terminations?	Yes - various groups of employees (disabled persons, persons on maternal or parental leave, persons in office) have special protections against dismissals. Additionally, employers cannot terminate an employment relationship due to discriminating aspects or because an employee tried to enforce his rights.
Are post-termination restrictions enforceable?	Yes – most of the post-contractual terminations would have to be explicitly agreed upon and – if the restrictions limit the employee's freedom of occupation - such limitation might need to be compensated. Especially a post-contractual non-compete would only be valid when paying a compensation of 50% of the employee's last salary. Additionally, the interest of employer and employee needs to be weighed.
Can parties enter into a settlement agreement?	Yes – settlements are very common on all levels of seniority. As the goal of all claims against terminations is the reinstatement of employment, many employers rather choose to find settlement including termination of employment in case there is a risk of a negative ruling or they want to avoid the costs of the legal proceedings. Also, termination agreements are possible to guarantee a truly mutual termination.
Can senior executives be dismissed if they are also a company director?	Yes – the company will have to differentiate between the contractual relationship and the office and ensure that both are terminated. The termination of the employment/service contract does not necessarily also end the office position and vice-versa.
Is alternative dispute resolution available?	Yes – however, it is not very commonly used. There would be the option to choose a private mediation. Also, the courts offer to enter into a special conciliation process next to the regular proceedings that are headed by a judge not participating in the regular proceedings.

What additional costs could be payable to a senior executive who has been dismissed?	In Germany, the following payments could occur: • Severance to avoid long proceedings and risk of reinstatement • Compensation for bonus claims depending on the contractual agreements • Compensation for unused vacation days • Compensation for post-contractual non-compete In case of a discrimination, the employee could also claim damages.

	 **Ghana**
Can employees be fired 'at will'?	**Yes** – the concept of "termination at will" applies in Ghana if that is the nature of the contract. An employer may indicate in an employment agreement that it is determinable "at will" in which case the employment may be terminated at the close of any day without notice. This is, however, not common in respect of employment contracts with senior executives.
Can employees be put on garden leave?	**Yes** – an employee may be put on garden leave if his/her employment agreement contains garden leave provisions. If such provisions are absent, it is not unusual for an employer to put an employee on garden leave as long as the employee continues to be paid.
Are employees subject to termination laws?	**Yes** – employees are subject to termination irrespective of the length of their service as long as the termination is done lawfully. Accordingly, an employment may be terminated for cause on grounds such as incapacity, incompetence, misconduct or redundancy in accordance with the terms of the employment agreement or any other internal employment document, or on notice or by mutual separation. An employee may also be dismissed without notice due to the wrongful act of the employee proven during a disciplinary procedure, such as negligence, misconduct, dishonesty, etc or summarily dismissed for conduct which threatens the reputation of the employer.
Are there restricted or prohibited terminations?	**Yes** – a termination may be deemed unfair if it is on grounds such as gender, race religion, trade union membership, disability, pregnancy or temporary certified illness.
Are Post-Termination Restrictions enforceable?	**Yes** – post-termination restrictions are enforceable if the employer can prove that it has legitimate business interests to protect.
Can parties enter into a settlement agreement?	**Yes** – it has become common in recent times, and especially in the case of senior executives, to terminate the employment relationship by mutual agreement. The parties negotiate terms such as the date of termination, severance pay, as well as any undertakings by the senior executive to waive any claims against the employer.
Can senior executives be dismissed if they are also a company director?	**Yes** – dismissal (or termination) of the senior executive must be done in accordance with their terms of employment. Removal of the senior executive from his/her directorship position must be done in accordance with the Companies Act, the company's constitution and shareholders' agreement, as applicable.
Is alternative dispute resolution available?	**Yes** –the NLC adjudicates industrial disputes through ADR means such as negotiation, mediation and arbitration. However, it is uncommon to see ADR provisions in an employment agreement as such terms potentially limit the power of the employer to discipline or terminate due to third party intervention. In respect of employee claims, NLC adjudicates such claims summarily.

What additional costs could be payable to a senior executive who has been dismissed?	In Ghana, employers may have to pay the following to senior executives: • Pro-rated salary • PILON (if applicable) • Accrued annual leave converted to cash • Any contractual entitlements (including bonus, accrued provident fund contributions) • Severance pay which is negotiated in the event of a mutual separation • Redundancy pay which is negotiated (in the absence of any agreed pay in an employment document) in the event of a redundancy

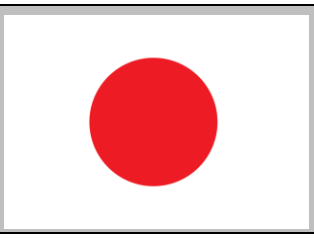
	 **Hong Kong**
Can employees be fired 'at will'?	No – the concept of "at will" employment does not exist in under Hong Kong law. All employees are entitled to receive notice of termination (unless summary dismissal is warranted) and be terminated lawfully, and employees who have been employed continuously for not less than 24 months are entitled to be terminated only by reason of one of the statutorily prescribed grounds. Although there is a statutory minimum notice requirement, typically senior executives would contain a much longer notice period in their employment contracts. Payment in lieu of notice is a statutory right given to both employers and employees in Hong Kong.
Can employees be put on garden leave?	Yes – provided that the employment contract contains a garden leave provision giving the employer the right to put the senior executive on garden leave. Garden leave is often used to reduce the exposure that the senior executive has to the employer's business and confidential information during the notice period and would typically offset the durations of any restrictive covenants.
Are employees subject to termination laws?	Yes – employees who have been employed for not less than 24 months continuously are entitled to be terminated only by reason of one of the statutorily prescribed grounds (which in summary are: the conduct of the employee; the capability or qualifications of the employee for performing his/her work; redundancy or other genuine operational requirements of the business; statutory requirements, and other substantial reasons).
Are there restricted or prohibited terminations?	Yes – regardless of an employee's service period, an employer must not terminate an employee (a) who is on statutory paid sick leave, or is pregnant and/or on maternity leave; (b) due to the employee possessing an attribute that is protected by Hong Kong's discrimination ordinances; (c) who is suffering from work related injury before having entered into an agreement for the employee's compensation or before the issue of a certificate of assessment; (d) due to the reason of the employee's (i) giving evidence or information in any proceeding or inquiry in connection with the enforcement of labour legislation, industrial accidents or breach of work safety regulations; (ii) involvement in any trade union or its activities.
Are post-termination restrictions enforceable?	Yes – provided the employer has not breached the employment contract, and the employer can prove that there are legitimate interests (such as confidential information) to protect, and the restriction(s) imposed do not go beyond what is absolutely necessary to protect such interests.

Can parties enter into a settlement agreement?	Yes – settlement agreements are commonly entered into when separating with a senior executive in Hong Kong, especially where the employer wants to minimise the risks of the senior executive bringing any claims against the employer.
Can senior executives be dismissed if they are also a company director?	Yes – although termination of the employment contract would not automatically cease the senior executive's directorship. The settlement agreement would typically set out the form of the resignation letter. If the senior executive does not resign, he/she will have to be removed in accordance with the Companies Ordinance.
Is alternative dispute resolution available?	Yes – the Labour Relations Division of the Labour Department provides conciliation and consultation service to help employers and employees in the non-government sector to resolve and settle their labour disputes. The conciliation is voluntary, thus neither party is compelled to attend. The Commissioner for Labour may refer a dispute to mediation without seeking prior consent of the parties concerned.
What additional costs could be payable to a senior executive who has been dismissed?	The company may have to pay the senior executive severance or long service payment depending on the senior executive's years of service and the circumstances leading to the termination. If the company makes payment of all of the senior executive's statutory and contractual entitlements, technically speaking, the senior executive would not be able to claim anything else from the company monetarily in an unreasonable dismissal claim. However, where the claim is for unreasonable and unlawful termination, or for breach of the anti-discrimination ordinances, the former may lead to the Labour Tribunal awarding a compensation amount not exceeding HK$150,000 (approx. GBP 15,000), and the latter may result in the Court awarding damages (uncapped).

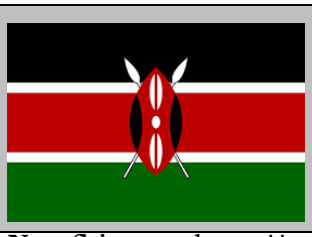
	 **Italy** =
Can employees be fired 'at will'?	**No** – As a general rule, according to Italian law, the employer may terminate executives "at will", with obligation to give the notice period (unless the termination is for just cause). However, such rule is integrated with the provisions of the NCBAs, which states that the dismissal of an executive shall be justified. The notice (or the relevant payment in lieu) is due with the exception of dismissal grounded on just cause (*i.e.* very serious misconducts, such as violation of loyalty obligations – business with competitors – , sexual harassment, criminal offence against employer and/or colleagues, insubordination).
Can employees be put on garden leave?	**No** - under Italian law, garden leave is not permitted since the executive has the right to work. Please note that if the employer unilaterally puts the executive on garden leave, there is the risk that the executive claims for demotion.
Are employees subject to termination laws?	**Yes** – executives have the right not to be unfairly dismissed. As said above, the executive shall be dismissed in writing and with specific indication of the justifying reason. If the dismissal is unfair, the executive is entitled to receive (i) the severance mandatory payments; (ii) the payment in lieu of the notice; as well as (iii) the supplementary indemnity payment provided by the applicable NCBAs. Instead, in case of null and void dismissal, the executive is entitled to obtain the reinstatement (or the relevant payment in lieu) as well as the payment of compensation for the salary lost as a result of the dismissal up to the date of reinstatement. Furthermore, in Italy it is customary to pay the executive's legal expenses if an agreement is reached with the executive (who has been assisted by a lawyer).
Are there restricted or prohibited terminations?	**Yes** – executives cannot be dismissed for discriminatory or retaliation reasons (in these cases, the dismissal is null and void), as well as in cases where particular situations prohibit the dismissal (e.g. pregnancy or maternity up to 1 year of the new-born).
Are Post-Termination Restrictions enforceable?	**Yes** – on the condition that the relevant covenants (*e.g.* non-compete covenant) comply with the law and case law.
Can parties enter into a settlement agreement?	**Yes** - settlement agreements are frequently used to exit senior executives. In order to be valid and enforceable the settlement agreements shall be executed before a competent body according to Article 2133 Italian Civil Code or within the so-called "assisted negotiation" procedure (see below).
Can senior executives be dismissed if	**Yes** – however, the relationship of the directorship should be carefully managed.

they are also a company Director?	
Is alternative dispute resolution available?	**Yes** – in particular • the so-called "assisted negotiation" which is a procedure which takes place with the collaboration of the employer's lawyer and the executive's lawyer, aimed to find a conciliation. • Some NCBAs provide Arbitration Panels to which the parties may refer any dispute.
What additional costs could be payable to a senior executive who has been dismissed?	According to Italian Law, the dismissed executive is entitled to receive: • Mandatory termination payments for accrued indirect and deferred remuneration (holidays, accruals of additional monthly instalments, paid leaves and so-called TFR). However, please consider that these amounts are accrued in the financial statements during the employment relationship and, therefore, they are to be considered as a cash-out rather than as a cost; • The indemnity in lieu of notice (not due in case of dismissal for just cause) • The supplementary indemnity (if the dismissal is unfair) • Further indemnities provided by the contract (*e.g.* due to non-compete or non-solicitation covenants or golden parachutes). Instead, in case of null and void dismissal (e.g. discrimination, retaliation etc), the executive is also entitled to obtain: (i) the reinstatement (or the payment in lieu of reinstatement – i.e. an additional compensation equal to 15 months' salary). (ii) the payment of compensation for the salary lost as a result of the dismissal up to the date of reinstatement (this indemnity amounts to a minimum of five months' salary).

	 IRELAND
Can employees be fired 'at will'?	No - employment "at will" is not an Irish concept. Employers need to ensure that the dismissal itself is fair and that fair procedures were followed throughout the process. Employees are also entitled to receive notice of termination (unless there is evidence of gross misconduct).
Can employees be put on garden leave?	Yes – if the contract is to be terminated on notice, and it contains garden leave provisions. Even in the absence of garden leave provisions, employees who are invited to go on garden leave rather than work their notice will usually jump at the offer. Because garden leave can be used to delay the executive from potentially starting new employment with a competitor, a savvy executive may object to garden leave with a view to negotiating an earlier exit (where the employer will not want the employee to remain in situ and working, during the notice period).
Are employees subject to termination laws?	Yes – employees with more than one year of service have the right not to be unfairly dismissed, save for certain automatic unfair dismissals which apply irrespective of length of service (dismissals relating to trade union membership/pregnancy/ race etc).
Are there restricted or prohibited terminations?	Yes – employers cannot terminate based on one of the nine protected characteristics in the Irish equality legislation (age, gender, marital status, religion, civil status, sexual orientation, disability, race, and membership of the Traveller community). Further, employees cannot be dismissed on the basis of their membership of a trade union, or for making a protected disclosure under Irish legislation. Fair procedures in line with natural justice must be followed for a termination to be permitted.
Are post-termination restrictions enforceable?	Yes, but not in all cases. The Irish courts consider the nature of the restriction and balance an employee's constitutional right to earn a livelihood with the business needs of the employer. The more narrowly defined and temporally limited a restriction, the more likely it will be upheld in the court.
Can parties enter into a settlement agreement?	Yes – severance agreements are frequently used to exit senior executives. They are particularly advisable where there is a risk that the senior executive would be successful in any claim brought to the WRC, or where there is a commercial imperative to expediate a formal process.
Can senior executives be dismissed if they are also a company director?	Yes – the company may wish to dismiss a senior executive who is also a company director. The company would need to check its constitution regarding provisions governing the removal of the director. In the absence of such provision and where an amicable resolution is not possible, a director may be removed from office by the procedure set out under Irish company law.
Is alternative dispute resolution available?	Yes – the WRC provides a mediation service as an alternative to senior executives bringing formal complaints. It also offers a conciliation service whereby a conciliation conference is held between the parties with an independent conciliation officer.
What additional costs could be payable to a senior executive who has been dismissed?	Senior executives may be entitled to a statutory redundancy payment if their role is made redundant (together with an enhanced severance payment if an amicable deal is agreed). Where no severance terms are negotiated and where an executive is successful in a claim for unfair dismissal before the WRC, they can be awarded compensation of up to two years' remuneration in case of unfair dismissal, limited to financial loss. Senior executives may also have contractual entitlements which must be met.

	 JAPAN
Can employees be fired 'at will'?	No - Japan does not have the concept of "at will" nor does it have a system for monetary dismissal. The employment status of employees is robustly protected by dismissal restrictions under the Labour Standards Act and a framework that prevents abuse of the right to dismiss. Regarding the legal aspects of dismissal regulations, as long as executives are considered employees, there is no difference in application between executives and general employees.
Can employees be put on garden leave?	Yes - in addition to granting garden leave based on agreed resignation terms, it is also possible for the employer to unilaterally implement garden leave by continuing to pay salary but refusing to allow the employee to work. The employer's obligation is to "pay a salary" for the work, and unless there are special circumstances, there is no obligation to give an employee work. Garden leave is often granted for a period of one to three months, both to provide executives with suitable opportunities for transitioning to new roles and to prevent leaks of information by executives.
Are employees subject to termination laws?	Yes - all employees are protected under the Labour Standards Act and the Employment Contract Act, which include restrictions on dismissal, preventions of abuse of dismissal rights, and prescribed dismissal procedures). Moreover, for fixed-term employment, unlike permanent employment, more stringent legal rules make dismissal during the employment period more challenging.
Are there restricted or prohibited terminations?	Yes - dismissals based on discrimination related to nationality, creed, social status, etc., are not permitted. Additionally, dismissals during maternity leave, leave due to work-related accidents, and other similar circumstances are not allowed. Furthermore, cases lacking objective rationality (reason for dismissal) or social adequacy in light of individual circumstances are also not recognised (social adequacy).
Can parties enter into a settlement agreement?	Yes - in Japan, since there is no monetary dismissal system, employers commonly negotiate resignation settlement terms to get resignation or resignation based on mutual agreement from executives. This is the approach is often used in cases where the employer wishes to ensure compliance with confidentiality and non-competition for a certain period, or when the risk of dispute is high.
Can senior executives be dismissed if they are also a company director?	Yes - however, in cases where the executive is of director status, it is also necessary to follow the procedures prescribed by the Companies Act (procedures for dismissal by a resolution of the shareholders' meeting) to terminate the status of a director, in addition to any relevant labour law procedures.
Is alternative dispute resolution available?	Yes - in the event of a labour dispute, several dispute resolution procedures are available. Outside lawsuits and labour tribunal proceedings, mediation and arbitration procedures are available through governmental Labour Bureaus.
What additional costs could be payable to a senior executive who has been dismissed?	In Japan, there are no statutory conditions for monetary dismissal procedures or resignation settlements. The content of the resignation package in resignation settlements depends on the negotiation between the employer and employee and the specific circumstances. Generally, resignation packages include severance pay (often including amounts additional to those provided in any company rules on severance), garden leave, and the buyout of remaining unpaid annual leave. The amount of severance pay depends on whether the termination of the contract is down to the company or the executive but is often based on years of service. In cases with a high risk of dispute, the amount often takes into account the fact that an adverse finding at court or labour tribunal can result in awards

	equivalent to two, three or more years of pay.

	 **Kenya**
Can employees be fired 'at will'?	**No** – firing employees' 'at will' is not permitted in Kenya. Dismissals must be for a fair reason and effected pursuant to a fair procedure; therefore, employees may not be dismissed without cause. The grounds on which an employer can fairly dismiss an employee are misconduct, incapacity (which can be incapacity either because of ill health or poor performance) or the operational requirements of the employer (more commonly known as a redundancy/retrenchment).
Can employees be put on garden leave?	**Yes** – in circumstances where a contract is to be terminated on notice, and the contract contains garden leave provisions. An employee may also be put on garden leave in the absence of a contractual right, but this may be subject to challenge. Garden leave is often used as a way to prevent the executive from disrupting the business of the employer.
Are employees subject to termination laws?	**Yes** – Kenya's termination law is the Employment Act. Dismissals must be procedurally and substantively fair, irrespective of the length of service. The grounds on which an employer can fairly dismiss an employee are misconduct, incapacity and the employer's operational requirements.
Are there restricted or prohibited terminations?	**Yes** – The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty: a) a female employee's pregnancy, or any reason connected with her pregnancy; b) the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract; c) an employee's membership or proposed membership of a trade union; d) the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours; e) an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative; f) an employee's refusal or proposed refusal to join or withdrawal from a trade union; g) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability; h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or an employee's participation in a lawful strike.
Are post-termination restrictions enforceable?	**Yes** – restraint of trade (i.e., non-compete or restrictive covenant) clauses can be included in employment contracts. In principle, these clauses are valid and enforceable. However, the employer bears the onus of proof and must show that the restraint of trade is reasonable. One of the principal enquiries is whether the employer seeking to enforce the restraint has a protectable interest and whether that interest outweighs public interest considerations. When an employer seeks to enforce restraint provisions, the courts retain a discretion as to whether to enforce the restraints and will not enforce them if, in a particular case, the enforcement would be unreasonable or contrary to the public interest.

Can parties enter into a settlement agreement?	**Yes** – It is possible for employers to conclude separation or settlement agreements with departing employees. To ensure that such a settlement is valid and binding, the employees must understand the terms of the agreement and acknowledge that they are entering into the agreement voluntarily. Under a separation or settlement agreement with a departing employee, the employer may agree to compensate the employee with additional payments or benefits in exchange for a full and final settlement of any claims that the employee may have against the employer (this is known as an *ex-gratia* payment).
Can senior executives be dismissed if they are also a company director?	**Yes** – however, the company will also need to validly terminate their directorship, which may be included in a settlement agreement, or removal under the company's articles of association.
Is alternative dispute resolution available?	**Yes** – This should be provided for in the executive's contract of employment. Otherwise, the Employment Act entitles all employee to file a labour dispute in court.
What additional costs could be payable to a senior executive who has been dismissed?	Employers have to pay the following to senior executives: • Accrued but untaken annual leave pay. • Notice pay (if applicable). • Any contractual entitlements (if applicable), for example, a *pro rata* payment of an annual bonus or the balance of any pension or provident fund benefits. Severance pay – in instance where the employee is retrenched. The employee would be entitled to at least 15 days pay per completed year of service.

	 **Latvia**
Can employees be fired 'at will'?	No, the concept of "employment at will" is not applicable in Latvia. Employees can only be terminated based on the grounds and in accordance with the procedures stipulated in the Labour Act. Employees have the right to terminate their employment contracts without providing any specific reasons. Both employers and employees are required to give each other notice of termination, in compliance with statutory notice periods. These statutory notice periods can be reduced through a separate written agreement between the parties, but only after a termination notice has been issued. Making a payment in lieu of notice is not permitted under Latvian law.
Can employees be put on garden leave?	The concept of "garden leave" does not exist in Latvian law. However, it is possible to place an employee on idle-time, which closely resembles the concept of garden leave. This can occur when an employment contract is terminated by notice or agreement and contains provisions for idle-time. Using idle-time can serve to deter the executive from competing with the employer during the notice period.
Are employees subject to termination laws?	Yes, employees can only be terminated based on the grounds and in accordance with the procedures set forth in the Labour Act. All employees have the right to be protected against unfair dismissal.
Are there restricted or prohibited terminations?	Yes, employers are prohibited from terminating employees on discriminatory grounds such as race, skin colour, age, disability, religious or political beliefs, national or social origin, financial status, marital status, or sexual orientation, among others. Enhanced protections are in place for specific situations, including for pregnant women, women in the postnatal period, employees with disabilities, and trade union members with more than six months of membership, as well as for employees on long-term incapacity leave. Additionally, terminations that violate the principles of equal rights and the prohibition of causing adverse consequences are not allowed. This also includes instances related to whistleblowing.
Are Post-Termination Restrictions enforceable?	Yes, such restrictions are permissible as long as they comply with applicable statutory provisions. Additionally, they must serve legitimate business interests. The scope of the protection should not exceed what is necessary to protect those interests and should be reasonable and commensurate.
Can parties enter into a settlement agreement?	Yes, settlement agreements are commonly used when parting ways with senior executives. They are especially advisable when there's potential for disputes or complications that could arise from unilateral termination. Settlement agreements offer a structured, amicable resolution, minimising legal risks and often accelerating the process for both parties.
Can senior executives be dismissed if they are also a company Director?	In Latvia, there is no distinct legal status for company directors. However, similarities can be observed between the role of a senior executive who also serves as a member of the management board. In such cases, the answer is "yes" to termination, but the company must also execute the termination properly, in accordance with applicable law and any agreed-upon arrangements. If the senior executive holds an employment contract specifically for a board member position, then the dismissal is governed solely by the Commercial Act. The company can terminate the individual by

	revoking their board member status in accordance with both the Commercial Act and the Articles of Association, thereby also terminating the employment contract. For a senior executive with dual status, terminating the employment contract requires either serving a termination notice or reaching a mutual agreement. The removal from the board member position must be conducted in accordance with the Commercial Act and the Articles of Association, typically through a shareholder's resolution.
Is alternative dispute resolution available?	Yes, mediation and other forms of alternative dispute resolution are available if they can be employed at the discretion of the involved parties. However, it's important to note that individual disputes between an employee and an employer can only be settled through court proceedings and are not subject to arbitration.
What additional costs could be payable to a senior executive who has been dismissed?	In Latvia, employers are obligated to fulfil the financial commitments outlined in the employment contract or other legally binding arrangements with the senior executive. These may include annexes to the employment contract, applicable bonus schemes, and other incentive programs, as well as 'golden parachutes.' In the event of unilateral termination, additional costs may arise depending on the specific reasons for the dismissal. For example, if the senior executive is dismissed due to their own fault, the law mandates that only their salary and compensation for accrued annual leave must be paid. If the dismissal is not attributable to the senior executive's fault, statutory severance pay is also required. In cases involving a termination agreement, the parties have the flexibility to negotiate amicable exit conditions. These negotiations may encompass various types of compensations, bonuses, and other payments. It should be noted that all such employment-related payments are subject to personal income tax and mandatory state social insurance contributions. If there's a case of unfair dismissal, the senior executive has the right to bring a claim to court. They can seek to establish that the dismissal was unjust and may request compensation for forced absence based on their average earnings, as well as moral compensation and any further damages if applicable.

	 **Luxembourg**
Can employees be fired 'at will'?	**No -** Employees have a statutory right not to be terminated unfairly or irregularly. Employees are also entitled to receive notice of termination and, as the case may be, a severance pay, unless there is evidence of gross misconduct.
Can employees be put on garden leave?	**Yes** – Garden leave should be mentioned in the termination letter or in a subsequent written document. The employer can discharge the employee from the obligation to work, although it must continue to pay the employee's salary. The employee can even start a new job during the notice period if they are on garden leave, in which case the former employer need only pay any difference between the former and the new salary for the remainder of the notice period. Employees are entitled to holidays, even in case of garden leave.
Are employees subject to termination laws?	**Yes** – the Labour Code provides for termination processes to be followed for all employees and all of them are entitled to challenge their dismissal within specific deadlines or raise employment related claims (for instance, salary claims or discriminatory claims) in front of courts, irrespective of their seniority.
Are there restricted or prohibited terminations?	**Yes** – for example, during sick leave, employees cannot be dismissed or invited to a pre-dismissal interview up to 26 weeks of uninterrupted sick leave. Pregnant employees cannot be dismissed or invited to a pre-dismissal interview as well. This protection continues during the first 12 weeks after childbirth. During parental leave, employees cannot be dismissed with notice. However, termination for gross misconduct is possible. Dismissal of staff representatives is prohibited during their term of office and for a period of six months thereafter. The same protection applies to candidates to the staff delegate elections and for a period of three months thereafter. However, termination for serious misconduct(s) is possible. Employers cannot terminate without good cause or based on protected characteristics (such as sex, race or disability status for instance) or without following the legal dismissal process.
Are Post-Termination Restrictions enforceable?	**Yes** – so long as the dismissal is not deemed unfair by the labour courts and comply with the requirements of the Labour code (such as duration, geographical scope and remuneration threshold).
Can parties enter into a settlement agreement?	**Yes** – settlement agreements are frequently used post dismissals to prevent any litigious claim in front of the courts. Mutual concessions must be made by both parties.
Can senior executives be dismissed if they are also a company Director?	**Yes -** however, the company will also need to validly terminate their directorship, which may be included in a termination by mutual consent, a subsequent written document following a dismissal or as part of a settlement agreement.

Is alternative dispute resolution available?	**Yes** – There are four public authorities that may intervene in an employment case: (1) the **labour courts** (while it is rare for a dispute brought before the court to result in conciliation, it should be noted that the judges have the preliminary task of reconciling the parties); (2) the **Individual Conciliation Body** (*Instance de Conciliation Individuelle*), which is not yet operational, but will be available to consult upon mutual agreement between the parties in order to reach a settlement as an alternative to commencing legal proceedings; (3) the **Litigation Commission** (*Commission des Litiges*), whose role is to attempt mediation at the pre-claim stage in the area of apprenticeships; and (4) the **Labour inspectorate**, whose role at the pre-claim stage is to intervene informally by hearing each party's side and attempting to find an extrajudicial solution. Mediation can also be available in certain circumstances. However, it is very rare that disputes are settled this way.
What additional costs could be payable to a senior executive who has been dismissed?	In Luxembourg, employers may have to provide the senior executive with: • Severance pay or packages depending on their contractual entitlements. • If the employee has been unfairly dismissed, they may be able to claim compensation for moral and material damage. • If the employee has been discriminated against as well they are also entitled to damages. If the executive is made redundant, the employer may have to pay additional packages depending on what has been negotiated in the context of the redundancy scheme.

	 **Mauritius**
Can employees be fired 'at will'?	**No** – terminating employees "at will" is not permitted in Mauritius. Termination may only occur on the basis of one of the grounds specified under the law, and after the employer has complied with all prescribed procedures and time frames.
Can employees be put on garden leave?	**Yes** – while there is no specific mention of garden leave in the laws of Mauritius, an employee may be put on garden leave. If the contract of employment is set to be terminated with notice, the enforcement of garden leave provisions would depend on the presence of an explicit cause in the contract.
Are employees subject to termination laws?	**Yes** – Mauritius recognises the concepts of justified and unjustified dismissal. Employers must have valid reasons to justify cause for dismissal, and they must follow the prescribed procedures. Grounds for dismissal include: (i) Termination for misconduct; (ii) Termination for misconduct subject to criminal proceedings; (iii) Termination for poor performance; and (iv) Redundancy. Failure to abide by the statutory procedures and timeframes would render the termination unjustified.
Are there restricted or prohibited terminations?	**Yes** – employers are prohibited from terminating employees based on protected characteristics, as stipulated in the Workers' Rights Act. These protected characteristics include factors such as an employee's race, colour, age, pregnancy, absence from work during maternity leave, temporary absence due to notified injury or sickness, becoming or being a member of a trade union, among others.
Are post-termination restrictions enforceable?	**Yes** – such restrictions can be incorporated into employment contracts, the most common being non-compete clauses. These are often included in the contracts of senior employees' as well to protect the company's interests and confidential information when the senior employee leaves the organisation. To be enforceable, non-competition clauses should specify a time limit and geographical scope. Their enforcements should not prevent the employee from earning a living, and their scope should be limited to protecting the legitimate business interests of the employer. In Mauritius, such clauses are not regulated by statute, and their validity is determined by the Courts on a case-by-case basis. In addition, non-solicitation (non-poaching) clauses are also common and can be enforced.
Can parties enter into a settlement agreement?	**Yes** – settlement agreements are often used as a device to mutually put an end to employment. Settlement agreements are often used to mutually agree on the termination of senior executives. These agreements typically serve as a comprehensive resolution and final settlement of any potential claims that the employee might have against the employer. They are regulated under the Workers' Rights Act and the Civil Code.
Can senior executives be	**Yes** – in Mauritius the company may also legally terminate their directorship, which may be addressed in a settlement agreement, or accomplished through removal in accordance with the

dismissed if they are also a company director?	company's Constitution.
Is alternative dispute resolution available?	**Yes** – the Commission for Conciliation and Mediation, established under the Employment Relations act, plays a significant role in handling labour disputes and provides a conciliation or mediation service on any labour dispute referred to it. The Ministry of Labour also provides a conciliation and mediation service to settlement individual labour disputes.
What additional costs could be payable to a senior executive who has been dismissed?	Employers may be required to bear these additional costs when senior executives leave the organisation: (i) Severance pay or packages depending on the contractual arrangements and allowances specified in their employment contracts; (ii) Any contractual entitlements, which may include *pro rata* payment of an annual bonus or other benefits specified in their employment contracts; and (iii) Pension payments; Payments relating to equity participation or employee share schemes.

	 **Namibia**
Can employees be fired 'at will'?	**No -** In terms of the Labour Act, 2007 it is not possible for an employer to fire an employee 'at will'. An employer is required to have a legally recognised valid and fair reason when invoking any contractual provision to terminate an employment contract. The grounds on which an employer may terminate an employment contract are as a result of supervening impossibility of performance; sickness or incapacity of the employee; death of the employee; sequestration of the employer or operational requirements of the employer.
Can employees be put on garden leave?	**Yes** – Garden leave refers to the period of time during which an employee stays away from the workplace or works remotely during the notice period. The employee remains on the payroll. The employee is not permitted to go to work nor to commence any other employment during the garden leave.
Are employees subject to termination laws?	**Yes** – Unfair dismissal in Namibia is defined by the Labour Act. The burden of the proof that a dismissal was fair lies with the employer. A termination of employment is regarded as an unfair dismissal when the employer dismisses the employee without a valid and fair reason.
Are there restricted or prohibited terminations?	**Yes** – automatically unfair dismissals include disciplinary action taken against an employee in contravention of the provisions of section 33 of the Labour Act, 2007; the dismissal of an employee for engaging with a trade union or an employer's organisation the unilateral termination of the employment contract without providing notice.
Are post-termination restrictions enforceable?	**Yes** – Restraint of trade agreements valid and enforceable in Namibia, subject to the requirements that they are reasonable and do not offend public policy. A restraint of trade clause, states that, in the event of termination of employment, an employee is limited geographically to work in the same sector of the economy or in an environment with similar businesses. Restraint of trade clauses is frequently contained in employment or shareholder agreements provisions. By limiting the behaviour of former employees or shareholders, they aim to safeguard business interests such as client information, intellectual property, employees, and trade secrets. However, it is frequently disputed and can lead to disagreements as to how much a company can limit an employee's or former director's action through such a clause. Contracts in restraint of trade are prima facie void under the common law, but can be enforceable if: i. the party imposing the restraint has a legitimate interest to protect; and ii. the restraint is reasonable in the context of protecting that interest; and iii. the restraint is not otherwise contrary to the public interest.

Can parties enter into a settlement agreement?	**Yes** – Settlement agreements may be concluded to settle employment claims, including both existing and potential contractual or statutory claims. It may be used to settle all claims that may be brought to the employment tribunal. Under the terms of the agreement the employee (or worker) waives statutory and contractual claims against the employer (with the option to exclude personal injury claims and certain accrued rights under an occupational pension scheme) and the employee receives a one-off termination payment, which may include a statutory and/or contractual redundancy payment and/or a payment in lieu of notice (PILON).
Can senior executives be dismissed if they are also a company director?	**Yes** – Where the executive is also a company director then consideration should be given as to how to facilitate their removal as a director. Usually, the contract of employment will require resignation as a director on termination of employment and the settlement agreement will then set out the terms that apply. It is important to bear in mind that for as long as the executive remains a director, they will be entitled to attend board meetings and access papers. In practice, if Board approval is required and the senior executive is a board member, the Board (or key members) will be informally sounded out to check that they support the termination. If the senior executive takes issue with the process, the point will be made that the decision has the Board's support and, if necessary, a full process can be carried out.
Is alternative dispute resolution available?	**Yes** – Part B of Chapter 8 of the Labour Act, 2007 provides for dispute resolution procedures. The principal dispute resolution procedures are conciliation and arbitration.
What additional costs could be payable to a senior executive who has been dismissed?	Employers have to pay the following to senior executives in terms of the Labour Act, 2007: • Accrued but untaken annual leave pay • Notice pay (if applicable) • Any contractual entitlements (if applicable), for example, a *pro rata* payment of an annual bonus or the balance of any pension or provident fund benefits • Severance pay – in instance where the employee is retrenched. The employee would be entitled to at least one week's remuneration per completed continuous years of service. Severance pay is an issue that must be consulted upon.

	Norway 
Can employees be fired 'at will'?	Norway does not recognise termination "at will". Employees are protected against termination without an objectively justified cause under statutory Norwegian law.
Can employees be put on garden leave?	The term "garden leave" is not directly regulated in Norwegian employment law. The employer can as a main rule not unilaterally deprive the employee of his/her right to work during the notice period. If the employer intends to restrict the employee's right to remain in their position, the employer must have particularly weighty reasons. These reasons are determined through a comprehensive evaluation of the interests of both parties, with a significant emphasis on whether allowing the employee to remain in their position could lead to substantial harm. Despite being lawfully placed on "garden leave", the employee is entitled to receive the same pay and contractual benefits as before, during the notice period. However, "garden leave" provisions are allowed and often practiced when negotiating a termination agreement. The termination agreement then typically includes the duration of garden leave and any limitations or conditions and are typically negotiated between the employer and the employee as part of the agreement to end the employment relationship.
Are employees subject to termination laws?	Yes - The Norwegian Working Environment Act (Arbeidsmiljøloven) is the main Act regulating the employer/employee relationship, including the rules of hiring and terminating employees. The Norwegian labour market is characterised by a strong governmental influence, and the requirements as to what constitutes a warranted termination are generally strict.
Are there restricted or prohibited terminations?	There are no general categories of employees who have complete protection against dismissals. There are, however, categories of employees that have particular protection against dismissals. These categories of employees and their protection are as follows: a. Employees on sick leave, b. Pregnant employees, c. Employees on maternity/paternity/adoption leave, d. Employees on military service
Are post- termination restrictions enforceable?	Yes, the following covenants are recognised and may under certain conditions be enforceable under Norwegian law: - Non-competition - Non-solicitation of customers - Non-solicitation of employees The restrictions must be agreed upon in writing, and certain procedures, duration and compensation rules apply for the enforcement of such restrictions.
Can parties enter into a settlement agreement?	Yes. Settlement agreements can help prevent potential legal disputes between employers and employees. This is particularly valuable in situations where the employment relationship is already tense or challenging, as it can save time and resources that would have been spent on a termination process, and to maintain a more positive reputation. For employees, it can provide the opportunity to end the relationship in a more positive manner, as well as the benefit of receiving financial compensation.

Can senior executives be dismissed if they are also a company director?	Yes
Is alternative dispute resolution available?	No – however the employer may enter into a written agreement with the general manager of the undertaking to the effect that disputes in connection with the termination of the employment relationship shall be settled through arbitration
What additional costs could be payable to a senior executive who has been dismissed?	There is no statutory right to receive a redundancy payment. However, it is not uncommon that employers offer the employees redundancy payments to avoid disputes. If the employee initiates legal proceedings claiming that the employment relationship has not been legally terminated due to procedural incorrectness or it being unjustified and/or invalid, the employee may be entitled to compensation for financial and non-financial losses. The level of compensation awarded depends on all relevant circumstances - the economic loss of the employee at the present time and in the future, the reasons for the termination, the employee's age, seniority, length of employment and the financial stability of the employer.

	 **Poland**
Can employees be fired 'at will'?	No, employees cannot be fired 'at will'. The employer's statement on termination of a fixed-term employment contract or an employment contract concluded for an indefinite period or on termination of an employment contract without notice should indicate the reason justifying the termination of the contract. Termination of the employment contract without notice is permissible only in those cases strictly defined by Labour Code provisions, e.g. through the fault of the employee in case of serious breach of the employee's basic duties. The PILON concept does not apply in Poland. This means that in the absence of circumstances justifying immediate termination, the employer must apply the notice period and the employee's contract terminates after the lapse of the notice period – the employer cannot pay in lieu of notice to terminate the contract earlier (the 3-month statutory notice period can only be shortened in case of the employer's bankruptcy or liquidation, of if the contract is terminated for reasons not related to employees, but not less than up to one month; in such case, the employee must receive compensation for the lost notice period). The parties can, however, terminate the employment contract upon mutual consent and decide that the employment terminates earlier than if the notice period had been applied (even on the signing date) – in such a case, the employees usually expect to receive at least similar financial compensation if their contract had been terminated with notice.
Can employees be put on garden leave?	Yes, the employer may release the employee from having to work during the notice period while retaining the right to remuneration – this results from the statutory provisions .
Are employees subject to termination laws?	Yes – a number of requirements (including formal requirements) apply. Also, termination must be justified which means the reasons justifying termination must be specified in the employer's statement on termination of a fixed-term employment contract or an employment contract concluded for an indefinite period with notice or on termination of an employment contract without notice. Also, special requirements apply to termination for reasons not related to the employees if the employer employs at least 20 employees. If the employee believes that termination was unlawful or unjustified he/she can appeal it to the Labour Court.
Are there restricted or prohibited terminations?	The employer cannot discriminate employees in termination. Also, there are situations in which an employee is protected against dismissal, such as the employee being on holiday leave or other justified absence of the employee, pre-retirement age, the employee's pregnancy, the exercise of rights related to parenthood or performing specific functions related to representing employee interests.
Are post-termination restrictions enforceable?	The parties may conclude a post-employment non-competition agreement if an employee has access to particularly important information, the disclosure of which could expose the employer to damage. Such an agreement must specify the duration of the competition ban, territorial scope of the competition ban and the compensation amount.

Can parties enter into a settlement agreement?	An agreement to terminate the employment contract may be concluded if the senior executive expresses such a will. On the termination of an employment contract (with or without notice), if the senior executive brings a lawsuit, it is possible to conclude a settlement in which the parties specify its terms (e.g. manner of terminating the contract, financial benefits).
Can senior executives be dismissed if they are also a company director?	Yes, in the event of a termination agreement between the company director and the company, there should be a change in the composition of the management board. However, the dismissal of an employee from his/her position as company director constitutes a reason justifying the termination of the employment contract, the conclusion of which was directly related to the employee's appointment to this position.
Is alternative dispute resolution available?	Yes, there are alternative methods for resolving disputes between an employer and employee. It is permissible to initiate mediation or arbitration (however, an arbitration clause which involves disputes within the subject-matter and scope of labour law may only be drawn up after a dispute has arisen).
What additional costs could be payable to a senior executive who has been dismissed?	Employers may have to provide the senior executive with severance pay or packages depending on their contractual entitlements. Depending on the situation, the employer may be obliged to pay compensation in the event of the unjustified or unlawful termination. If an employee has been discriminated against in relation to the termination of their employment relationship, they are also entitled to claim compensation. An employee who resumes work as a result of reinstatement should be paid for the period of being out of work (but within the limits specified in the Labour Code). A senior executive whose employment relationship is terminated as part of a collective redundancy will be entitled to a redundancy payment the amount of which depends on the employee's length of service with a given employer.

	 Rwanda
Can employees be fired 'at will'?	**No** – employees cannot be 'fired at will' in Rwanda. It is mandatory to provide prior written notice of termination, which must include the grounds for termination. Termination without notice is only permitted where both parties mutually agree to the termination or when the employee is still on probation. The proper procedure and time periods must be respected otherwise the employee may be entitled to compensation from his or her employer.
Can employees be put on garden leave?	**Yes** – although not expressly provided for under Rwandan law, an employee may be put on garden leave if such a provision has been enshrined in the employment contract. Otherwise, putting the employee on garden leave could be construed as breach of employment contract by the employer.
Are employees subject to termination laws?	**Yes** – Rwandan law recognises economic reasons, technical transfer or long term sickness as lawful reasons for termination. The list of acts of gross misconduct from the Minister of Public Service and Labour adds to the list of reasons for termination and sets out the minimum acts that may lead to termination within 48 hours of evidence of such acts.
Are there restricted or prohibited terminations?	**Yes** – employees cannot be terminated: during the suspension period of their contract; while they are on leave;; as a result of lawful strike or lockout; as a result of the employee reporting or testifying to sexual harassment committed by his or her supervisor; on the basis of discrimination (opinion, cultural difference, physical or mental disability among others); or as a result of occupational accident unless a recognised doctor declares the employee unfit to resume service in the position previously held.
Can parties enter into a settlement agreement?	**Yes** – settlement agreements are used mainly for senior employees to avoid any risk of potential litigation against the employer by agreeing to a certain termination package which may be fair for both parties. The settlement agreements also provide an opportunity for both parties to agree on modalities for a smooth handover while at the same time, helping to preserve the employer's reputation.
Can senior executives be dismissed if they are also a company director?	**Yes** – In practice, termination of the executive's employment will be done in parallel with the removal of the executive from his/her position as a company director. Unless otherwise provided for under the Articles of Association, the removal of the said director will not pose any risk to the company as shareholders have the right to remove a person from his/her position of director without providing any justification to that effect.
Is alternative dispute resolution available?	**Yes** – the Labour Law makes it mandatory to make recourse to amicable settlement under the facilitation of employee's representative, or conciliation between the parties facilitated by the labour inspector. Parties cannot resort to court unless they have attempted to settle their disputes amicably before the labour inspector. Arbitration is not provided for as an alternative dispute resolution for individual labour disputes.
What additional costs could be payable to a senior executive who has been dismissed?	**None** – Employers who follow the proper termination procedure may only need to compensate their former employees if (i) they are contractually obligated to do so or (ii) the reason for termination was economic reasons, technical transfer or sickness.

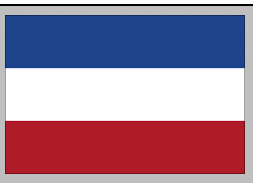
	 South Africa
Can employees be fired 'at will'?	**No** – firing employees' 'at will' is not permitted in South Africa. Dismissals must be for a fair reason and effected pursuant to a fair procedure; therefore, employees may not be dismissed without cause. The grounds on which an employer can fairly dismiss an employee are misconduct, incapacity (which can be incapacity either because of ill health or poor performance) or the operational requirements of the employer (more commonly known as a redundancy/retrenchment).
Can employees be put on garden leave?	**Yes** – garden leave is typically provided for in an employee's employment contract; in these instances, placing the employee on garden leave would be permissible. Alternatively, getting the employee's agreement to be placed on gardening leave would be advisable. An employer may also place an employee on gardening leave without a contractual right or agreement. Since there is ordinarily no right to work in terms of South African law (certain exceptions exist) an employer is not required to provide work. However, the employer would face the risk of the employee bringing an unfair labour practice claim relating to suspension at the CCMA (a dispute resolution body in South Africa) since forced gardening leave is a form of suspension or a contractual claim in the Labour Court seeking specific performance that the employer allow the employee to return to work.
Are employees subject to termination laws?	**Yes** – South Africa's termination laws are in the Labour Relations Act 66 of 1995 (LRA). Dismissals must be procedurally and substantively fair, irrespective of the length of service. The grounds on which an employer can fairly dismiss an employee are misconduct, incapacity and the employer's operational requirements. An employee may also be regarded as having been automatically unfairly dismissed where the reason for the dismissal is one of a limited list of reasons in the LRA that are regarded as particularly unfair grounds for dismissal.
Are there restricted or prohibited terminations?	**Yes** – automatically unfair dismissals include where the reason for the dismissal is that the employee participated in protected industrial action; a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer; the employee exercised rights conferred by the LRA; related to the employee's pregnancy; unfair discrimination against an employee (race, gender, protected disclosure. etc); a transfer of a business as a going concern; or victimisation of a whistle-blower.
Are post-termination restrictions enforceable?	**Yes** – restraint of trade (i.e., non-compete or restrictive covenant) clauses can be included in employment contracts. In principle, these clauses are valid and enforceable. In South Africa, the employee bears the onus of proof and must show that the restraint of trade is unreasonable. One of the principle enquiries is whether the employer seeking to enforce the restraint has a protectable interest and whether that interest outweighs public interest considerations. When an employer seeks to enforce restraint provisions, the courts retain discretion as to whether to enforce the restraints and will not enforce them if, in a in a particular case, the enforcement would be unreasonable or contrary to the public interest.
Can parties enter into a settlement agreement?	**Yes** – It is possible for employers to conclude separation or settlement agreements with departing employees. To ensure that such a settlement is valid and binding, the employees must understand the terms of the agreement and

	acknowledge that they are giving up potential claims. Under a separation or settlement agreement with a departing employee, the employer may agree to compensate the employee with additional payments or benefits in exchange for a full and final settlement of any claims that the employee may have against the employer (this is known as an *ex gratia* payment).
Can senior executives be dismissed if they are also a company director?	**Yes** – Directorship and employment fall under separate legislative provisions, which have distinct requirements and consequences. The LRA guides how the employment of a senior executive is terminated and the Companies Act 71 of 2008 prescribes how the Director is removed from the board of directors. The dismissal of the senior executive does not automatically mean that his/her directorship is terminated. Statutory directors cannot be suspended from their posts. Err must be taken to avoid a constructive dismissal if an executive has a contractual right to be a director.
Is alternative dispute resolution available?	**Yes** – The LRA provides for statutory dispute resolution mechanisms to deal with employment disputes. It generally entails a process of an employee referring a dispute (e.g., alleging unfair dismissal) to the CCMA or a bargaining council with jurisdiction, which body then sets a conciliation meeting presided over by one of its officials, at which an attempt must be made to resolve the dispute by agreement. If that attempt fails, the dispute can then be referred to arbitration or adjudication in the Labour Court, or the parties can resort to lawful industrial action (where the nature of the dispute is not susceptible to arbitration or adjudication).
What additional costs could be payable to a senior executive who has been dismissed?	Employers have to pay the following to senior executives: • Accrued but untaken annual leave pay • Notice pay (if applicable) • Any contractual entitlements (if applicable), for example, a *pro rata* payment of an annual bonus or the balance of any pension or provident fund benefits • Severance pay – in instance where the employee is retrenched. The employee would be entitled to at least one week's remuneration per completed year of service. Severance pay is an issue that must be consulted upon.

	 **Spain**
Can employees be fired 'at will'?	**No -** As a general rule, all terminations by the employer must be justified in a specific ground (disciplinary or objective). The only exception is the withdrawal of the top executive contract, where the employer can withdraw from the contract alleging the lack of confidence in the employee. The law envisages statutory severance in case of termination without cause and even the possibility that the employee is reinstated.
Can employees be put on garden leave?	**Yes** – this is not regulated in Spanish employment law, but the employer can release the employee from providing services (generally during the notice).
Are employees subject to termination laws?	**Yes** – all employees, regardless of the length of services, are entitled to statutory severance in case of termination without cause or breach of fundamental rights.
Are there restricted or prohibited terminations?	**Yes -** employers cannot terminate without cause if there are protected characteristics (such as sex, race, disability discrimination) or dismissals related to trade union membership, health and safety, pregnancy and whistleblowing.
Are Post-Termination Restrictions enforceable?	**Yes** – so long as the parties mutually agree the restrictions, the employer pays an adequate compensation, has an industrial or commercial interest on prohibiting the employee from competing and the restriction is not in force for more than two years.
Can parties enter into a settlement agreement?	**Yes** – settlement agreements are common to facilitate the exit of executive and avoid litigation by regulating the terms of the exit and the applicable severances.
Can senior executives be dismissed if they are also a company Director?	**Yes** – it must be analysed in detail the true nature of the contract since a director position may have absorbed the executive employment contract and, in such cases, termination shall be subjected to commercial regulations (instead of employment ones).
Is alternative dispute resolution available?	**Yes** – all claims challenging a termination must follow a mandatory conciliation process before moving forward to the Labour Courts.
What additional costs could be payable to a senior executive who has been dismissed?	In Spain, termination without cause is subject to the agreement between the parties and, in lieu of it, statutory severance to be calculated depending on the length of services and the salary of the employee. If the dismissal is considered to have breach the fundamental rights of the employee, a Labour Court will order that the employee is reinstated with back pay and even is paid a severance to compensate any damages.

	 **Switzerland**
Can employees be fired 'at will'?	**No** in principle, the employer can terminate the employment contract at will. There are, however, certain grounds based on which a notice is considered abusive, e.g. dismissal for a discriminatory reason or because of a trade union membership. The employer has to provide a notice of termination and in general observe notice periods. The statutory notice period depends on the length of the service. If the employee however engaged in gross misconduct - so that the continuation of the employment contract can no longer be demanded in good faith from the employer - immediate termination without notice is possible. In the event of certain circumstances, such as pregnancy or illness, notice of termination may not be given resp. not be given for a certain period of time.
Can employees be put on garden leave?	**Yes**- employers can put the terminated employees on garden leave during part or the whole notice period. This is especially common for executives. During the garden leave period the employee in principle continues to be entitled to receive his/her salary, benefits etc..
Are employees subject to termination laws?	**Yes**- under Swiss law every employee has the right not to be abusively dismissed or immediately dismissed without significant reason, regardless of the duration of their employment.
Are there restricted or prohibited terminations?	**Yes** –there are certain grounds based on which terminations are considered abusive. (see above). A termination thereby is also considered abusive if the employer has failed to adhere to a fair procedure, in particular if he has not issued a warning before giving notice
Are Post-Termination Restrictions enforceable?	**Yes**- if the employee got access to customers, manufacturing or business secrets, the use of such knowledge could significantly harm the employer and is agreed-upon by the parties in writing. The non-competition clause furthermore has to be reasonably restricted in terms of geographic location, duration, and scope to prevent excessively limiting the employee's future economic opportunities. Such non-competition clauses are in general secured by a contractual penalty. A direct enforcement can only be demanded if this is specifically agreed-upon by the parties in writing and justified by the violated or threatened interests of the employer and the behaviour of the employee.
Can parties enter into a settlement agreement?	**Yes**- the parties can enter into settlement agreements to exit senior executives which is common. If an earlier exit (than would have been possible by observing the notice period) is agreed, the settlement must be justified by the interests of the executive (additional benefits for him).
Can senior executives be dismissed if they are also a company Director?	**Yes**- Swiss law, however, distinguishes between the termination of an employment contract and the removal from a directorship, treating them as separate processes. When it comes to dismissing an executive, a decision of the competent entity – the board of directors - – is required in order to initiate the termination process under employment law.
Is alternative dispute resolution available?	**Yes** –meditation as well as arbitration are commonly used for resolving disputes. Furthermore, it has to be noted that – before filing a lawsuit as such – the claimant must appeal to a so-called conciliation court which tries to reach a settlement agreement between the parties.
What additional costs could be	In Switzerland, employers may have to provide the senior executive with: • Compensation: If the employee has been abusively dismissed or dismissed immediately without

payable to a senior executive who has been dismissed?	significant cause. • Accrued Vacation and Untaken Time Off: The senior executive would typically be entitled to receive compensation for any accrued but unused vacation days or other untaken time off. However, part of the garden leave can be set off against accrued time compensation entitlements. • Severance pay: in principle if contractually agreed upon. Severance payments to executives of Swiss listed companies are, however, prohibited.

	 **The Netherlands**
Can employees be fired 'at will'?	**No** - under Dutch law, if an employer wishes to unilaterally terminate the employment contract of an employee, permission needs to be sought from either a court or the Labour Office (UWV), depending on the termination ground. The Dutch Civil Code contains the following exhaustive list of what constitutes as a termination ground, and the termination ground must be substantiated in full. If permission is granted, a notice period must be observed, and usually a statutory severance payment is due.
Can employees be put on garden leave?	**No** – it is not possible to unilaterally put an employee on garden leave; this is only possible with the consent of the employee. In practice, it is common that parties agree to garden leave in a settlement agreement and sometime even during negotiations on such agreement.
Are employees subject to termination laws?	**Yes** – an employee may only be terminated if a dismissal ground is available, please see above.
Are there restricted or prohibited terminations?	**Yes** – it is not possible to terminate an employment contract if a dismissal protection ground applies, such as sickness, pregnancy, whistleblowing or discrimination.
Are Post-Termination Restrictions enforceable?	**Yes** – if permission to terminate is granted, any post-termination restrictions in principle remain enforceable. It is common however to release employees from a non-compete and non-relations clause in a settlement agreement.
Can parties enter into a settlement agreement?	**Yes** – settlement agreements are frequently used, seeing that the procedure to get permission from a court or the Labour Office can be difficult and time consuming.
Can senior executives be dismissed if they are also a company Director?	**Yes** – in that case it is not necessary to seek prior permission to terminate. A termination of the membership of the board automatically terminates the employment agreement of the director. The director may claim compensation due to unfair dismissal in the absence of a sufficient termination ground and/or if the company acted seriously culpable.
Is alternative dispute resolution available?	**Yes** – voluntary mediation is not uncommon in the Netherlands, whereby parties try to resolve issues, or come to an agreement in case of an exit mediation. Arbitration is uncommon in the context of termination of employment agreements.
What additional costs could be payable to a	In the Netherlands, employers may have to provide the senior executive with: • Statutory severance pay.

senior executive who has been dismissed?	• If the employer's actions have been seriously culpable, an additional compensation may be awarded.

	 UAE
Can employees be fired 'at will'?	It is necessary for there to be a "legitimate reason" to support termination of employment. However, the UAE courts now seem willing to accept a broad range of reasons in this context, including those of questionable veracity.
Can employees be put on garden leave?	Yes, although they must continue to receive all pay and benefits. They will continue to accrue gratuity during the period of garden leave.
Are employees subject to termination laws?	Yes. The Labour Law prescribes minimum notice periods and compensation of unjustified termination.
Are there restricted or prohibited terminations?	Although the Labour Law contains anti-discrimination provisions, these do not restrict an employer's ability to dismiss an employee in the same way as they might in other jurisdictions.
Are post-termination restrictions enforceable?	Not in any meaningful manner.
Can parties enter into a settlement agreement?	Yes, and disputes with senior executives will frequently be resolved by execution of a negotiated settlement agreement.
Can senior executives be dismissed if they are also a company director?	Yes.
Is alternative dispute resolution available?	Mediation is mandatory in all employment disputes before formal litigation can be commenced.

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