

United Kingdom

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Legislation and agencies

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

The main statutes relating to employment are the Employment Rights Act 1996 and the Trade Union and Labour Relations (Consolidation) Act 1992. There is a large body of legislation covering employment in the UK. The above two are the main statutes but several more are referred to below in context.

2 Is there any legislation prohibiting discrimination or harassment in employment?

The anti-discriminatory and harassment statutes and relevant protection categories are:

- the Sex Discrimination Act 1975, which applies with regard to sex and gender reassignment, marital status, equal pay and civil partnership;
- the Race Relations Act 1976, which applies with regard to race, colour, nationality and ethnic origin;
- the Disability Discrimination Act 1995, which applies with regard to disability;
- the Protection from Harassment Act 1997, which applies with regard to general harassing conduct which need not be in respect of any of the protected categories under the other discrimination legislation (eg, sex, race, etc);
- the Employment Equality (Religion or Belief) Regulations 2003, which apply with regard to religious belief and non-belief or philosophical beliefs;
- the Employment Equality (Sexual Orientation) Regulations 2003, which apply with regard to sexual orientation; and
- the Employment Equality (Age) Regulations 2006, which apply with regard to age.

The term 'discrimination' encompasses a number of concepts and causes of action:

- Direct discrimination – unequal, less favourable treatment based on the employee belonging to one of the protected categories.
- Indirect discrimination – applying an apparently neutral provision, criteria or practice which in practice puts those in a protected category at a disadvantage and which is not a proportionate way of achieving a legitimate aim.
- Victimisation – treating someone less favourably in retaliation for that person having availed him or herself of any protections under any discrimination statute.
- Harassment – unwanted conduct on the grounds of any of the protected categories having the purpose or effect of violating dignity or creating an intimidating, hostile, degrading,

humiliating or offensive working environment.

- Equal pay – paying one gender less than the other where their work is like-work, equally valuable work or has been rated as equivalent in a professional study, where such disparity in pay is not justified by a material difference.
- Reasonable adjustment – applies only in disability discrimination. A duty to make reasonable adjustments to the working environment to ensure a disabled person is not placed at a substantial disadvantage.

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

The Data Protection Act 1998 ensures the fair and lawful processing of individuals' personal data in accordance with the eight 'principles of fair processing':

- personal data to be processed fairly and lawfully;
- personal data to be processed for specified purposes and not beyond;
- personal data to be adequate, relevant and not excessive;
- personal data to be accurate and up-to-date;
- personal data not to be kept longer than necessary;
- personal data to be processed in accordance with the rights of the subject of the personal data;
- appropriate security measures to be put in place to protect personal data; and
- personal data not to be transferred outside EEA unless the recipient ensures adequate data protection.

Employers are obliged to notify the UK Information Commissioner of the data being processed, the purposes for which processing of data is being carried out and any transferring beyond the EEA. Employers must comply with 'access requests' by individuals to their personal data.

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

The enforcement of most employment rights is through individual claims and actions to and in the UK employment tribunals and civil courts. Some collective matters (eg, trade union recognition under statutory scheme) are dealt with by the Central Arbitration Committee (the CAC).

The Commission for Equality and Human Rights (CEHR) was established under the Equality Act 2006 and will come into being in October 2007. It will bring together the work of the three existing commissions: the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities

Commission. The CEHR will take on the powers of the existing commissions as well as new powers to enforce legislation more effectively to promote equality for all.

Worker representation

- 5** Is there any legislation mandating the establishment of a works council or workers committee in the workplace?

The Transnational Information and Consultation of Employees Regulations (1999) applies with regard to European Works Councils, and the Information and Consultation of Employees Regulations (2004) applies to Domestic Works Councils. Works councils are not mandatory but require an 'employee request' or employer initiative for establishment. The regulations set out thresholds for size and geographic spread of the relevant workforce for the provisions to apply.

Background information on applicants

- 6** Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?
- The Rehabilitation of Offenders Act 1974 applies, save in respect of certain exceptions (eg, working with children, vulnerable people, security services, etc). The Act prevents employers making employment decisions where an employee or candidate has disclosed or has failed to disclose an offence which is 'spent' under the Act. It does not make any significant difference under the law in this area if the check is carried out by the employer or a third party.
 - The Asylum and Immigration Act 1996 requires certain prescribed background checks to ensure the employee may lawfully work in the UK.
- 7** Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

The Access to Medical Reports Act 1988 provides that if the examination or report is to be produced by a medical practitioner responsible for the individual's care, then consent is required and there is a right of prior scrutiny and comment by the employee before the report is seen by the employer.

The requiring of a medical examination by an employer-appointed practitioner is generally acceptable if provided for in an employment contract and if it is uniformly applied. However, the use of information obtained may be impacted by discrimination legislation, eg, the Disability Discrimination Act 1995.

An employer can refuse to hire an applicant who does not submit to an examination; however, such a policy may be open to challenge if the employer is aware, or reasonably ought to be aware, of a disability or maternity status. The age discrimination legislation may also provide a route to challenge.

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

No, however similar comment as in question 7 can be made.

An employer can refuse to hire an applicant who does not submit to an examination, but see comments under question 7.

Where information about exposure to drugs and alcohol is collected by the employer, the Data Protection Act 1998 will

apply. If collected to enforce the business' rules and standards, employers should make sure the rules and standards have been clearly set out to the employee. Also, drug and alcohol tests should only be used where they provide significantly better evidence than less intrusive means, and tests should be limited to substances that meet the purpose for which the testing is being conducted.

Hiring of employees

- 9** Are there any legal requirements to give preference in hiring to particular people or groups of people?

No, 'positive discrimination' is generally unlawful in the UK save that 'reasonable adjustment' in disability discrimination (see question 2) is regarded as a form of partial positive discrimination.

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

No, there is no statutory requirement for a written employment contract. There must be, however, a statutory statement of particulars incorporating the following:

- names, addresses (employee and employer);
- date of commencement;
- remuneration details;
- hours of work;
- holiday and holiday pay;
- sickness and sick pay;
- pension;
- additional details for work outside the UK;
- notice period;
- title;
- temporary or permanent work;
- place of work;
- collective agreements;
- grievance and appeals; and
- disciplinary rules and procedures.

It should be noted that certain types of clauses are unlikely to be enforceable unless in a written employment contract, eg, covenants not to compete, post-termination confidentiality, intellectual property protection.

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

These are permissible; however, certain rights and protections are given by the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

There is no maximum duration of contracts, but successive fixed-term contracts over four or more years may result in the next renewal of contract being deemed a permanent contract with the employer, unless otherwise justified.

- 12** What is the maximum probationary period permitted by law?

There is no maximum. Customarily employers will impose a period of six months or less.

This probationary period may be extended at the discretion of the employer, if stated in the employment agreement.

See question 33 in relation to unfair dismissal service qualifications.

13 To what extent are covenants not to compete valid and enforceable?

They are assumed unenforceable as a restraint of trade unless:

- they go no further than reasonably necessary, in scope, duration or geographical extent, to protect employer's legitimate business interests; and
- they do not otherwise offend public policy.

The maximum period for such covenants is 12 months (by case law). A full 12 months will only be justified for the most senior employees or in special circumstances, eg, where the employee may do a great deal of damage to the employer's business.

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

An employee is someone required to perform work under the control of the employer and the employee has no power to substitute his or her labour. An employment relationship is also characterised by the fundamental mutual obligations to personally perform work (employee) and to pay for it (employer). It is important to be aware that there is no single determining test of employment. All relevant factors will be considered.

An independent contractor is in business on his or her own account, takes profits and bears losses and risks and controls his or her own work product. He or she normally (subject to limited exception) has power to substitute labour. Determination of employee or independent contractor status is a question of substance over form.

Foreign workers**15** Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity to a related entity?

There are no limitations on the number of UK work permits that can be issued, nor are there any limitations on the number of work permits an employer can obtain on behalf of any particular employee.

Visas are available for employees transferring from one corporate entity to another related entity. This is known as an intra-company transfer work permit application, although evidence establishing the relationship (usually through common ownership or related subsidiaries) between the two companies will need to be provided.

16 Is spousal work authorisation available?

Dependent spouses are permitted to work in the UK provided that the main work permit holder has a full work permit.

17 What are the rules about having a work-authorized workforce and what are the sanctions if you do not?

There are laws in place which prevent illegal working in the UK. An employer can face criminal charges if it employs a person aged 16 or over who does not have permission to be in, or work in, the UK.

A person (or company) found guilty of an offence could be fined up to £5,000 for each employee who has been employed illegally and may also face imprisonment.

There are defences against prosecution, if certain documents are checked by the employer before the employee commences work.

Terms of employment**18** Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The Working Time Regulations 1998 limit working hours as follows:

- a 48-hour maximum working week calculated as an average over a 17-week period; and
- an individual 'opt-out' by written agreement (with exceptions for under-18s). Note: the individual opt-out is controversial and subject to review. The Regulations also govern shift work, night work and paid annual leave (see question 20).

19 What categories of workers are entitled to overtime pay and how is such pay calculated?

Overtime pay is not governed by specific legislation but is generally a matter of individual or collective agreement. The National Minimum Wage Act 1998 governs an employer's obligation to pay a certain minimum amount per hour which may render unpaid overtime unlawful in certain circumstances.

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

The Working Time Regulations 1998 establishes entitlement to four weeks leave per annum which is paid (inclusive of public holidays). There will likely be a phased increase of paid annual leave to 28 days by 2008.

Accrual is monthly and is paid in lieu only on termination.

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

The Social Security Contributions and Benefits Act 1992 governs the UK statutory sick pay scheme. This grants a right to 28 weeks' leave in any three-year period (including linked periods), which is paid at the statutory sick pay rate.

22 In what circumstances may an employee have the right to take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Leaves of absence are as follows:

Maternity leave	Up to 52 weeks' leave Up to 39 weeks' 'paid'
Adoption leave	Same as maternity
Paternity leave	Two weeks' leave Two weeks' 'paid'
Parental leave	13 weeks' unpaid
Dependent leave	'Reasonable' unpaid time off to deal with emergencies
Jury service	Length of jury service unpaid

'Paid' above does not mean full contractual pay. It is an amount set by the government but paid by the employer.

23 What employee benefits are mandated by law?

The Welfare Reform and Pensions Act 1999 requires access to a 'stakeholder' pension – this applies to all employers with five or more employees. The employer must designate a pension scheme and register the scheme and provide all relevant employees with access to it. This does not require the employer to make contributions.

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

Regulations relating to fixed-term employees – see question 11 – grant such employees:

- the right to the same terms and conditions as comparable permanent employees; and
- the right not to suffer a detriment or unfair dismissal by reason of their fixed-term status.

The rules relating to part-time workers are governed by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which grant such workers (unless objectively justified):

- the right to the same terms and conditions as comparable to full-time workers; and
- the right not to suffer a detriment or unfair dismissal by reason of their part-time status.

Liability for acts of employees**25** In which circumstances may an employer be held legally liable for the acts or conduct of its employees?

At common law, employers are vicariously liable to third parties for acts and omissions of employees done ‘in the course of’ their employment.

Employers are vicariously liable for the discriminatory acts and omissions (including harassment) of their employees ‘in the course of employment’ (where ‘course of’ has a broader meaning than at common law) and where the employer has failed to take reasonable practicable preventative steps.

Taxation of employees**26** What employment-related taxes are mandated by law?

The deduction at source of income tax and employer and employee national insurance contributions (social security) under the UK ‘Pay as You Earn’ (PAYE) system is mandated by the Income Tax (Earnings and Pensions) Act 2003.

Employee-created IP**27** Is there any legislation addressing the parties’ rights with respect to employee inventions?

The following legislation addresses employee inventions:

- the Patents Act 1977; and
- the Copyright, Designs and Patents Act 1988.

Termination of employment**28** Can an employer dismiss an employee for any reason or must there be ‘cause’? How is cause defined under the applicable statute or regulation?

Contractually, at common law, an employer can dismiss an employee for any reason, provided appropriate notice is given.

Statutorily, if the employee has the relevant qualifying length of service (if any), they may be dismissed only for:

- capability or qualifications;
- conduct;
- redundancy;
- breach of a statutory enactment by the employer;
- ‘some other substantial reason’; or

- retirement (governed by the Age Discrimination Regulations).

Please see question 32 regarding additional procedure requirements.

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

Notice of at least the statutory prescribed minimum must be given prior to dismissal, ie:

Length of service	Notice period
Up to one month	Nil
One month to two years	One week
Two years to 12 years	One week for each year
12 years plus	12 weeks

UK employers provide additional notice as a matter of custom in the employment contract. Where this is the case, the contractual notice must be given by the employer.

Payment in lieu of notice can be given if set out in the employment contract.

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

This may occur only in cases of ‘gross misconduct’. Gross misconduct is misconduct of a very serious nature or which the employer is justified in treating as very serious in the context of its business. It is important that as many of the rules of gross misconduct as possible are set out by the employer and notified to the employee. See question 10.

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

Under the Employment Rights Act 1996, statutory redundancy pay exists for employees with two or more years’ service. The exact amount is linked to the length of service, age of the employee and national industrial average ‘weekly pay’.

32 Are there any procedural requirements for dismissing an employee?

Yes, there is a duty on employers to act ‘reasonably’ pursuant to the Employment Rights Act 1996. The Advisory Conciliation and Arbitration Service (ACAS) Code of Practice includes procedural fairness and employment tribunals must take this Code into account when judging the fairness of any dismissal.

Statutory dispute resolution procedures exist under the Employment Act 2002 – failure to comply may result in an increase in compensation or damage awarded against the employer. These procedures are controversial and subject to review.

Prior approval by the UK government is not required by law, but if the employer proposes to make redundancies affecting 20 or more employees it must ‘notify’ the Department of Trade and Industry (but permission is not required).

33 In what circumstances are employees protected from dismissal?

The following have protection ordinarily:

- employees with 12 months’ service have general statutory protection from unfair dismissal.

Update and trends

Like other EU Member States, the UK provides protections – principally to secure continuity of employment – for employees in the context of the sale of a business (as distinct from a share sale). UK Domestic Regulations: The Transfer of Undertakings Protection of Employment Regulations (TUPE) derive from the EC Acquired Rights Directive (Council Directive 77/187/EC) as amended, now replaced by Council Directive 2001/23/EC. April 2006 saw a consolidation and clarification with the implementation of TUPE 2006. Under these Regulations, as a matter of domestic law, it is clear that in addition to ‘traditional’ business sales, TUPE also applies to protect employees during most service provision changes (typically outsourcings, insourcings, and reoutsourcings).

October 2006 saw the implementation in the UK of new regulations rendering age discrimination in the workplace unlawful. The Employment Equality (Age) Regulations 2006 also derive from an EC Directive – the 2000 Equal Treatment Framework Directive (2000/78/EC). Legislation outlawing workplace discrimination on grounds of race, gender, disability, sexual orientation, religion or belief or age (and in other respects, too) therefore applies in all EU Member States.

In broad terms, in the UK age discrimination against both young and old is now unlawful at all stages of employment, including in recruitment and dismissal. A regime similar to those applicable under other anti-discrimination legislation applies. There is some scope for objective justification of otherwise discriminatory treatment, and certain service-

related benefits may remain.

The Regulations introduce a controversial default retirement age of 65, and particular procedures to be followed in relation to retirement ‘dismissals’ at normal retirement age, as well as the right for the employee to request to continue working after retirement age.

The Working Time Regulations 1998 provide workers with a minimum paid annual holiday entitlement of four weeks. Up until now, employers were able to count the eight public and bank holidays towards this total. The Government proposes that this minimum annual paid holiday entitlement should increase to 28 days per year for full-time workers (this can include the eight public and bank holidays). It proposes to phase in this increased entitlement with a requirement to provide full-time workers (and pro rata for part-timers) a minimum paid annual holiday entitlement of 24 days from 1 October 2007 and of 28 days from 1 October 2008. Employers can, of course, always agree to provide more than the statutory minimum paid holiday entitlement.

Under the Health Act 2006, smoking in enclosed public spaces and workplaces was outlawed in Wales from 2 April 2007 and in Northern Ireland from 30 April 2007. In England, the law applies from 1 July 2007. Scotland has its own separate legislation – The Smoking, Health and Social Care (Scotland) Act 2005 and the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006. The smoking ban came into force in Scotland on 26 March 2006.

The following categories have ‘automatic’ unfair dismissal protection but require 12 months’ service:

- dismissal due to a ‘spent’ conviction (see question 6 above);
- dismissal where the statutory procedures for dismissal are not followed (see question 32); and
- transferring employees under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

The following categories have ‘automatic’ unfair dismissal protection and do not require any qualifying length of service:

- jury service;
- leave for family reasons and related leaves;
- health and safety activities;
- Sunday working;
- asserting certain statutory rights;
- asserting rights under the Working Time Regulations (see questions 18 and 20);
- employee trustees of occupational pension schemes;
- employee consultation representatives or candidates (including European and domestic works councils);
- whistleblowers;
- flexible working requestees;
- those involved in all areas of discrimination protection;
- exercising the rights to be accompanied at disciplinary or grievance hearings;
- part-time workers;
- fixed-term employees;
- in connection with entitlement to a national minimum wage; and
- trade union membership or activities or official industrial action.

Please note that dismissal is ‘automatically’ unfair if it is by reason of the protected category, ie, it is causally connected.

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

Yes, a special consultation regime applies where there are more than 19 affected employees. ‘Protective awards’ exist of up to 90 days’ pay per affected employee for employer’s failure to consult. This is governed by the Trade Union and Labour Relations (Consolidation) Act 1992, section 188. Also note the DTI notification set out in question 32.

Dispute resolution

35 Can the parties agree to private arbitration of employment disputes?

No. However, private mediation can be agreed to and undertaken between the parties.

36 Can an employee agree to waive statutory and contractual rights to potential employment claims?

An employee can agree to waive contractual rights. An employee may only waive statutory rights with a valid ‘statutory compromise agreement’ or through an officer of ACAS on form COT3 (ie, an official form used by ACAS to evidence a binding legal settlement between employers and employees).

The requirements for a valid waiver are as follows, with regard to a statutory compromise agreement:

- it must be in writing;

- it must relate to specific proceedings;
- independent legal advice must have been given to the employee;
- the independent advisor must have insurance for negligence;
- the agreement must identify the advisor; and
- the agreement must state that the conditions regulating compromise agreements are satisfied.

37 What are the limitation periods for bringing employment claims?

Ordinary unfair dismissal and automatic unfair dismissal	Three months
Discrimination	Three months
Equal pay	Six months
Redundancy pay	Six months

All limitation periods are subject to extension of time according to different tests. It is broadly easier to extend limitation periods applicable to discrimination claims than all other types of claim.

Also, statutory dispute procedures (see question 32) provide for extension of limitation periods in certain circumstances (broadly speaking where this is to allow the completion of a relevant procedure).

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Legislation and agencies

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

The main statutes and regulations governing employment are the French Labour Code, administrative regulations and collective bargaining agreements either at a field of activity level or at a company level.

2 Is there any legislation prohibiting discrimination or harassment in employment?

The French Labour Code protects employees against harassment and discrimination at work. Pursuant to Article L 122-45 of the French Labour Code, an employer must not take into account an employee's membership or activity in a union, his or her race, religion, nationality, gender, family situation, health, handicap or pregnancy.

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

The French Data Privacy Law dated 6 January 1978 (amended in August 2004) protects employee privacy and personal data. Pursuant to this rule, an employer may collect information on employees, except information regarding racial origins, political opinions, religious or philosophical beliefs, health or sexual preferences. Pursuant to article L 121-6 of the French Labour Code, an employer may collect personal information from an applicant only if the purpose of such collection is to assess the applicant's abilities to carry out his or her future duties or professional skills. The French Data Protection Authority (CNIL) controls the collection of personal data. The monitoring of employees in the workplace is also subject to restrictive requirements (eg, email monitoring, video monitoring).

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

The creation and administration of French labour law is entrusted to the Ministry of Labour, which is represented by regional and departmental directors of labour. The judicial enforcement of French labour law is the primary responsibility of the labour courts (*conseils de prud'hommes*). The labour courts are competent to judge all individual disputes arising out of the employment relationship.

Worker representation

5 Is there any legislation mandating the establishment of a works council or workers committee in the workplace?

Under French law, companies must implement works councils (*comités d'entreprise*) as soon as they employ 50 or more employees. Each union may also appoint one delegate in companies meeting this staff level condition. Companies that employ less than 50 employees but at least 11 must organise elections for staff delegates (*délégués du personnel*).

Background information on applicants

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

The collection and treatment of information regarding an applicant's private life is not legal. Provided that the employer complies with the requirements set forth in response to question 3, it may either conduct its own background checks or hire a third party to perform such checks.

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

Under French law, a medical examination is mandatory at the time of the recruitment (ie, the hiring date). An employee cannot refuse to submit to the examination. An employer can refuse to hire an applicant who does not submit to an examination.

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

Drug and alcohol testing of applicants is illegal because it is considered a part of the applicant's private life.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to particular people or groups of people?

An employer cannot give preference in hiring to particular people or groups of people. This may be considered as discrimination, which is prohibited by law. There is no official positive discrimination practice in France.

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

A written employment contract is mandatory when an individual is hired as a temporary employee or is hired on a fixed-term or a part-time contract. A written employment contract is not strictly required under French law in other cases, although it is recommended for evidentiary reasons. Moreover, the European Directive dated 14 October 1991 requires employers to provide a written agreement. The essential terms of the contract include the starting date, the notice period, the job description, the salary, the working time, the trial period and the duration of the contract.

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

A fixed-term contract may only be used to hire an employee to perform a precise and temporary task in factual circumstances strictly defined by the law as follows: (i) to replace an employee who is temporarily absent or whose contract is temporarily suspended, (ii) to temporarily replace an employee whose job is being eliminated (for a duration of 24 months maximum), (iii) to fill temporarily a vacant job position while awaiting the arrival of a new employee (for a duration of nine months), (iv) to deal with a temporary increase in business activity (for duration of 24 months), or (v) to hire for seasonal work or in business sectors in which fixed-term contracts are standard practice. Usually, the maximum duration of a fixed-term contract is 18 months and may be extended to 24 months under specific conditions.

12 What is the maximum probationary period permitted by law?

The maximum probationary period can freely be stated by the parties in an open-ended contract, unless, as is frequently the case, a maximum period is set in the applicable collective bargaining agreement. A fixed-term contract may provide for a probationary period that depends on the duration of the contract and may last up to one month for contracts exceeding six months.

13 To what extent are covenants not to compete valid and enforceable?

Under French law, the territorial scope and duration of non-compete covenants must be limited. Moreover, financial compensation should be provided in consideration for the covenant. If an employee is not compensated for his or her non-compete commitment, the covenant will not be enforceable, or if the employee complies with this covenant, he or she may claim for damages. Lastly, the company must justify the protection of its legitimate interests.

The maximum period for a non-competition covenant depends on the employment contract and on the collective bargaining agreement, if any. Usually, the duration is between 12 to 24 months.

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

Independent contractors cannot be in a subordinate position to an employer as they are self-employed and are not governed by the French Labour Code. French labour law imposes a variety of requirements and obligations on the parties in an employment relationship that do not apply to independent contractors (eg, disciplinary regulations, working time regulations, paid holidays).

Foreign workers

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

All foreign workers need a work permit to work in France unless they are nationals of one of the member states of the European Union, Norway, Iceland, Liechtenstein or Switzerland. These foreign workers only need a valid passport to work in France. However nationals of the new member states (Estonia, Hungary, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Slovenia) will need a work permit until May 2011, and the nationals of Bulgaria and Romania will need a work permit until January 2014. Foreign workers who are not nationals of these countries will need an authorisation to stay and work in France. French authorities grant to foreign workers different authorisations. Basically, there are three main authorisations which would allow the foreign worker to work in France: the residence permit, which is valid for 10 years; the temporary stay visa with an authorisation to work, which is valid for one year; and the temporary authorisation to work, which is valid for nine months. Other authorisations exist for students, scientists, etc.

Particular visa rules apply to the employees seconded from a corporate entity to another related entity located in France. These rules are less restrictive than those governing the introduction of foreign workers to France. Companies located abroad are entitled to second their employees in France to carry out a service. The following rules apply: the secondment is possible to the extent that the relationship between the foreign employer and the secondee is an employer-employee relationship and the secondment is necessarily for a limited period of time and cannot in principle exceed five years. Moreover, certain French labour legal requirements apply to the secondee while on secondment, including working time provisions, days off, paid holidays, minimum salary, overtime, and rules relating to health and safety. These requirements ensure that the secondment will not deprive the employee seconded from the rights he or she would have obtained under a French employment contract. Each employee seconded will need a work permit and a visa.

16 Is spousal work authorisation available?

A temporary authorisation to stay in France for personal reasons is available to the extent that the individual meets the legal conditions set by French law. This authorisation is for a maximum duration of one year (automatic renewal) and allows its holder to carry out a professional activity.

17 What are the rules about having a work-authorized workforce and what are the sanctions if you do not?

The procedural rules to obtain a work permit depend on the place where the foreign worker lives. If the foreign worker lives in France, the employer would need to check the validity of his or her authorisation to work. If the foreign worker does not live in France, the employer must list the position with the Unemployment Agency and will be entitled to recruit a foreign worker only if no French resident accepts this employment offer.

The Labour Authorities issue the authorisation to work. The Labour Authorities take into account the employment situation in the territorial area where the foreign worker would work, the employment conditions (notably, salary) that would apply to the foreign worker, and the technological and commercial purposes of the stay. Any refusal shall be written and shall provide

grounds. The usual formalities (notably medical examination) and labour requirements apply to foreign workers. The employer would have to pay a specific contribution for the employment of a foreign worker.

Failure to comply with the legal requirements governing the introduction of foreign workers to France may give rise to various sanctions (including criminal liabilities). Courts will impose fines and imprisonment upon the employer while French authorities can withhold the employee's authorisation to work or stay in France.

Terms of employment

18 Are there any restrictions or limitations on working hours and can an employee opt out of such restrictions or limitations?

The typical work week is 35 hours under French law, unless otherwise specified by the applicable collective bargaining agreement. The number of overtime hours that an employee may work during a calendar year is limited by the collective bargaining agreement; beyond such limit, additional overtime hours may be authorised by the labour inspector. The average number of hours that an employee may work per week over any period longer than 12 consecutive weeks may normally not exceed 46 hours, nor may the number of hours the employee works during any given week exceed 48 hours. A temporary authorisation to exceed such a limit may be granted by the labour authority. Each failure by the employer to abide by the applicable rules and regulations relating to working hours or overtime hours is sanctioned by a maximum fine of €750. The fine is multiplied by the number of employees concerned by the violation of the law.

19 What categories of workers are entitled to overtime pay and how is such pay calculated?

An employer intending to require overtime in its workplace is bound by a threshold of hours per year (the legal threshold of 220 hours per year) and must declare in advance such threshold to the labour authority. Overtime pay is calculated on the basis of the hourly rate applicable to the employee with a surcharge (for example 25 per cent).

Non-managers are entitled to overtime pay unless they are subject to a particular arrangement (eg, itinerant worker).

Three categories of managers are distinguished for working time purposes under French law; only managers belonging to category (ii) are entitled to overtime pay:

- (i) High-level managers (*cadres supérieurs*) are not covered by current working time rules because of their duties and are not eligible for overtime pay.
- (ii) Managers working under a collective schedule will be subject to standard 35-hour working weeks. However, a collective bargaining agreement can provide for a greater working time limit per week and grant additional days off in compensation. These managers are eligible for overtime pay.
- (iii) Managers who do not fall in the scope of category (i) and (ii) above, whose working time cannot be predetermined, will be subject to special provisions that, for example, provide for a number of working days per year (usually 217 days). These managers will not be eligible for overtime pay.

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

French labour law grants any employee the right to a minimum amount of paid annual vacation. Two and a half workable days of annual leave are given per month in the reference year, not to exceed 30 workable days. A workable day (*jour ouvrable*) is any one of the six days in the maximum six-day work week. For individuals working the typical five-day week during a full reference year, they will benefit from 25 working days (*jours ouvrés*) for annual vacation.

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

The applicable collective bargaining agreement or the 1977 General Monthly Pay Agreement ensures, in the event of any absence resulting from illness, continuation of the employee's salary. Pursuant to the 1977 General Monthly Pay Agreement, the indemnity amounts to 90 per cent of the gross salary during the first 30 days of illness, and to 66 per cent of the gross salary during the following 30 days.

22 In what circumstances may an employee have the right to take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

An employee's absence as a result of illness is normally a reason to suspend the employment contract. The salary of the employee is paid by the employer and the social security system. There is no maximum duration for such an absence. But an employee's lengthy illness that disturbs the normal functioning of the company is a valid cause for termination of the employee's employment contract. Other valid circumstances for an absence include: maternity leave (usually 16 weeks) or family leave (eg, marriage, death of a parent). The employee receives pay during these leaves of absences. If the employee is absent without a valid reason, he or she will not be paid and may be dismissed.

23 What employee benefits are mandated by law?

French law requires that any company employing at least 50 employees must manage a mandatory profit-sharing plan.

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

An employer may not discriminate against part-time or fixed-term employees based on the fact that they are not employed on a permanent and full-time basis. Part-time employees have priority to apply for a full-time position (for similar duties or professional category) and to obtain such a position if there is an opportunity.

Liability for acts of employees

25 Under what circumstances may an employer be held legally liable for the acts or conduct of its employees?

When an employee injures a third party, the employer may be held jointly and severally liable for such injury. The employer is not liable for the acts of its employee when the employee acts outside of the course of his or her employment or the employee acts in violation of the terms and conditions of such employment.

Update and trends

On 6 May 2007, France elected Nicolas Sarkozy as President of the Republic to succeed President Jacques Chirac for a term of five years. During his electoral campaign, President Sarkozy developed a centre-right programme oriented toward flexibility and free enterprise. In particular, he addressed four salient social and labour issues:

- The need to relax the workweek maximum and the regulations that restrict the possibility of overtime work. The programme, which was viewed by the left as a threat to the legal 35-hour workweek, includes social security and tax exemptions for overtime work.
- The need to simplify employment contracts and facilitate recruitment by creating a 'single employment contract', which would replace some of the numerous employment contracts currently provided by the law, and provide for a more flexible environment during the first two years of employment. During such period, the employee's rights would increase in proportion to the duration of the contract.
- Increasing the pace toward equal compensation for men and women working in France. A law enacted in the summer of 2006 had assigned a period of four years to employers and unions to achieve the goal of equal compensation. Sarkozy intends to reduce this period to two years.
- Regulating the constitutional right of strike in the area of public transportation, by imposing a duty of minimum

service to the workers employed in this sector. Similar legislation exists in other EU countries.

The new prime minister, François Fillon, has confirmed that the above topics will give rise to discussions with the unions at a national level in the summer and will be put on the agenda of the Parliament after the National Assembly elections that will take place in June 2007.

Finally, 2007 will see a re-codification of the French Labour Code, as authorised by laws enacted in 2004 and 2006. The purpose of such re-codification is to reorganise and simplify the Labour Code by eliminating obsolete and unused provisions, adding into the Code certain rules of case law, and restating provisions that are currently scattered in various parts of the code or have not been codified in a single instrument. The new Labour Code will be divided into eight distinct parts dealing, respectively, with: individual employment relationships, collective relationships, wages and hours and employee saving schemes, health and safety in the workplace, public employment policies, training, rules governing specific categories of workers (journalists, entertainment, fashion), and control of the application of labour and employment laws and regulations. The re-codification, which will lead to a renumbering of all provisions of the Code, should be completed by the end of 2007 and become effective in March 2008.

Taxation of employees

26 What employment-related taxes are mandated by law?

All employees working for an employer in France must be affiliated with the French social security system. The employer must pay social security contributions calculated according to the employee's salary.

Employee-created IP

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

The French Intellectual Property Code provides for the rules applicable to any software created by an employee in the performance of his or her duties: the invention created by the employee in the performance of his or her duties shall belong to the company and all rights shall be assigned to the company. The employee will be eligible for an additional compensation in consideration for his or her invention.

Termination of employment

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

An employer must have a real and serious cause to terminate the employment agreement and must comply with all applicable dismissal procedures (for economic grounds or personal grounds).

According to the courts, the cause must be 'real', meaning exact, precise and objective, and 'serious', which makes the continuation of the contract not possible after expiration of the notice period.

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

Whatever the cause for a contract's termination (except for gross misconduct or gross negligence), an employer must give a notice period prior to dismissing an employee. The employer may release the employee from working during the notice period and instead pay a corresponding indemnity. The indemnity is equal to the base salary, bonuses and benefits that the employee would have received if he or she were to work during the notice period.

30 In what circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

A gross misconduct (*faute grave*) as well as a gross negligence (*faute lourde*) is a legal basis for terminating an employment contract without allowing the employee to serve his or her notice period and without having to pay him or her the notice period indemnity and the severance pay.

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

The employer must pay the dismissed employee a minimum legal severance pay, provided that the employee has been employed

two years in the company. This severance pay is paid whether the grounds for dismissal are personal or economic. The severance pay is equal to one-tenth of a month's salary for each year of service increased by one-fifteenth of a month's pay per year of service longer than 10 years. The collective bargaining agreement may provide for a higher severance pay in lieu of the legal requirement.

32 Are there any procedural requirements for dismissing an employee?

Yes. The procedure to dismiss an employee is highly formalistic. The employer or its representative must call the employee to attend a preliminary meeting in order to discuss his or her potential dismissal. After this meeting, the employer must send a dismissal letter to the employee that indicates the reasons for the dismissal and the duration of the notice period.

The applicable procedure depends on the nature of the dismissal, that is, for personal reasons (including disciplinary grievances) or for economic reasons. For economic dismissal, the procedure depends on the number of employees to be dismissed as well as on the number of employees in the company.

Special procedures apply when one or more employees are dismissed for economic reasons: the employer has to consult its works council on the economic grounds. The works council has no veto power and just provides its opinion. The employer must notify the labour inspector and must look for any redeployment solution.

33 In what circumstances are employees protected from dismissal?

Employee representatives are covered by specific labour law protection: a special procedure (authorisation of the labour inspector) must be followed should the employer wish to terminate their contracts. Moreover, as a general rule, it is illegal for an employer to take into consideration an individual's sex or family situation when terminating an employment contract.

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

Yes, when an employer proposes to lay off 10 or more employees for economic reasons in any given 30-day period, a consultation with the employee representative body in the company is mandated. In companies with more than 50 employees, it is required to supply a redundancy plan to avoid some dismissals and to facilitate the employees' redeployment. The information provided to the employee representatives, and the minutes of their meetings, must be transmitted to the labour director with jurisdiction in the area where the employer is located. The individual dismissal letters may not be sent to employees before expiration of certain periods depending on the scope of the redundancy (ie, number of employees made redundant).

Dispute resolution

35 Can the parties agree to private arbitration of employment disputes?

No. If the parties agree to private arbitration, the opinion of the arbitrator will have no binding effect.

36 Can an employee agree to waive statutory and contractual rights to potential employment claims?

No, an employee cannot waive statutory and contractual rights to potential employment claims.

37 What are the limitation periods for bringing employment claims?

All claims regarding salary are subject to a five-year statute of limitation following the date of the alleged violation. All other claims are subject to a 30-year statute of limitation. As regards economic dismissal, a special one-year statute of limitation applies if it was expressly stated in the dismissal letter.

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Legislation and agencies

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

The most important German statute on individual employment law is the Civil Code, the basis of all individual employment contracts. Details of the employment relationship are governed by separate statutes, eg, by the Part-Time and Fixed-Term Employment Act, the Continuation of Remuneration Payments Act (which deals with sick and holiday pay), the Federal Vacation Act, the Working Time Act, the Protection against Dismissal Act and the Company Pension Act. The main non-discrimination statute is the General Equal Treatment Act. Relevant collective employment law statutes are the Collective Bargaining Agreement Act, the Works Constitution Act (on works councils and their rights) as well as the Co-Determination Act and the One-Third Representation Act which both deal with employee representation on the supervisory board.

2 Is there any legislation prohibiting discrimination or harassment in employment?

The Federal Constitution provides that no one shall be discriminated against or privileged due to gender, descent, race, language, homeland, origin, religion, political opinion or disability. This provision applies directly or indirectly to all employment relationships. Discrimination in employment is now specifically prohibited by the General Equal Treatment Act. The Act prohibits direct and indirect discrimination on the grounds of racial or ethnic origin, gender, religion, belief, disability, age or sexual orientation as well as harassment and sexual harassment. Age discrimination can be to the detriment of older or younger employees and is not subject to an age threshold. Different treatment may be justified by genuine and determining occupational requirements, or in the case of occupational activities within churches and similar organisations, where a person's religion or belief constitutes a genuine and legitimate occupational requirement with respect to the organisation's ethos. Different treatment on the grounds of age shall not constitute discrimination if it is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In particular, the Act allows agreements on mandatory retirement upon reaching the regular retirement age and the fixing of ages in company pension schemes. Employees who have been discriminated against are entitled to compensation of financial and non-financial damage but do not acquire a right to employment. If the employee can establish a prima facie case for discrimination, the employer bears the burden of proof that no discrimination has occurred. In addition, employers are prohibited from

differentiating in any other way among their employees without having a sufficient justification.

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

The Federal Constitution guarantees the right to privacy and the right to determine who is to receive individual data. Under the Federal Data Protection Act, an employer must collect, process and use individual data (ie, facts relating to a specific or at least identifiable individual) only if the Federal Data Protection Act or another statute or regulation so allows or orders or if the employee consents in writing, following sufficient information on the envisaged purpose of the collection, processing or use. Without employee consent, the employer may collect, store, alter, transmit or use individual data for its own purposes: if doing so serves the purpose of the employment relationship; or to the extent it is necessary to safeguard the employer's legitimate interests, provided that there is no reason to assume that the employee's interests in the omission of the processing or use prevail. Third parties receiving personal data from the employer, in particular affiliated companies, may process or use such data only for the purposes for which they were transmitted. Certain sensitive information, eg, regarding health, is subject to additional protection. Transmission of personal data to countries other than member states of the European Economic Area is subject to further requirements. Employees have to be informed of the storage of their personal data and are entitled to obtain information as to which data is stored, to whom they are transmitted and the purpose of storage. Subject to de minimis thresholds, employers have to appoint a data protection commissioner.

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

Law enforcement by government entities plays a role only in certain areas of employment law. The most important one is occupational safety and health where jurisdiction lies with state authorities. The Federal Employment Agency has some limited enforcement powers, namely under the Temporary Employment Act. Illegal employment, ie, employment without payment of income tax and social security contributions, is pursued by the customs administration which is supported by the social security providers.

Worker representation

- 5** Is there any legislation mandating the establishment of a works council or workers committee in the workplace?

A works council may be established in any operation that regularly employs at least five permanent employees who have reached the age of 18 and of whom at least three have six months of service. Works council establishment is voluntary. A works council is only established if the employees, even a minority among them, take the necessary steps. Works councils have a variety of statutory rights in relation to social, personnel and economic matters, ranging from information and consultation to full co-determination.

Background information on applicants

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

As a principle, background checks are allowed to the extent that the employer is entitled to obtain the relevant information directly from the applicant, irrespective of whether or not the employer conducts the check himself or hires a third party. Within these limits, employers may check the background of an applicant by contacting his previous employers. They may ask an applicant for criminal or credit records only if such information is relevant for the specific position; they are not entitled to obtain such records directly from the relevant registers. Security checks may be conducted if the position is security sensitive. Psychological, personality and graphological tests require the applicant's consent whereas polygraph tests are illegal. Background checks regarding union membership are not allowed, checks regarding political or religious affiliation are only allowed if the employer is a political or religious institution.

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

The employer may request a medical examination only to the extent that such an examination is relevant for the applicant's physical ability to perform the work and only with the applicant's consent. The consent requirement, however, is of little help to the applicant as refusal to consent may lead to a rejection of the application. HIV tests may be required only if the work bears an increased risk of infecting others. Genetic testing is widely regarded as illegal.

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

Alcohol and drug tests may be required if the applicant, by drug- or alcohol-related misconduct, could endanger either himself or herself or others or cause substantial property damage. Such tests require the applicant's consent. Refusal to consent may lead to a rejection of the application.

Hiring of employees

- 9** Are there any legal requirements to give preference in hiring to particular people or groups of people?

Employers with at least 20 employees are required to employ disabled persons on at least 5 per cent of the positions in their operations. However, non-compliance with this obligation does not give a disabled person a right to be hired; instead, such person may claim an adequate compensation under non-discrimination law.

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

The law does not require employment contracts to be in writing. However, if the contract is for a fixed term, such limitation in time must be in writing in order to be valid. In practice, most employers use written employment contracts. In doing so, they can comply with the Documentation Act which would otherwise require them to hand over to the employee a written summary of the essential terms of the employment relationship within one month of its commencement. The essential terms are as follows:

- the names and addresses of the parties;
- the employment commencement date;
- for fixed-term contracts, the envisaged term of employment;
- the place of employment or, if the employee will not be employed at only one location, the information that the employee may be required to work at various locations;
- a brief characterisation or description of the work to be performed;
- the composition and the amount of remuneration including all components as well as their due dates;
- the agreed working time;
- the annual vacation;
- the notice periods; and
- a general reference to applicable collective bargaining and works agreements.

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

Fixed-term employment contracts are permitted if the limitation in time is justified by a reasonable cause. A reasonable cause exists in particular if the operational need for work is only temporary, if the employee replaces another employee (eg, in case of illness) or if the limitation is for a probationary period. Fixed-term employment of new employees is allowed for a maximum term of two years and a fixed-term employment contract may be extended up to three times, subject to an overall maximum term of two years. The maximum term is four years for newly established undertakings within four years of establishment. Specific statutes govern fixed-term employment during parental leave, with scientific and artistic university staff and with medical practitioners in further education.

- 12** What is the maximum probationary period permitted by law?

Employment contracts may provide for a probationary period of up to six months. An extension is only possible if a shorter period has initially been agreed, only up to six months in total and only by agreement. During the probationary period, a notice period of two weeks applies.

13 To what extent are covenants not to compete valid and enforceable?

An employee must not compete with the employer during the employment relationship. Post-contractual covenants not to compete are only enforceable if they have been agreed in writing and if the employer has agreed to pay a compensation of at least 50 per cent of the employee's most recent pay and benefits for the term of the covenant which must not exceed two years. A post-contractual covenant not to compete is unenforceable to the extent that it is not justified by the employer's legitimate business interests or makes the employee's professional advancement unreasonably difficult.

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

An employee is defined as someone who, on the basis of a contract under private law, is obliged to work in someone else's services. Contrary to an independent contractor, who is essentially free to determine his activities, his hours and his place of work, an employee is integrated into the employer's operational organisation and subject to the employer's instructions regarding the contents, performance, time, duration and place of work. If the wording of the contract and its practical implementation deviate from each other, practice prevails over wording. Independent contractors who are economically dependent on the employer and, comparable to employees, in need of social protection are regarded as employee-like persons to whom some employment statutes apply as well.

Foreign workers**15** Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity to a related entity?

Short-term visas, ie, visas for periods of up to three months, are not subject to numerical limitations. As regards employees transferring from a foreign corporate entity to a related German entity, visas are available only for certain qualified employees, in particular employees with university or similar education and, if employment in Germany is absolutely necessary for the preparation of foreign projects and the employee will work abroad in connection with the implementation of such project, employees whose qualification is comparable to a German skilled worker and who have specific, especially company-specific, know-how. The maximum visa period is three years. Employees from other EU or EEA countries (except those having joined the EU in 2004 or later) or Switzerland do not require a visa for employment in Germany.

16 Is spousal work authorisation available?

Subject to certain conditions, spouses of foreign employees are entitled to a residence permit that includes permission to work. For example, in the event of subsequent family immigration of the spouse and one or more minors, the employee must have the necessary residence permit and sufficient housing space. Spouses of employees from other EU or EEA countries (except those having joined the EU in 2004 or later) or Switzerland who do not have the citizenship of one of these countries automatically receive an EU residence permit if they live with the employee. This EU residence permit includes permission to work.

17 What are the rules about having a work-authorized workforce and what are the sanctions if you do not?

Employees from other EU or EEA countries (except those having joined the EU in 2004 or later) or Switzerland do not require a residence permit. Employees from other foreign countries require a residence permit that includes permission to work. The grant of such residence a permit is subject to detailed statutory requirements and, in principle, limited to certain occupations or categories of employees. The residence permit usually has to be applied for at the relevant German embassy before entering Germany. The embassy will involve the local foreigners' office and the federal employment agency, if necessary. Employment without the necessary residence permit constitutes an administrative offence. The maximum fine is €500,000 for the employer and €5,000 for the employee.

Terms of employment**18** Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The maximum daily working time from Monday through Saturday is eight hours. It may be increased to 10 hours if an average of eight hours per day, ie, 48 hours per week, is not exceeded within a period of six months or 24 weeks. Work on Sundays and public holidays, in principle, is prohibited although numerous exceptions apply. An employee is not entitled to opt out of these restrictions.

19 What categories of workers are entitled to overtime pay and how is such pay calculated?

German law does not provide for statutory overtime pay. Instead, entitlement to and calculation of overtime pay are regulated by collective bargaining agreements, works agreements or individual employment contracts (or both). Employment contracts with higher paid white-collar employees often provide that any overtime is compensated by the regular salary. It is, however, questionable if such clauses are enforceable.

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

Employees are entitled to a paid minimum vacation of 24 working days per year on the basis of a six-day week, which translates into 20 working days in case of a five-day week. During the first six months of the employment relationship, vacation accrues at a rate of 1/12 per completed month. After six months of service the employee is entitled to the full annual vacation. Disabled employees are entitled to five days paid additional vacation (on the basis of a five-day week).

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

An employee's obligation to work discontinues if the employee is unable to work due to illness. The employee is obliged to present a medical certificate for any inability to work that lasts more than three calendar days. After four weeks of service, an employee is entitled to sick pay for a period of up to six weeks for the same illness.

22 In what circumstances may an employee have the right to take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Employees are entitled to parental leave if they live with a child, care for it and educate it. Parental leave can be taken until the child's third birthday. With the employer's consent up to 12 months' parental leave may be taken after the child's third but prior to its eighth birthday. Parental leave is unpaid, however employees are entitled to work up to 30 hours per week during such leave. Paid leaves of absence exist only if an employee is prevented from work for personal reasons through no fault of his or her own for a relatively short period of time. Examples include major family events like weddings, medical consultations and home care for close relatives who are sick, in particular for children up to 12 years.

23 What employee benefits are mandated by law?

Employees are regularly members in the social security system, comprising statutory pension, health, nursing care, unemployment and occupational accidents insurance. Social security contributions are borne in equal shares by the employer and the employee, with the exception of the occupational accidents insurance the contributions to which are solely borne by the employer. Social security benefits include retirement pensions, disability pensions, health care and nursing care as well as unemployment benefits. Another statutory benefit is the maternity allowance which employers have to pay to women for a period of six weeks before and eight weeks after childbirth.

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

Employees with more than six months of service may request a reduction of their working time. Employers who employ at least 15 employees have to accept such request to the extent that operational reasons do not require otherwise. Such operational reasons exist in particular if the reduction materially affects the organisation, workflow or safety in the operation or if it causes unreasonably high costs. A similar right exists for employees who are entitled to parental leave. Specific statutory provisions apply to on-call work and job sharing. Part-time and fixed-term employees must not be discriminated against based on their type of employment. Pre-retirement part-time work is subject to specific requirements under a separate statute.

Liability for acts of employees

25 Under what circumstances may an employer be held legally liable for the acts or conduct of its employees?

Within the framework of a contractual relationship, an employer is liable for any negligent or wilful breach of contract caused by an employee he uses to perform his obligations under the contract, provided that an intrinsic factual link exists between the employee's act and the breach. The employer is not liable for any act the employee commits only on occasion of the performance of the contract, eg, if he commits a criminal offence that is in no way linked to his duties. As regards liability in tort, the employer may excuse himself by proving proper care and diligence in selecting the relevant employee. The effect, however, of such an excuse is limited due to the employer's obligation to indemnify the employee. Such obligation depends on the degree of the employee's fault: where there is a low degree of negligence

– full indemnification; where there is ordinary negligence – partial indemnification; and where there is gross negligence or wilful act – usually no indemnification. Personal injury to employees caused by an occupational accident for which another employee is responsible is covered by the insurance for occupational accidents. Employers are liable for such damage only if they have acted wilfully or with gross negligence.

Taxation of employees

26 What employment-related taxes are mandated by law?

The employee's remuneration is subject to income tax and to the solidarity surcharge on such tax. Income tax and solidarity surcharge must be withheld and paid to the tax authority by the employer but borne by the employee.

Employee-created IP

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

The Employee Invention Act governs inventions which are capable of patent or utility patent protection. The employee is obliged to inform the employer of any invention he has made and to offer such invention to the employer first. If the employer decides to acquire such invention, the employee is entitled to compensation to be agreed between the parties. Failing agreement, the employee may apply for determination of the compensation by the court. The Employee Invention Act cannot be deviated from to the employee's detriment by mutual agreement.

Termination of employment

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

If an employer employs more than 10 employees, and if the relevant employee has more than six months of service, notice to terminate may be given only if it is justified by reasons relating to the employee's person or conduct or by urgent operational requirements. A typical reason relating to the employee's person is illness, eg, long-term illness with no reasonable chance of recovery or repeated short-term illnesses causing unreasonably high sick-pay costs. Termination for reasons relating to the employee's conduct requires a breach of contract in spite of a prior warning relating to a similar breach. Urgent operational requirements require that the employer's actual headcount exceeds the required headcount, that the employee cannot be further employed on another vacant position, even after reasonable further education or under modified terms and conditions, and that the employer, in selecting the employee among comparable employees, has sufficiently taken into account the length of service, age, number of dependents and disability. Employees whose continued employment is required by legitimate operational interests, eg, due to their knowledge, abilities and performance or to ensure a well-balanced personnel structure, are excluded from this social selection. The Federal Labour Court has developed detailed case law in relation to all of these requirements.

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

Written notice to terminate must be given prior to dismissal. The standard statutory notice period is four weeks to the 15th or the end of a calendar month. It increases with the length of service up to seven months to the end of a month after 20 years of service. Different notice periods may be agreed in collective bargaining agreements or, to a limited extent, employment contracts. Pay in lieu of notice is only possible on the basis of a separate agreement with the employee. Such agreement, however, is usually not advisable as the employee's unemployment benefits are thereby negatively affected.

- 30** In what circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee extraordinarily with immediate effect only if facts exist on the basis of which the employer, taking into account all circumstances of the individual case and balancing the interests of the parties, cannot reasonably be expected to continue the employment relationship until the end of the notice period. Notice to terminate must be given within two weeks from the employer becoming aware of the relevant circumstances. Detailed case law has evolved over time. Circumstances usually justifying termination with immediate effect include all types of fraud to the employer's detriment, eg, in relation to working time or expenses.

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

Although most labour court proceedings are settled against payment of a negotiated severance, a right to severance exists only in particular cases. An employer who has given notice to terminate for urgent operational requirements may offer the employee, in the notice, a severance if the employee does not bring an action in court within the statutory period of three weeks. Upon expiry of the notice period, the employee is then entitled to a severance of 0.5 monthly remunerations per year of service. Such offer, however, is usually not advisable for the employer. Another case may arise in labour court proceedings. If the notice is invalid, but if the employee cannot be reasonably expected to continue employment, he may apply for dissolution of the employment relationship by the court against payment of a severance. The employer may file such application if facts exist on the basis of which continued employment cannot be expected to benefit the employer's operational interests. Such severance may amount to up to 12 monthly payments (or 15 monthly payments for employees aged 50 with at least 15 years of service; and 18 monthly payments for employees aged 55 with at least 20 years of experience). Monthly remuneration is defined as pay and benefits in the month in which the employment relationship ends, based on the employee's regular working hours.

- 32** Are there any procedural requirements for dismissing an employee?

The works council must be informed and consulted with prior to giving notice. It has seven days to raise concerns (three days in case of extraordinary termination). A notice to terminate that is given without prior information of, and consultation with, the works council is invalid. Information which is available but not given to the works council at this stage cannot be used by the employer to justify the termination in any labour court proceed-

ings that may follow. Government agency approval is required for specific groups of employees, eg, disabled employees, pregnant employees and employees on parental leave.

- 33** In what circumstances are employees protected from dismissal?

Disabled employees may be dismissed only after prior approval by the integration office. The dismissal of female employees is prohibited during pregnancy and a period of four months after childbirth if the employer, when giving notice, was aware of the pregnancy or if he is informed thereof within two weeks from receipt of the notice. The relevant state agency may approve a termination for non-pregnancy-related reasons in exceptional cases. Similar protection exists for employees on parental leave. Works council members must not be given notice during their term of office and one year thereafter unless reasons for extraordinary termination exist and the works council or, in lieu of it, the labour court, has approved such termination. Candidates for works council elections and election board members enjoy similar protection during the election process and for a period of six months thereafter.

- 34** Are there special rules for mass terminations or collective dismissals?

Collective dismissals often constitute so-called operational changes which the employer may implement only after having tried to achieve an agreement with the works council. If the works council refuses to enter into such an implementation agreement, the employer has to apply to a conciliation board and postpone the implementation until such board has met, in order to avoid employee claims for damages resulting from any premature implementation. The whole process of trying to achieve agreement may take up to six months, in exceptional cases even more. In case of an operational change, the works council is also entitled to demand a social plan, providing in particular for severances to the employees to be dismissed. Failing agreement between the employer and the works council, the conciliation board may determine the financial volume and the details of the social plan. In implementing a collective dismissal, the employer is obliged to inform and consult with the works council and to notify the Federal Employment Agency before he dismisses within 30 calendar days: more than five employees in operations regularly employing more than 20 but less than 60 employees; at least 10 per cent of the employees or more than 25 employees in operations regularly employing at least 60 but less than 500 employees; or at least 30 employees in operations regularly employing at least 500 employees.

Dispute resolution

- 35** Can the parties agree to private arbitration of employment disputes?

Employer and employee cannot submit a dispute to private arbitration.

- 36** Can an employee agree to waive statutory and contractual rights to potential employment claims?

An employee cannot in advance waive statutory rights, rights under collective bargaining agreements or works agreements. Even if a specific right, eg, to sick pay or vacation, has arisen under a statute the employee is usually not entitled to waive it. Rights resulting from a collective bargaining agreement,

eg, remuneration claims, can be waived only in a settlement approved by the parties to the collective bargaining agreement, rights resulting from a works agreement only with the works council's consent. Rights under an individual employment contract may be waived.

37 What are the limitation periods for bringing employment claims?

The standard limitation period for employment claims is three years and commences upon the end of the year in which the claim arises. However, a variety of other limitation periods applies to specific claims, notably to actions in court challenging a notice to terminate or the validity of a fixed term. The limitation period for such actions is three weeks from receipt of the notice or expiry of the fixed term.

Update and trends

What impact the new General Equal Treatment Act and the underlying EU anti-discrimination directives will have on German employment law and practices, particularly in the area of age discrimination, remains to be seen. The German parliament's reluctance to implement substantial changes means that the country will likely fall short of certain requirements of the EU directives. Whether this will result in the direct application of the EU directives to private employers or whether private employers can still rely on the Act (until amended in accordance with the directives) is an open issue.

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