# THE EMPLOYMENT LAW REVIEW

Twelfth Edition

**Editor**
Erika C Collins

THE LAWREVIEWS

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# UKRAINE

*Svitlana Kheda*[1]

## I INTRODUCTION

Ukrainian labour law has inherited a significant number of concepts and approaches from the Soviet era. Despite numerous changes, the Labour Code (of 10 December 1971), which is the key piece of legislation regulating employment matters, remains highly employee-focused but is full of pitfalls. Since Ukraine became independent, specific statutes have been adopted to deal with labour safety, remuneration, vacation, collective bargaining agreements, employment of the population and employment of foreign nationals, but a replacement of the Labour Code is necessary to enable Ukrainian labour law to adapt to the needs of a market economy.

Labour disputes are considered by labour disputes commissions (LDCs) and courts of general jurisdiction.

LDCs are created in companies with 15 or more employees and members are elected at a general meeting of the labour collective. The LDC hears a case if an employee fails to settle a dispute with the employer either directly or through a trade union. An LDC decision can be appealed in a local court of general jurisdiction. However, certain categories of labour disputes have to be considered directly by the courts (e.g., when a company has no LDC and in cases of wrongful dismissal). A new trend in Ukraine is to settle labour disputes through mediation or quasi-mediation, especially those relating to compliance violations.

There are a number of government agencies responsible for supervising and controlling labour law compliance, including the Ministry of Social Policy of Ukraine, the State Labour Service and the Ministry of Health Protection. The State Employment Service is responsible for issuing working permits to foreign employees and the State Migration Service is responsible for providing foreign employees with temporary residence certificates. The Ukrainian parliament's ombudsman (the Ombudsman) is the authorised state agency in respect of personal data protection.

## II YEAR IN REVIEW

In general, 2020 was remarkably poor for developments in employment law. In the main, various state agencies (such as the State Labour Service and the State Fiscal Service) were issuing their official interpretations of Ukrainian legislation concerning the regulation of working time, employee transfers, combining jobs (i.e., one employee holding two positions

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with the same employer), employee evaluation, overtime, workforce migration, employee dismissal, employee compensation, vacation, workplace health and safety, and other key employment law issues.

Several amendments have been introduced to the Labour Code, including adding public servants to the categories of employees who can be dismissed at the employer's initiative without the mandatory prior consent of a trade union, providing for special rules for public servants' redundancy, extending a statutory maximum term for employees' unpaid leave for the duration of a quarantine established by government, and amending the Labour Code's provisions in respect of liability for violation of labour legislation.

On 4 March 2020, the Labour Code was supplemented with a new legal ground for dismissal of employees at the employer's initiative, namely terminating the employment agreement when an employee has a permanent, real or potential conflict of interest that cannot be resolved in any other way prescribed by the Law of Ukraine on Preventing Corruption (Article 41, Part 4[1]). At the same time, Article 32 of the Labour Code was supplemented with a prohibition for employers to fire or otherwise retaliate (threaten to retaliate) against employees who reported possible facts in respect of corruption, corruption-related offences or other violations envisaged by the Law of Ukraine on Preventing Corruption.

On 30 March 2020, Article 60 of the Labour Code was amended to introduce the notions of flexible working hours and remote working (teleworking) to the Labour Code. Even though these changes were brought about by the government's response to the covid-19 pandemic, they will remain valid in post-quarantine times, providing more flexibility to employers and employees in regulating working regime issues.

On 13 April 2020, the Ministry of Finance issued its Order No. 155 on Approval of Changes to the Instruction on Business Trips within Ukraine and Abroad. This Order, in particular, clarified that an employer shall deposit funds for business trip-related expenses to a payment card bank account of an employee before a business trip.

## III SIGNIFICANT CASES

On 31 August 2020, the Cassation Civil Court of the Supreme Court of Ukraine ruled in case No. 359/5905/18 that if an employer and an employee reached an agreement to mutually terminate the employment relationship between them under Article 36, Part 1, Item 1 of the Labour Code, and an employee later changes his or her mind to leave an employer, the wish of the employee shall not be satisfied automatically, and the parties would have to renegotiate the employment termination (i.e., an employer is entitled to refuse to retain an employee who initially agreed to the mutual agreement regarding termination).

## IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

### i Employment relationship

An employment relationship is established in Ukraine by an employment agreement between an employer and an employee. The agreement contains the terms of employment, including the title of the position, a description of the work to be performed by the employee, an obligation for the employer to ensure adequate working conditions and the salary payable for the performance of employment duties. The Labour Code provides that employment agreements shall generally be concluded in writing and establishes some specific instances when an employment agreement must be in writing (e.g., with employees under 18 years

of age or with any employee insisting on this). Many Ukrainian companies (especially those with foreign participation) have been entering into formal written employment agreements with their employees more frequently.

In general, employment agreements are concluded for an indefinite term. Even though Ukrainian labour law enables an employer to conclude fixed-term employment agreements with its employees, these should be concluded only with those employees whose work is by nature of a limited duration (i.e., when it is possible to estimate the last day of employment). It is also possible to enter into an employment agreement 'until the completion of agreed work' when it is impossible to determine the period necessary to complete the limited scope of agreed work. An employee can also state in his or her employment application that he or she is asking to be employed for a fixed term for family-related or other personal reasons.

Ukrainian labour law also provides for a special form of employment agreement called an employment contract, which may be concluded either for a fixed term or for an indefinite period. The employment contract, unlike an ordinary employment agreement, has the following features:

*a* it allows the employer to establish an employment relationship for a fixed period even when the nature and conditions of employment would not ordinarily warrant the conclusion of a fixed-term employment agreement;

*b* it may contain reasons for the discharge of an employee in addition to the list of grounds provided in the Labour Code; and

*c* an employer and an employee may agree in the employment contract on their additional rights, obligations and liabilities, conditions of remuneration apart from those established by law, provided that the additional terms do not diminish the employee's rights as guaranteed by law.

The use of employment contracts is limited to instances specifically provided for by the laws of Ukraine, including in certain branches of the economy, for certain types of companies or for certain positions (e.g., for company directors, teachers, scientific research employees and paralegals).

A written employment agreement or contract can be concluded before or on the date that the employer issues a hiring order and becomes effective on the date of the hiring order. It must be signed by the employee as the party to the employment agreement or contract.

The parties can amend the employment agreement or contract at any time. To make any changes to the essential terms of employment (compensation, working hours, etc.), the employer must issue an order notifying the employee of the changes at least two months in advance.

Irrespective of the form of an employment agreement, the employer must issue an internal hiring order to document commencement of the employment relationship, stating the employee's position and salary. The employer must also notify the State Fiscal Service of all hired employees. Failure by the employer to comply with this statutory requirement may result in a financial liability, currently 4,723 hryvnia.

In addition, the employer must enter the relevant record in an employee's labour book. The labour book records the employment activity and must be kept by the employer for each employee working for more than five days.

### ii Probationary periods

When concluding an employment agreement, the employer may set a probationary period, unless the employee belongs to any of the categories of employees not allowed by law to be subject to a probationary period (e.g., pregnant women, single mothers of children under 14, temporary or seasonal workers and those on a fixed-term employment agreement). The probationary period cannot exceed one month for blue-collar workers or three months for other employees. In certain circumstances (e.g., for state officials), the probationary period can be up to six months, subject to the trade union's consent. The duration of the probationary period does not include the days when an employee does not work, irrespective of the reasons for that.

Considering the complexity involved in dismissing employees under Ukrainian law, employers frequently use the probationary period as a legal and practical way to ascertain the suitability of a candidate for the position by making a candidate's employment subject to the successful completion of the probationary period. If this is the case, the terms and conditions of the probationary period must be stated in the hiring order and the employer can dismiss a non-performing employee within this probationary period merely by stating that the results of his or her probation are not satisfactory.

The law obliges the employer to issue a dismissal notice to an employee on probation three days in advance. However, the employee is not required to provide the employer with any advance notice of his or her intended departure.

### iii Establishing a presence

Generally, although the Ukrainian authorities do not welcome such engagements as no Ukrainian payroll taxes apply to them, foreign companies without an official registered presence in Ukraine are not directly prohibited from hiring Ukrainian employees, provided that they do not have a permanent establishment (PE) in Ukraine (as discussed below). Foreign companies may also use human resources agencies to hire Ukrainians to avoid registration with the Ukrainian tax authorities. In these circumstances, these agencies would be the *de jure* employers of the Ukrainian employees, and would be responsible for reporting and paying the Ukrainian payroll-related taxes on behalf of those employees.

If the salary and social benefits are paid by a non-resident employer to its Ukrainian employee and this employer has no PE in Ukraine, the salary and social benefits will only be subject to the Ukrainian personal income tax and military tax payable individually by the Ukrainian employee annually.

For the purposes of taxation, the PE of a foreign entity may be created through either the acquisition of a fixed place of business by the foreign entity in Ukraine, or a dependent agent, commissioner or other resident acting in a similar capacity, provided that the activities are performed solely for the benefit, in the interest and at the expense of one (or several related) non-residents. At the same time, a non-resident shall not be deemed to have a PE in Ukraine merely because it conducts business in Ukraine through a broker, general commission agent or any other agent of independent status, provided that those persons are acting in the ordinary course of their business, and at market (regular) terms and conditions (unless the broker, general commission agent or any other agent acts in the ordinary course of its business and at market (regular) terms and conditions but for the benefit, in the interest and at expense of one (or several related) non-residents). In addition, a PE arises when a foreign company provides services in Ukraine, including consulting services but excluding

the provision of personnel, through its employees hired for this purpose (within one project or several related projects) for longer than 183 days during any 12-month period. The foregoing is valid unless an applicable double tax treaty to which Ukraine is a party provides otherwise.

A foreign company generally may engage an independent contractor under a service agreement without registering with the Ukrainian state authorities, unless the engagement creates a PE. If the foreign entity's activity through an independent contractor creates a PE in Ukraine, the foreign entity may be required to register (or be registered at the discretion of the tax authorities without filing any applications or documents) as a taxpayer in Ukraine and subject to regular taxation in Ukraine.

Finally, if a Ukrainian individual is not registered as a Ukrainian private entrepreneur prior to entering into any contracts with foreign businesses, there is a risk that a contract that has been entered into by the individual may be declared invalid, resulting in penalties being imposed by the Ukrainian tax authorities on the responsible person.

Employees, including foreign nationals working for Ukrainian companies, are required to be paid a salary, sick leave allowance, annual holiday pay and certain other statutory benefits depending on the employee category. Statutory benefits must be declared by employers. They are also responsible for withholding personal income tax and military tax at source, unless the benefits are exempt (e.g., maternity leave compensation), as well as accruing the unified social tax at the employers' cost.

## V RESTRICTIVE COVENANTS

The contractual obligation of an employee not to work for a competitor either during or after termination of his or her employment as part of a non-compete clause is not enforceable in Ukraine.

One of the basic employee rights stipulated in the Labour Code is the right to freely choose a profession, occupation and job. Free choice of the type of employment activity is also guaranteed by the Labour Code.

Ukrainian labour law is very protective of employees, meaning that, even though the Labour Code allows an employer to conclude employment contracts with certain categories of employees where provisions that differ from those envisaged by the Labour Code may be included, these provisions must not worsen the employees' position as compared with the Labour Code, as these provisions will then be considered null and void.

## VI WAGES

### i Working time

The number of working hours for full-time employees cannot exceed 40 hours per week, other than when a non-fixed working day (or week) has been established, as for certain categories of employees. The duration of the working day before a holiday or a weekend shall be reduced by one hour. In the case of a six-day working week, the duration of the working day before the weekend cannot exceed five hours.

Ukrainian law establishes, among other things, the following working hour regimes:

*a* normal business hours, when overtime is paid at double the standard rate of pay and employees are entitled to a vacation allowance of 24 calendar days per year;

*b* non-fixed working day, which may be established for employees whose working day cannot be estimated in advance. These employees are entitled to a vacation allowance of 24 calendar days per year and to additional vacation of up to seven working days;
*c* flexible working hours; and
*d* remote working (teleworking).

The Labour Code generally allows night work, provided that working time at night is reduced by one hour. Employees working at night receive an increase in their base salaries that must not be less than 20 per cent of their base salary for each hour of night work. It is prohibited to engage pregnant women and employees under 18 years old, among others, for night work.

### ii Overtime

The general rule is that overtime is not allowed. The Labour Code provides an exhaustive list of exceptions of when an employee may be required to work overtime. The maximum limit of overtime work is 120 hours per year. Overtime work also shall not exceed four hours over two consecutive days for the same employee. The employer must keep a register of overtime work.

Employers are prohibited from engaging in overtime work, among others, pregnant women, employees under 18 years old and employees who are full-time students receiving secondary or professional secondary education during term-time.

An employee's consent is required for overtime work if the employee has a child under 14 years old. A trade union must give permission for each instance of overtime work. Employees are entitled to extra remuneration for overtime work at double the standard rate for work performed in excess of the daily, weekly or monthly limit. The law prohibits compensating overtime work with only additional vacation or leave of absence.

## VII FOREIGN WORKERS

The majority of labour law provisions apply equally to Ukrainian and foreign nationals. Thus, foreign employees enjoy the same benefits, guarantees and protections available to Ukrainian employees under Ukrainian labour laws and employers' internal labour rules, policies and procedures. However, special procedures exist for hiring foreign nationals that must be followed to avoid administrative liability or even deportation of a foreign national.

In accordance with Ukrainian law, a Ukrainian employer must obtain a working permit for each foreign national that it intends to hire. However, there are some exceptions to this rule; in particular, foreign nationals permanently residing in Ukraine or working for the Ukrainian representative offices of foreign companies do not require working permits. As a foreign national may be employed by several Ukrainian employers simultaneously, each employer must obtain a separate working permit for the foreign national. An application for a working permit and the supporting documents are submitted by the employer to the respective employment centre through the centres for provision of administrative services.

A decision on the issuance of a working permit is granted by the respective employment centre within seven business days of the date of receipt of the required documents from the employer. The employer shall pay the fee for working permit issuance within 10 business days of obtaining the decision of the respective employment centre.

A working permit may be issued for a term of up to three years for:
*a* seconded employees;

*b* special categories of foreign employees, namely highly paid professionals with a salary of at least 50 statutory minimum salaries,[2] shareholders or beneficiaries of Ukrainian legal entities, holders of diplomas from the world's top-ranked universities, and creative and IT professionals; and

*c* intra-company transferees.

For all other foreign employees, a working permit may be issued for up to one year, with the possibility of extension.

The employer shall enter into an employment agreement (contract) with the foreign employee within 90 calendar days of the issuance of the working permit and shall submit a certified copy of the employment agreement (contract) to the respective employment centre within 10 days of its execution.

The salaries of foreign employees working for public or charity organisations and educational establishments may not be less than five statutory minimum salaries and the salary of all other categories of foreign employees may not be less than 10 statutory minimum salaries. The minimum salary requirements are not applicable to the special categories of foreign employees (see point (b), above).

Termination of an employment agreement (contract) with a foreign national results in termination of the working permit. Thus, every time a foreign national changes his or her place of employment in Ukraine, the new employer must obtain a new working permit for him or her.

If the employment relationship with a foreign national is prematurely terminated, the employer shall notify the respective employment centre, which initiates cancellation of the working permit.

According to Ukrainian immigration laws, foreign nationals employed in Ukraine, in particular on the basis of a working permit, are not subject to the general regulation of a foreign national's stay in Ukraine. These foreign employees are deemed to be lawfully staying in Ukraine after receiving a temporary residence permit, regardless of the duration of their stay.

Violation of working permit and immigration regulations may result in liability for the employer, its executives and the foreign employee (up to his or her deportation from Ukraine).

The employer of a foreign national is also his or her tax agent for the purpose of salary payments.

## VIII GLOBAL POLICIES

Ukrainian law provides that a number of mandatory employment-related regulations can be adopted by Ukrainian companies, including a collective bargaining agreement, internal labour rules (internal rules), labour safety regulations and some other documents, depending on the specifics of a particular company's business.

The most important disciplinary documents are the internal rules negotiated by the employer and the company's trade union, and approved by the labour collective. Newly hired employees have to acknowledge their awareness of the contents of the internal rules by signing a statement to that effect. The internal rules do not need to be filed with, or approved by, any government authorities.

2 The statutory minimum salary as of 1 January 2021 is 6,000 hryvnias.

All employment-related documentation, including the internal rules, must exist in Ukrainian, notwithstanding the company's form or ownership.

As a matter of practice, the internal rules and other internal labour policies and procedures adopted by the company are incorporated into written employment agreements or contracts by reference. However, this is not required by law.

The internal rules have to be easily accessible by all employees. They can be placed on the company intranet, but the original hard copy should also be kept.

Ukrainian companies often issue other optional internal regulations (e.g., regarding discrimination, sexual harassment or personal data protection) in accordance with their global corporate policies. The Anti-Corruption Law provides for mandatory and optional compliance policies (depending on the employer), and establishes the duty of all employees of all Ukrainian companies to comply with anti-corruption laws.

The global policies are not *per se* enforceable in Ukraine and must be incorporated into the practice of a Ukrainian subsidiary as local policies.

## IX PARENTAL LEAVE

Ukrainian employment laws make a distinction between leave taken for pregnancy and childbirth (childbirth leave) and leave taken to care for a child until he or she reaches three years of age (maternity leave).

Childbirth leave must be provided to all women based on a medical opinion and extends from 70 calendar days before the expected date of childbirth to 56 calendar days after the date of childbirth (or 70 calendar days if two or more children are born or the delivery is complicated). This leave is paid for by the employer. All 126 (or 140) calendar days of childbirth leave are provided to all women in full, notwithstanding the actual number of days taken before childbirth.

A woman or her child's father (or the grandparents or any other relative who is minding the child) may take maternity leave up until the child, as a general rule, is three years old. This leave is paid for by the government only. However, employers are entitled to provide additional partially paid or unpaid maternity leave after the expiry of the statutory three-year term. During maternity leave, women (or a child's father, grandparents or other relatives) may choose to work part-time or from home.

Pregnant women and women with children under three years old are a specially protected group of employees (Protected Employees) and it is prohibited for them to be dismissed at the employer's initiative except in the event of the employer going into liquidation. Even then, however, an employer has to look for and offer Protected Employees alternative employment prior to dismissing them. The same is true if Protected Employees are to be dismissed owing to the expiry of a fixed-term employment agreement. Until a new job is offered, an employer has to pay a Protected Employee's average salary, but only for up to three months after the expiry of a respective employment agreement.

## X TRANSLATION

Under the Law on Ensuring the Functioning of the Ukrainian Language as the State Language, adopted on 16 July 2019 and revised on 2 January 2020, employment agreements (contracts) must be concluded in Ukrainian (the state language), although parties are permitted to translate agreements into any other language. Furthermore, under this Law, no

one can be mandated to use any language other than Ukrainian during the performance of their employment duties, with the following exceptions: (1) rendering services to consumers and other clients who are foreign nationals or stateless persons; or (2) creating legal, technical, information and advertising texts, other notifications and documents (including verbal ones) if addressed to foreign nationals or stateless persons, legal entities, bodies and officials of foreign states and international organisations. The Law requires all official documents that certify a citizen's identity and legal status (such as passports) to be issued, as a general rule, in Ukrainian.

In practice, Ukrainian subsidiaries of multinational companies prepare and approve bilingual documents (i.e., in Ukrainian and the language of the country of the company's headquarters, with the Ukrainian text being given priority if there are any discrepancies between the versions). The translation of company documents (including employment agreements, regulations, rules, procedures and any other employment-related documents) into a foreign language has to be certified by a notary only in certain cases, including if they are official documents or they have to be notarised. Therefore, no translation of company employment documentation (except for the documents certifying employees' identity and legal status) is required to be certified.

Even though the Law on Ensuring the Functioning of the Ukrainian Language as the State Language does not specify the language to be used by Ukrainian employers, it is likely that law enforcement authorities and courts will be applying the statutory requirement of Ukrainian being the mandatory language for employment agreements and all employment-related documents issued by Ukrainian employers. Moreover, there is a risk that a company's employment-related documentation, if it exists only in a foreign language, will not be enforceable in Ukraine in most instances. However, it is possible that a court, when hearing a case, may order an official translation of any foreign language documents (e.g., personnel policies and procedures) to protect the rights and legitimate interests of the affected employee.

## XI EMPLOYEE REPRESENTATION

Ukrainian law provides for trade unions as the only representative bodies of employees at company level. If there is no trade union established within a company, some of its functions may be performed by elected employees' representatives. In general, their functions are limited to the conclusion of collective bargaining agreements, the organisation of work and representation of employees before the employer.

Ukrainian employees may freely and without any approval establish trade unions in any company. Foreign nationals may not establish trade unions, but they may become members of an existing trade union if it is specified in a respective internal regulation of a trade union. A trade union functions within a company through its elected body or representative. There are no specific requirements regarding the number of employees in a company or the company's ownership for establishing a trade union.

Normally, employees establish one trade union in a company to represent employees in negotiations with the employer and protect their labour rights. However, in large companies, a few trade unions may be established. In such cases, they should form a joint representative body with the purpose of signing a collective bargaining agreement.

The law provides for guarantees for a trade union functioning within a company, such as the amendment of an employment agreement, or changes to the payment terms for an employee who is a trade union member, which require the consent of the employee's trade union.

A trade union can initiate the dismissal of a company's director for violating labour legislation, not participating in collective bargaining agreement negotiations, or not fulfilling his or her obligations under that agreement and violating other laws governing collective bargaining agreements.

Trade unions also monitor an employer's compliance with labour legislation and its correct application of the established terms of payment of labour compensation, and are authorised by law to demand that the employer rectify any violations. One of the guarantees of a trade union's activity is its right to demand and obtain from directors and other company officers all documents, information and explanations relating to the terms of labour compensation, the performance of the collective bargaining agreements, and compliance with labour legislation. Trade unions are entitled to file lawsuits with respect to the these issues.

Election procedures, the term of service of a trade union's representatives, the frequency of trade union meetings and many other issues are regulated by a trade union's charters.

## XII DATA PROTECTION

### i Requirements for registration

Under Ukrainian law, the main elements of personal data are a person's name, nationality, education, family status, religion, health condition, address, and date and place of birth. The Labour Code prohibits an employer from requesting information from candidates regarding their nationality, political party membership, origins, place of residence and other documents not required by law.

Almost all companies operating in Ukraine have been facing problems in the process of adjusting their business activities to new personal data protection legislation. The Law on Personal Data Protection (the PDP Law), which came into effect on 1 January 2011 and has been significantly amended several times, sets rules for collecting, storing, using, processing and transferring personal data. The PDP Law contains many questionable provisions, the interpretation of which is often problematic even for the representatives of the data protection authorities.

Ukrainian law provides for serious penalties for companies found in breach of the PDP Law (including fines of up to 17,000 hryvnias for each violation and up to three years' imprisonment for a company's chief executive officer). Therefore, it is absolutely necessary for all entities operating in Ukraine to become compliant with the PDP Law.

As of 1 January 2014, data controllers are no longer required to register databases containing personal data. If the processing of personal data creates a risk to the rights of the data subjects (risk data), the controller must notify the Ombudsman within 30 business days of the date of the processing. The types of data that constitute risk data are established by the Ombudsman and include, but are not limited to, sensitive data (see Section XII.iii).

Considering that, under the PDP Law, a company must obtain express consent from each employee before transferring his or her personal data to any third parties, unless otherwise required by law, Ukrainian employers normally prefer to obtain their employees' consent for collecting, storing and other processing of their data as well.

Companies that process personal data are responsible for ensuring the protection of processed data from any illegal processing and access, including by designating an employee to perform these functions.

To assist in proving the absence of guilt in violating the personal data protection legislation before the data protection authorities or the court, a sound corporate personal data protection programme should be developed by every entity doing business in Ukraine. This programme should include developing model internal documentation, such as regulations, orders, letters of consent and personal data protection clauses in employment agreements (or contracts).

### ii Cross-border data transfers

The law does not require registration or notification for the cross-border transfer of personal data, unless the data in question falls under the category of risk data (see Section XII.i).

It is generally prohibited to transfer personal data to jurisdictions that do not ensure adequate protection of such data (i.e., all countries except those in the European Economic Area and other signatories to the EC Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data). However, the PDP Law provides for five exhaustive exceptions when transferring personal data to jurisdictions with inadequate protection. Three of them are relevant to employers: (1) the unequivocal consent of the affected data subjects for the transfer of their personal data to jurisdictions whose data protection regime is deemed inadequate; (2) the collection and further processing of personal data is necessary for establishing, exercising or defending a legal claim (e.g., for internal investigations); and (3) by the controller giving guarantees to the data subjects that there will be no intrusion into their personal and family lives arising from the transfer.

The transfer consent should contain, in particular, details of the data recipient, the scope of the transferred data and the purpose of its processing. It can be incorporated into the initial employee consent for data processing obtained by employers. It is advisable for an employer to enter into an agreement with a foreign data recipient that requires an obligation to be imposed on the data transferee to ensure protection of the imported data at least at the level established by the employer.

The employer shall notify all affected data subjects of a data transfer, but only where the right to receive such a notice was not waived by the data subjects at the time of obtaining their initial consent for data processing.

### iii Sensitive data

Information relating to race, ethnic origin, political, religious and ideological beliefs, political party and trade union membership, criminal prosecution and judgments in criminal cases, biometric and genetic data, as well as medical records and other data relating to the health and intimate life of an individual are considered as sensitive data that, in general, cannot be requested and processed, except in certain cases specifically permitted by law, including when the processing is required by law in the area of employment relationships. The sensitive data of an employee or candidate for employment can be transferred to third parties, including those located abroad, only after the employer obtains consent from the data subject, unless he or she has already consented to the transfer of sensitive data when giving consent for the processing of personal data.

### iv Background checks

An employer may request only a limited amount of information and documentation from a candidate or current employee. In all instances, requests should be justified by law. For instance, if a certain job has specific health or age requirements, the employer is authorised to request confirmation of these requirements from a candidate.

The law clearly states which documents can be requested from a candidate or employee for each type of job (e.g., for teaching positions, criminal records can be verified) and it is forbidden for the employer to ask for additional documents or information (such as credit history or bank statements).

Personal data protection laws restrict background checks on candidates applying for a job. It is likely that express consent will be required from candidates to justify any collecting, storing, using, transferring and other processing of their personal data, except for information, documents and other data, the provision of which is expressly prescribed by the Labour Code and other applicable laws.

## XIII DISCONTINUING EMPLOYMENT

### i Dismissal

Termination of an employment agreement at the employer's initiative is difficult and an employee cannot be dismissed without cause. The employer may dismiss an employee only in the following limited cases provided in the Labour Code:

*a* changes in the company's activities, including its liquidation or reorganisation, bankruptcy, changes in its business or reduction of its staff. In these circumstances, the employer must notify the relevant government authorities about the pending dismissal of its employees two months in advance and provide each affected employee with a two-month dismissal notice, which cannot be replaced with a payment (discussed in Section XIII.ii). The consent of the company's trade union is required for the dismissal of each member employee who is subject to dismissal on this ground (except liquidation of the company);

*b* non-compliance by an employee with his or her position owing to inadequate qualification or a health condition that interferes with the ability to perform their duties;

*c* failure by an employee to fulfil his or her duties if disciplinary actions were previously taken against him or her;

*d* failure by the employee to appear at work for more than three consecutive hours in one working day without a good reason for the absence;

*e* failure to appear at work for more than four consecutive months owing to a temporary incapacity to work unless a longer term is permitted by law for certain diseases and unless the incapacity was caused by work-related illness or severe injury;

*f* attendance by an employee at his or her workplace in a drunken, narcotic-induced or intoxicated state;

*g* resumption of work of another employee who was previously occupying the position;

*h* an employee being found guilty of larceny of his or her employer's property;

*i* an individual owner being called up for military service or mobilised during a special period; and

*j* establishment during the probationary period of non-compliance by an employee with his or her position or work performed by him or her.

A trade union's consent is required for dismissal of an employee who is a member of that trade union on the grounds in points (a) to (f), above.

Some employees can be dismissed on the following additional grounds, stipulated in the Labour Code:

*a* gross violation of employment obligations by a director of a company or its branch, or his or her deputy, chief accountant, his or her deputy, and certain state officials;

*b* deliberate action of a company director that results in untimely salary payment or payment of a salary that falls below the statutory minimum salary;

*c* purposeful actions of an employee who is managing funds or commodities if that action results in the loss of trust in the employee;

*d* immoral misconduct of an employee performing pedagogical functions that prevents the employee from holding this position any longer;

*e* working under the direct supervision of a 'close person', in line with the meaning under the Anti-Corruption Law;

*f* presence of a permanent real or potential conflict of interest of an employee that cannot be resolved in any other way prescribed by the Law of Ukraine on Preventing Corruption; and

*g* termination of the powers of a company officer.

The consent of a trade union is required for dismissal of an employee who is a member of a trade union on the grounds described in points (c) and (d) above.

Further, it is prohibited to dismiss:

*a* employees who are on sick leave or vacation (when the dismissal is initiated by the employer);

*b* pregnant women, women with children under three years old, single mothers with children under 14 or a disabled child, except in the event of:
- company liquidation; or
- the expiry of a fixed-term employment agreement or contract for the relevant employee;

*c* employees on the sole basis of them reaching retirement age; or

*d* employees who are members of a trade union without obtaining prior consent from the respective trade union (in most cases).

On the dismissal date, the employer provides the employee with his or her labour book and dismissal order, and settles all payments due to this employee.

When an employee is dismissed because of redundancy or other changes in the company's activities, an employee's non-compliance with his or her position, or the resumption of work of another employee, he or she is entitled to a severance payment equal to one average monthly salary. The Labour Code also establishes a severance payment due to company officers dismissed because of the termination of their authority in the amount of six times their monthly average salary.

Employees subject to dismissal on any grounds provided by Ukrainian law are entitled to receive compensation for unused vacation. The employer shall also pay to an employee any additional compensation or benefits that may be specified in a written employment agreement or contract with this employee and any collective bargaining agreement.

The law does not prohibit the employer and the employee from concluding a settlement agreement. To be enforceable, however, the provisions of this agreement must not worsen the employee's position as compared with Ukrainian labour law.

### ii Redundancies

Under the Labour Code, an employer may unilaterally initiate the dismissal of its employees because of redundancy. In these circumstances, the employer must notify all its employees of their pending dismissal, as a general rule, no later than two months before their dismissal. This notice cannot be replaced with a payment.

Under the Labour Code, employees with higher productivity levels or qualifications are given priority to stay when dismissals are carried out because of redundancy or other changes in the company (except in the event of company liquidation).

Between employees with equal qualifications and productivity levels, priority is given based on various criteria, including preference for an employee who is the only working person in a family, has been with the company for a long time, has acquired a disability while working for the company or developed a work-related disease, or is within three years of reaching retirement age.

The Labour Code also entitles employees dismissed because of redundancy or other changes in the company (except for company liquidation) to be rehired by the employer within one year of their dismissal if the employer has vacancies that require similar qualifications. During the rehiring, priority is given to the aforementioned categories of persons prioritised for retention during redundancy.

Redundancy can be performed, as a general rule, only after prior trade union consent (for member employees). The trade union shall consider the employer's reasonable written redundancy petition within 15 days, in the presence of each employee to be dismissed. The trade union must notify the employer in writing of its agreement to the decision within three days. If this deadline is not met, it is considered that the trade union has agreed with the dismissal of all proposed employees.

Employees who are subject to redundancy must be considered for employment in other available positions.

The State Employment Centre must be provided with at least two months' prior notice of a prospective mass lay-off, which must state the grounds for the pending dismissal of the company's employees and the position, qualifications and salary of each employee.

The categories of employees protected from dismissal, severance and other dismissal payments, and the possibility of the parties entering into a settlement agreement, are discussed in Section XIII.i and apply equally to redundancies.

## XIV TRANSFER OF BUSINESS

There is no specific law in Ukraine relating to business transfers. The general employee guarantees and protections stipulated in the Labour Code apply during a business transfer (transfer of the employee's rights to the business transferee, extension of the collective bargaining agreement to the new business owners, the transfer of business does not in itself constitute a ground for employee dismissal, among other things).

The Labour Code expressly provides that in the event of a change in a company's ownership or a company's reorganisation, the employment agreements with its staff will

remain in force. Employees of the seller are entitled to be transferred automatically to the buyer as a change of the target's ownership does not imply that the target ceases to be their employer.

## XV OUTLOOK

It is expected, based on recent legislative developments, that the year 2021 may bring several significant changes to employment regulations in Ukraine, largely targeted at attracting foreign investment. It is hoped that these developments may include the adoption of a long-awaited and much-needed new Labour Code.

A draft Law No. 3695 was introduced on 19 June 2020, proposing to supplement the Labour Code and the Law on Vacations with a new type of vacation, namely a 14-calendar day paid leave following childbirth. If the draft Law is enacted, this vacation could apply equally to mothers, fathers, grandfathers and grandmothers of newborns.

In our opinion, employment-related litigation in Ukraine might be affected by the covid-19 pandemic for at least the next 12 months. The types of cases that are likely to arise may include, among others, wrongful dismissal (e.g., redundancies), corruption-related whistleblowing retaliation, flexible working hours and remote working (teleworking), compensation and benefits, and vacations.

**Appendix 1**

# ABOUT THE AUTHORS


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*Sayenko Kharenko*


Dr Svitlana Kheda is a counsel at Sayenko Kharenko, heading the firm's labour practice. She is an internationally recognised expert in labour and employment, privacy and data protection, and anti-corruption and anti-bribery compliance, with more than 20 years' experience.

Svitlana was named Lawyer of the Year in labour and employment by *Best Lawyers International* 2021 and 2017, and as a top lawyer in privacy and data security law by *Best Lawyers International* 2021. She has been recognised as a leading labour and employment law lawyer by *The Legal 500* 2020, *Chambers Europe* 2020 and *Ukrainian Law Firms* 2020, and recommended as one of the best employment law lawyers and mediators in Ukraine by *Client's Choice: Top 100 Lawyers in Ukraine* 2019.

Dr Kheda is a certified mediator, with more than 10 years' experience in practising and teaching employment mediation. She has served on the boards of the Ukrainian National Association of Mediators and the Ukrainian Bar Association (Labour Law Committee).

Svitlana was awarded a PhD (LLD) in international private law from Kiev National Taras Shevchenko University and obtained her LLM in international legal studies from Georgetown University Law Center (Washington, DC). She has had work published in more than 100 publications in various countries.


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