THE EMPLOYMENT LAW REVIEW

Thirteenth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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This article was first published in February 2022
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-278-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAET SCHJØDT AS

ALC ADVOGADOS

AL DOSERI LAW, ATTORNEYS AT LAW & LEGAL COUNSELS

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SCHÖNHERR RECHTSANWÄLTE GMBH

TSMP LAW CORPORATION

VAN OLMEN & WYNANT

VIEIRA DE ALMEIDA

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PREFACE

For each of the past 12 years, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. Every year when I update this book, I reread the Preface that I wrote for the first edition in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. I have been practising international employment law for more than 25 years, and I can say this holds especially true today, as the past 13 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 13th edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see this publication grow and develop to satisfy its initial purpose: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

Speaking of changes, we have now been living with the covid-19 pandemic for more than two years. In 2020, we entered a new world controlled and dictated by a novel coronavirus, one that spread at a rapid pace and required immense government intervention. The ways in which governments responded (or failed to respond) shed light on how different cultures and societies view, balance and respect government regulation, protection of workers and employee privacy. Employment practitioners around the globe have been thinking about and anticipating the future of work for a decade. But with the onslaught of covid-19, the future of work was foisted upon us. Covid-19 has expedited the next decade of technological advancement and employer–employee relations, causing entire industries and workplaces to change in real time and not over the course of years.

Unsurprisingly, this year's text would not be complete without another global survey of covid-19 that summarises some of the significant legislative and legal issues that the pandemic has presented to employers and employees. The updated chapter highlights how international governments and employers continued to respond to the pandemic during the course of 2021, from shutdowns and closures to remote working and workplaces reopening. Employers around the globe have needed to be nimble to deal with the constantly changing environment.

The other general interest, cross-border chapters have all been updated. The #MeToo movement continues to affect global workforces. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media so as to bring awareness to the prevalence of this behaviour in the workplace. In this chapter, we look at the movement's success in other

countries and analyse how different cultures and legal landscapes affect the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

The chapter on cross-border mergers and acquisitions continues to track the variety of employment-related issues that arise during these transactions. The covid-19 pandemic initially caused significant challenges to mergers and acquisitions (M&A). Deal activity slowed substantially in 2020, negotiations crumbled and closings were delayed. Although uncertainty remains about when merger and acquisition activity will return to pre-pandemic levels, it appears that businesses and financial sponsors once again have begun to pursue transactions. Parties already have begun to re-engage on transactions previously put on hold and potential sellers appear willing to consider offers that provide a full valuation. The content of due diligence may change because the security of supply chains, possible crisis-related special termination rights in key contracts and other issues that were considered low-risk in times of economic growth now may become more important. This chapter, and the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2021 for multinational employers across the globe. Many countries in Asia, Europe and South America have continued to develop their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation, and regulations on gender quotas and pay equity, to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals in the workforce remain underprotected and under-represented, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

We continue to include a chapter that focuses on social media and mobile device management policies. Mobile devices and social media have a prominent role in, and impact on, both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement bring-your-own-device programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. Particularly in the time of covid-19 and remote working, bring-your-own-device issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work, and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Our final general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and the chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to them. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to the six general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 38 jurisdictions around the world.

Covid-19 aside, in 2022, and looking into the future, global employers continue to face growing market complexities, from legislative changes and compliance challenges, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, addressing social media issues, negotiating collective bargaining agreements or responding to increasing public attention on harassment or equal pay issues, workforce issues can affect a company's ability to attract and retain talent, or damage its reputation and market value in an instant. These issues have created a confluence of legal and business challenges that no longer can be separated or dealt with in isolation. As a result, every company requires business advisers who can address the combined business and legal issues relating to its multinational workforce. It is my hope that this text provides legal practitioners and human resources professionals with some guidance, best practices and comprehensive solutions to significant workforce issues that affect a company's market position, strategy, innovation and culture.

A special thank you to the legal practitioners across the globe who have contributed to this volume for the first time, as well as those who have been contributing from the first year. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my Faegre Drinker associates, Katherine Gordon, Caroline Guensberg, Charlotte Marshall and Kerry Zaroogian, and my law partners, Alex Denny, Nicole Truso and Jill Zender, for their invaluable efforts in bringing this 13th edition to fruition.

Erika C Collins
Faegre Drinker Biddle & Reath LLP
New York
February 2022

Chapter 40

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

There were several important developments in employment law during 2021.

On 4 February 2021, the Ukrainian parliament passed Law No. 1213-IX on Amending Certain Ukrainian Laws Regarding Improving Legal Regulation of Remote Working, Homeworking (Teleworking) and Working Based on Flexible Working Hours Regime. This Law introduces important changes to the Labour Code for regulating the flexible working

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regime, remote working and teleworking. In particular, it distinguishes between remote working and teleworking, the main difference being that the working place of an employee who is teleworking is fixed, whereas an employee who is working remotely may freely choose the location for carrying out his or her employment duties. Moreover, the Law legitimises electronic means of communication between employers and employees, and establishes the conditions of the flexible working hours regime.

On 5 May 2021, separate model employment agreements for remote working and for teleworking were approved by the Ministry of Economic Development, Trade and Agriculture of Ukraine.

On 15 April 2021, the Ukrainian Labour Code and the Law on Vacations were amended to ensure equal childcare possibilities for a mother and a father. In particular, a new type of vacation was introduced, namely 14 calendar days' paid leave following childbirth, which applies equally to mothers, fathers, grandfathers and grandmothers of newborns.

Law No. 1667-IX on Promoting Development of a Digital Economy in Ukraine, dated 15 July 2021, introduces several amendments to the Labour Code concerning gig contracts.

Finally, various state agencies (such as the State Labour Service and the State Fiscal Service) have each issued their official interpretations of Ukrainian legislation concerning the regulation of working time, employee transfers, combining jobs (i.e., one employee holding two positions with the same employer), employee evaluation, overtime, workforce migration, employee dismissal, employee compensation, vacation, workplace health and safety, and other key employment law issues.

III SIGNIFICANT CASES

On 10 February 2021, the Supreme Court of Ukraine ruled in case No. 758/2641/17 that inadequate documenting of sick leave may not evidence per se that an employee's absence from work was not justified and, therefore, shall not be a basis for dismissal under Article 40, Section 1, Item 4 of the Labour Code.

On 29 April 2021, the Supreme Court of Ukraine ruled in case No. 266/3163/16-ц that the duration of a fixed-term employment agreement may be determined not only by a particular term but also by a certain event (e.g., return to work of an employee from maternity leave).

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

An employment relationship is established 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 it). 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 the nature of whose work is 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.

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).

The law provides for special types of employment agreements with employees working remotely or from home (teleworking). If an employee was hired based on an ordinary employment agreement and then, during his or her employment, the employee's working regime was changed to remote working or teleworking, a new employment agreement for remote working or teleworking, as is the case, shall be executed with that employee. This new agreement supersedes the previous, ordinary employment agreement.

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 6,500 hryvnias.

In addition, the employer must enter the relevant record in an employee's labour book (if any). 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 who, by law, are not 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 annually by the Ukrainian employee.

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 interests and at the expense of one (or several related) non-residents. At the same time, a non-resident entity 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 interests and at the 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 employees it has hired for the purpose (within one project or several related projects) for longer than 183 days during any 12-month period. A PE of a non-resident entity may also arise if that entity has its place of management in Ukraine. Note, however, that, as of 1 January 2022, a non-resident entity that has its place of effective management in Ukraine may voluntarily recognise itself as a tax resident in Ukraine. However, if the non-resident entity does not wish to do this, there is a risk that the Ukrainian tax authorities might themselves set up a PE of the non-resident, with its places of management in Ukraine.

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 as a taxpayer in Ukraine (or be registered at the discretion of the tax authorities without filing any applications or documents) 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 as are 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 work permits. As a foreign national

may be employed by several Ukrainian employers simultaneously, each employer must obtain a separate work permit for that person. An application for a work 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 work 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 issuance of the working permit within 10 business days of obtaining the decision of the respective employment centre.

A work 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, shareholders or beneficiaries of Ukrainian legal entities, holders of diplomas from the world's top-ranked universities, and creative and IT professionals;

c gig specialists; and

d intra-company transferees.

For all other foreign employees, a work 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 work 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 salaries 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), or a gig 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 terminated prematurely, 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 work 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 work 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.

All employment-related documentation, including the internal rules, must be drawn up 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.

No later than three months after a child's birth, a one-time paid childbirth vacation of 14 calendar days (excluding public holidays and non-working days) shall be granted to any of the following categories of employees:

a child's father married to his or her mother;
b child's father not married to his or her mother; or
c child's grandmother or grandfather, or any other adult relative who *de facto* takes care of a child whose mother or father is a single parent.

A woman or her child's father (or the grandparents or any other relative who is minding the child) may take maternity leave 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; and (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 in which the company has its headquarters, with the Ukrainian text being given priority if there are any discrepancies between the two 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 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, state of health, 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 or 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 personal life of an individual are considered to be 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 substituted by 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 his or her 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 an employee to appear at work for more than three consecutive hours in one working day without a good reason for the absence;
e failure by an employee 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 stated 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 (if any) 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 substituted by a payment.

Under the Labour Code, employees with higher productivity levels or qualifications are given priority to be retained 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, who has been with the company for a long time, who has acquired a disability while working for the company or developed a work-related disease, or who 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 (as discussed in Section XIII.i), apply equally to redundancies.

XIV TRANSFER OF BUSINESS

There is no specific law in Ukraine concerning business transfers. The general employee guarantees and protections stipulated in the Labour Code apply during a business transfer (i.e., the transfer of an employee's rights to the business transferee, extension of the collective bargaining agreement to the new business owners, or the transfer of business not constituting 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 2022 may bring several significant changes to employment regulations in Ukraine, largely targeted at attracting foreign investment, liberalising employment legislation and deregulating employment relationships. In addition, several bills have been introduced recently, with the aim of improving employee anti-discrimination and other means of strengthening the protection of employees' rights, as well as defining employment relationships and their characteristics. It is also expected that Ukraine will have a new Personal Data Protection Law.

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 whistle-blowing retaliation, flexible working hours, remote working and teleworking, compensation and benefits, and vacations.

Appendix 1

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Svitlana was named Lawyer of the Year in labour and employment by *Best Lawyers International* in 2017 and 2021, and as a top lawyer in labour and employment, and privacy and data security law by *Best Lawyers International* 2022. She has been recognised as a leading labour and employment law lawyer by *The Legal 500* 2021, *Chambers Europe* 2021 and *Ukrainian Law Firms* 2021, and recommended as one of the best employment law lawyers and mediators in Ukraine by *Client's Choice: Top 100 Lawyers in Ukraine* (2013–2020).

Svitlana is a certified mediator, with 15 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).

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ISBN 978-1-83862-278-7