The Employment Law Review

Sixth Edition

Editor
Erika C Collins

Law Business Research

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The Employment Law Review
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THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

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THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

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CONTENTS

EDITOR'S PREFACE

It is hard to believe that we are now on our sixth edition of *The Employment Law Review*. When we published the first edition of this book six years ago, I noted my belief that a book of this sort was long overdue given the importance to multinational corporations of understanding and complying with the laws of the various jurisdictions in which they operate. It has given me great pleasure to see the past editions of this book used over the last several years for just this purpose – as a tool to aid practitioners and human resources professionals in identifying issues that may present challenges to their clients and companies. The various editions of this book have highlighted changes in the laws of many jurisdictions over the past few years, making even clearer the need for a consolidated and up-to-date reference guide of this sort.

Global diversity and inclusion initiatives remained a hot topic in 2014. Many companies have unrolled initiatives regarding 'unconscious' bias, which is addressed in the first general interest chapter on global diversity. Looking abroad, recent legal developments regarding gender and transgender recognition will affect multinational corporations both in terms of law and policy, as underscored by recent legal developments out of India.

Our second general interest chapter tracks another active year of mergers and acquisitions after a brief decline following the financial crisis. This chapter, which addresses employment issues in cross-border corporate transactions, along with the relevant country-specific chapters, will aid practitioners and human resources professionals in conducting due diligence and providing other employment-related support in connection with cross-border M&A deals.

The third general interest chapter covers the increasing trend of clients considering or revising company's social media and mobile device management policies. In particular, there is an increase in the number of organisations that are moving toward 'bring your own device' programmes and this chapter addresses issues for consideration by multinational employers in rolling out policies of this sort. 'Bring your own device' issues remain a topic of concern because more and more jurisdictions have passed or are beginning to consider passing privacy legislation that places significant restrictions

on the processing of employee personal data. This chapter introduces practice pointers regarding monitoring of employee social media use at work as well as some steps to consider before making an employment decision based on information found on social media.

In addition to these three general-interest chapters, the sixth edition of *The Employment Law Review* includes 48 country-specific chapters. This edition has once again been the product of excellent collaboration. I wish to thank our publisher, particularly Gideon Roberton, Katherine Jablonowska, Adam Myers, Eve Ryle-Hodges and Shani Bans, for their hard work and continued support. I also wish to thank all of our contributors, as well as my associates, Jon Dueltgen and Courtney Bowman, for their efforts to bring this edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2015

Chapter 47

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 and full of pitfalls. Specific statutes have been adopted since Ukraine became independent to deal with labour safety, remuneration, vacation, collective bargaining agreements, employment of population and employment of foreign nationals, but the replacement of the Labour Code is necessary to enable Ukrainian labour law to adapt to the needs of a market economy.

In Ukraine, 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 elected at the 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. The decision of the LDC can be appealed in a local court of general jurisdiction. Certain categories of labour disputes have to be directly considered by court (e.g., when there is no LDC in the company, wrongful dismissal cases, etc.). A new trend in Ukraine is to settle labour disputes through mediation or quasi-mediation.

There are a number of government agencies responsible for supervising and controlling labour law compliance in Ukraine, including the State Inspection on Labour Issues, the State Service for Mining Supervision and Industrial Safety, and the Ministry of Health Protection. The State Employment Service is responsible for issuing working permits to foreign employees and the Ministry of Interior, acting through territorial departments of the State Migration Service, is responsible for providing foreign employees

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with temporary residence certificates. The Ukrainian parliament's ombudsman (the Ombudsman) is the authorised state agency in the personal data protection area.

II YEAR IN REVIEW

Once again, the long-awaited new Labour Code was not adopted in 2014. In general, this year did not result in any significant legislation in the labour law area.

The most notable act enacted in 2014 was the Law on Amending Certain Legislative Acts of Ukraine Regarding Protecting Investors Rights. This Law, which came into force on 1 June 2014, allows the dismissal of top managers of Ukrainian companies without cause (i.e., a decision of the company's highest governing body will be sufficient), and increases the liability of companies' management.

On 1 January 2014, the Law No. 383-VII on Amending Certain Laws on Improving the System of Personal Data Protection came into force. This Law introduced the important changes into the data protection legislation, including transferring the functions of the central state body in the data protection area from the Ukrainian State Personal Data Protection Service to the Ombudsman and abolishing the registration requirement for data controllers (see Section XI *infra*).

In the spring of 2014, the Ukrainian parliament passed several acts introducing changes into certain laws with respect to mobilisation aimed at ensuring that employees mobilised for military service keep their job, position and average salary (for up to one year).

The Ukrainian parliament made some changes to the anti-discrimination legislation by passing Law No. 1263-VII dated 13 May 2014. In particular, the new wording of 'discrimination' and some other key notions was introduced.

On 19 June 2014, the Law on Amending the Law on the Legal Status of Foreigners and Stateless Individuals was enacted. Amendments introduced by this Law are related to the documents to be filed for obtaining a temporary residence certificate for foreign employees for them to legally stay in Ukraine.

On 14 October 2014, Law No. 1700-VII on Preventing Corruption was enacted (the Anti-Corruption Law). This Law supplemented Article 36 of the Labour Code with a new ground for employment termination, namely concluding an employment agreement (contract) contrary to the requirements of the recently enacted. According to Article 53 of the Anti-Corruption Law, whistle-blowers cannot be fired, caused to terminate their employment, be subject to disciplinary action or otherwise be retaliated against (or be threatened with retaliation) by their employers in connection with reporting violations of the Anti-Corruption Law. In addition, Article 235 of the Labour Code was amended with a new provision aimed at protecting whistle-blowers and members of their families from such retaliation.

Various state agencies have passed a number of regulations and official interpretations of the Ukrainian legislation concerning regulation of data protection, working time, employee dismissal, business trips, social protection, collective bargaining agreements, engaging foreign labour, vacation, labour safety, and other important employment law issues.

III BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The employment relationship in Ukraine is established by an employment agreement between an employer and an employee. The employment 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 employee to observe internal labour rules, an obligation for the employer to ensure adequate working conditions, and the salary amount for performance of employment duties. The Labour Code provides that employment agreements shall generally be concluded in writing and establishes some specific cases when the employment agreement must be in writing (e.g., with employees under 18 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 on a more frequent basis.

In general, most 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 agreements 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 their employment). It is also possible to enter into an employment agreement 'until the completion of agreed-upon work' when it is impossible to determine the period necessary to complete the limited scope of agreed-upon 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 or personal reasons.

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

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

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 also agree in the employment contract on their additional rights, obligations and liabilities, conditions of remuneration apart from those provided by law, provided that such additional terms do not diminish the employee's rights guaranteed by law.

The use of employment contracts is limited to cases 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, paralegals).

A written employment agreement or contract can be concluded before or on the date of issuing a hiring order by the employer 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 change the essential terms of employment (compensation, working hours, etc.) the employer must issue an order notifying the employee of such 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. An employment agreement is deemed to be concluded even if a hiring order was not issued, but an employee was *de facto* admitted to work.

In addition, the employer must enter the relevant record in the 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 for the employee, which 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.

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 his or her successful completion of probation. In this case, the conditions and terms of the probationary period must be stated in the hiring order and the employer can dismiss the non-performing employee within this probationary period merely by stating that the results of his or her probation are not satisfactory.

The law does not oblige the employer to issue an advance dismissal notice to an employee on probation. The employee is also 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 these companies do not have a permanent establishment (PE) in Ukraine (as discussed below). Foreign companies may also use HR agencies to hire Ukrainians to avoid registration with the Ukrainian tax authorities, in which case these HR agencies would be the *de jure* employers of the Ukrainian 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 amounts and social benefits will only be subject to Ukrainian personal income tax payable individually by the Ukrainian employee on an annual basis.

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 such foreign entity in Ukraine, a dependent agent, commissioner or other resident acting in a similar capacity. At the same time, a non-resident employer 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 such persons are acting in the ordinary course of their business. In addition, a PE occurs when a foreign company provides services in Ukraine, including consulting services but excluding the provision of personnel, through its employees or other persons hired for this purpose for longer than six months during any 12-month period. The above is valid unless the 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 tax authorities, unless such engagement creates a PE. If the foreign entity's activity through an independent contractor creates a PE in Ukraine, such foreign entity may be subject to complete taxation in Ukraine.

Finally, a Ukrainian individual has to be registered as a Ukrainian private entrepreneur prior to entering into any contracts with foreign businesses. Otherwise, any such contract may be declared invalid resulting in penalties imposed on the responsible person.

Employees, including foreign nationals working for Ukrainian companies, are required to be paid salary, sick leave allowance, annual vacation pay and some other statutory benefits depending on the employee category. Statutory benefits must be declared by employers. They are also responsible for withholding individual income tax at the source, unless such benefits are exempt (e.g., maternity leave compensation, etc.).

IV RESTRICTIVE COVENANTS

A 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 will not be 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.

V WAGES

i Working time

The maximum number of working hours of full-time employees cannot exceed 40 hours per week, unless a non-fixed working day (or week) is established 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 others, the following working hour regimes:

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

b non-fixed working day, which may be established for employees whose working day cannot be estimated in advance; such employees are entitled to a vacation allowance of 24 calendar days per year and to an additional vacation of up to seven working days.

The Labour Code generally allows night work, provided that the working time at night is reduced by one hour. Employees working at night receive an increase to 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, among others, pregnant women and employees under 18 in night work.

ii Overtime

The general rule is that overtime is not allowed. The Labour Code provides an exhaustive list of exceptions 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 and employees who are also 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. A trade union's permission must be obtained for each instance of overtime work. In the case of overtime work, employees are entitled to extra remuneration at a double 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.

VI 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 for Ukrainian employees under Ukrainian labour laws and the employer's internal labour rules, policies and procedures. However, there exist special procedures for hiring foreign nationals that must be followed to avoid administrative liability or even deportation of a foreign national.

In accordance with Ukrainian law, each foreign national intending to work in Ukraine for a Ukrainian company must obtain a work permit. Only foreign nationals permanently residing in Ukraine or working for the Ukrainian representative offices of foreign companies do not require working permits. An application for a work permit and the supporting documents are submitted by the employer to the respective employment centre. These documents are considered by a specially created commission at the employment centre, which is to include representatives of the Ministry of Internal

Affairs, the State Migration Service, the Ministry of Health Protection, the State Security Service and the State Frontier Service.

There is no *de jure* restriction on the number of foreign nationals that can be employed by a Ukrainian company in a given period. However, each time an employer files documents for obtaining a working permit for its foreign employees he or she must be able to demonstrate that employees with similar qualifications cannot be found in Ukraine. The Regulation of the Cabinet of Ministers approving the Procedure for Issuance, Extension and Annulment of the Work Permits for Foreigners and Stateless Persons dated 27 May 2013 (the Working Permit Procedure) provides that employment of a foreigner shall be considered as sufficiently justified if this foreigner: (1) is a candidate for the position of director, deputy director or other management position, provided that this foreigner is also the founder (co-founder) of the employing company; or (2) is a subject of copyright and neighbouring rights invited to work in Ukraine for exercising such rights.

A decision on the issuance of a working permit is usually granted within 15 days from the date of receipt of the required documents from the employer. The working permit shall be issued within 10 days from the date of crediting the state fee for issuing a working permit paid by the employer.

A working permit may be issued for a term of up to one year with a possibility of extension for the same term. Working permits for intra-company transferees and persons rendering services without being commercially present in Ukraine should be issued for up to three years and can be extended for two more years.

After a foreign national is issued a working permit he or she has to apply for a D-type visa, bearing a special mark 'employment' before entering Ukraine for the purposes of employment. This means that if a foreign national is already in Ukraine on a short-term visa at the moment of issuance of a working permit, this person has to leave the country, apply for a D-type visa, bearing the 'employment' mark, on the basis of the working permit, and then enter Ukraine again.

The employer is required to keep a register of foreign employees.

Termination of an employment 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, he or she must obtain a new working permit. Upon obtaining the working permit and within three working days after executing an employment agreement (contract) with a foreign employee, the employer shall submit its certified copy to the respective employment centre.

In case the employment relationship with a foreign national is prematurely terminated, the employer shall notify about this a respective employment centre within three working days after such termination.

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

The employer of a foreign national must also pay taxes and local benefits and notify the tax administration about foreign employees' income and paid-up taxes on a quarterly basis.

VII 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 document 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 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 in 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 site, but the original hard copy should also be kept.

Ukrainian companies often issue other optional internal regulations (e.g., regarding discrimination, sexual harassment, personal data protection) in accordance with their global corporate policies. The Anti-Corruption Law provides for mandatory and optional compliance policies (depending of the employer), as well as establishes a job duty for 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.

VIII TRANSLATION

Under the Law on the Framework of the State Language Policy all companies operating in Ukraine can use Ukrainian (the state language), Russian or any other regional or minority language, as well as any other language as their working language. The Law requires the official documents that certify a citizen's identity and legal status (passport, labour book, university diplomas, birth and marriage certificates, etc.) to be issued in Ukrainian and one of the regional or minority languages of the citizen's choice.

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 in case of 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 it is the official document or if it has to be notarised. Therefore, no translation of company employment documentation (except for the documents certifying the employees' identity and legal status) is required to be certified.

There is a risk that the company's employment-related documentation, if it only exists 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 the foreign language documents (e.g., employment agreement) to protect the rights and legitimate interests of the affected employee.

IX EMPLOYEE REPRESENTATION

Ukrainian law provides for trade unions as the only representative bodies of employees at a company level. If there is no trade union established in a company, some of its functions may be performed by the 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 in 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 to establish 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 in a company, for instance, the amendment of the employment agreement or changing the payment terms of an employee who is a trade union member requires the consent of their 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 the employer to rectify such 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 related 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 above issues.

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

X DATA PROTECTION

i Requirements for registration

Under Ukrainian law, the main personal data includes 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

on 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 the new Ukrainian personal data protection legislation. The Law on Personal Data Protection (the PDP Law), which came into effect on 1 January 2011 and has already been significantly amended several times, sets new 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 up to 17,000 hryvnas for each violation and up to three years' imprisonment for the company's CEO). Therefore, it is absolutely necessary for all entities operating in Ukraine to become compliant with the PDP Law.

As of 1 January 2014, controllers are no longer required to register their databases containing personal data. If processing of the personal data creates a risk to the rights of the data subjects (risk data), the controller will have to notify the Ombudsman of such processing within 30 business days of the date of the processing. The types of data that constitute risk data are established by the Ombudsman. The risk data includes, but is not limited to, sensitive data (see Section XI.ii, *infra*).

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

The company processing personal data is responsible for ensuring protection of the 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 (policies, regulations, orders, letters of consent, personal data protection clauses in the employment agreements (or contracts), etc.).

ii Cross-border data transfers

Ukrainian law does not require registration or notification for the cross-border transfer of personal data, unless the data transferred falls into the category of risk data.

It is generally prohibited by Ukrainian law to transfer personal data to jurisdictions that do not ensure adequate protection of such data (as of now these are all countries save for the EEA countries 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 will be allowed under Ukrainian law. Two of them are relevant to employers, namely: (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; or (2) 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, information on 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 the employers. It is advisable for the employer to enter into an agreement with a foreign data recipient requiring imposing an obligation on such 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 their data transfer, but only where the right to receive such notice was not waived by them at the time of collecting their initial consents for data processing.

iii Sensitive data

Information related to race, ethnic origin, political, religious and ideological beliefs, political party and trade union membership, criminal prosecution and judgment in a criminal case, biometric and genetic data, as well as medical records and other data related to the health and intimate life of an individual is considered as sensitive data which, in general, cannot be requested and processed, except for in certain cases specifically permitted by law, including when such processing is required by law in the area of employment relationships. The sensitive data of an employee can be transferred to third parties, including those located abroad, only after the employer obtains respective transfer consents, unless the transfer consent language was not included into the initial employee consents for their data processing by the employer.

iv Background checks

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

The law clearly states which documents can be requested from a candidate or employee for each 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 (credit history, bank statements, etc.).

XI DISCONTINUING EMPLOYMENT

i Dismissal

Termination of an employment agreement at the employer's initiative is difficult and the employee cannot be dismissed without cause. The employer may dismiss an employee 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 this case the employer must notify the relevant government authorities about the pending dismissal of its employees and provide each affected employee with a prior dismissal notice, which cannot be replaced with a payment, as discussed in

subsection ii, *infra*. The consent of the company's trade union is required for the dismissal of each member employee subject to dismissal on this ground (except for the company liquidation);

b non-compliance by an employee with his or her position due to inadequate qualification or a health condition interfering with the ability to perform employment duties;

c systematic failure by an employee to fulfil his or her employment 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 such absence;

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

f if an employee came to his or her workplace drunk or in a narcotic-induced or intoxicated state;

g resumption of work of another employee who was previously occupying this position; and

h if an employee was found guilty of larceny of his or her employer's property.

The trade union's consent is required for dismissal of the trade union member employee on the grounds (a)–(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 the company or its branch, or his or her deputy, chief accountant, his or her deputy and some state officials;

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

c purposeful actions of an employee managing funds or commodities if such action results in the loss of trust in such employee;

d immoral misconduct of the employee performing pedagogical functions that prevents such employee from further holding this position;

e working under direct supervision of the close person in the meaning of the Anti-Corruption Law; and

f termination of the authorities of a company officer.

The trade union's consent is required for dismissal of the trade union member employee on grounds (c) and (d) above.

It is prohibited to dismiss:

a employees during their sick leave or vacation;

b pregnant women, women with children under three, single mothers with children under 14 or a disabled child, except in the event of:

- company liquidation; or
- the expiration of a fixed-term employment agreement or contract for the relevant employee;

c employees on the sole basis of reaching retirement age; or
d trade union member employees without obtaining prior trade union consent (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 due to 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 one average monthly salary as a severance payment. The Labour Code also establishes a severance pay due to company officers dismissed because of the termination of their authorities in amount of their six monthly average salaries.

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 the 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 due to redundancy. In such a case, the employer must notify all of its employees on their pending dismissal not later than two months before their dismissal and this notice cannot be replaced with a payment.

Under the Labour Code, employees with higher productivity levels or qualifications are given a priority to stay when dismissals are carried out due to 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 a preference for an employee who is the only working person in a family, who has long-term experience working at this company, who was made disabled during work at the company or developed a work-related disease, etc.

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

Redundancy can be performed only after the 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 shall notify the employer in writing of the adopted 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 subject to redundancy have to be considered for employment in other available positions.

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

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

XII TRANSFER OF BUSINESS

There is no special business transfer law in Ukraine. The general employee guarantees and protections stipulated in the Labour Code apply during 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 the employee dismissal, etc.).

The Labour Code expressly provides that in the event of a change of the company's ownership or a company's reorganisation, the employment agreements with its employees shall remain in force. Employees of the seller are entitled to be automatically transferred to the buyer as a change of the target's ownership does not imply that the target ceases to be their employer under Ukrainian law.

XIII OUTLOOK

The most prominent trends relating to labour and employment issues in the coming year are likely to be the following:

a introducing further amendments to the military service and mobilisation laws affecting the employment relationships;

b amending the legislation concerning foreigners' employment and residence in Ukraine;

c enacting legislation affecting the employment relationships between the companies registered in the Republic of Crimea (the Russian-occupied territory) and their employees; and

d substantial amendments to or implementation of new anti-corruption compliance programmes and practices by the employers due to the entry into force on 26 April 2015 of the Anti-Corruption Law.

Appendix 1

ABOUT THE AUTHORS

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Sayenko Kharenko

Svitlana Kheda is a counsel heading the firm's labour and compliance practice and leading its labour and employment, privacy and data protection and anti-corruption and anti-bribery practice groups. Svitlana is the internationally recognised expert in all of the above areas of law with over 17 years of experience in advising clients on the wide range of the complex and complicated issues in all areas of her expertise.

Svitlana Kheda is named as one of the top two labour law lawyers, according to *Ukrainian Law Firms 2014*, and is recommended as one of the best labour law lawyers in Ukraine, according to *Chambers Europe 2014*, *Best Lawyers International 2014*, and *Client's Choice: Top 100 Lawyers in Ukraine 2012–2013*.

Svitlana is a certified mediator experienced in employment mediation. She heads the ICC Ukraine-based Mediation Centre and is a founding member of the Mediation Practices Club under the auspices of the Ukrainian Mediation Centre. Since 2013 Ms Kheda has been a member of the labour law committee at the Ukrainian Bar Association.

Before joining Sayenko Kharenko, Ms Kheda ran the Programs Department of the International Law Institute (Washington, DC) and worked for the Kiev office of a leading Western law firm operating in Ukraine.

Svitlana Kheda graduated *summa cum laude* from Kiev National Taras Shevchenko University, where she was later awarded a PhD in international private law. She obtained her LLM in international legal studies from Georgetown University Law Center (Washington, DC). Ms Kheda is a published author of a monograph and over 80 articles and commentaries in the UK, the US, Ukraine, Turkey, India and Canada, and is a frequent speaker on various legal issues (including abroad).

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