The Employment Law Review

Third Edition

Editor
Erika C Collins

Law Business Research

The Employment Law Review

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THE EMPLOYMENT LAW REVIEW

Third Edition

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Erika C Collins

Law Business Research Ltd

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EDITOR'S PREFACE

Erika C Collins

Employment relations in 2011, and legislative and judicial developments in the area of labour and employment law, continue to be coloured by the financial downturn that began in 2008 along with related economic uncertainty, including the recent sovereign debt crisis throughout the Eurozone. As was the case last year, the 'Year in Review' and 'Outlook' sections of nearly every chapter in this edition detail efforts by countries both to address the continuing effects of the economic downturn and to implement regulations aimed at preventing similar crises in the future. Governments continue to seek ways to decrease financial burdens on businesses, including the costs of labour, in an apparent effort to increase competitiveness and stimulate business. In Italy and Greece, for example, new rules regarding collective bargaining permit companies to agree to company-level collective labour agreements that are less favourable to employees than the sector-level collective agreements that otherwise would govern. And in the United Kingdom, the government confirmed its commitment to the Red Tape Challenge, a deregulation programme expressly aimed at reducing the burdens on businesses. On the flip side, many governments also sought to implement rules and regulations aimed at preventing the types of behaviour that are viewed as having caused or contributed to the ongoing financial crisis. In Brazil, for example, the Central Bank has approved a resolution aimed at reducing risk-taking in banking activity by tying executive compensation to long-term results, through the requirement that specified percentages of incentive compensation are paid in company equity and/or deferred over a period of several years. And in Ireland, the Prevention of Corruption (Amendment) Act 2010, signed into law in December 2010, and the Criminal Justice Act 2011 both provide for protection for whistle-blowers who report certain offences.

Another trend during 2011 has been an increasing focus, in a number of jurisdictions, on privacy and protection of individuals' personal data – a topic that can be of utmost importance to employers, who typically collect and hold a great deal of personal, and sometimes sensitive, information about their employees. There has long been a dichotomy between the US and EU approaches to data privacy. In the US the workplace is not considered private, and the US has taken a sectoral, 'patchwork'

approach to data protection that consists primarily of reacting to data privacy issues as they have arisen in various industries. Accordingly, where privacy rights exist in the US they are largely the product of industry-specific laws. In the EU, by contrast, there is an overarching right to privacy stemming from the European human rights charter that all European countries are party to, and the EU data protection directive applies to all handlers of personal data, whether they are financial institutions, employers or internet retailers. It appears from recent developments that the EU approach is winning the day. In the last year, a number of countries – including, notably, India, Korea, Malaysia, Mexico and Singapore – have passed or implemented data privacy and protection laws that follow the EU model.

The third edition of *The Employment Law Review* includes several enhancements meant to better serve employers and employment-law practitioners operating in the global arena. These include two general-interest chapters – one addressing employment issues in cross-border mergers and acquisitions and the other social media in the workplace – as well as a new section in each country chapter addressing translation requirements for employment documents. This edition also boasts the addition of seven new countries, bringing the number of covered jurisdictions to 51. As with the first two editions, this book is not meant to provide a comprehensive treatise on the law of any of these countries but rather is intended to assist practitioners and human resources professionals in identifying the issues and determining what might land their client or company in hot water.

The third edition of *The Employment Law Review* has once again been the product of excellent collaboration, and I wish to thank our publisher and all of our contributors, as well as Michelle Gyves, an associate in the international employment law practice group at Paul Hastings, for their tireless efforts to bring this book to fruition.

Erika C Collins
Paul Hastings LLP
New York
January 2012

Chapter 48

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.

There are a number of government agencies responsible for supervising and controlling labour law compliance in Ukraine, including the Inspector of Labour, the Department for Monitoring Labour Legislation Compliance, the State Committee on Labour Safety, the Ministry of Health Protection, etc. The State Employment Centre is responsible for issuing working permits to foreign employees, and the local bodies of the Ministry of Interior are dealing with providing them with temporary residence certificates.

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II YEAR IN REVIEW

This year a number of important laws in relation to labour law were enacted by parliament, including the Law on the Legal Status of Foreign Nationals and Stateless Persons, which came into force on 25 December 2011. This Law establishes clearer rules for foreign employees and experts providing technical assistance entering Ukraine, state and municipal agencies, and other foreign nationals.

On 1 January 2012, the Law on Amending Certain Laws of Ukraine Regarding Increasing Liability for Violating the Personal Data Protection Legislation of 2 June 2011 comes into force. The Law provides serious penalties for companies found in breach of the Law on Personal Data Protection (see Section XI, *infra*), which came into effect on 1 January 2011.

On 2 June 2011, the parliament also amended Articles 19 and 43 of the Law on Labour Protection introducing, among others, an elaborate penalty clause for employers violating labour protection legislation.

On 9 September 2011, President Yanukovych signed the contentious Law on Legislative Measures for Conducting the Pensions System Reform, passed to meet the requirements of the IMF. The Law came into force on 1 October 2011 and envisages, *inter alia*, a gradual increase of the pension age from 55 to 60 years for women, and from 60 to 62 years for men.

The Cabinet of Ministers passed a regulation approving the Rules for Issuing Entry and Transit Visas, which directly affects foreign employees. The Regulation establishes a new simplified approach for regulating visa issues, and includes eliminating certain types of visa. The Cabinet of Ministers has also passed a resolution regulating the issues related to the business trip expenses of state officials and employees of companies financed from state and municipal budgets.

Various state agencies have passed a number of regulations concerning employment relations. In particular, on 17 March 2011, the Ministry of Finance approved a new wording of its Instruction on Business Trips within Ukraine and Abroad.

III SIGNIFICANT CASES

There were no significant employment-related cases in Ukraine in 2011.

IV 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, with any employee insisting on this, etc.). 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 by its nature is 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.

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 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., with 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 (i.e., 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 prescribe 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.).

V 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 employee protective 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 be considered null and void.

VI 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 (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 which 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 only with additional vacation or leave of absence.

VII FOREIGN WORKERS

The majority of labour law provisions apply equally to Ukrainian and foreign nationals. Thus, foreign employees enjoy the same benefits, guarantees, and protections available 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 Ukrainian companies must obtain a work permit. Only foreign nationals permanently residing in Ukraine do not require working permits. After a foreign national is issued a work permit he or she has to apply for a D-type visa, bearing a special mark 'Employment' prior to entering Ukraine with an employment purpose. This means that if a foreign national is already in Ukraine on a tourist or business visa (or a short-term visa under the new visa regime) at the moment of issuance of a work permit, this person has to leave the country, apply for a D-type visa, bearing the 'Employment' mark, on the basis of the work permit, and then enter Ukraine again.

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 to include representatives of the ministry of internal affairs, state security service, state frontier service and state tax administration, etc.

There is no legal requirement for the employer to keep a register of foreign employees, nor is there a *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.

A decision on the issuance of a working permit is usually granted within 30 days.

A working permit may be issued for a term of up to one year with a possibility of extension. Working permits for intra-corporate 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.

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.

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.

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 ('the Rules'), labour safety regulations, and some other documents, depending on the specifics of a particular company's business.

The most important disciplinary document is the 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 Rules by signing a respective statement. The Rules do not need to be filed with or approved by any government authorities.

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

As a matter of practice, the 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 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, corruption, personal data protection) in accordance with their global corporate policies. The global policies are not *per se* enforceable in Ukraine and must be incorporated into the document system of a Ukrainian subsidiary as local policies.

IX TRANSLATION

Under the Law on Languages, all companies operating in Ukraine have to use Ukrainian as their working language and all official company documentation must be in Ukrainian. However, if the majority of people residing in a region do not have a good working knowledge of Ukrainian or if the company operates in a multinational region where no particular nationality constitutes the majority of the region's population, company documents, including employment-related documents, can be prepared either in

Ukrainian or in a language acceptable to the entire region's population (Russian in most cases). However, the Law requires that official documents certifying a citizen's identity and legal status (e.g., passport, labour book, university diplomas, birth and marriage certificates, etc.) be issued in both Ukrainian and Russian.

It can be seen from the above provisions that the Law on Languages protects the rights of all nationalities and ethnic groups living in Ukraine. Regarding the use of foreign languages (i.e., the languages, including English, other than those native to Ukrainian citizens), the Law is clear that no foreign language can be officially used in a Ukrainian company and no official document should be drafted in a foreign language.

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 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.

X 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 a purpose to sign 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, changing the payment terms of a trade union member employee requires this trade union's consent.

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.

XI DATA PROTECTION

i Requirements for registration

Under Ukrainian law, the main personal data includes a person's 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 which are 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 of Ukraine on Personal Data Protection ('the PDP Law'), came into effect on 1 January 2011, 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 State Service of Ukraine for Personal Data Protection ('the PDP Service').

The issue becomes even more serious from 1 July 2012 when the Law of Ukraine on Amending Certain Laws of Ukraine Regarding Increasing Liability for Violating the Personal Data Protection Legislation, which increases liability for violating the PDP Law, come into effect. The said law provides for serious penalties for companies found in breach of the PDP Law (up to £1,300 in fines for each single violation and up to five years of imprisonment for the company's CEO). Therefore, it is absolutely necessary for all entities operating in Ukraine to become compliant with the PDP Law by the above date.

The PDP Law requires, *inter alia*, registering with the PDP Service databases containing personal data (e.g., passport details) of, in particular, all employees of all companies doing business in Ukraine. Under the PDP Law, the company must obtain a written consent from each employee for collecting, processing, storing, using and transferring his or her personal data to any third parties, including abroad.

The PDP Law prohibits processing personal data related to race, ethnic origin, political, religious and ideological beliefs, political party and trade union membership, as well as data related to health and private life, except for, among others, when such processing is required by law in the area of employment relationships.

The company owning a personal database is responsible for ensuring protection of the data contained therein from any illegal processing and access, including by designating an employee to perform these functions.

In view of the fact that the PDP Service has already started to inspect the company's compliance with personal data protection legislation and intends to make sure that the PDP Law and supplementary legislation is observed in Ukraine, a sound corporate personal data protection program should be developed by every entity doing business in Ukraine. To reduce the risk of being prosecuted for breaching PDP Law, the corporate programme should include the development of model internal documentation (e.g., policies, regulations, orders, letters of consent, personal data protection clauses in the employment agreements (contracts) etc.).

ii Cross-border data transfers

Ukrainian law does not require registration for the cross-border transfer of personal data. There is no special legal regulation for cross-border personal data transfers, except for in Article 29, part 3 of the PDP Law. This provision states that a cross-border personal data transfer is permitted only when: (1) an adequate level of personal data protection is ensured; (2) respective permissions are obtained as required by law or international treaty; and (3) if the purpose of the personal data transfer corresponds with the purpose of its collection.

The Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data regarding supervisory authorities and trans-border data flows, ratified by Ukraine, contains a general rule that personal data may be transferred to the user located in a state or an organisation other than that being a party to the Convention only if such a state or organisation ensures the adequate level of protection for the respective data transfer.

To avoid any possible claims, it is recommended to follow the rules applicable to the data transfers within Ukraine discussed above. In particular, if the employer wishes to transfer its employees' personal data abroad, it should obtain these employees' prior written consent for such transfer. The permission should contain, in particular, information on the data addressee, the scope of the transferred data and the purpose of its processing. It is advisable for the employer to enter into an agreement with a foreign data recipient requiring the transferred data to be treated as confidential information.

iii Sensitive data

Information related to race, ethnic origin, political, religious and ideological beliefs, political party and trade union membership, 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 a third party, including those located abroad, only after the employer obtains a prior written consent of the concerned employee for such transfer.

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 a 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 the criminal records can be verified) and it is forbidden for the employee to ask for additional documents or information (e.g., credit history, bank account statements, etc.).

XII 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 sub-section (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 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 resumption of work of another employee who was previously occupying this position;

g if an employee came to his or her working place drunk or in a narcotic or toxic state; 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) – (e) and (g) 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; and

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

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.

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 to Ukrainian labour law.

ii Redundancies

Under the Labour Code, an employer may unilaterally initiate 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 prior to 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 redundancy, stating the grounds for the pending dismissal of the company's employees and the positions, qualifications and salary of each employee. The State Employment Centre must also be given a list of the dismissed employees within 10 days after their actual dismissal.

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.

XIII 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 (e.g., 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.

XIV OUTLOOK

During the first six months of 2012, employers, as personal data processors, will need to get serious about making their business compliant with the Law 'On Personal Data Protection' and its supplementary legislation.

In addition, in 2012 companies will continue adjusting their business practices to the provisions of a new Tax Code and a new Law 'On the Measures to Prevent and Combat Corruption', which both came into force in 2011. This will have a great impact on both employers and employees.

2011 did not become the year of the adoption of the long-awaited new Labour Code, as was expected. There is a hope that this major event which will influence the development of labour law in Ukraine will occur in 2012.

The government will continue implementing pension reforms.

Appendix 1

ABOUT THE AUTHORS

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Sayenko Kharenko

Svitlana Kheda is a counsel heading the firm's labour/employment law practice. She has over 14 years of experience in advising clients on all labour/employment law issues, including on the employment aspects of M&A transactions. Ms Kheda specialises in bringing global employment policies and procedures of transnational companies in compliance with Ukrainian law, including adjusting the global corporate policies, prepared in accordance with the FCPA and the UK Bribery Act 2010, to the Ukrainian anti-corruption legislation. Svitlana Kheda is a certified mediator heading the ICC Ukraine Mediation Centre experienced in employment mediation. She is also a member of the Expert Council of the State Service of Ukraine on Personal Data Protection and a member of the ICC Ukraine's Working Group tasked with drafting amendments to the Personal Data Protection Law.

Prior to joining Sayenko Kharenko, Ms Kheda was running the Programmes Department of the International Law Institute (Washington, DC). The experience of Ms Kheda also includes practising law with the Kiev office of a leading western law firm operating in Ukraine and supervising the HR department of one of Ukraine's biggest garment factories.

Svitlana Kheda graduated *summa cum laude* from Kiev National Taras Shevchenko University, where she was later awarded PhD in International Private Law. She obtained her LLM in International Legal Studies from Georgetown University Law Centre (Washington, DC). Ms Kheda is a published author of a monograph and over 40 articles and commentaries in the UK, US, Ukraine, Turkey, India, and Canada and is a frequent speaker on various legal issues.

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