The Employment Law Review

Fourteenth Edition

Editor
Erika C Collins

The Law Reviews

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The Employment Law Review

Fourteenth Edition

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Erika C Collins

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CONTENTS

PREFACE...vii
Erika C Collins

Chapter 1 INTERNATIONAL EMPLOYMENT CHALLENGES AND ADAPTATIONS TO THE COVID-19 PANDEMIC 1
Erika C Collins

Chapter 2 THE GLOBAL IMPACT OF THE #METOO MOVEMENT 11
Erika C Collins

Chapter 3 EMPLOYMENT ISSUES IN CROSS-BORDER M&A TRANSACTIONS...............27
Erika C Collins

Chapter 4 GLOBAL DIVERSITY AND INTERNATIONAL EMPLOYMENT..........................34
Erika C Collins

Chapter 5 SOCIAL MEDIA AND INTERNATIONAL EMPLOYMENT...................................45
Erika C Collins

Chapter 6 RELIGIOUS DISCRIMINATION IN INTERNATIONAL EMPLOYMENT LAW 55
Erika C Collins

Chapter 7 ANGOLA...73
Daniela Sousa Marques and Catarina Levy Osório

Chapter 8 ARGENTINA..83
Enrique Alfredo Betemps

Chapter 9 AUSTRALIA..99
Joydeep Hor, Kirryn West James and Andrew Jose

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Chapter 10 BAHRAIN 111
Saad Al Doseri

Chapter 11 BELGIUM 128
Chris Van Olmen

Chapter 12 BERMUDA 145
Juliana M Snelling

Chapter 13 CAMBODIA 158
Vansok Khem, Samnangvathana Sor and Raksa Chan

Chapter 14 CHILE 175
Ignacio García, Fernando Villalobos and Soledad Cuevas

Chapter 15 CHINA 188
Claire Zhao

Chapter 16 CYPRUS 202
Nicholas Ktenas

Chapter 17 DENMARK 213
Tommy Angermair, Mette Neve and Caroline Sylvester

Chapter 18 DOMINICAN REPUBLIC 231
Carlos Hernández Contreras and Fernando Roedán

Chapter 19 GERMANY 244
Jan Tibor Lelley, Julia M Bruck and Diana Ruth Bruch

Chapter 20 HONG KONG 257
Jeremy Leifer

Chapter 21 INDIA 270
Rahul Chadha, Savita Sarna, Manila Sarkaria and Natasha Sahni

Chapter 22 ISRAEL 285
Orly Gerbi, Maayan Hammer-Tzeelon, Nir Gal, Keren Assaf, Naama Friedman Laish and Ohad Elkeslassy

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Chapter 23 ITALY 300
Raffaella Betti Berutto

Chapter 24 JAPAN 316
Yoshikazu Abe, Masahiro Ueda, Ryosuke Nishimoto, Mariko Morita and Kota Yamaoka

Chapter 25 LUXEMBOURG 329
Guy Castegnaro, Ariane Claverie and Christophe Domingos

Chapter 26 MALAYSIA 352
Jack Yow

Chapter 27 MEXICO 369
Carlos Ferran Martínez Carrillo, José Alberto Sánchez Medina and Zaret Juleyma Valencia Martínez

Chapter 28 MYANMAR 381
Chester Toh, Min Thein and Lester Chua

Chapter 29 NETHERLANDS 395
Dirk Jan Rutgers, Inge de Laat, Annemeijne Zwager, Ilaha Muhseni and Hanna Steensma

Chapter 30 NEW ZEALAND 414
Charlotte Parkhill and James Warren

Chapter 31 NORWAY 426
Magnus Lütken and Fredrik Øie Brekke

Chapter 32 PAKISTAN 439
Saqib Majeed

Chapter 33 PERU 452
Ernesto Cárdenas Terry and Iván Blume Moore

Chapter 34 PORTUGAL 465
Tiago Piló and Helena Manoel Viana

Chapter 35 PUERTO RICO 478
Katherine González-Valentín, María Judith (Nani) Marchand-Sánchez, Gregory J Figueroa-Rosario, Patricia M Marvez-Valiente, Gisela E Sánchez-Alemán, Nicole G Rodríguez-Velázquez and Luis M Cotto-Cruz

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Chapter 36 SINGAPORE......495
Ian Lim, Nicholas Ngo and Elizabeth Tan

Chapter 37 SLOVENIA......516
Petra Smolnikar and Tjaša Marinček

Chapter 38 SOUTH AFRICA......536
Stuart Harrison, Brian Patterson and Zahida Ebrahim

Chapter 39 SOUTH KOREA......551
Kwan Ha (KH) Kim and Shawn Seungyul Yum

Chapter 40 SWITZERLAND......557
Simone Wetzstein

Chapter 41 UNITED KINGDOM......573
Alex Denny, Emma Vennesson and Charlotte Marshall

Chapter 42 UNITED STATES......587
Nicole Truso

Chapter 43 VENEZUELA......599
Juan Carlos Pró-Rísquez

Appendix 1 ABOUT THE AUTHORS......621
Appendix 2 CONTRIBUTORS' CONTACT DETAILS......651

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PREFACE

For each of the past 13 years, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. Every year when I update this book, I reread the Preface that I wrote for the first edition in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. I have been practising international employment law for more than 25 years, and I can say this holds especially true today, as the past 14 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 14th edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see this publication grow and develop to satisfy its initial purpose: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

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

Unsurprisingly, this year's text would not be complete without another global survey of covid-19 that summarises some of the significant legislative and legal issues that the pandemic has presented to employers and employees. The updated chapter highlights how international governments and employers continued to respond to the pandemic during the course of 2022, from shutdowns and closures to remote working and workplaces reopening. Employers around the globe have needed to be nimble to deal with the constantly changing environment.

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

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

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

Global diversity and inclusion initiatives remained a significant issue in 2022 for multinational employers across the globe. Many countries in Asia, Europe and South America have continued to develop their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation, and regulations on gender quotas and pay equity, to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals in the workforce remain under-protected and under-represented, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

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

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

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In addition to the six general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 37 jurisdictions around the world.

Covid-19 aside, in 2023, and looking into the future, global employers continue to face growing market complexities, from legislative changes and compliance challenges, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, addressing social media issues, negotiating collective bargaining agreements or responding to increasing public attention on harassment or equal pay issues, workforce issues can affect a company's ability to attract and retain talent, or damage its reputation and market value in an instant. These issues have created a confluence of legal and business challenges that can no longer be separated or dealt with in isolation. As a result, every company requires business advisers who can address the combined business and legal issues relating to its multinational workforce. It is my hope that this text provides legal practitioners and human resources professionals with some guidance, best practices and comprehensive solutions to significant workforce issues that affect a company's market position, strategy, innovation and culture.

A special thank you to the legal practitioners across the globe who have contributed to this volume for the first time, as well as those who have been contributing since the first year. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my Faegre Drinker associates, Xinyi Chen, Katherine Gordon, Caroline Guensberg, Konstantina Kloufetos, Zoey Twyford, Brooke Razor and Charlotte Marshall, counsel Emma Vennesson, and my law partners, Alex Denny, Nicole Truso and Claire Zhao, for their invaluable efforts in bringing this 14th edition to fruition.

Erika C Collins
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Chapter 33

PERU

Ernesto Cárdenas Terry and Iván Blume Moore[1]

I INTRODUCTION

Peru has a vast and diverse labour and employment legal framework. Statutes, judicial and constitutional precedents and collective agreements govern employment and labour relations. The Constitution is the foundation of Peruvian laws, including but not limited to fundamental labour rights such as non-discrimination, working hours, freedom of association and collective bargaining. The Constitutional Court is the principal organ of interpretation and control of constitutionality and the protection of constitutional rights.

Labour law regulates the relationship with labour unions, collective bargaining, arbitration and the right to strike (Collective Labour Relations Law, Supreme Decree No. 010-2003-TR and its Regulations, Supreme Decree No. 011-92-TR). Employment laws, most importantly the Single Revised Text of the Labour Productiveness and Competitiveness Law, approved by Supreme Decree No. 003-97-TR, set the rules for hiring and dismissing employees. There are specific laws that regulate statutory benefits, minimum standards for wages, working hours, non-discrimination and occupational safety and health, among many others. There are also specific laws that apply to the public sector (government employees) and special labour regimes (such as civil construction, foreign employees and micro and small employers).

Employment disputes are litigated in labour or constitutional courts, depending on the claims asserted. Arbitration is often used as a conflict resolution mechanism for collective bargaining but seldom used for the purposes of individual labour disputes. The National Superintendency of Labour Inspection (SUNAFIL) is the public entity in charge of ensuring employees' rights and overseeing workplace issues. It is often involved in employment disputes, most importantly to impose fines on non-compliant employers.

II YEAR IN REVIEW

Recent years have been marked by the efforts to reactivate the economy, re-energise businesses and implement a safe return to the workplace. As of 4 September 2022, due to amendments passed by Ministerial Resolution No. 675-2022-MISA, it is no longer necessary for employees to be vaccinated against covid-19 to return to work in person.

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Further, according to the Technical Report of the National Institute of Statistics and Information Technology, comparing the third trimester of 2022 with the third trimester of 2021, the working population increased by 3.8 per cent.[2]

Also, the temporary modality of remote working implemented in 2020, created by the government specifically to deal with the pandemic, was extended until 31 December 2022. If employers and workers wish to continue either total or partial remote working in 2023, they must adapt to the regulations of Law No. 31572, the new Teleworking Law. The Law will be enforceable 60 business days after the regulations are issued by the government; at the time of writing, this issuance is pending.

The Labour Inspection Tribunal, a technically independent collegiate body formed to make final administrative decisions in cases in which a grave labour infraction has occurred, has issued important mandatory precedents; for example, regarding effective supervision[3] and working on days off.[4]

In July 2022, the Ministry of Labour issued Supreme Decree No. 014-2022-TR, which amended the Regulations to the Collective Labour Relations Law and introduced several changes to the established labour relations system, as described in Section XI. In February 2022, the Ministry enacted Supreme Decree No. 001-2022-TR, which forbids the outsourcing of core activities. This prohibition came into effect on 23 August 2022, although its application is currently suspended because of a precautionary measure at an administrative level, as discussed in Section XV.

III SIGNIFICANT CASES

i Compensating for paid leave during the pandemic

In March 2020, to prevent the spread of covid-19, the government declared that employees in an at-risk group or those who could not carry out physical work because of covid-19 restrictions, whose activities were not compatible with remote working, were entitled to paid leave subject to future compensation.

Although the Labour Inspection Tribunal had previously issued more than one decision stating that it is possible to deduct any pending paid leave from the settlement of statutory benefits following dismissal,[5] the Peruvian Congress passed Law No. 31632, which contemplates two forms of compensation for accumulated hours of paid leave:

a with overtime work or training outside working hours, without exceeding two hours a day or 52 hours a week, at a rate of three hours of leave for each hour of overtime or training; and

b with accrued but unused annual leave, without exceeding 15 days per leave period, at a rate of three days of leave for each day off.

Contrary to what was previously provided, the Law expressly prohibits the compensation of paid leave by discounting social benefits.

2 https://m.inei.gob.pe/prensa/noticias/poblacion-ocupada-del-pais-alcanzo-los-17-millones-632-mil-personas-en-el-iii-trimestre-del-presente-ano-14012/.

3 Resolution No. 011-2022-SUNAFIL/TFL.

4 Resolution No. 008-2022-SUNAFIL/TFL.

5 Resolutions Nos. 69-2021-SUNAFIL/TFL and 89-2021-SUNAFIL/TFL.

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ii SUNAFIL may not sanction companies that outsource core activities

Through Resolution No. 0355-2022/SEL-INDECOPI, the court of the Peruvian National Institute for the Defence of Competition and the Protection of Intellectual Property (INDECOPI) issued a precautionary measure to stop SUNAFIL from applying the prohibition on outsourcing core activities. Employers may not be inspected or penalised by SUNAFIL for outsourcing activities that are part of the core functions of a business. A decision on the merits is pending.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

In general, employees are hired for an indefinite term. There are no formal requirements for indefinite-term contracts, which can be entered into verbally or in writing. Contracts for an indefinite term can be amended at any time with the agreement of the parties.

Employees may only be hired for a fixed term as expressly detailed in the law (e.g., when initiating a productive activity or when there are occasional increases in production). The total term of fixed-term employment contracts, including the initial contract and its renewals, depends on the type of contract. In general, under no circumstances may an employee remain under a fixed-term contract with the same employer for more than five years, even if there have been different types of contracts during that time.

Fixed-term contracts should be executed in writing at the start of employment and can be amended at any time with the agreement of the parties. However, if an employee has been hired for a period that exceeds the fixed term, or the contract was not executed in a timely manner, the employee will be deemed to have been hired for an indefinite term.

Employees on a fixed-term contract have the same rights to all statutory benefits, except for receiving compensation, provided their employment ends with the expiry of the term of the contract. The only difference from employees hired for an indefinite term relates to the calculation of the compensation for arbitrary dismissal, as discussed in Section XIII.

ii Probationary periods

A probationary period allows an employer to assess whether an employee is suitable for the job. If the standards of the employer are not met, the employee can be dismissed without being liable for compensation for arbitrary termination.

A typical probationary period is three months, at the end of which the employee is entitled to protection against arbitrary dismissal. A longer period can be agreed if training or adaptation is required, or the nature or degree of responsibility justifies an extension. The extension of the probationary period must be recorded in writing but must not exceed six months (for qualified or trusted employees) or one year (for management personnel).

iii Establishing a presence

There is no restriction on a non-domiciled entity hiring Peruvian nationals to work in Peru. However, the foreign entity will be unable to comply with mandatory requirements applicable to employers in Peru. For instance, it will not be able to implement an electronic payroll to register its employees, pay statutory benefits in compliance with Peruvian law or

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withhold payroll taxes applicable to its employees (unless a permanent establishment (PE) is implemented). Therefore, in practice, the foreign entity will be unable to operate as a compliant employer for Peruvian law purposes.

Indirect hiring (agency or third-party employees) and outsourcing for local and foreign companies is permitted subject to the restrictions and requirements of local law. It is possible for foreign entities to hire independent contractors in Peru because no formal obligations would be imposed on the non-domiciled entity. However, the contractor must be an autonomous and independent service provider. Independent contractors must have broad freedom of action so as not to be considered employees in Peru.

It would be crucial to determine whether the activities of the independent contractor would give rise to it being a PE of the entity in Peru, in which case, the PE will be considered a domiciled taxpayer for income tax purposes. Whether the activities of the independent contractor are tantamount to being a PE will depend on the activities and negotiation powers exercised in Peru in accordance with the Income Tax Law.

V RESTRICTIVE COVENANTS

Non-compete obligations are not legally regulated in Peru. Likewise, there are no judicial decisions in this regard. However, Article 25 of the Labour Productiveness and Competitiveness Law indicates that unfair competition is a serious offence that would justify dismissal of the employee. Therefore, any non-compete clause would be a contractual provision that equates to the employee's legal obligation not to compete unfairly with their employer. Therefore, in practice, it is advisable to include a non-compete clause in employment agreements.

The validity of non-compete agreements can be debatable when the employment relationship has already ended. However, these agreements are generally considered valid when the following four conditions are met: (1) the agreement is executed in writing; (2) the agreement is temporary (no more than two years); (3) there is a legitimate business purpose; and (4) adequate compensation is provided.

VI WAGES

Employees are entitled to a number of statutory benefits, and payroll taxes are applicable.

The minimum wage is currently 1,025 soles. This is adjusted by the government periodically. Salaries may be paid monthly, fortnightly, weekly, daily or hourly. Wages in Peru are subject to the following contributions:

a social health insurance: monthly premiums must be paid to the social health insurance authority, EsSalud, at 9 per cent of employees' remuneration (which can be reduced to a maximum of 6.75 per cent if employees are only registered with EsSalud or have separate private health insurance);

b pension: employees are required to pay pension contributions of approximately 13 per cent of their salary. Employers will withhold pension contributions due from the remuneration and pay them on behalf of employees to the fund chosen by the respective employee; and

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c income tax: employees are liable for income tax but the amounts due are withheld from remuneration and paid by employers on their behalf. The tax applies in five categories at a progressive cumulative rate that ranges from 8 per cent to 30 per cent. Tax is not payable on the first seven tax units (UITs)[6] (32,200 soles in 2022).

In addition to their salary, employees are entitled to the following statutory benefits:

a legal bonuses: the employer must pay a bonus in the months of July and December of each year. The amount of each bonus is one monthly remuneration. If the employee does not work the complete semester, the bonus is paid proportionally;

b extraordinary bonuses: employees are entitled to receive two extraordinary bonuses, which are paid in the same way as the legal bonuses. Extraordinary bonuses are equivalent to 9 per cent or 6.75 per cent of the legal bonuses, depending on the health coverage provided by the employer to its employees;

c compensation for length of services: all employees are entitled to this compensation, provided they work a minimum of four hours a day. This benefit is deposited by the employer every six months (in May and November) with the banking or financial institution chosen by the employee. The amount of each deposit is equivalent to approximately 8.33 per cent of the remuneration earned each semester;

d profit-sharing: companies with more than 20 employees whose activities generate category three income must distribute among its employees a percentage of their profits before taxes. The profit-sharing rate ranges from 5 per cent to 10 per cent, depending on the company's business. Half of this is distributed proportionally between the employees' annual wages and the other half is distributed according to the days worked by each employee, with a cap of 18 salaries;

e family allowance: employees receive an amount equivalent to 10 per cent of the minimum wage (currently equivalent to 102.50 soles) if the employee has one or more dependent children under 18 years old. In some cases, the benefit can be extended for a few more years;

f annual leave: employees are entitled to 30 calendar days of paid annual leave for each complete year of service, unless they agree with the employer to reduce, accumulate or break down the period subject to specific rules. If employees fail to take all the annual leave due within the year after the one in which they earned their entitlement, they will be entitled to the equivalent of two monthly remunerations in addition to their normal monthly pay; and

g life insurance: employees have the right to life insurance paid for by the employer from the first day of work. The law regulates the characteristics of this insurance.

Working hours are a maximum of eight hours per day or 48 hours per week. Accumulative or atypical work periods are permitted provided the average is no more than 48 hours a week over three weeks. A lunch break is not included in an employee's working hours unless it is expressly agreed.

Remuneration for employees working a night shift (from 10pm to 6am) cannot be less than the minimum wage imposed by law plus a 35 per cent surcharge (currently 1,383.75 soles).

6 Unidad impositiva tributaria.

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Work carried out in excess of the working day or weekly hours shall be considered overtime and will be payable with a surcharge not less than 25 per cent of the employee's normal hourly remuneration for the first two hours and 35 per cent of the normal hourly remuneration for all remaining hours. Overtime work may be compensated with equal time off, if so agreed. Overtime is voluntary for both the employer and the employee, except where prescribed by law.

The following categories of employees are not bound by the maximum limits on working hours or entitled to overtime: (1) management personnel; (2) employees not under direct supervision; and (3) those who perform intermittent services with periods of waiting between.

Employees have the right to paid leave on national holidays. If an employee works on holidays provided by law without the corresponding day off, the employer shall pay compensation for the work done with a 100 per cent surcharge. Employees are entitled to a minimum rest period of 24 hours per week, preferably on Sundays.

VII FOREIGN WORKERS

To hire a foreign employee, it is necessary to comply with certain requirements. The foreign employee must request a foreign identification, issued by the Peruvian Immigration Agency, and may start working only after having obtained the foreign identification. With some exceptions, foreign employees should be hired for a fixed term, for a maximum of three years (renewable for equal periods, indefinitely). Again with some exceptions, the Ministry of Labour must approve employment contracts, which requires compliance with the formalities provided by law (specific information, mandatory clauses, etc.).

The hiring of foreign employees is subject to two limitations: only 20 per cent of an employer's workforce and no more than 30 per cent of the payroll may be foreign nationals. However, foreign citizens are not considered to be included in these percentage limitations if they are professional specialist personnel or management personnel of new companies or nationals of a country with which Peru has a labour reciprocity agreement or a bilateral or multilateral agreement (e.g., the Andean Community and Mercosur), among other things.

Generally, a foreign national coming to work in Peru will require a work visa, which will permit a legal stay of up to 365 days, renewable for the same period. Once the foreign identification is issued, the foreign national can begin rendering services and can be entered on the employer's payroll.

Foreign employees have the same statutory labour rights as local employees.

VIII GLOBAL POLICIES

Employers with more than 100 employees are obliged to implement internal labour regulations. These regulations set the rules, obligations and rights of the workplace and require the approval of the Ministry of Labour. Once approved, the regulations should be given to and signed by all employees.

Furthermore, employers must implement (1) a compensation policy providing criteria and guidelines to manage, set and adjust employees' remuneration without discrimination, which must be provided to all employees in writing or via digital means, and (2) an internal

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policy to prevent and sanction sexual harassment, which must be provided to all employees. The latter policy is mandatory for employers with 20 or more employees; however, it is recommended that all employers have one.

In addition, employers with 20 or more employees must implement internal health and safety at work regulations, duly approved by the entity's health and safety at work committee and provided to its employees.

As these are unilateral rules enacted by the employer, they are not incorporated in the employment contract. However, non-compliance with these policies may trigger disciplinary action, including dismissal.

IX PARENTAL LEAVE

i Maternity leave

Pregnant employees are entitled to 49 days of prenatal leave and 49 days of postnatal leave. Prenatal leave may be partially or wholly deferred and taken in the postnatal period, if the employee so chooses.

If a working mother has pending annual leave, she may take it from the day following expiry of postnatal leave.

In the case of multiple births or births of children with disabilities, postnatal leave shall be extended by 30 additional calendar days.

Employees on maternity leave are paid directly by the employer but this remuneration is later reimbursed by EsSalud.

ii Breastfeeding at work

After expiry of postnatal leave, the working mother is entitled to one hour of leave per day for breastfeeding until her child is one year old.

In the case of multiple births, breastfeeding leave is increased by one hour per day. This leave may be split into two equal periods within the working day.

iii Paternity leave

Male employees can take 10 consecutive calendar days as paternity leave, which can be extended by 20 to 30 consecutive calendar days: in the case of premature and multiple births; if the baby is born with a terminal congenital disease or a severe disability; or if the mother has serious health complications.

Remuneration for these days is paid by the employer.

Finally, there are other types of leave of absence available to parents, including adoptive leave, leave for medical assistance and rehabilitation therapy for disabled family members, leave for employees whose immediate family members are seriously or terminally ill or have suffered a serious accident and leave for employees due to the death of immediate family members.

X TRANSLATION

Although it is not mandatory for employment documents to be drawn up in Spanish, any document submitted to government authorities that is not in Spanish must be officially translated into Spanish. In addition, it is highly advisable to translate all employment and

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data protection (e.g., privacy policy) documents into Spanish, as employees may claim that they did not understand them, which in turn will limit the ability of the employer to apply disciplinary action for non-compliance.

XI EMPLOYEE REPRESENTATION

i Sexual harassment intervention committee

Employers with 20 or more employees are required to form a sexual harassment intervention committee. Employers with fewer than 20 employees are required to appoint a delegate against sexual harassment.

The sexual harassment intervention committee is responsible for the preliminary assessment of a sexual harassment case. It will issue recommendations as to whether the accused employee should be sanctioned and whether other measures to prevent further cases of sexual harassment should be implemented. The committee will meet only when necessary to address a case.

The committee shall be comprised of four members. The employer appoints two of them and the other two are elected by the employees. In both cases, gender parity shall be observed. In addition, one of the members appointed by the employer must be from the human resources department. The employer sets the term of office of committee members.

ii Health and safety committee

Employers with 20 or more employees must set up a health and safety committee with an equal number of employer representatives and employee representatives (at least four but no more than 12 in total). Employers with majority unions must include a member from that union as an observer.

The committee is responsible for promoting health and safety at work, and guiding and monitoring compliance with rules on health and safety at work. The employees should elect their representatives, members and deputies to serve on the health and safety committee.

iii Trade unions

Unions can be formed at different levels: company, branch of activity, profession or miscellaneous occupations. For unions formed at a company level, there must be at least 20 employees, and for all other types of unions, there must be at least 50 employees. Unions affiliating an absolute majority of the employees in a certain area represent all the employees of that area, including non-members. Minority unions will represent only their members. Companies are obliged to negotiate with the union.

When there are not enough members to form a union, employees may elect two delegates to represent them before the employer and the labour authority.

The collective bargaining procedure is annual (although longer terms may be negotiated) and will start with the union producing a list of demands (a draft collective bargaining agreement). When collective bargaining is unsuccessful, other mechanisms to solve the conflict may be used, such as conciliation or mediation. There are also cases in which the union can force an arbitration.

It is strictly forbidden for employers to discriminate against their employees because of their union activity or their participation in collective bargaining procedures or strikes. Any termination based on (1) union membership or participation in union activities,

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(2) being or having been a candidate for employee representative, and (3) filing a complaint or participating in a process against the employer before the corresponding authorities, will be considered null and void. Consequently, employees may request reinstatement.

In July 2022, the Ministry of Labour enacted Supreme Decree No. 014-2022-TR, which introduced several changes to the Regulations to the Collective Labour Relations Law. In general, the changes seek to introduce new union formulas, open collective labour relationships among independent workers, grant more power and protection to union representatives and limit employers' options during strikes and collective bargaining proceedings. Many companies have filed complaints against the amendments established in the Decree with INDECOPI's Bureaucratic Barriers Commission, alleging that the amendments impose undue and illegal market restrictions and that the Peruvian Ministry of Labour did not comply with the formality of publication of the changes before the entry into force of the Supreme Decree nor with supporting the suitability, necessity and proportionality of the measures.

XII DATA PROTECTION

The Peruvian Personal Data Protection Law[7] and its Regulations[8] apply to personal data[9] of individuals contained or destined to be contained in a public or private personal database[10] to be processed[11] in Peru. Thus, the processing of personal data of employees and candidates that are contained in databases is protected under the Data Protection Law. The main obligations are as described below.

The processing of personal data requires the prior, free, informed, express and unequivocal consent of the data subject (i.e., the employee or candidate), unless exceptions apply (such as contractual reasons, anonymisation or legitimate interest). Sensitive data (which includes information about an individual's race, trade union affiliation, income and religious beliefs, among other things) is subject to special protection and, generally, written consent of the data subject is required prior to processing.

Data controllers must (1) register their databases and report cross-border transfers, (2) inform data subjects in a detailed, simple, express and unequivocal manner and prior to collection about how and why their data is to be processed, and by whom, and (3) guarantee the security and confidentiality of the personal data.

Exporters of personal data must refrain from making cross-border transfers if the destination country does not provide adequate levels of protection.

The Personal Data Protection Authority has determined that access to criminal and judicial records is valid when the interested party requests it from the competent public

7 Law No. 29733.

8 Supreme Decree No. 003-2013-JUS.

9 All numerical, alphabetical, graphic, photographic, sound or any other type of information concerning an individual that identifies or could be used to identify the individual.

10 An organised set of personal data, automated or not, regardless of their form, whether physical, magnetic, digital, optical or other to be created, irrespective of the manner or means of creation, formation, storage, organisation and access.

11 Any technical operation or procedure, automated or not, that allows the collection, registration, organisation, storage, retention, preparation, modification, extraction, consultation, use, blockage, suppression, disclosure by transmission, or dissemination, or otherwise makes available or facilitates the access, correlation or interconnection of personal data.

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authorities. Therefore, outsourcing the services pertaining to criminal and judicial records is not allowed. The express consent of the candidate or employee is required before an employer can safely run background checks. If an employer makes enquiries without the consent of the data subject, it may face claims in the light of privacy and non-discrimination legislation.

The penalties that may ensue for non-compliance vary between 0.5 UIT and 100 UITs. The data subject may also file a claim for damages.

Electronic signatures

Electronic signatures are permissible in Peru. Thus, electronic signatures are generally valid and enforceable for offer letters and employment contracts, unless documents need to be filed with the authorities (e.g., employment contracts for foreign employees). For an electronic signature to have the same validity and legal effectiveness as a wet ink signature, it must be generated by a digital certification service provider that is duly accredited by INDECOPI. In that sense, in principle, electronic signatures are valid; however, parties should ensure the use of appropriate software in executing documents electronically.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Employees can be dismissed from their job only for a just cause under the law. The law establishes the just causes for dismissal, which include matters relating to the employee's capability (e.g., physical, intellectual, mental or sensory deficiencies or performance) or conduct (e.g., violent acts, failure to comply with work obligations or sexual harassment).

An employee dismissed without just cause may choose between two remedies: (1) reinstatement or (2) compensation for arbitrary (unfair) dismissal. Protection against arbitrary dismissal arises after the probationary period expires, as described in Section IV.

Compensation for arbitrary dismissal differs depending on the type of contract:

a 1.5 monthly salaries for every year of service for employees hired under an employment agreement for an indefinite term; and

b 1.5 monthly salaries for every month remaining on the contract for employees hired under a fixed-term employment agreement.

Fractions of a year are paid on a pro-rata basis. A cap of 12 monthly salaries applies to both types of compensation. Compensation paid for arbitrary dismissal is tax-free.

A trend to grant an additional indemnity for moral damages is currently quickly spreading through the labour courts. Amounts vary greatly depending on the circumstances.

Employees dismissed for cause are not entitled to severance pay. However, the employer needs to follow the legally established procedure to end the employment relationship for cause. This procedure requires the employer to give the employee six calendar days to defend themself.

Managerial and trust employees may not request reinstatement in their job. In principle, these employees may be dismissed without cause, and the only consequence for the employer will be the payment of compensation. In the past few years, that payment has become a matter of debate in Peru, as the Supreme Court has ruled that employees who have rendered services since the beginning of their employment as trust or management personnel can be dismissed without just cause (through the withdrawal of trust) without being entitled to compensation for arbitrary dismissal.

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It is possible to terminate an employment relationship by mutual consent. There are no formal requirements for this type of settlement agreement but they usually include the payment of a certain amount of money (although this is not mandatory). It is common for the employer to offer at least an equivalent amount to the compensation that would be payable for an arbitrary dismissal. Separation agreements containing a release or waiver of all claims against the employer are not allowed in Peru, as it is not possible to waive statutory rights.

ii Redundancies

Peruvian law allows the termination of employment agreements under the following circumstances: (1) cases of *force majeure*; (2) economic, technological, structural or similar cases, provided the termination of the employment contracts involves more than 10 per cent of the employer's workforce; and (3) winding up of the business, liquidation of the employer and bankruptcy.

As a result of a valid collective termination, employees have no right to claim any type of compensation for termination of their employment relationship.

In general, the procedure entails (1) discharging 10 per cent or more of the workforce, (2) bargaining with employees (by a trade union or employee representatives), and (3) approval from the Ministry of Labour. The procedure is long and complicated and the Ministry rarely approves collective terminations.

If the business is dissolved or liquidated, the procedure is very simple and straightforward. The company must adopt a resolution approving the dissolving of the company, designating liquidators and authorising them to terminate the employment relationships with its employees. The company should only advise the Ministry of Labour about the terminations, sending a certified copy of the resolution in which the winding up was approved, a list of the affected employees, the date of termination and the amount of social benefits due to the employees. No authorisation or permit is required.

The company liquidator should then forward a letter to the affected employees advising them about the termination of their employment and making their statutory benefits available to them. The letters should be sent via a public notary 10 days before the actual termination date. The employer may substitute this prior notice with payment of the remuneration due for those 10 days.

Employees affected by collective redundancies will be entitled to the remuneration due and statutory benefits within 48 hours of termination.

In addition, employees have a preferential right to be re-employed if the employer decides to hire, either directly or through a third party, new personnel for the same or similar positions within one year of the collective termination being concluded.

XIV TRANSFER OF BUSINESS

Labour legislation does not expressly regulate the transfer of personnel from one employer to another. Employees can be transferred by the employer's contractual position being assigned to a new party.

The consent of employees is required prior to a transfer. The parties usually enter into a tripartite agreement to regulate the assignment of contracts.

There are no legal requirements regarding the form or content of the agreement but it is customary for the new employer to acknowledge all the employees' benefits, conditions, seniority and length of service.

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Notwithstanding the foregoing, the Supreme Court has recognised the possibility of automatically and unilaterally transferring employees through a transfer of business as part of a simple reorganisation (as provided in Article 391 of the General Corporations Law).[12]

A justifiable reason for an automatic transfer of employees would be that they belong to the equity block that is being transferred. Therefore, the employees can all be together, as part of that equity block, segregated and granted to another entity. In this circumstance, employees' seniority and acquired rights (both legal and conventional) should be acknowledged by the new employer.

Hence, if the transfer of employees includes the transfer of a whole business line (inventory, assets, contracts, etc.), as provided by the Supreme Court, the simple substitution of the employer through an automatic transfer is possible. If not, the employees' consent would be required.

XV OUTLOOK

The following are some issues that employers should consider in their human resources plans for the coming year.

i Remote working

As indicated in Section II, a special modality for remote working was in force until 31 December 2022. However, in September 2022, the Peruvian government passed the new Teleworking Law, which supersedes the existing legislation and seeks to regulate work from home schemes currently in existence. Among other things, the new Law will force employers to: (1) provide or compensate employees for internet, electricity and equipment, unless otherwise agreed; (2) be responsible for the safety and health of their workers (work accidents and occupational illnesses) while they are working remotely; and (3) properly justify the reasons why the company needs an employee to return to the workplace before ordering them to do so. The Law will be enforceable 60 business days after its regulations are issued by the government; at the time of writing, this is still pending.

ii Vaccination

According to Ministerial Resolution No. 675-2022/MINSA and Supreme Decrees Nos. 108-2022-PCM and 130-2021-PCM, as of 4 September 2022, there is no longer legal support to demand that an employee is vaccinated before they return to work in person or to suspend the employment contract of a non-vaccinated employee.

In this context, the government promotes the optional use of masks and vaccination against covid-19, among other measures.

12 Ruling Cas. Lab. No. 1162-2013-JUNIN.

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iii Outsourcing

In February 2022, the Ministry of Labour issued Supreme Decree No. 001-2022-TR, which amended the Regulations to the Outsourcing Law and banned the outsourcing of core business and complementary activities. According to the Decree, only 'main' non-nuclear activities[13] (such as back-office activities) can be outsourced to a third party.

Many companies filed complaints against the amendments with INDECOPI's Bureaucratic Barriers Commission, alleging that they impose undue and illegal market restrictions. These complaints have resulted in the new Regulations being temporarily suspended until the Commission issues a final decision. It remains to be seen whether the changes will take effect, but it is clear that the trend of limiting or prohibiting outsourcing continues.

13 'Nuclear activities' relate to a company's core activities and cannot be outsourced. Supreme Decree No. 001-2022-TR proposes that activities relating to the following should be considered in identifying a company's core business: (1) the corporate purpose of the company; (2) what identifies the company to its end customers; (3) the differentiating element of the company in the market in which it operates; (4) generating added value for the company's customers; and (5) generating the greatest income for the company; https://busquedas.elperuano.pe/normaslegales/decreto-supremo-que-modifica-el-decreto-supremo-n-006-2008-decreto-supremo-n-001-2022-tr-2042220-1/.

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Appendix 1

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Ernesto Cárdenas Terry is a partner at Rodrigo, Elías & Medrano Abogados, and specialises in labour contracting, migrations and social security matters.

He received his law degree from the Pontifical Catholic University of Peru with the highest honours.

Ernesto counsels companies on hiring national and foreign personnel, social security issues, labour cost reductions, compensation planning, termination of work, inspection and audit processes and on administrative and judicial procedures relating to his specialisms.

He is a professor at the Postgraduate School of the Peruvian University of Applied Sciences and ESAN University and was previously assistant professor of the labour law course at the Law School of the Pontifical Catholic University of Peru (2003–2004).

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He counsels companies on hiring national and foreign personnel, immigration, labour cost reductions, compensation planning and equality, termination of work relationships, internal investigations, privacy and personal data protection. He assists in inspection and audit processes, and in administrative and judicial procedures relating to his speciality.

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He was previously international visiting lawyer of the corporate and securities practice area at Dechert LLP, New York (2013–2014) and consultant in the corporate area at Posse Herrera Ruiz, Bogotá (2014–2015).

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