EMPLOYMENT TERMINATION SURVEY

APRIL 2019

INTRODUCTION

CONTENTS

INTRODUCTION

WongPartnership LLP, together with Asia-Pacific members of the Employment Law Alliance ("**ELA**"), have come together to prepare this publication designed to provide a guide to the termination practices and provisions across 22 jurisdictions in the Asia-Pacific region. Frequently asked questions such as, "is an employer required to give reasons before terminating an employment agreement" and "must retrenchment benefits or severance payments be made in a retrenchment scenario" are addressed in this publication.

We hope you will find this publication useful and relevant. The information in this publication is meant as an overview and does not constitute legal advice. If you have any questions on the law in any of the jurisdictions, please contact the relevant member firm, who can provide the appropriate legal support.

The firms that have participated in this survey are:

1.	Australia	Corrs Chambers Westgarth
2.	Bangladesh	Sattar & Co
3.	Cambodia	DFDL
4.	China	JunHe
5.	Guam	Camacho Calvo Law Group LLC
6.	Hong Kong	Deacons
7.	India	Trilegal
8.	Indonesia	SSEK Legal Consultants
9.	Japan	Ushijima & Partners
10.	Korea	Kim & Chang
11.	Laos	DFDL
12.	Macau	MdME
13.	Malaysia	Shearn Delamore & Co.
14.	Myanmar	DFDL
15.	New Zealand	Simpson Grierson
16.	Pakistan	Meer & Hasan
17.	Philippines	SyCip Salazar Hernandez & Gatmaitan
18.	Singapore	WongPartnership
19.	Sri Lanka	John Wilson Partners
20.	Taiwan	Lee, Tsai & Partners
21.	Thailand	Price Sanond
22.	Vietnam	DFDL

AUSTRALIA

1. What are the sources of law governing the termination of employment in your jurisdiction?

There are a number of sources of employment regulation in Australia. The principal source is the Fair Work Act 2009 (**FW Act**), federal legislation which applies to all employees in the private sector (except in the state of Western Australia, where it does not apply to employees of unincorporated businesses). The FW Act includes the National Employment Standards (**NES**) which set out ten minimum employment entitlements for all employees. Included among the NES are minimum periods of notice prior to dismissal of an employee (see our response to question 2 below), and minimum redundancy payments (see our response to question 13), both based on an employee's length of service with their employer.

Terms of employment may also be governed by a modern award, enterprise agreement and/or contract of employment, which can provide more generous conditions than the NES. Modern awards supplement the NES, setting out more detailed employment conditions which apply to all employers and employees in various industries and occupations. Enterprise agreements are collective agreements negotiated for specific businesses (or part of a business), under which employees must generally be 'better off overall' when compared with the applicable modern award. Once approved by the Fair Work Commission (**FWC**), enterprise agreements exclude the operation of any relevant modern award.

Under the FW Act, an employer cannot dismiss an employee from their employment in a manner that is *harsh, unjust or unreasonable*. For more information on the eligibility requirements for an employee to bring an unfair dismissal claim, as well as the factors taken into account by the FWC in determining if a claim succeeds, see our responses to questions 19 and 20 below.

Under the common law, a wrongful dismissal claim may arise where an employer terminates an employee's employment in breach of contract (although these claims are generally only pursued by executives and senior/professional employees). A wrongful dismissal claim might be available when an employer terminates an employee's employment:

- without providing the period of notice of termination specified in the contract;
- before the date on which the contract is expressed to end (in the case of a fixed-term contract);
- on a summary basis but without the requirements for summary dismissal (e.g. serious misconduct) set out in the contract being satisfied; or
- without following any termination procedures that may be set out in the employment contract.

The FW Act general protections provisions protect employees from adverse action by an employer, which includes dismissal, on certain prohibited grounds. These provisions protect employees:

AUSTRALIA

- in the exercise of their workplace rights;
- in terms of freedom of association (e.g. involvement or non-participation in union activity); and
- from workplace discrimination (on the basis of protected attributes including age, race, sex, sexual preference, disability, etc).

Federal, state and territory anti-discrimination statutes also prohibit unlawful discrimination, which arises where an employer terminates an employee's employment on the basis of a protected attribute specified in the applicable legislation.

2. How can an employer terminate an employment agreement?

Termination by notice

Under the FW Act, employees must be given written notice of the termination of their employment, or payment in lieu of notice. The NES provide for certain minimum notice periods based on an employee's length of continuous service with their employer:

Period of the employee's continuous service with the employer	Notice period
One year or less	1 week
1-3 years	2 weeks
3-5 years	3 weeks
5+ years	4 weeks

Employees over 45 years of age with at least two years' continuous service are entitled to an additional week of notice (or pay in lieu).

However, the above statutory minimum notice periods do not apply to certain categories of employees including casuals, employees engaged for a specified period or task, trainees, etc. Notice of termination is also not required where an employee has engaged in serious misconduct (e.g. theft, fraud, assault, intoxication, refusal to carry out a lawful and reasonable instruction, or other conduct inconsistent with continuation of the employment).

Payment in lieu of notice under the NES must include payment at the full rate of pay for the hours the employee would have worked if the employment had continued until the end of the notice period, and any applicable incentive payments, bonuses, loadings or allowances.

Modern awards, enterprise agreements or individual contracts of employment may include provisions for longer notice periods than those specified in the NES.

AUSTRALIA

Where an employment contract does not specify a minimum notice period, an employee may be able to establish a right to termination on 'reasonable notice' (based on an implied contractual term at common law). The period of reasonable notice is determined on the basis of factors including the employee's length of service, age and seniority. This could be anything between 3 months and 2 years, although typically the courts find reasonable notice to be 6-12 months. Reasonable notice claims are pursued mainly by executives and higher-level professionals, seeking damages for the equivalent of the reasonable notice period not provided by the employer. To preclude the prospect of such a claim, employers should include a notice period in the written employment contract.

Summary dismissal

There are two possible sources of an employer's right to terminate an employee's employment without notice (also known as summary dismissal). First, at common law, an employer may terminate the employment contract in the event of serious breach or repudiatory conduct on the part of an employee (such as serious misconduct). Secondly, express terms of the employment contract, legislation or an industrial instrument (e.g. modern award or enterprise agreement) may make provision for the employer's right of summary dismissal in specified circumstances.

3. How can an employee terminate an employment agreement?

The minimum statutory notice periods in the NES for termination of employment which must be observed by an employer (see our response to question 2 above) do not apply in reverse to an employee's resignation from their employment. However, an employee may be required to provide similar periods of notice ahead of resignation under the provisions of a modern award or enterprise agreement. Contracts of employment may also specify a required notice period for termination of employment by the employee.

Where an employee has provided their employer with the required period of notice of resignation, the employer can let the employee work out their notice period, or instead provide the employee with pay in lieu of notice and end the employment from that point.

If an employee provides their employer more notice than is required, the employer can choose to reject this and permit the employee to only work out the minimum notice period (or provide pay in lieu of notice for that period).

An employee is permitted to resign without notice where their employer has engaged in conduct that breaches the employment contract (e.g. unilateral removal of an employment benefit).

Finally, an employer and employee can end the employment by agreement (i.e. in circumstances and upon terms agreed by both parties).

AUSTRALIA

4. Is an employer required to give reasons before terminating an employment agreement?

Under the unfair dismissal provisions of the FW Act, an employer must provide a valid reason for a decision to terminate an employee's employment. This reason must be based on the employee's incapacity (usually, poor performance) or misconduct. An employee may also be dismissed due to changes in the operational requirements of the business (i.e. redundancy).

Reasons for a dismissal may not have to be given to an employee if an employer wishes to terminate the employment during or at the end of a specified probationary period, allowing the employer to determine the employee's suitability for the role. However, probationary periods cannot exclude an employee's right to bring an unfair dismissal claim once they have served the applicable minimum qualifying period under the FW Act: 6 months' continuous service, or 12 months for employees in a small business (less than 15 employees). In effect, this means that an employee will need to be provided with reasons for dismissal in a probationary period that extends beyond 6 or 12 months (as applicable).

At common law, an employer is not required to provide reasons for terminating an employment contract on the giving of a required period of notice (or pay in lieu). However, where the employer is seeking to exercise a right of summary dismissal, the employer would need to provide reasons supporting the basis for that right (e.g. the specific acts of alleged serious misconduct or other repudiatory action by the employee).

5. Can an employer reject an employee's resignation?

In general, an employer cannot reject an employee's resignation which has been effected in accordance with the terms of the employment contract (e.g. where the required period of notice has been given by the employee) or other legal requirements.

An employer may need to exercise caution in circumstances where an employee resigns in the 'heat of the moment' (usually verbally). If the employee quickly retracts the resignation, it may be considered unreasonable for the employer to have accepted the employee's purported resignation.

AUSTRALIA

6. Can a person undergoing internal disciplinary proceedings resign?

An employee who is the subject of internal disciplinary proceedings can resign. However, it may be possible for an employee to pursue a constructive dismissal claim where a resignation occurs in these circumstances (either as a common law breach of contract claim, or an unfair dismissal claim under the FW Act).

Constructive dismissal occurs when an employee is placed in a position where he/she has no real choice but to resign. For example, where an employee who is subjected to an unjustified internal disciplinary process or investigation resigns, it may be determined that it was the employer's conduct (rather than the employee's resignation) that effectively terminated the employment relationship. The onus is on the employee to prove that he/s did not resign voluntarily, but that he/she was forced to do so by his/her employer.

In contrast, there is no dismissal where the employee resigns of his/her own accord, without any fault of the employer.

7. Can you terminate the employment of an employee for poor performance?

Under the FW Act, an employer can dismiss an employee on the basis of poor performance such as unsatisfactory work, poor attendance record or failure to meet specified performance standards.

However, prior to dismissing the employee, the employer *must* provide warnings to the employee about his/her unsatisfactory performance. This affords the employee an opportunity to understand the problem and try to improve his/her performance.

Warnings should be clearly stated, indicating the nature of the employee's performance deficiencies, the improvements in performance that are required and the time-frames for achieving them. Furthermore, warnings should clearly express that the employee's employment is at risk of ending unless his/her performance improves. The employer may also need to consider providing training or other support to assist the employee to meet the stated performance objectives.

Where an employee is not warned – or not adequately warned – about his/her unsatisfactory performance, the employee may be able to pursue an unfair dismissal claim under the FW Act (see question 19 below). A common law claim for wrongful dismissal might also be available, if the employment contract contains any provisions for performance-based dismissal which have not been observed by the employer.

Employers should also consider any disabilities an employee might have when addressing unsatisfactory performance issues. State, territory and federal anti-discrimination legislation prohibit unlawful discrimination, which can arise where the employee's employment is terminated on the basis of a protected attribute. For example, the employer cannot terminate

the employee's employment on the basis of a disability contributing to the unsatisfactory performance in question (subject to the defence that the employee is unable to perform the inherent requirements of the position; it will also be relevant to consider whether the employer should have made reasonable adjustments to enable the employee to perform the role despite his/her disability).

8. Can you terminate the employment of an employee who is on extended medical leave?

An employee on extended medical leave can only be dismissed in accordance with relevant provisions of the FW Act and anti-discrimination legislation, an applicable modern award or enterprise agreement, and te employment contract.

Under the FW Act general protections provisions, an employer cannot dismiss an employee because he/she is temporarily absent from work due to illness or injury. An absence will be considered temporary where there is a genuine illness or injury and the employee provides the employer a medical certificate within a reasonable time. However, an absence ceases to be temporary if it exceeds three months, or the employee's total absences exceed three months within a 12-month period. Any part of that period in which the employee is on paid sick leave does not count for these purposes. For example, if an employee has been absent due to illness for four months, but is using accrued sick leave for all of that period, it will be considered a temporary absence due to illness and injury and the employer cannot lawfully dismiss the employee.

An employee dismissed for being on extended medical leave may also be able to pursue an unfair dismissal claim on the basis that that the dismissal was harsh, unjust or unreasonable (see our responses to questions 19 and 20 below).

An employee may have grounds for a successful discrimination claim if he/she is dismissed while on extended medical leave, where it can be proved that the dismissal was on the basis of a physical or mental disability (see our responses to question 11 below).

9. Can you terminate the employment of a pregnant employee?

It is unlawful for employers to discriminate against employees on the basis of a protected attribute including an employee's pregnancy. Therefore, an employer cannot dismiss a pregnant employee on the basis of her pregnancy alone.

Federal, state and territory anti-discrimination legislation prohibit such unlawful discrimination. This includes direct discrimination (e.g. dismissal because the employer learns the employee is pregnant); and indirect discrimination, which may occur when an employer imposes a practice or requirement with which a person with a protected attribute is less likely to be able to comply (e.g. requiring all employees to attend early meetings when a pregnant employee may be suffering from morning sickness and therefore unable to attend).

AUSTRALIA

10. Can you terminate the employment of an employee on maternity leave?

An employee cannot be dismissed while on maternity leave (which is treated as unpaid parental leave under the NES provisions of the FW Act), unless the dismissal is based on reasons other than the employee being on such leave – for example, if the dismissal is based on misconduct which the employer has only learned about while the employee is on parental leave.

Where a female employee has been granted parental leave under the NES, she has a right to return to her position at the end of the leave period. She should be returned to her pre-leave position; however, if that position no longer exists, she should be returned to an available, suitable position commensurate with the status and pay of her pre-leave position.

While an employee is on unpaid parental leave under the NES, her employer must consult with her about any decision that would have a significant effect on the status, pay or location of her pre-leave position. For example, if the employer decides to make the employee's position redundant, it must first consult with her, and take all reasonable steps to provide her with information and an opportunity to discuss the effect of the decision. All other requirements for a redundancy-related dismissal would also need to be met (see our responses to questions 12-14 below).

11. Are there (other) categories of employees whose employment cannot be terminated?

Under federal, state and territory anti-discrimination legislation, and the FW Act general protections provisions, it is unlawful for an employer to discriminate against employees *on the basis* of a protected attribute. This means that an employer cannot dismiss an employee based on a protected attribute. These attributes vary from one jurisdiction to another, but generally include the following attributes of an employee:

- race, colour, national descent or social origin;
- sex or gender;
- sexual preference;
- pregnancy, potential pregnancy or breastfeeding;
- relationship status, or parenting/carer status;
- religious beliefs or political views;
- age;
- medical record or disability;
- criminal record; and
- trade union membership or industrial activity.

AUSTRALIA

This protection does not extend to action that is:

- not unlawful under the applicable anti-discrimination law;
- taken due to the inherent requirements of the role; or
- taken against a worker at a religious institution in good faith and to avoid injury to the religious susceptibilities or supporters of that religion.

12. What constitutes retrenchment?

Redundancy occurs when an employer no longer requires a particular job to be performed by anyone. If the redundancy arises from genuine operational needs, such as a restructure, the introduction of technology or a downturn in business, the employer will have a legitimate basis for dismissing an employee (i.e. retrenchment).

A redundancy may also occur where only part of the position previously performed by the employee is now required by the employer. However, an employer cannot implement a redundancy where an employee's position is to be filled by someone else.

An employer can make an employee's position redundant, and therefore terminate his/her employment, if the employer complies with:

- the FW Act in relation to dismissal on the grounds of genuine redundancy, payment of redundancy pay, and consultation;
- any applicable modern award, enterprise agreement, employer policy relating to consultation or redundancy pay, or contract of employment;
- the general protections provisions under the FW Act; and
- applicable anti-discrimination legislation.

Under the FW Act, there is no genuine redundancy if it would have been reasonable for the employee to be redeployed within the employer's enterprise (or an associated business of the employer). This means that an employer seeking to implement redundancies must consider, and discuss with affected employees, any opportunities that may be available for redeployment. In addition, the employer must comply with the requirements in an applicable modern award or enterprise agreement to consult with employees and their representatives over proposed redundancies. If the employer fails to meet these requirements, the dismissal will not be considered a genuine redundancy and the employee may be able to access the unfair dismissal jurisdiction.

In addition, the FW Act makes provision for payment of severance pay to retrenched employees (see our response to question 13 below).

AUSTRALIA

In implementing redundancy-related dismissals, an employer must also consider:

- any relevant provisions of an applicable modern award, enterprise agreement, workplace policy or employment contract; and
- the FW Act general protections/anti-discrimination legislation provisions. Selection of employees for redundancy must not involve any discriminatory element (e.g. selecting union members rather than non-unionists, selecting females or older employees, etc).

13. Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?

In the event of a retrenchment (see our response to question 12 above), an employee may be entitled to severance payments under the FW Act, a modern award or enterprise agreement, and/or his/her employment contract.

Under the NES provisions of the FW Act, an employee whose position is made redundant is entitled to redundancy pay, calculated at his/her base rate of pay for his/her ordinary hours of work, by reference to his/her period of continuous service with the employer:

An employee's length of continuous service	Redundancy pay
1-2 years	4 weeks' pay
2-3 years	6 weeks' pay
3-4 years	7 weeks' pay
4-5 years	8 weeks' pay
5-6 years	10 weeks' pay
6-7 years	11 weeks' pay
7-8 years	13 weeks' pay
8-9 years	14 weeks' pay
9-10 years	16 weeks' pay
10+ years	12 weeks' pay

Redundancy pay is not payable under the NES:

- to employees whose employment is terminated due to the ordinary and customary turnover of labour;
- to employees with less than 12 months' service;
- where the employer is a small business (less than 15 employees at the relevant time);

- if the employer obtains other acceptable employment for the employee and has obtained an order from the FWC reducing the quantum of its redundancy pay obligation;
- if the employer cannot pay and has obtained an order from the FWC excusing it from payment;
- in some cases where there is a transfer of employment; or
- to excluded employees (for example, trainees, those on fixed-term contracts and casuals).

Employers must also provide redundant employees with the required period of written notice of the termination of their employment, or payment in lieu of notice, set out in the NES (see our response to question 2 above).

An employee may be entitled to more generous severance pay than the minimum provisions of the NES, under the terms of an applicable modern award, enterprise agreement or employment contract. For example, many union-negotiated enterprise agreements provide for severance pay of 2-4 weeks' pay per year of service with the employer (sometimes capped at 52 weeks' pay, otherwise uncapped).

14. Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?

Under the FW Act, employees are only entitled to severance payments where their position is made redundant (see our response to question 13 above). Modern awards or enterprise agreements may provide for severance payments in other situations (although such provisions are not common).

An employer and employee may also agree to severance payments in other circumstances, e.g. making payment mandatory under an employment contract. This most commonly arises in relation to executives' employment contracts.

15. What is the retirement age?

There is no mandatory retirement age in Australia. Many Australians retire in their early to mid-60s, which is largely attributed to people reaching the age at which they can access the Federal Government's age pension and/or their superannuation entitlements.

As of 1 July 2019, the pension age will be 66 years. Access to superannuation varies depending on particular superannuation fund rules, but is generally based on reaching between 55 and 65 years of age.

The federal *Age Discrimination Act 2004* provides that it is unlawful for an employer to discriminate against an employee on the basis of age. This legislation will typically be interpreted to mean that compulsory retirement policies are unlawful, unless an employer can prove that a specific retirement age is necessary because having an employee under that age

is an 'inherent requirement' of the particular role. Similar prohibitions upon age discrimination apply under state and territory anti-discrimination laws, and the FW Act general protections provisions.

An employer may be able to argue that it can enforce a retirement age on employees on the basis that it is complying with a provision of the applicable modern award. State and territory legislation may also permit employers to enforce a retirement age in some circumstances, particularly for public sector workers.

Employers may have retirement policies. However, these policies cannot displace the operation of federal, state and territory age discrimination laws. For example, some of Australia's leading accounting firms have recently attracted criticism for their practices of requiring partners to retire at the age of 58.

16. Are there any implications if an employee is terminated before retirement age?

See our response to question 15 above. An employee whose employment is terminated on the basis of his/her age will be able to pursue a claim under federal, state or territory anti-discrimination legislation or the FW Act general protections provisions. However, the employee must choose one of these options and cannot pursue multiple claims at one time.

17. Can you re-employ or continue with the employment of an employee who has attained retirement age?

See our response to question 15 above. Although there is no mandatory retirement age, an employee may face restrictions on re-employment or remaining in employment once they have reached the eligibility age for accessing the age pension or their superannuation entitlements.

18. Can an employee be placed on garden leave?

It is possible to place an employee on 'garden leave' where the employee consents to the decision, or where the employment contract or a modern award or enterprise agreement permits this practice (more commonly this would be the subject of contractual provision). However, where an employee holds a position with specific duties, he/she may be able to mount an argument that there is an implied contractual term enabling him/her to carry out these duties. An employer may therefore be in breach of contract where the employer places an employee on 'garden leave' or diminish his/her duties without consent.

19. What constitutes unfair / wrongful dismissal?

Unfair dismissal

To bring an unfair dismissal claim under the FW Act, an employee must satisfy the following eligibility requirements:

AUSTRALIA

1 The employee must make an application to the FWC within 21 days following their dismissal.
2 The employee must have been employed with the employer for at least six months prior to his/her dismissal, or 12 months if employed by a small business (less than 15 employees).
3 The employee must not be barred from a claim by the high income threshold. Employees on higher salaries (presently A$145,400) are precluded from bringing an unfair dismissal claim, except where their employment is covered by a modern award or enterprise agreement.
4 A casual employee cannot bring an unfair dismissal claim unless he/she was employed on a regular and systematic basis and had a reasonable expectation of ongoing employment.
5 Employees engaged on fixed-term/specified-task contracts cannot bring an unfair dismissal claim where their employment is not extended beyond the fixed-term/task period.

An employee will be considered to have been unfairly dismissed under the FW Act where:

1 the employee has been dismissed;
2 the dismissal was harsh, unjust or unreasonable (see below);
3 the dismissal was not consistent with the Small Business Fair Dismissal Code (this Code provides some relaxation of the normal unfair dismissal rules for businesses with less than 15 employees); and
4 the dismissal was not a case of genuine redundancy (see questions 12-14 above).

In determining whether an employee has been dismissed in a manner that was *harsh, unjust or unreasonable*, the FWC will consider:

- whether the dismissal related to the person's capacity or conduct (see questions 4, 6 and 7 above);
- whether the person was notified of that reason;
- whether the person was given an opportunity to respond to any such reason;
- any refusal of the employer to allow the person to have a support person present for discussions related to the dismissal;
- if the dismissal related to unsatisfactory performance, whether the person had been warned of this;
- the size of the employer and the extent of its human resources support and expertise; and
- any other relevant factors.

Wrongful dismissal

Wrongful dismissal claims arise at common law, because the employer terminated the employee's employment in breach of contract. Most commonly, this would be a claim alleging that the employer did not observe the notice period specified in the contract, or (if there is no such provision) did not provide the employee with reasonable notice (see our response to question 2 above). Alternatively, an employee may bring a wrongful dismissal claim where the employer has terminated a fixed-term contract prior to its stated expiry date.

20. What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?

Unfair dismissal remedies

The FWC may order the following remedies for successful unfair dismissal claims under the FW Act:

1 Payment of compensation to the employee (see below).

2 Reinstatement of the employee to their former position, or to an alternative position on terms and conditions that are no less favourable. This may also include orders to:

   i. Maintain continuity of the employee's service for the purpose of accruing or calculating the employee's other entitlements, such as annual leave.

   ii. Restore lost pay to the employee.

To determine the amount of compensation to be paid by the employer, the FWC will consider:

- the effect of a compensation order on the business;
- the length of the employee's service;
- remuneration lost by the employee;
- the employee's efforts to mitigate their loss;
- money earned by the employee after the dismissal; and
- any other relevant matters.

The statutory cap for these claims is the lesser of:

- the amount of remuneration the employee would have received in his/her employment during the 26 weeks immediately before his/her dismissal; and
- half the amount of the high income threshold immediately before the dismissal (currently A$72,700).

Wrongful dismissal remedies

The two main remedies that may be obtained by an employee in a common law wrongful termination claim are damages and an order for specific performance (i.e. reinstatement).

AUSTRALIA

However the courts are generally very reluctant to make an order for reinstatement, given the personal nature of the employment relationship.

Damages are more commonly awarded, but will usually be limited to the equivalent amount of pay for any notice period not complied with by the employer (e.g. six weeks' pay where the specified notice period was six weeks), subject to the employee's duty to mitigate their loss.

Larger damages awards may be available in cases of failure by the employer to provide 'reasonable notice', or early termination of a fixed-term contract (where damages equivalent to payment for the balance of the contractual term could be ordered).

21. Are wrongful termination cases heard before the civil courts or a specialised tribunal?

The FWC – Australia's national workplace relations tribunal – deals with unfair dismissal cases. These claims are first the subject of a telephone conciliation proceeding and, if not settled at conciliation, proceed to an arbitration hearing before a member of the FWC.
The FWC also conducts the initial conciliation proceedings for general protections claims, and arbitration of such claims if the parties agree. If not, general protections claims are determined by the Federal Court of Australia or the Federal Circuit Court.

Common law wrongful termination cases must be initiated in the civil courts of the relevant state or territory (e.g. the Magistrates Court, County Court or Supreme Court of Victoria).

Discrimination-based dismissal claims are dealt with in the equal opportunity/human rights tribunal of the relevant jurisdiction (e.g. the Victorian Equal Opportunity and Human Rights Commission).

22. Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?

Post-termination covenants, otherwise known as post-employment restraints, are enforceable as long as they do not unreasonably restrict an employee's activities and ability to earn income. The validity of these restraint clauses will be determined by a court by reference to the reasonableness of the geographic scope of the restraint; its period of operation; and the activities that it seeks to restrict.

A restraint clause must be no wider in these respects than is necessary to protect the legitimate interests of the business seeking to restrict its former employee's activities. If it extends beyond those parameters, the restraint clause will be found to be an unlawful restraint of trade and struck down.

Courts cannot re-write invalid restraints to preserve the enforceable components, unless the restraint is structured as a 'stepped' or 'cascading' clause (except in the state of New South

AUSTRALIA

Wales, where the courts can re-write restraints even if they are not expressed in a cascading manner).

This is a very simple explanation of a complex area of Australian law. Further information may be obtained upon request.

23. Do trade unions get involved in issues relating to the termination of employment?

Trade unions are frequently involved in representing their members in issues related to dismissal, such as unfair dismissal and general protections claims. Unions are also very active, and must be consulted as the representatives of employees, in situations where large-scale redundancies are being contemplated by an employer.

24. Are there particular matters to be aware of when terminating foreign employees?

The FW Act and other workplace laws generally apply equally to all workers performing work in Australia, including foreign employees working in the country under a valid work visa (subject to the complex rules relating to conflicts of laws).

Termination of a foreign employee's employment could have adverse effects on the person's visa and his/her ability to remain in the country. Immigration law requirements must therefore be considered in addition to the laws relating specifically to termination of employment covered in this guide.

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BANGLADESH

1. What are the sources of law governing the termination of employment in your jurisdiction?

The termination of employment in Bangladesh is governed by the Bangladesh Labour Act 2006 (as amended in 2018) (the **"BLA"**) in conjunction with the Bangladesh Labour Rules 2015 (the **"BLR"**). This is so if the employee falls under the purview of the definition of "worker" as envisaged in the BLA:

*"**2. Definitions.–***

*In this Act, unless there is anything repugnant in the subject or context,**–***

…

*(65) **'worker'** means any person including an apprentice employed in any establishment or industry, either directly or through a contractor, by whatever name he is called to do any skilled, unskilled, manual, technical, trade promotional or clerical work for hire or reward, whether the terms of employment are expressed or implied, but does not include a person employed mainly in a managerial, administrative or supervisory capacity. …"*

If the employee does not fall within the purview of the definition of worker, the BLA and the BLR shall not apply. In that case, the concerned employment contract or service rule of concerned employer shall govern the termination of employment.

2. How can an employer terminate an employment agreement?

The BLA provides a number of ways through which the employer can terminate an employment agreement. The primary section applicable here is Section 26 of the BLA, which directly deals with termination of an employment agreement. This section states that the employment of a permanent worker may be terminated by an employer by giving him/her a notice in writing of 120 days, if he/she is a monthly rated worker, or 60 days, in the case of other workers.

Moreover, the employer may terminate the employment agreement by way of retrenchment under Section 20 of the BLA on grounds of redundancy by giving an employee 1 months' notice in writing mentioning the reasons for his/her retrenchment or, in lieu of such notice paying him/her wages for the period of notice and sending a copy of the notice to the Chief Inspector or any other officer specified by employee, and another copy to the collective bargaining agent of the employer, if any; and paying him/her as compensation 30 days' wages for every year of service or gratuity, if any, whichever is higher.

The employer can also terminate the employment agreement by discharging the employee under Section 22 of the BLA on grounds of physical or mental incapacity or continued ill-health certified by a registered medical practitioner.

BANGLADESH

Additionally, the employer may dismiss the employee under Section 23(1) of the BLA without a notice or without wages in lieu of a notice if he/she is convicted of any criminal offence; or found guilty of misconduct under section 24 of the BLA.

Apart from the above, the employer may release the employee under Section 27(3A) of the BLA if a worker remains absent from his/her work place for more than 10 days without notice or permission.

These are the ways, through which the employer can terminate the employment contract under the provisions of BLA.

3. How can an employee terminate an employment agreement?

According to Section 27 of the BLA, an employee may terminate an employment agreement by handing in a resignation. A permanent worker may resign his/her service by giving the employer 60 days' notice in writing and a temporary worker may resign his/her service by giving the employer a notice, in writing, of 30 days, if he/she is a monthly rated worker and 14 (fourteen) days, in case of other workers. Where a worker intends to resign his/her service without any notice, he/she may do so by paying the employer an amount equal to the wages for the period of notice.

Furthermore, where a permanent worker resigns his/her service under Section 27, he/she shall be paid by the employer compensation at the rate of 14 (fourteen) days' wages for his/her every completed year of service, if he/she completes 5 (five) years of continuous service or more but less than 10 (ten) years under the employer or at the rate of 30 (thirty) days' wages for every completed year of service and this compensation shall be in addition to any other benefit payable to such worker under the BLA.

4. Is an employer required to give reasons before terminating an employment agreement?

According to Section 26 of the BLA an employer is not required to prescribe any reason for termination of employment agreement.

If an employee is discharged from his service due to physical or mental illness, the employer is required to prescribe the reason of specific illness under Section 22 of the BLA.

Moreover, the employer is also required to mention the reason of dismissal under Section 27 of the BLA. However, for dismissal of an employee, due process under Section 24 of the BLA needs to be followed.

If an employee is retrenched under Section 20 of the BLA, the employer is required to serve employee 1 (one) months' notice in writing mentioning the reasons for his retrenchment or, in lieu of such notice paying him wages for the period of notice and sending a copy of the notice

BANGLADESH

to the Chief Inspector, and another copy to the collective bargaining agent of the employer, if any.

5. Can an employer reject an employee's resignation?

The position is not entirely clear as the BLA is silent on this issue. For example, in the case of *S.M. Humayun Kabir v Bangladesh and others*, 1 LCLR [2012] HCD 22, the High Court held that resignation is only valid if the resignation is accepted as a resignation is merely an offer to quit. Therefore, it may be argued that there is a scope for refusing the resignation.

6. Can a person undergoing internal disciplinary proceedings resign?

There are no express bars in this regard.

7. Can you terminate the employment of an employee for poor performance?

Termination of an employee on grounds of poor performance is not directly envisaged in the BLA and BLR. However, the employer has always an option to terminate employment agreement without showing any reason following the requirements under Section 26 of the BLA. Moreover, if poor performance means habitual absence, late attendance or breach of regulations of the establishment, then the employee may be dismissed for misconduct under Section 23 of the BLA.

8. Can you terminate the employment of an employee who is on extended medical leave?

Yes.

9. Can you terminate the employment of a pregnant employee?

There is no legal bar to terminate pregnant women under the BLA and BLR. However, according to Section 50 of the BLA, if any notice or order of discharge, dismissal, removal or otherwise termination of employment is given by the employer to a woman employee within a period of 6 (six) months before and 8 (eight) weeks after her delivery and such notice or order is given without sufficient cause, she shall not be deprived of any maternity benefit to which she would be entitled under the BLA if such notice or order has not been given.

10. Can you terminate the employment of an employee on maternity leave?

There is no legal restriction to terminate an employee who is on maternity leave under the provisions of the BLA and BLR**.** However, the provision of Section 50 of the BLA shall apply.

BANGLADESH

11. Are there (other) categories of employees whose employment cannot be terminated?

No, there are no such categories provided for in the BLA.

12. What constitutes retrenchment?

Retrenchment in Bangladesh is the termination of services of an employee due to the need of services being redundant.

13. Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?

Yes, certain retrenchment benefits and/or severance payments must be made available to the employee, provided that the employee has been in continuous service under an employer for not less than 1 (one) year. The quantum is stated clearly in the statute:

*"**20. Retrenchment.–***

(1) Any worker may be retrenched from service of any establishment on the ground of redundancy.

*(2) If any worker has been in continuous service under an employer for not less than 1 (one) year, the employer, in the case of retrenchment of such worker, shall**–***

…

(c) pay him as compensation 30 (thirty) days' wages for his every year of service or gratuity, if any, whichever is higher.." (Emphasis Added)

14. Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?

Yes, there are other rights to severance payments when an employee's service is terminated rather than retrenchment.

15. What is the retirement age?

Under Section 28(1) of the BLA, the retirement age is 60 (sixty).

16. Are there any implications if an employee is terminated before retirement age?

No, it will depend upon the circumstances and reason for termination.

BANGLADESH

17. Can you re-employ or continue with the employment of an employee who has attained retirement age?

It is possible for any authority to employ later a retiring employee under a contract according to Section 28(4) of the BLA.

18. Can an employee be placed on garden leave?

Yes.

19. What constitutes unfair / wrongful dismissal?

If termination is not carried out according to the provisions of the BLA, that will amount to unfair/wrongful dismissal.

20. What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?

According to Section 33 of the BLA the employee may file a complaint to the employer within 30 (thirty) days of being informed of the cause of such a complaint, which may be in regards to the wrongful termination. Upon receipt of such complaint the employer, within 30 (thirty) days shall make enquiry into the matter and provide a decision in regards to the matter upon hearing the employee.

However, if the employer is unable to provide any decision within the allotted time, or if the employee is dissatisfied with the decision provided, the employee may submit a written complaint to the Labour Court within 30 (thirty) days. The Labour Court upon hearing the employer and employee may direct reinstatement of the employee with or without arrear wages and convert the order of dismissal to another minor punishment.

21. Are wrongful termination cases heard before the civil courts or a specialised tribunal?

Wrongful termination cases are heard before the Labour Court.

22. Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?

Generally, non-compete clauses in Bangladesh are inserted into employment agreements to prevent employees from joining a rival company or starting a similar business, either during the course of employment or after termination or resignation from the company. In law, however, non-compete agreements are subject to the principle of restraint of trade. Section 27 of the Contract Act 1872 rigidly invalidates all agreements in restraint of trade, including any profession or service, whether totally or partially, subject to the limited exception where goodwill is sold. This exception of goodwill is in turn subject to the test of reasonableness.

BANGLADESH

Non-compete clauses, during the course of employment, are enforceable in Bangladesh.

23. Do trade unions get involved in issues relating to the termination of employment?

Yes, in some cases.

24. Are there particular matters to be aware of when terminating foreign employees?

Please note that there are no specific provisions in regards to the termination of foreign employees. Therefore, all provisions that apply to employees in general under the BLA shall also apply to foreign employees.

However, when terminating foreign employees, the employer should be mindful of any conditions imposed in his/her work permit, especially in relation to notification requirements.

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CAMBODIA

1. What are the sources of law governing the termination of employment in your jurisdiction?

The following are the key sources of laws that govern the termination of employment in Cambodia:

(1) Constitution of the Kingdom of Cambodia;
(2) Labour Law dated 13 March 1997, as amended on 20 July 2007 and on 26 June 2018 ("**Labour Law**");
(3) Civil Code dated 8 December 2007, as amended by the Law on Implementation of the Civil Code dated 31 May 2011;
(4) Law on Trade Unions dated 17 May 2016 ("**Law on Trade Unions**");
(5) Law on Amendments to Article 87 of Title "C" of Section 3 under Chapter 4, Articles 89, 90, 91, 94, 110, 120 and 122 of the Labour Law dated 26 June 2018 ("**Labour Law Amendment**");
(6) Law on Minimum Wages dated 6 July 2018 ("**Law on Minimum Wages**");
(7) Prakas No. 443 on Seniority Payments dated 21 September 2018 ("**Prakas 443**"); and
(8) Instruction No. 042/19 on Back Pay for Past Seniority prior to 2019 for Enterprises and Establishments Outside of Garment, Footwear and Textile Sectors ("**Instruction 042/19**").

2. How can an employer terminate an employment agreement?

Under the Labour Law, there are two main types of employment contracts: (1) fixed duration contract ("**FDC**"); and (2) undetermined duration contract ("**UDC**"). To terminate an employment contract, the employer must follow the applicable legal rules. The summary table below sets out the grounds and the accompanying compensation applicable to the termination of FDCs and UDCs:

	FDC	UDC
Admissible Grounds	• Serious misconduct **(with cause)** • Force majeure **(with cause)** • Mutual agreement (witnessed by labour inspector) • Expiration of the contract	• Serious misconduct **(with cause)** • Force majeure **(with cause)** • Valid reasons relating to worker's aptitude or behaviour or operational requirements **(with cause)** • Mutual agreement[1]
Notice	• No notice requirement for premature termination • Notice must be provided by employer for expiration/ non-renewal of an FDC: Length of notice period depends on the FDC contract period:	• Notice must be provided for termination. Length of notice period depends on length of continuous service: < 6 months: 7 days ≥ 6 months – 2 years: 15 days

[1] Please note that the Labour Law does not provide for termination benefits in case of mutual termination of a UDC.

CAMBODIA

	FDC	UDC
	≤ 6 months: Nil > 6 months – 1 year: 10 days > 1 year – 2 years: 15 days	> 2 years – 5 years: 1 month > 5 years – 10 years: 2 months > 10 years: 3 months In addition, the employee is entitled to 2 days of paid leave per week to look for a new job during the notice period. Note: No notice obligation for termination due to serious misconduct, force majeure (with a few exceptions under Articles 85 and 86 of the Labour Law) and termination during probation.
Compensation (for termination with cause)	• Last salary and benefits & accrued annual leave • Severance pay of at least 5% of total salary and benefits paid to the employee during the length of employment, except for serious misconduct or force majeure (subject to different interpretation). Note: The above benefits are also applicable in the cases of expiration of the FDC and mutual agreement.	• Last salary and benefits & accrued annual leave • For termination up to 2018 (except for serious misconduct or, subject to different interpretation, force majeure), severance (i.e. indemnity for dismissal) equal to,: - 6-12 months' seniority = 7 days salary and benefits; and - >1 year seniority = 15 days salary and benefits/year (up to 6 months) • For termination from 2019 onwards, seniority payments (which have replaced severance as per the new Article 89 of the Labour Law Amendment (see below for additional comments).
Compensation (for termination without cause)	• Last salary and benefits & accrued annual leave • Severance pay of at least 5% of total salary and benefit paid to the employee during the length of employment • Damages (salary and benefits to be paid to the employee up to the expiration date of the contract)	• Last salary and benefits & accrued annual leave • For termination up to 2018, severance (i.e. indemnity for dismissal) equal to: - 6-12 months' seniority = 7 days salary and benefits; and - >1 year seniority = 15 days salary and benefits/year (up to 6 months) • For termination from 2019 onwards, seniority payments (which have replaced severance as per the new Article 89 of the Labour Law Amendment (see below for additional comments). • Damages at least equal to severance/seniority payments.

Apart from the above termination rules based on the type of employment contract, there are also special rules under the Labour Law applicable to specific cases of termination, including collective termination/mass layoff and termination of protected employees (such as shop

CAMBODIA

stewards, local union leaders and certain union members). These are addressed in our response to question 11 below.

Note: For UDCs, under the new Article 89 of the Labour Law Amendment, the term '*seniority payments*' has replaced the term '*severance'* (i.e. indemnity for dismissal) under the old Article 89 of the Labour Law. Up to 31 December 2018, severance was payable only upon termination of a UDC by an employer (except where the termination is for serious misconduct committed by the employee). However, from January 2019 onwards, seniority payments must be paid to employees (including foreign employees) every 6 months during employment. The seniority payments include new seniority pay for new seniority from 2019 onwards and back pay for past seniority prior to 2019. Instruction 042/19 has postponed the implementation of the provision of back pay for enterprises and establishments outside of Garment, Footwear and Textile sectors to December 2021. However, while provision of back pay is postponed to December 2021, in the case of termination for any reason other than serious misconduct, retirement or death, the employer is required to provide all outstanding back pay.

Further, while under the Labour Law the amount of damages (if applicable) was to be at least equal to the amount of 'severance', under the Labour Law Amendment, the amount of damages is now to be at least equal to the amount of seniority payments.

Under Prakas 443 and Instruction 042/19, all employers covered under the scope of the Labour Law must provide seniority payments to their UDC employees on an on-going basis during employment twice per year, every 6 months, according to the schedule summary below:

<table>
<tr><th>Seniority Payment (from 2019 onwards)</th><th>Amount</th><th>Timing of Payment (twice per year)</th><th>Note</th></tr>
<tr><td rowspan="3">New seniority payment from 2019 onwards</td><td>15 days of wages and benefits per year, divided as follows:</td><td></td><td rowspan="3">For first year of employment – seniority from 1-6 consecutive months: new seniority payment is 7.5 days of wages and benefits.

While Prakas 443 does not directly state the new payment in case of serious misconduct, it is generally understood from the Labour Law Amendment that it is not payable in such event.

In the event of resignation, while it is not entirely clear from the Labour Law Amendment and Prakas 443 as to whether the seniority payment is due to an employee, it is generally understood that it is not payable in such event.</td></tr>
<tr><td>7.5 days of wages and benefits</td><td>June</td></tr>
<tr><td>7.5 days of wages and benefits</td><td>December</td></tr>
</table>

CAMBODIA

Seniority Payment (from 2019 onwards)	Amount	Timing of Payment (twice per year)	Note
Back pay of seniority payment for past seniority prior to 2019	**From 2019 onwards** For garment, textile and footwear sectors: 30 days of total seniority payment per year, divided as follows:		Capped at 6 months of the average base wages for each of the relevant years of employment up to 31 December 2018. For the back pay for an employee's initial year of employment, an employer must pay: (1) 7.5 days of back pay if the period of employment in the initial year was between 1 to 6 months; or (2) 15 days of back pay if the period of employment in the initial year was more than 6 months up to 12 months. Note that back pay of seniority payment is not payable to resigning employees. Prakas 443 does not directly state the payment of back pay of seniority payment in case of serious misconduct, but it is generally understood from the Labour Law Amendment that those terminated for serious misconduct are not entitled to the remaining back pay. Under Instruction 042/19, the resigning employees or those terminated for serious misconduct are not entitled to the remaining back pay. Further, while provision of back pay is postponed to December 2021, in the case of termination for any reason other than serious misconduct, retirement or death, the employer is required to provide all outstanding back pay.
	15 days of seniority payment	**June**	
	15 days of seniority payment	**December**	
	From December 2021 onwards For other sectors: 6 days of the total seniority payment per year, divided as follows:		
	3 days of seniority payment	**June**	
	3 days of seniority payment	**December**	

CAMBODIA

3. How can an employee terminate an employment agreement?

For FDCs, an employee can prematurely terminate the contract with cause on the grounds of: (1) serious misconduct by the employer; or (2) force majeure. If an employee otherwise terminates an FDC without cause, the Labour Law provides that he/she will be liable to the employer for damages in an amount that corresponds to the damages sustained by the employer. However, it should be noted that no legislative guidance has been given concerning the calculation of damages and, as a matter of practice, it would be very challenging for an employer to successfully claim damages from an employee in Cambodia.

For UDCs, the employee can terminate the contract on the grounds of: (1) serious misconduct by the employer; or (2) force majeure; or (3) by way of prior written notice in accordance with the Labour Law. However, the new Article 91 of the Labour Law Amendment indicates that if an employee terminates a UDC without valid reason (i.e. without cause), the employee shall be liable to the employer for damages. To the best of our knowledge, no legislative guidance has been given concerning the calculation of damages and, again, enforcement of such right against an employee would prove challenging in Cambodia.

4. Is an employer required to give reasons before terminating an employment agreement?

For FDCs, the employer can only prematurely terminate the contract for cause on the following grounds: (1) serious misconduct by the employee; or (2) force majeure.

For UDCs, the employer can only unilaterally terminate the contract for cause on the following grounds: (1) serious misconduct by the employee; (2) force majeure; or (3) valid reason relating to an employee's aptitude or behaviour, or according to the operational requirements of the employer.

Although the law is silent as to whether the employer has to give a reason for termination to an employee, it is common practice to do so.

5. Can an employer reject an employee’s resignation?

For FDCs, the Labour Law does not allow an employee to terminate the contract before its expiration date by way of giving prior notice. Therefore, unless otherwise permitted by the contract, the employer may reject the employee’s resignation if the latter terminates the contract for reasons other than those permitted by the law (otherwise, he/she shall be liable for damages in an amount that corresponds to the damages sustained by the employer).

For UDCs, the Labour Law permits an employee to terminate the contract by providing a prior written notice to the employer in accordance with the law. Therefore, the employer may not reject the employee’s resignation, provided that notice has been duly given by the employee.

CAMBODIA

6. Can a person undergoing internal disciplinary proceedings resign?

The Labour Law is silent as to whether a person undergoing internal disciplinary proceedings can resign from employment. However, for FDCs, as the employee is not permitted to resign until the contract is expired by law, an FDC employee may not resign without prior agreement from the employer, regardless of whether he/she is subject to internal disciplinary proceedings.

For UDCs, considering the lack of official or judicial guidance, this issue remains open. The view that an employee would not be allowed to resign because of an ongoing disciplinary procedure may be challenged as the Labour Law allows the employee to terminate the contract by way of prior written notice. However, one could also argue that the prior agreement of the employer must be obtained in such a case since the latter is legally entitled to undertake internal disciplinary proceedings against its employees. Likewise, it could be argued that a resignation whilst disciplinary proceedings are pending may be regarded as a resignation without a "valid reason" (see Section 3 above).

7. Can you terminate the employment of an employee for poor performance?

For FDCs, the employer is not permitted to terminate the employee merely on the ground of poor performance (i.e. as opposed to serious misconduct by the employee).

For UDCs, the employee can be terminated based on a valid reason related to his/her aptitude, behaviour, or the operational requirement of the enterprise. However, the issue of whether poor performance constitutes a "valid reason" for termination remains open.

8. Can you terminate the employment of an employee who is on extended medical leave?

The Labour Law is silent as to whether an employer can terminate an employee who is on extended medical leave.

However, under Article 71 of the Labour Law, an employment contract may be suspended when the employee is absent from work due to illness (as verified by a qualified doctor), provided that the duration of the absence is limited to 6 months. An employer cannot terminate a suspended contract until the reason for the suspension have been remedied and the required notification of such termination has been given in accordance with the law. Further, under Article 72 of the Labour Law, the suspension of an employment contract affects only the main obligations of the contract. Accordingly, the employee does not need to work for the employer and the employer does not need to pay the employee (unless there are contrary provisions that require the employer to pay the employee).

In light of the above, for UDCs, although the employer is permitted to terminate the employee based on a valid reason related to his/her aptitude, behaviour, or the operational requirement of the enterprise, it would be prudent for the employer to suspend the contract for up to 6

CAMBODIA

months before termination can be undertaken, in order to mitigate the risk of not being in compliant with Articles 71 and 72 of the Labour Law. For FDCs, as the employer is not permitted to prematurely terminate the contract for reasons other than serious misconduct by employee or force majeure, the employer is not permitted to terminate the employee with cause when he/she is on extended medical leave.

9. Can you terminate the employment of a pregnant employee?

Under the Labour Law, an employer is prohibited from terminating the employment of women during their maternity leave regardless of whether advance notice is given.

10. Can you terminate the employment of an employee on maternity leave?

Please refer to our response to question 9 above.

11. Are there (other) categories of employees whose employment cannot be terminated?

Under the Labour Law, there are some prohibitions or restrictions regarding termination of certain categories of employees.

Cambodian law prohibits discrimination during termination of employment. Employers are generally prohibited from terminating employees based on grounds of the employee's race, colour, sex, creed, religion, political opinion, birth, social origin, trade union membership or activities, or participation in a strike.

The following employees are entitled to special protection from termination for a certain period of time:

(1) shop stewards – protected during the term of their mandate (ie, 2 years for each term) and 3 months after the end of their term;

(2) unelected candidates for shop stewards – protected within 3 months after the result of shop stewards election;

(3) three elected union leaders of legally registered unions – protected during the term of their position;

(4) founding union members or normal union members who volunteer to join the union – protected from the date of submission of applications of union registration until 30 days after the union is duly registered; and

(5) candidates for union elections and unelected candidates for union elections – protected within 45 days before and after the union election.

CAMBODIA

These employees may not be terminated unless there is prior approval from the labour inspector of the Ministry of Labour and Vocational Training ("**MLVT**"). In case of serious misconduct, however, the employer can immediately suspend them pending authorization from the labour inspector.

The employer must file a letter requesting termination of these protected employees with the MLVT by specifying, among others, the reason(s) for termination and the intended date of termination. The labour inspector will then provide its decision concerning the termination within 1 month following receipt of the request. In the absence of notification from the labour inspector within this 1-month period, the request is considered to be rejected. On receipt of the decision of the labour inspector, the employer or the employee may appeal to the Minister of the MLVT within 2 months. The Minister of the MLVT can then cancel or reverse the decision of the labour inspector. If the Minister of the MLVT remains silent for 2 months following receipt of the appeal, the appeal is considered to be rejected.

In addition to the above, the Law on Minimum Wage also grants similar protection to the employee who is appointed as a member of the National Council of Minimum Wage (including protection against termination as set out above).

12. What constitutes retrenchment?

The Labour Law allows collective termination (i.e. mass layoff) of employees, if it is the result of a reduction in an employer's activity or due to an internal reorganization. There is no definition specified under the Labour Law concerning a '*reduction in an employer's activity or an internal reorganization'*.

A collective termination is subject to the following procedures:

(1) the employer must establish the order of termination in light of: (a) the professional qualifications; (b) the seniority (i.e. length of service) within the establishment; and (c) the family responsibilities of the employees;

(2) the first employees to be terminated must be those with the least professional ability, followed by the employees with the least seniority (bearing in mind that an employee's seniority is increased by one year for a married employee and by an additional year for each dependent child);

(3) the employer must inform the shop stewards in writing about the planned collective termination and seek their suggestions on the appropriate measures for the prior announcement of the proposed collective termination and measures to mitigate the effects of the termination on the affected employees;

(4) the employer must inform the labour inspector of each step of the collective termination process and, at the request of the shop stewards, the labour inspector

can call the concerned parties together (for one or more times) to determine the impact of the proposed collective termination and assess the measures to be taken to minimize its effects;

(5) in exceptional cases (and for up to two times), the minister of the MLVT can issue a regulation to suspend the collective termination for a period not exceeding 30 days in order to help the concerned parties find a solution; and

(6) the employer must give priority to the terminated employees if there is any job similar to their prior job within two years after the collective termination. In this regard, when there is a vacancy, the employer must inform the terminated employees via a registered letter or a letter delivered by hand to their last known address. The employee(s) must appear at the enterprise within 8 days of receipt of the letter.

13. Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?

The Labour Law does not specifically provide for termination compensation to be paid to employees in the case of collective termination. Therefore, the termination compensation must be paid in accordance with the termination rules based on the types of employment contract as set out in the summary table in response to question 2 above.

14. Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?

When employees are terminated for reasons other than collective termination, they are entitled to termination compensation in accordance with the type of their employment contracts (i.e. whether it is an FDC or a UDC) and the reason of termination, as outlined in the summary table in response to question 2 above.

15. What is the retirement age?

The Labour Law does not stipulate a minimum retirement age for the private sector.

16. Are there any implications if an employee is terminated before retirement age?

Termination of employment based on the ground of retirement age would be dealt with in the same way as for terminating “regular” employees.

17. Can you re-employ or continue with the employment of an employee who has attained retirement age?

Not applicable (see responses to questions 15 and 16 above).

CAMBODIA

18. Can an employee be placed on garden leave?

The concept of 'garden leave' is not provided for under the Labour Law and not widely understood by the relevant labour authorities. To our knowledge, it is not uncommon for some employers to include garden leave provisions in the employment contract. However, such provisions may be challenged by the labour authorities in the case of a dispute over garden leave implementation.

19. What constitutes unfair / wrongful dismissal?

The Labour Law does not clearly and specifically distinguish between the concepts of 'unfair dismissal' and 'wrongful dismissal'. In this regard, failing to comply with legal procedures in terminating employees in accordance with the types of employment contract (as set out in response to question 2 above) and failing to follow the legal rules regarding prohibitions or restrictions on termination of certain categories of employees (such as a failure to comply with legal procedures in dismissing protected employees under the law or in undertaking a collective termination), as provided in the responses to questions 9 and 11 above, would constitute unfair/wrongful dismissal under the Labour Law.

20. What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?

If the employer terminates the employee's contract without cause, the terminated employee will be entitled to the termination compensation in accordance with his/her contract type as follows.

	FDC	UDC
Compensation (termination without cause)	• Last salary and benefits & accrued annual leave • Severance pay (at least 5% of total salary and benefit paid to the employee during the length of employment) • Damages (salary and benefits to be paid to the employee up to the expiration date of the contract)	• Last salary and benefits & accrued annual leave • For termination up to 2018, severance (i.e. indemnity for dismissal) equal to: - 6-12 months' seniority = 7 days salary and benefits; and - >1 year seniority = 15 days salary and benefits/year (up to 6 months) • For termination from 2019 onwards, seniority payments (which have replaced severance as per the new Article 89 of the Labour Law Amendment). • Damages at least equal to severance/seniority payments.

CAMBODIA

In the case of collective termination, the termination compensation will need to be paid in accordance with the termination rules based on the types of employment contract. In this regard, for FDCs, the collective termination will be considered 'termination without cause'. For UDCs, in the event that the collective termination is considered 'termination with cause', the relevant compensation (as set out in the summary table in the response to question 2 above) will apply. However, please note that there is an ambiguity as to whether a collective termination would qualify as a valid reason for termination. In the event the employer cannot establish a valid reason for termination (i.e. where there is a lack of supporting evidence) or does not follow the correct collective termination procedures, in the case of a dispute, the employer may need to pay the compensation for termination of a UDC without cause. In addition to the above, the employer must ensure compliance with the notice obligations for the termination as set out in the summary table in the response to question 2 above.

In some cases, it remains possible (based on a case-by-case basis) that the employer is ordered by the competent adjudicated body to reinstate the employee as per the employee's request.

Further, in the event that the employer fails to comply with legal procedures in terminating special protected employees, the employer would generally be ordered to reinstate the protected employees. Likewise, if the employer violates prohibitions regarding termination of employees (such as terminating employment based on discrimination or of women during their maternity leave), it is also very likely that the employer will be ordered to reinstate these employees.

21. Are wrongful termination cases heard before the civil courts or a specialised tribunal?

Under the Labour Law, a labour dispute may be an individual labour dispute or a collective labour dispute, either of which will be resolved under the different dispute resolution mechanisms, which are summarised below.

Either party to an individual labour dispute has the right to commence proceedings before a (civil) court. Alternatively, either party may file a complaint with the MLVT or Department of Labour and Vocational Training ("**DLVT**") for conciliation, and the other party will be required to participate in the conciliation procedure. An agreement made before a conciliator of the MLVT/DLVT is enforceable by law. If the conciliation is unsuccessful and the parties do not enter into an agreement, either party may file a complaint with a competent (civil) court within 2 months from the date of the issuance of a non-conciliation report by the MLVT/DLVT.

For a collective labour dispute, the conciliation procedure supervised by the MLVT/DLVT is the primary mandatory process used to resolve such disputes. If the conciliation results in an agreement between parties, a written agreement must be signed by all parties, and then signed and certified by the MLVT/DLVT. If the conciliation fails to resolve all of the issues related to the dispute, the MLVT/DLVT must make a written report, noting the unresolved

issues, and file the report with the Minister of the MLVT within 48 hours after the conciliation ends. The dispute must then be referred to one of the following dispute resolution mechanisms:

(1) the arbitration procedure as prescribed in the relevant collective agreement, if any;

(2) by any other procedure agreed to by the parties; or

(3) in the absence of the above, to the Arbitration Council ("**AC**").

At present, following the conciliation, the collective labour disputes are generally submitted to the AC. The AC is a tripartite body made up of arbitrators nominated by unions, employer associations and the Cambodian government as represented by the MLVT. Each case referred to the AC will be arbitrated by an arbitration panel that is constituted specifically for the dispute at hand. The arbitration panel will consist of three members of the AC, including one arbitrator chosen by each of the parties to the dispute and a third arbitrator to be chosen by the two arbitrators elected by the parties.

Upon receipt of notification of an arbitration decision from the AC, the Minister of the MLVT must immediately notify the parties, after which either party has the right to contest the decision within 8 calendar days, by filing an appeal with the MLVT. If neither party contests the arbitration decision within the specified timeframe, the decision becomes immediately effective and enforceable. In the event either party refuses to abide by a decision of the AC, the other party may file with a competent court a request that the competent court enforce the AC's decision.

22. Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?

The enforceability of post-employment non-compete or non-solicitation clauses is subject to the interpretation of Article 70 of the Labour Law which broadly prohibits an employer from imposing any restrictions on the employee after his or her employment has ceased. If the term "activity" under Article 70 of the Labour Law is broadly interpreted to cover any activity by the departing employee, from a pro-employee perspective, it may also capture non-compete or non-solicitation clause. Nonetheless, in practice, non-compete or/and non-solicitation clauses are commonly used in employment contracts in Cambodia.

23. Do trade unions get involved in issues relating to the termination of employment?

Under the Law on Trade Unions, trade unions get involved in issues relating to the termination of employment in several aspects.

For example, where a complaint has been made to the labour inspector in relation to the dismissal of shop stewards or unelected candidates for shop stewards, the relevant trade

CAMBODIA

union must be informed by the labour inspector who has received the complaint on the employee's dismissal of his/her decision, in addition to notification to the employer and the employee in question, within 1 month following receipt of the complaint. Similarly, upon receipt of the decision from the labour inspector, the relevant trade union also has a right to file an appeal to the Ministry of MLVT within 2 months.

Further, the Law on Trade Unions distinguishes between two categories of trade unions, being (1) trade union with the most representative status ("**MRS Union**"); and (2) the minority trade union ("**Non-MRS Union**"). The MRS Unions has the exclusive right to represent all employees in negotiating the collective bargaining agreements (which must include the procedures for labour dispute resolutions) or in resolving the collective labour disputes with the respective employer or employer association and the right to represent their members in dealing with the individual disputes. The Non-MRS Unions is entitled to the right to represent their own members in dealing with individual labour disputes.

24. Are there particular matters to be aware of when terminating foreign employees?

There are no specific rules under the Labour Law regarding the termination of foreign employees.

However, in terms of registration procedures, it is important that the employer files a written declaration of staff movement (out) to the MLVT/DLVT within 15 days of the foreign employees' departure. In addition, the employer will need to send a request to the MLVT/DLVT for removal or deregistration of the foreign employees from the MLVT's online system. Please note that these deregistration procedures can only be undertaken if the foreign employees had been duly registered with the MLVT/DLVT.

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CHINA

1. What are the sources of law governing the termination of employment in your jurisdiction?

Labor Law and Labor Contract Law.

2. How can an employer terminate an employment agreement?

Employers may terminate an employment agreement only on statutory grounds, which include:

(1) Agreement with the employee.

(2) Immediate termination: (i) during probation; (ii) serious breach of an employer rule; (iii) graft; (iv) engaging in criminal conduct.

(3) Termination with 30 days' notice: (i) exhaustion of the statutory medical treatment period; (ii) nonperformance; (iii) redundancy.

(4) Mass layoff on certain grounds and following certain procedural requirements if at least 20 employees or 10 percent of the workforce is terminated. In practice, mass layoffs through such procedures are extremely rare.

3. How can an employee terminate an employment agreement?

An employee may resign by giving 30 days' prior written notice. Three days' notice is required if resignation occurs during a probation period.

4. Is an employer required to give reasons before terminating an employment agreement?

Yes, the employer should specify the legal basis for the termination in a written termination notice.

5. Can an employer reject an employee's resignation?

No.

6. Can a person undergoing internal disciplinary proceedings resign?

Yes.

7. Can you terminate the employment of an employee for poor performance?

Theoretically, yes. An employer may terminate an employee for poor performance by giving 30 days' prior written notice to the employee if the employee is "incompetent", and remains so

CHINA

after training or a change of job position. In practice, such termination grounds are difficult to prove.

8. Can you terminate the employment of an employee who is on extended medical leave?

An employer may terminate the employment of an employee during the employee's medical treatment period only by agreement, or if there are grounds for immediate termination. An employee may be terminated after the employee exhausts the employee's medical treatment period.

9. Can you terminate the employment of a pregnant employee?

An employer can terminate the employment of a pregnant employee only by agreement or if there are grounds for immediate termination.

10. Can you terminate the employment of an employee on maternity leave?

An employer may terminate the employment of an employee on maternity leave only by agreement or if there are grounds for immediate termination.

11. Are there (other) categories of employees whose employment cannot be terminated?

The employment of the following employees may be terminated only by agreement or if there are grounds for immediate termination:

(1) employees who have engaged in work exposed to occupational hazards and have not undergone an occupational health check;

(2) employees who have contracted an occupational injury or illness, or are suspected to have occupational illness under medical treatment or observation;

(3) employees in their statutory nursing periods; and

(4) employees who have been working for the employer for more than 15 consecutive years and are less than 5 years away from their legal retirement age.

12. What constitutes retrenchment?

An employee may be terminated based on a "major change of objective circumstances." Practically speaking, performance of the employee's labor contract must be impossible. The employee must also be offered another job. In practice, termination for redundancy is quite rare. Instead, employees sign termination agreements.

CHINA

13. Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?

Statutory severance is required to be paid to employees. Severance is based on the number of years the employee has worked for the employer. The rate is one month's "average compensation" for each full year of work. Employment of more than six months but less than one year is counted as one year of work.

14. Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?

In general, an employee is entitled to severance if his/her employment is terminated by notice, terminated by agreement, or terminated in a mass layoff, or if an employment contract expires and is not renewed.

15. What is the retirement age?

The retirement age for males is 60 years old. The retirement age for females is 50 years old (or 55 years old for certain management positions).

16. Are there any implications if an employee is terminated before retirement age?

No, but if an employee does not secure another job, the employee may not accrue sufficient service to qualify for a statutory pension.

17. Can you re-employ or continue with the employment of an employee who has attained retirement age?

Yes, but individuals who work after they reach retirement age are not considered to be employees fully protected by employment laws. Employers may sign service contracts (instead of labor contracts) with this type of employees.

18. Can an employee be placed on garden leave?

Although PRC law is silent on garden leave, an employer is free to place an employee on garden leave provided compensation and benefits stay the same.

19. What constitutes unfair / wrongful dismissal?

A dismissal that is not based on the grounds specified in PRC labor laws is considered unfair/wrongful.

CHINA

20. What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?

Statutory remedies for wrongful termination are reinstatement or two times the statutory severance payable.

21. Are wrongful termination cases heard before the civil courts or a specialised tribunal?

The cases are first heard by labor arbitration tribunals. Parties disagreeing with arbitration awards may then bring de novo actions in district courts.

22. Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?

Post-termination non-compete restrictions are enforceable for a maximum period of two years. Compensation must be paid to a former employee during the term of a non-compete obligation.

PRC law does not prohibit non-solicitation or non-disparagement clauses effective after termination of employment.

23. Do trade unions get involved in issues relating to the termination of employment?

Yes. Strictly speaking, when an employer wants to unilaterally terminate an employee, the employer must notify the employer's trade union or an "upper-level" trade union. Trade union committee members are afforded additional protection with regard to their employment period and termination of employment.

24. Are there particular matters to be aware of when terminating foreign employees?

In some cities, such as Shanghai, employers are allowed to agree with foreign employees on grounds for termination other than those specifically set forth in PRC labor laws, such as at-will termination.

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GUAM

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   United States and Guam statutory provisions and court cases.

2. **How can an employer terminate an employment agreement?**

   As Guam is an “at-will” jurisdiction, employers generally may terminate with or without cause. If there is an employment agreement, an employer may terminate the employment based on the terms provided in the agreement.

3. **How can an employee terminate an employment agreement?**

   As Guam is an “at-will” jurisdiction, employees generally may terminate with or without cause. If there is an employment agreement, an employee may terminate the employment based on the terms provided in the agreement.

4. **Is an employer required to give reasons before terminating an employment agreement?**

   Depends on the terms of the agreement. Contract law applies with employment agreements.

5. **Can an employer reject an employee’s resignation?**

   Generally no, because under the “at-will” theory an employee may resign with or without cause.

6. **Can a person undergoing internal disciplinary proceedings resign?**

   Yes.

7. **Can you terminate the employment of an employee for poor performance?**

   Yes

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   In most cases no, however, it would depend on the specific facts on the reason(s) for the termination.

9. **Can you terminate the employment of a pregnant employee?**

   In most cases no, however, it would depend on the specific facts on the reason(s) for the termination.

GUAM

10. **Can you terminate the employment of an employee on maternity leave?**
In most cases no, however, it would depend on the specific facts on the reason(s) for the termination.

11. **Are there (other) categories of employees whose employment cannot be terminated?**

United States and Guam laws prohibit adverse employment actions against employees protected under the laws prohibiting discrimination.

12. **What constitutes retrenchment?**

As an “at will” jurisdiction, Guam does not require retrenchment processes.

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

No, retrenchment benefits and severance payments are not required. Not applicable.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

No, employees are not entitled to severance payments upon termination.

15. **What is the retirement age?**

Generally early retirement can begin at age 55 and normal retirement at age 65. Employers can however design retirement plans that specify different retirement ages. The Age Discrimination in Employment Act (“ADEA”) prohibits discrimination against persons older than 40 years of age.

16. **Are there any implications if an employee is terminated before retirement age?**

No. ADEA applies in termination cases as well.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

In most cases, yes.

18. **Can an employee be placed on garden leave?**

Guam law does not prohibit “garden leave”, but it is generally not a practice employers engage in.

GUAM

19. What constitutes unfair / wrongful dismissal?

The violation of a federal or territorial statutory provision prohibiting an adverse employment termination (see response to question 11 above).

20. What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?

The administrative review or civil court may require reemployment, back pay, forward pay, or treble / punitive damages. The damages that may be awarded depend on whether the action is filed with the federal government or the Guam courts.

21. Are wrongful termination cases heard before the civil courts or a specialised tribunal?

Generally, wrongful termination cases can be heard at the administrative level with the Department of Labor's Equal Employment Opportunity Commission, and then at the civil courts. In some cases, employees may proceed directly to the civil courts.

22. Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?

Guam law prohibits non-compete/solicitation clauses post termination. However, employers are able to enforce confidentiality provisions of employment agreements.

23. Do trade unions get involved in issues relating to the termination of employment?

For employers with a collective bargaining agreement, it is possible for trade unions to get involved.

24. Are there particular matters to be aware of when terminating foreign employees?

Employers need to ensure they are in compliance with the immigration process.

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HONG KONG

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   The Employment Ordinance, and common law.

2. **How can an employer terminate an employment agreement?**

   (i) By serving termination notice;
   (ii) By making payment in lieu of notice; and
   (iii) By way of summary dismissal

3. **How can an employee terminate an employment agreement?**

   (i) By serving termination notice;
   (ii) By making payment in lieu of notice; and
   (iii) By accepting the repudiatory breach on the part of the employer

4. **Is an employer required to give reasons before terminating an employment agreement?**

   No.

5. **Can an employer reject an employee's resignation?**

   No.

6. **Can a person undergoing internal disciplinary proceedings resign?**

   Yes.

7. **Can you terminate the employment of an employee for poor performance?**

   Yes.

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   No, except in the case of summary dismissal or where the employee is no longer on statutory paid sick leave (but there may be risk of allegations of disability discrimination).

HONG KONG

9. Can you terminate the employment of a pregnant employee?

No, except in the case of summary dismissal, or during the first 3 months of probation, where pregnancy is not the reason for termination.

10. Can you terminate the employment of an employee on maternity leave?

No, except in the case of summary dismissal, or during a probationary period of not more than 12 weeks, where pregnancy is not the reason for termination.

11. Are there (other) categories of employees whose employment cannot be terminated?

Employees who are receiving compensations under the Employees' Compensation Ordinance (regarding work related injury or occupational disease) unless and until the relevant assessment has been completed or a settlement has been reached on the claims.

12. What constitutes retrenchment?

If the dismissal is due to the fact that (i) the employer is closing or intends to close his business; (ii) the employer has ceased, or intends to cease, the business in the place where the employee was employed; or (iii) the requirement of the business for employees to carry out work of a particular kind, or for the employee to carry out work of a particular kind in the place where the employee was employed, has ceased or diminished or is expected to cease or diminish.

13. Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?

Yes, to those employees who have been under continuous employment for 2 years or more.

Statutory severance payment is calculated as follows:-
"Monthly wages (capped at HK$22,500) x 2/3 x years of service"

14. Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?

No.

15. What is the retirement age?

There is no legally required retirement age.

HONG KONG

16. Are there any implications if an employee is terminated before retirement age?

No.

17. Can you re-employ or continue with the employment of an employee who has attained retirement age?

Yes.

18. Can an employee be placed on garden leave?

There is no legally required retirement age.

19. What constitutes unfair / wrongful dismissal?

There applicable term in Hong Kong is unreasonable dismissal. This applies to employees who have been employed under a continuous contract for a period of not less than 24 months, who are dismissed other than for a valid reason under the Employment Ordinance.

Valid reasons mean (i) the conduct of the employee; (ii) the capability or qualification of the employee for performing his work; (iii) redundancy; (iv) the employment will be in breach of any statutory requirement; or (v) other substantial reasons.

20. What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?

For unreasonable dismissal, the employers will be required to pay any outstanding statutory payments due to the employees.

21. Are wrongful termination cases heard before the civil courts or a specialised tribunal?

They are heard by the Labour Tribunal.

22. Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?

Yes, but only if the restrictions imposed are necessary and reasonable to protect the legitimate interest of the employer, and the employer is able to provide evidence to prove its case.

23. Do trade unions get involved in issues relating to the termination of employment?

No.

HONG KONG

24. Are there particular matters to be aware of when terminating foreign employees?

If the employee is leaving Hong Kong for a period of 1 month or above, the employer has to file a prescribed form to the Inland Revenue Department of Hong Kong, and shall withhold all payments due to the employee for a period of 1 month from the date when the prescribed form is filed or when the Letter of Release is received (whichever is the earlier).

The employer has to inform the Immigration Department of the termination of employment.

For foreign domestic helpers, the employers have to provide air-tickets to the employees for their return to their home country.

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INDIA

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   Rights and obligations governing termination of employment are set out in the Industrial Disputes Act, 1947 ("**ID Act**"), state specific Shops and Establishment Acts ("**S&E Acts**"), standing orders under the Industrial Employment (Standing Orders) Act, 1946, and the terms of the relevant employment contract.

2. **How can an employer terminate an employment agreement?**

   Employer initiated terminations can be broadly classified as:
   - Termination simpliciter; and
   - Stigmatic termination.

   Termination simpliciter is quite wide in its scope and has been interpreted to include termination for redundancy, poor performance, continued ill-health and loss of faith. A stigmatic termination, on the other hand, is a termination on account of misconduct.

3. **How can an employee terminate an employment agreement?**

   An employee can terminate an employment agreement by resigning from his/her position.

4. **Is an employer required to give reasons before terminating an employment agreement?**

   Yes, for most classes of employees and in most locations in India. “At-will” employment is not recognized in India and terminations for no reason could be challenged as illegal, especially for "workman" category employees who enjoy the protection of the ID Act, or employees who are covered by a state specific S&E Act. Employers are generally required to ensure that there are fair and reasonable grounds to terminate employment.

5. **Can an employer reject an employee’s resignation?**

   Yes, but only in limited circumstances. A company could reject a resignation when it has justifiable reasons for the same, such as important business exigencies or a pending disciplinary enquiry against the concerned employee. It is important to reserve the right to reject a resignation in such circumstances in the employment contract.

6. **Can a person undergoing internal disciplinary proceedings resign?**

   Law does not explicitly prohibit an employee undergoing internal disciplinary proceedings from resigning. However, an employer may reject such a resignation to avoid the employee escaping from the disciplinary process.

INDIA

7. Can you terminate the employment of an employee for poor performance?

Yes, employment can be terminated for poor performance provided the employee was given appropriate feedback about the same and a reasonable opportunity to improve performance before termination. Failure to demonstrate that the employee was given prior notice and an opportunity to show improvement may prove to be an issue, if the employee chooses to dispute the termination.

8. Can you terminate the employment of an employee who is on extended medical leave?

Yes, employment may be terminated on grounds of continued ill-health. In such cases, employers are required to demonstrate that (a) the employee was absent for a considerably long period of time due to his illness, and (b) the nature of sickness/illness was such that the person had become incapable of performing the role for which he/she had been hired.

9. Can you terminate the employment of a pregnant employee?

The employment of a pregnant employee can be terminated. Notice of termination should however not expire after her maternity leave has begun (see response to question 10 below). Further, the employer will have to ensure that her statutory maternity benefits are added to her severance package (except where the termination is for gross misconduct).

10. Can you terminate an employee on maternity leave?

Employees on leave under the Maternity Benefit Act, 1961 are protected during the tenure of such leave, and their employment cannot be terminated during this period.

11. Are there (other) categories of employees whose employment cannot be terminated?

Yes, employees covered under the Employees State Insurance Act, 1948 (**ESI Act**) (i.e. those who earn only up to INR 21,000 per month) are protected from termination during the "period of sickness" under certain circumstances. For instance, if an employee is receiving a sickness benefit under the ESI Act, his/her employment cannot be terminated during such period. Similarly, if the employee is under medical treatment for sickness, the employment cannot be terminated until a period of 6 months of treatment has passed (in the case of some ailments, the period prescribed is longer).

Further, workman category employees working in a factory with 100 or more workmen on average over the last 12 months (the limit is 300 in some states), cannot be retrenched without prior government permission.

INDIA

12. What constitutes retrenchment?

'Retrenchment' under the ID Act means termination by the employer of the service of a "workman" for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

(a) voluntary retirement of the workman; or
(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(c) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(d) termination of the service of a workman on the ground of continued ill-health.

In other words, termination for any reason, except misconduct, continued ill-health, retirement or expiry of a fixed term contract, constitutes retrenchment.

13. Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?

Yes, severance payments in a retrenchment scenario are typically the following -

i. Notice pay – To be paid if the employee is not given any notice.
ii. Retrenchment compensation - Payable only to "workman" category employees under the ID Act at the rate of 15 days average wages for each year of service (with 6 months or more of service being treated as one full year). This must be paid on or before the last date of employment for the termination to be legal.
iii. Leave encashment – Amount due towards accrued but untaken leave as per company policies and locally applicable S&E Act provisions.
iv. Gratuity – Payable to all employees (irrespective of category) who have completed at least 5 years of continuous service (reckoned as 4 years and 8 months) under the Payment of Gratuity Act, 1972. This is payable at the rate of 15 days wages for every year of service (with 6 months or more of service being treated as one full year). The formula to calculate gratuity is different from that for retrenchment compensation, and gratuity payments can also be limited to INR 2,000,000, unless the employer has a more beneficial policy.
v. Any accrued but unpaid salary till the last date of employment.
vi. Other contractual dues, if any – this may include bonuses, payments relating to stock options, etc. that may have been agreed contractually.

INDIA

14. Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?

Most types of termination (such as for poor performance, redundancy, etc.) would be classified as retrenchment under Indian law, and employees would have the right to receive severance payments. Employees would not be entitled to notice pay or retrenchment compensation if they are terminated for misconduct.

15. What is the retirement age?

There is no mandatory retirement age laid down under Indian laws. Some state model standing orders do prescribe a retirement age. However organizations are free to stipulate a higher retirement age.

The age of retirement is typically stipulated by the employer in their employment contract or policy, and most private organizations stipulate the age of 60 (sometimes 62).

Please note that as per the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act"**), at the age of 58, members of pension schemes attain superannuation and become eligible to withdraw those benefits. Nevertheless, they can continue to be employed.

16. Are there any implications if an employee is terminated before retirement age?

No, so long as the termination was for a reasonable cause like misconduct or non-performance or redundancy, etc.

17. Can you re-employ or continue with the employment of an employee who has attained retirement age?

An employer may choose to re-employ or continue with the employment of such an employee. In practice, such employees tend to be engaged as consultants rather than as employees. Organizations would need to be mindful of how they approach such extensions, however, to avoid claims of unequal treatment from individuals whose employment was not extended.

18. Can an employee be placed on garden leave?

Yes, although there is limited jurisprudence on this issue, this practice is often used to prevent employees from taking with them confidential information when they leave their current employer, especially in cases when an employee is joining a competitor. Garden leave provisions should be enforceable provided they are intended to operate during the notice period, and not after.

INDIA

19. What constitutes unfair / wrongful dismissal?

Under the ID Act, discharging or dismissing workmen without any reasonable cause or in the following manner is considered unfair labour practice:

i. by way of victimisation;
ii. not in good faith, but in the colourable exercise of the employer's rights;
iii. by falsely implicating a workman in a criminal case on false evidence or on concocted evidence;
iv. for patently false reasons;
v. on untrue or trumped up allegations of absence without leave;
vi. in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;
vii. for misconduct of a minor technical character, without having any regard to the nature of the particular misconduct or the past record or service of the workman, thereby leading to a disproportionate punishment.

An unfair dismissal would also occur where the principles of natural justice were not followed in a disciplinary matter. These include:

i. not providing the employee with a reasonable opportunity of being heard;
ii. not providing the right of a hearing by an impartial inquiry officer or tribunal; and
iii. not acting reasonably and in good faith.

20. What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?

The damages awarded would depend on the actual loss faced by the employee. Do note that if the employee is a "workman", the labour court or tribunal could order reinstatement with or without back wages from the date of termination.

21. Are wrongful termination cases heard before the civil courts or a specialised tribunal?

Labour courts and industrial tribunals can look into disputes or matters connected or relevant to the discharge or dismissal of workmen, including wrongful termination.

Civil courts can also look into such matters for employees who do not enjoy the protection of the ID Act or the State specific S&E Acts.

INDIA

22. Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?

Non-compete provisions extending beyond the term of employment are not enforceable under Indian law, since they are considered to be in restraint of trade or of a profession. However, companies tend to include such provisions as a deterrent to the employee.

Non-solicit clauses are valid and enforceable under Indian law. However, the enforceability of a non-solicit clause depends on the facts and circumstances of each case.

23. Do trade unions get involved in issues relating to the termination of employment?

Yes, in organisations where trade unions exist, they can take on matters of termination of employment on behalf of its members. Industry level trade unions could also espouse the cause of individual workmen.

24. Are there particular matters to be aware of when terminating foreign employees?

If a foreign employee's right to work expires, there is an obligation on the company to terminate the employment of the individual, since the company only has the ability employ a person who has a valid work visa/permit.

Separately, the employer also has an obligation to inform the relevant authorities in case of termination of the contract, and to notify the departure of the foreign national from the country, along with the foreign national's flight details and date of departure.

Employers are also obligated to share prescribed details with the Employees Provident Fund Organisation, in the event of an international worker leaving service of the establishment. A copy of the same would have to be provided to the foreign employee as well.

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INDONESIA

1. What are the sources of law governing the termination of employment in your jurisdiction?

- Law No. 13 of 2003 (March 25, 2003) on Manpower, as amended by several Constitutional Court Decisions (the "Manpower Law");
- Law No. 2 of 2004 (January 14, 2004) on Industrial Relations Dispute Settlement ("Law No. 2"); and
- Law No. 21 of 2009 (August 4, 2000) on Labour Unions ("Law No. 21").

2. How can an employer terminate an employment agreement?

When terminating an employment relationship, the employer and the employee must initially pursue an effort to prevent the termination. If such effort fails, the termination must proceed with tripartite negotiations between the employer, the employee and a third-party mediator. Following the tripartite negotiations, if the two parties fail to reach a settlement, the employer can only terminate the employment relationship with the employee after obtaining a stipulation from the labor court, the decision of which may be appealed to the Supreme Court.

There are two types of employment agreement, namely (i) fixed-term employment agreement and (ii) permanent employment agreement. An employer can terminate a fixed-term employment agreement by providing conditions or reasons for termination in the employment agreement, due to which the employer is not obligated to compensate the employee for the remainder of the contract term. A permanent employment agreement can only be terminated following the procedures discussed above, i.e., tripartite negotiations and labour court approval.

Additionally, if the termination is due to the violation of provisions provided for in the employment contract, company regulation, or collective labor agreement, the employment relationship may be terminated only after the employee in question has been issued a first, second and third warning letter in succession.

3. How can an employee terminate an employment agreement?

By voluntary resignation, subject to our discussion in response to question 5 below.

4. Is an employer required to give reasons before terminating an employment agreement?

Yes, unless the termination is mutually agreed between the employee and the employer in an agreement, typically called a mutual termination agreement ("**MTA**").

INDONESIA

5. Can an employer reject an employee's resignation?

No, insofar as the employee has first filed a written resignation letter 30 days before the actual resignation date, the employee is not bound by duty attachment, and the employee continues to fulfill his/her work obligations until the resignation date.

However, if an employee resigns before their fixed-term employment contract expires, that employee must compensate the employer in an amount equal to the wages that have been paid by the employer up to the termination of the employment contract.

6. Can a person undergoing internal disciplinary proceedings resign?

Yes.

7. Can you terminate the employment of an employee for poor performance?

Yes, following the procedures as discussed above. The employer must first issue first, second and third warning letters to the employee about their performance.

8. Can you terminate the employment of an employee who is on extended medical leave?

Yes, following the procedures as mentioned above. The company can terminate the employment of an employee on medical leave. However, the reason for termination cannot be the medical leave (unless the medical leave has exceeded 12 months). The Indonesian Manpower Law expressly prohibits medical leave as the basis for the termination of an employment relationship, unless the medical leave has exceeded 12 months.

9. Can you terminate the employment of a pregnant employee?

Yes, following the procedures as mentioned above. The company can terminate the employment of a pregnant employee, but the reason for termination cannot be the pregnancy. The Indonesian Manpower Law expressly prohibits pregnancy as the basis for the termination of an employment relationship.

10. Can you terminate the employment of an employee on maternity leave?

Yes, following the procedures as mentioned above. The company can terminate the employment of an employee during the employee's maternity leave, but the reason for termination cannot be the maternity leave. The Indonesian Manpower Law expressly prohibits maternity leave as the basis for the termination of an employment relationship.

INDONESIA

11. Are there (other) categories of employees whose employment cannot be terminated?

An employer is prohibited from terminating an employment relationship based on any of the following reasons:

- The employee is unable to work due to illness based on a doctor's statement, for a period not exceeding 12 consecutive months.
- The employee is prevented from working due to fulfilling state duties in accordance with the provisions of the prevailing laws and regulations.
- The employee performs religious rites prescribed by their religion.
- The employee gets married.
- The employee is pregnant, gives birth, miscarries or is breastfeeding.
- The employee has a blood and/or marital relationship with another employee in the same company, except where this is regulated in the employment agreement, company regulation or collective labour agreement.
- The employee establishes and/or becomes a member of the management of a labour union, or an employee engages in labour union activities outside working hours or during working hours with the agreement of the employer or pursuant to the provisions regulated in the employment agreement, company regulation or collective labour agreement.
- The employee reports the employer to the authorities for a criminal act committed by the employer.
- Differences in ideology, religion, political leaning, ethnic group, skin colour, group, gender, physical condition or marital status.
- The employee is permanently disabled, injured due to a work accident or injured due to the employment relationship where, based on a doctor's statement, the recovery period required cannot be predicted.

12. What constitutes retrenchment?

The Manpower Law does not provide any specific rules for retrenchment. Any termination of employees must follow the procedures discussed above. However, the law specifies certain conditions which affect the amount of severance pay that the employer must pay to the terminated employees.

13. Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?

Yes. Employees are entitled to either (i) two times severance pay, single service pay and compensation pay according to their years of service; or (ii) single severance pay, single service pay and compensation pay according to their years of service, depending on the financial condition of the company that is the reason for the termination of the employees.

INDONESIA

14. Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?

Yes. Generally speaking, severance pay will be determined by the number of years the employee has worked for the employer.

15. What is the retirement age?

The law does not prescribe any retirement age. Employers are free to specify a retirement age in the company regulation or collective labour agreement, the latter of which must be agreed to by the relevant labour union. In practice, it is common to set 55 as the retirement age. It is also common to use the retirement age stipulated in the social security law, which is 57 for 2019, and which will increase by one year every three years until it reaches 65.

16. Are there any implications if an employee is terminated before retirement age?

Early retirement is permissible as long as it is agreed by both the employer and the employee. Otherwise, labour court approval will be necessary.

17. Can you re-employ or continue with the employment of an employee who has attained retirement age?

Yes, although it is uncommon in Indonesia since the re-employed employee may no longer be able to enjoy benefits like a regular employee, particularly in terms of social security benefits. Typically, continued service of a retired employee is entered into by way of a consultancy agreement.

18. Can an employee be placed on garden leave?

Yes, employers can require employees to serve a period of “garden leave” as a form of suspension pending the outcome of mediation and labour court proceedings. During such period, the employees are still entitled to their salary.

19. What constitutes unfair / wrongful dismissal?

The dismissal will be deemed wrongful if it fails to abide by the procedure as set forth in our response to question 2 above. The dismissal is considered valid if it is mutually agreed by both parties or if the labour court has approved the plan to terminate the employment relationship. The employer must also take into account the prohibited justifications in dismissing an employee, which would render the dismissal null and void. In the event that the dismissal is based on a reason as specified in our response to question 11 above, the dismissed employee may challenge the termination through the labour court.

INDONESIA

20. What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?

As a consequence of a wrongful termination that is deemed as null and void, the dismissed person will be reinstated as an employee.

21. Are wrongful termination cases heard before the civil courts or a specialised tribunal?

Termination cases are heard at the Ministry of Manpower through tripartite negotiations. If such negotiations fail, the case will be brought to the labour court, and any decision rendered by the court may be appealed to the Supreme Court.

22. Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?

Theoretically, non-competition and non-solicitation agreements are enforceable under their terms. In practice, the enforcement of the agreement would likely depend on the facts of the case, i.e., the scope and duration of restrictions, which should not interfere with a person's right to gainful employment under Indonesian law or with the nation's development. There has been almost no jurisprudence, i.e., scholarly comment or cases, on this point.

It is common for executive employment contracts to provide that employees are prohibited, directly or indirectly, from soliciting or diverting any customers, business employees or suppliers of the employer with whom they became acquainted as a result of their employment for a period of one to two years after the end of their employment.

The principle of freedom of contract allows employers to include confidentiality terms in their employment agreements. However, the Manpower Law does not recognize restrictive covenants on post-termination activities.

The enforcement of non-compete agreements may depend on the circumstances in which an employee leaves a company. It is possible that the government or an Indonesian court may view such an agreement as contrary to public policy because it prevents an individual with valuable skills from contributing to national development.

23. Do trade unions get involved in issues relating to the termination of employment?

Not directly, but they may serve as a reference for what happens in the market, especially for the severance package typically paid in a certain industry.

24. Are there particular matters to be aware of when terminating foreign employees?

The recent Presidential and Ministerial Decree provides that in the event that the employment relationship of any foreign employee is terminated before the working contract period elapses,

INDONESIA

the employer must submit a report to Minister of Manpower. The failure to submit the report would result to the employer being subject to an administrative sanction in the form of postponement of services by the Ministry of Manpower.

Further, in the section on labour court policies in Circular Letter No. 1 Year 2017 regarding the Implementation of the 2017 Supreme Court Meeting as a Guideline for the Role of Indonesian Courts, the Supreme Court issued new policies as follows:

1. Foreign employees can be employed in Indonesia only for a certain position and a certain period under a fixed-term employment agreement (*Perjanjian Kerja Waktu Tertentu* or "PKWT").
2. The legal protection of foreign employees only applies if such foreign employees have obtained a work permit (*Izin Mempekerjakan Tenaga Kerja Asing* or "IMTA").
3. If a foreign employee's work permit has expired, but the period of their fixed-term employment agreement is still valid, the remaining period of their fixed-term employment agreement will not be protected by law.

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KOREA

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   Labor Standards Act and Labor Contract Act

2. **How can an employer terminate an employment agreement?**

   The employer needs to provide advance notice 30 days before termination, in principle.

3. **How can an employee terminate an employment agreement?**

   The employee needs to provide 2 weeks' notice before termination, in principle.

4. **Is an employer required to give reasons before terminating an employment agreement?**

   No.

5. **Can an employer reject an employee's resignation?**

   No

6. **Can a person undergoing internal disciplinary proceedings resign?**

   Yes.

7. **Can you terminate the employment of an employee for poor performance?**

   Yes, if an employer can prove that the employee's performance is extremely poor and cannot be improved.

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   Yes.

9. **Can you terminate the employment of a pregnant employee?**

   You can terminate the employment of a pregnant employee if she has not commenced maternity leave, but her pregnancy cannot be the reason for termination.

10. **Can you terminate the employment of an employee on maternity leave?**

    No.

KOREA

11. **Are there (other) categories of employees whose employment cannot be terminated?**

    Employers cannot terminate an employee during a period of absence from work for medical treatment with respect to injuries or illnesses suffered in the course of employment, nor within 30 days thereafter, and cannot terminate any woman during the period of absence from work before and after childbirth in accordance with the provisions of Article 65 of the Labor Standards Act, nor within 30 days thereafter.

12. **What constitutes retrenchment?**

    Retrenchment is termination by an employer for the purpose of personnel reduction necessary for business reasons.

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

    Retrenchment benefits or severance payments are not legally required in a retrenchment scenario. However, practically speaking, in a retrenchment scenario, most employers offer severance payments to induce targeted employees to agree to separation agreements. The employers unilaterally terminate employees only when they do not agree to separation agreements. There are no rules or regulations concerning the amount of severance payment; it is determined by the employer on a case-by-case basis.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

    No.

15. **What is the retirement age?**

    Minimum retirement age is 60.

16. **Are there any implications if an employee is terminated before retirement age?**

    No.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

    Yes.

18. **Can an employee be placed on garden leave?**

    Yes.

KOREA

19. **What constitutes unfair / wrongful dismissal?**

    It is unfair or wrongful dismissal if an employer terminates an employee without reasonable grounds.

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

    Unfair or wrongful dismissal is invalid. Therefore, employees can claim reinstatement and backpay for the period in which the employee was not paid due to unfair or wrongful dismissal.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

    They are heard before the civil courts.

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

    Yes.

23. **Do trade unions get involved in issues relating to the termination of employment?**

    Yes.

24. **Are there particular matters to be aware of when terminating foreign employees?**

    Even if the employment contract specifies that the applicable law is the law of another country besides Japan, the mandatory provisions of Japanese labor law will likely still be applicable to an employee working in Japan

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KOREA

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   The Labor Standards Act (the "**LSA**"), in principle, and the Equal Employment Opportunity and Work-Family Balance Assistance Act for those on maternity or paternity leave.

2. **How can an employer terminate an employment agreement?**

   Pursuant to Article 27 of the LSA, "an employer must notify the employee of the reason for and the timing of the termination in the form of a written document."

3. **How can an employee terminate an employment agreement?**

   Unlike an employer, an employee may terminate an employment agreement either verbally or in writing.

4. **Is an employer required to give reasons before terminating an employment agreement?**

   As mentioned in response to question 2, an employer is required to provide reasons before terminating an employment contract.

5. **Can an employer reject an employee's resignation?**

   No, unless under special circumstances that require employer approval – i.e. where the employee's resignation is submitted immediately before restructuring.

6. **Can a person undergoing internal disciplinary proceedings resign?**

   Yes.

7. **Can you terminate the employment of an employee for poor performance?**

   Yes, but an employer must prove poor performance to a degree that substantially undermines the employment relationship, to terminate an employee.

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   Pursuant to Article 23 of the LSA, no employer can terminate an employee "during a period of temporary interruption of work for medical treatment of an occupational injury or disease and within 30 days thereafter" unless the employer pays a lump sum compensation pursuant to the LSA or the business ceases to exist.

KOREA

9. **Can you terminate the employment of a pregnant employee?**

   Yes, Korean law does not expressly prohibit termination of a pregnant employee as long as she is not on maternity leave. That being said, termination solely based on a person's pregnancy may be a violation of the Equal Employment Opportunity and Work-Family Balance Assistance Act.

10. **Can you terminate an employee on maternity leave?**

    No, you cannot terminate an employee during the period of maternity leave and within 30 days thereafter, unless the business ceases to exist during that period.

11. **Are there (other) categories of employees who cannot be terminated?**

    Pursuant to Article 14 of the Equal Employment Opportunity and Work-Family Balance Assistance Act, an employer cannot terminate an employee (1) "who has suffered damage with regard to sexual harassment on the job or who has claimed that damage from sexual harassment occurred," (2) who is on childcare leave, and (3) who has reported or experienced incidents of workplace harassment. Please note that Korean law distinguishes sexual harassments from workplace harassments.

12. **What constitutes retrenchment?**

    Pursuant to Article 24 of the LSA, retrenchment requires the following:

    1. Urgent business necessity;
    2. Employer's effort to avoid dismissal;
    3. Rational and fair criteria for dismissal; and
    4. 50 days' notice prior to the dismissal day and good faith consultation with the union

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

    Yes, statutory severance payments must be made based on the following formula – 30 days' worth of average wage must be paid for every year of continuous employment. This requirement applies not only to retrenchment but also to other forms of dismissals.
    Many employers also provide "comfort money" upon dismissal, although it is not a statutory requirement.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

    As mentioned above in our response to question 13, severance payments, based on the same formula, must be made for other forms of dismissals.

KOREA

15. **What is the retirement age?**

    60 years old.

16. **Are there any implications if an employee is terminated before retirement age?**

    Pursuant to Article 23 of the LSA, an employee must be terminated only for a justifiable reason following a proper procedure. Please note that Korea is a “just cause” jurisdiction, not an “employment at will” jurisdiction.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

    Yes, you can re-employ or set a higher retirement age to continue employment of an employee who has attained retirement age.

18. **Can an employee be placed on garden leave?**

    Yes.

19. **What constitutes unfair / wrongful dismissal?**

    Cause: Termination for a cause not listed in the collective bargaining agreement or terms of employment.

    Procedure: Termination without following a proper procedure.

    Severity of disciplinary action: Unreasonable level of disciplinary action in light of the misconduct.

    In general, all three elements above must be satisfied to constitute a proper dismissal.
    Also, absence of written notice constitutes wrongful dismissal.

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

    Reinstatement and back pay.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

    Before the civil courts and the Labor Relations Commission.

KOREA

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

    They can be effective, but courts have been hesitant to enforce them.

23. **Do trade unions get involved in issues relating to the termination of employment?**

    Yes, if such issues are included in the collective bargaining agreement.

24. **Are there particular matters to be aware of when terminating foreign employees?**

    No, foreign employees are treated no differently from Korean employees.

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LAOS

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

- Labor Law (№ 43/NA, 24 December 2013) ("**Labor Law**");
- Contract and Tort Law (№ 01/NA, 8 December 2008) ("**Contract and Tort Law**"); and
- Decree on Management of Local Employees in Foreign Organizations (№ 456/PM, 1 November 2010) ("**Decree 456**") and implementing Instruction (№ 00480/MoFA, 1 February 2011) ("**Instruction 480**") (Decree 456 and Instruction 480 together referred to as "Local Staff Legislation").

2. **How can an employer terminate an employment agreement?**

Save for the specific "fault-based" scenarios that are listed in the Labor Law (such as the employee deliberately causing damage to the employer), which may be further supplemented in internal regulations governing each workplace, termination of the employment contract by the employer must: (i) be documented in writing with the reason for termination clearly stated; and (ii) the employee must receive his/her termination allowance (if applicable) and payment of his/her salary, allowances and other benefits accrued up until the date of expiry of the notice period.

An employer may not unilaterally terminate an employment contract without having a valid reason, and the Labor Law provides that termination to improve "business operations" or termination in instances where an employee lacks the necessary skills may both be valid reasons. However, in each case, certain procedures must be followed. For example, termination on the grounds of a restructure whereby the position of an employee becomes redundant must be preceded by a process of consultation between the parties and notification to the Labor Administration Authority ("**LAA**"). In cases where an employee is dismissed for lacking the necessary skills, an employer must, where possible, offer an alternative position to that employee before deciding that dismissal is the only viable option.

Other than dismissals that are occasioned by the fault of the employee, the employer is also liable to compensate the employee by making a severance payment, and the amount thereof may be higher if an employer is unable to demonstrate that a valid reason for the termination exists.

Unless a more generous notice period is provided in the applicable employment contract, an employee is entitled to:

- 30 days' notice in relation to employees engaged in manual work; and
- 45 days' notice in relation to employees engaged in non-manual labour.

For fixed term employment agreements, the notice requirement is freely determined by the parties and stipulated in the employment contract.

LAOS

3. **How can an employee terminate an employment agreement?**

   An employee can terminate an indefinite term employment contract by giving 30 days' notice in relation to employees engaged in manual work or 45 days' notice in relation to employees engaged in non-manual work. When the employee is employed under a fixed-term employment contract, the notice requirement for termination may be agreed between the parties and stipulated in the employment contract.

4. **Is an employer required to give reasons before terminating an employment contract?**

   Yes, the reason for termination must be clearly stated in the dismissal letter or notice handed over to the employee.

5. **Can an employer reject an employee's resignation?**

   Provided that the employee complies with the statutory notice period (or, for fixed term employment contract, the notice period contractually set in the employment contract), the Labor Law does not provide for the possibility for an employer to reject an employee's resignation.

6. **Can a person undergoing internal disciplinary proceedings resign?**

   The Labor Law does not prevent an employee undergoing internal disciplinary proceedings from resigning.

7. **Can you terminate the employment of an employee for poor performance?**

   Yes, Lao laws allow an employment contract to be terminated on a non-fault basis, including for the employee's lack of essential skill required to perform the work.

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   An employer is not permitted to terminate the employment of an employee who is (i) suffering a medical illness and undergoing medical treatment or (ii) recovering from a medical illness after medical treatment (subject to obtaining a medical certificate).

   However, if an employee commits an offence or violation of the internal regulations that entitles the employer to terminate the employment contract as a "fault-based" termination, an employer may terminate the employment contract even if the employee falls within any of the restricted categories set out above. In such cases, the employer needs the authorization of the LAA to terminate the employment contract.

LAOS

9. **Can you terminate the employment of a pregnant employee?**

An employer is not permitted to terminate the employment of an employee who: (i) is pregnant; or (ii) is working within a year of giving birth. As with an employee suffering from a disease or illness, if the pregnant employee commits an offence or violation of the internal regulations that entitles the employer to terminate the employment contract as a "fault-based" termination, the employer may dismiss the employee with the prior authorization of the LAA.

10. **Can you terminate the employment of an employee on maternity leave?**

See our response to question 9 above – Pregnant employees and employees who are working within a year of giving birth are protected against dismissal unless the authorization of the LAA is obtained.

11. **Are there (other) categories of employees whose employment cannot be terminated?**

In addition to the "protected" employees listed in our responses to questions 8, 9 and 10 above, the Labor Law prevents the employer from dismissing employees who are:

- suffering the consequences of a disaster such as fire or flooding;
- on annual leave or leave approved by the employer;
- performing work at another workplace on assignment directed by the employer;
- pursuing a Labor Law complaint or claim against the employer;
- involved in legal proceedings or who have been detained or are awaiting a court decision;
- cooperating with any Government authority in relation to the implementation of the Labor Law or a labor dispute; or
- carrying out activities for trade unions or employees' representatives with the approval of the employer.

While termination of an employment contract on any of the above grounds is expressly not authorized by the law, the LAA does have the discretion to permit such a termination if the matter is referred to it.

12. **What constitutes retrenchment?**

Redundancy may occur when the employer determines that it is necessary to reduce the number of workers in a labor unit in order to improve its business operations.

As part of the redundancy process, the employer is required to:

- consult with the trade union, employees' representatives or the majority of employees;
- submit a notice to the LAA;
- provide the affected employee(s) with the relevant period of advance notice; and
- provide an explanation for the reduction in workforce size.

LAOS

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

    In the event of a redundancy in the context of retrenchment, an employee will not be entitled to any compensation other than the termination allowance (severance pay) provided under the Labor Law, i.e. save for termination during the probationary period or on fault-based grounds, 10% of the employee's monthly salary before the termination for each month of service.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

    Yes, the same amount of severance applies as above. Save for termination during the probationary period or on fault-based grounds, where an employer terminates employment unilaterally, the employee will be entitled to a termination allowance equal to 10% of their monthly salary before the termination for each month of service. If the termination is made on any prohibited ground or without a valid reason (see our response to question 11, above), the rate of severance pay is increased from 10% to 15%.

15. **What is the retirement age?**

    The Labor Law does not expressly provide for a mandatory retirement age, but instead sets an age at which employees can receive retirement benefits under the state system. The eligible ages for receiving retirement benefits is 60 years for men and 55 years for women who have worked under normal conditions, and 55 years for men and 50 years for women who have worked under dangerous conditions.

16. **Are there any implications if an employee is terminated before retirement age?**

    Employees whose contracts are terminated before retirement age are not eligible for retirement benefits under the state system.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

    Yes. There is no provision in the Labor Law that prevents employers from hiring or employing employees who have attained retirement age, or from continuing the employment relationship beyond retirement age.

LAOS

18. **Can an employee be placed on garden leave?**

The Labor Law prevents the employer from placing the employee being terminated on garden leave if the parties are engaged in a dispute which is the subject of formal dispute resolution procedures. In such cases, the employer is obliged to make the workplace available to the employee to continue their work, unless there are serious grounds not to do so. For the sake of clarity, however, it is recommended to provide for the possibility of permitting garden leave in the employment contract or internal regulations.

19. **What constitutes unfair / wrongful dismissal?**

If an employer terminates the employment contract without a valid reason, through an abuse of power, or by violating basic rights of the employee such that the employee is prevented from performing his/her job, or where an employer breaches its contractual obligations such that an employee is forced to resign, such instances will all constitute unjustified dismissals. It may be inferred that a violation of the basic rights of an employee also includes any dismissal effected on the prohibited or unauthorized grounds noted above (see our response to question 11).

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

Where an employee is found by the court or governmental authority to have been dismissed without a valid reason, the employer may be ordered to:

- reinstate the employee to their former position;
- reinstate and assign the employee to alternative appropriate work; or
- pay a termination allowance (severance pay) equal to 15% of the employee's last drawn monthly salary .

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

The Ministry of Labor and Social Welfare administers disputes between employees and employers through the LAA. As a "dispute of right", a dispute regarding the termination of an employment contract or the violation of the internal rules of the workplace must be negotiated between the parties themselves. Failing any settlement by negotiation, the matter may be referred to the LAA. Whether the dispute is brought at local or village level, provincial or city level or at the central level, the LAA only has the power to mediate disputes. In doing so, the LAA may, in practice, make a finding of liability on the merits of the matter. However, this is not recognized as binding unless upheld by the People's Court.

LAOS

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

Non-compete or non-solicitation clauses are not addressed in the Labor Law. The Contract & Tort Law may render a contract void or voidable if it is found to be “not beneficial” to a party. Therefore, the ability of an employer to enforce an unreasonably broad or lengthy restraint which is not intended to protect the legitimate interests of an employer, but rather to penalize a former employee, may not necessarily be upheld by the courts. In addition, the Constitution of Lao PDR provides a guaranteed right for Lao citizens to “work and engage in occupations”. A restraint which violates this right may be found to be unconstitutional. A reasonable restraint, which is narrow in scope and designed to protect the legitimate proprietary interests of an employer may be valid. However, no binding judicial or administrative decisions on this point are publicly available.

23. **Do trade unions get involved in issues relating to the termination of employment?**

Yes, the role of trade unions in the Lao PDR is to protect and promote the legitimate interests of employees. As such, they may participate in the settlement of labor disputes. In practice, the formation and recognition of trade unions in the Lao PDR is rather limited. In the absence of a trade union, an employer may be obliged to consult or otherwise deal with an employee representative who is appointed by the employees in that labor unit.

24. **Are there particular matters to be aware of when terminating foreign employees?**

Foreign employees are granted the same protections as Lao nationals with regard to their employment in Laos. Upon expiration of an employment contract, the foreign employee must surrender his or her work permit.

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MACAU

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   The Labour Relations Law.

2. **How can an employer terminate an employment agreement?**

   Termination with cause;
   Termination without just cause; and
   Mutual revocation.

3. **How can an employee terminate an employment agreement?**

   Termination with cause;
   Termination without just cause; and
   Mutual revocation.

4. **Is an employer required to give reasons before terminating an employment agreement?**

   For termination with just cause: Yes, and the reason or just cause must be communicated to the employee within 30 days after the employer has acknowledged it/or after the just cause occurs.

   For termination without just cause: No.

5. **Can an employer reject an employee's resignation?**

   No.

6. **Can a person undergoing internal disciplinary proceedings resign?**

   Yes.

7. **Can you terminate the employment of an employee for poor performance?**

   Yes, this can be considered a just cause for termination.

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   Yes.

9. **Can you terminate the employment of a pregnant employee?**

   Yes, to the extent that maternity compensation is given.

MACAU

10. **Can you terminate the employment of an employee on maternity leave?**

    Yes, to the extent that maternity compensation is given.

11. **Are there (other) categories of employees whose employment cannot be terminated?**

    No.

12. **What constitutes retrenchment?**

    There is no legal definition of retrenchment in the Macau Labour Relations Law. Termination due to retrenchment is deemed to be termination without cause.

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

    Since termination due to retrenchment is deemed to be termination without cause, the quantum of severance is determined under the Labour Relations Law.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

    Employees are entitled to severance payment when they are terminated without just cause, i.e due to retrenchment.

15. **What is the retirement age?**

    There is no retirement age in the private sector. the retirement age for civil servants is generally 65.

16. **Are there any implications if an employee is terminated before retirement age?**

    No.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

    Not applicable.

18. **Can an employee be placed on garden leave?**

    Yes.

MACAU

19. **What constitutes unfair / wrongful dismissal?**

- Wrong calculation of severance or final payment;
- Lack of written communication to the employee when there is termination with just cause

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

The employees can claim patrimonial loss and non-patrimonial loss in a court of law, plus any interests on arrears of the relevant labour credits.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

Administrative Proceedings: Macau Labour Affairs Bureau, commonly known as “DSAL”
Judicial Proceedings: Labour Court, which belongs to civil courts;

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

Yes. These clauses are enforceable subject to certain conditions, i.e. a payment of compensation, and limitation in duration and location;

23. **Do trade unions get involved in issues relating to the termination of employment?**

Although the Macau Basic Law has set forth the right to join trade unions, up not now, the trade union law has not yet been drafted. There are certain groups of employees who established “associations” instead to defend their rights.

24. **Are there particular matters to be aware of when terminating foreign employees?**

Foreign employees normally hold a work permit in Macau, and are commonly known as “blue card” holders. The calculation of the severance payment is different from the regime for resident workers. In addition, regardless of having just cause or not, the employer is liable to pay the repatriation cost, i.e. ferry or plane tickets to the foreign employees to go back to their habitual residence.

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MALAYSIA

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   Case law and employment legislation, namely the Industrial Relations Act 1967, Employment Act 1955 and Minimum Retirement Age Act 1967:

2. **How can an employer terminate an employment agreement?**

   By giving notice or providing salary in lieu thereof depending on the terms of the contract. For employees within the purview of the Employment Act 1955, if no notice is provided, salary in lieu of a minimum of 4 weeks / 6 weeks / 8 weeks of notice is payable depending on their length of service. For employees outside the scope of the Employment Act 1955, they would be governed by the notice provisions in their employment agreements. In the event an employment agreement does not provide for an express termination clause, the employment relationship may be terminated by either party upon giving the other reasonable notice of their intention to do so.

   Mutual Separation

   The parties can mutually agree to terminate the employment relationship by entering into a mutual separation agreement.

   Summary Dismissal

   An employer can summarily dismiss an employee provided it is for just cause and excuse. The most common ground for invoking a summary dismissal would be on the basis of an act of misconduct committed by the employee.

3. **How can an employee terminate an employment agreement?**

   An employee can terminate by giving notice and by tendering his/her resignation.

4. **Is an employer required to give reasons before terminating an employment agreement?**

   No, however the employer would need to be able to justify the reasons for the termination in the event the employee requests for the reasons, or if the matter is litigated.

5. **Can an employer reject an employee's resignation?**

   No.

MALAYSIA

6. **Can a person undergoing internal disciplinary proceedings resign?**

   Yes.

7. **Can you terminate the employment of an employee for poor performance?**

   Yes, but generally before terminating employment, an employer should give sufficient warnings and opportunities to improve, and only terminate employment of the employee if he/she still fails to improve.

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   No. If the employee is on continuous medical leave, he/she must be on medical leave for a sufficiently lengthy period before he/she can be medically boarded out or terminated on medical grounds.

9. **Can you terminate the employment of a pregnant employee?**

   Yes, provided that the dismissal is with just cause or excuse.

10. **Can you terminate the employment of an employee on maternity leave?**

    No. Section 37(4) of the Employment Act 1955 states that any employer who terminates the service of a female employee during the period in which she is entitled to maternity leave commits an offence. The proviso for this section states that such termination shall not include termination on the ground of closure of the employer's business.

11. **Are there (other) categories of employees whose employment cannot be terminated?**

    It is pertinent to note that Section 60N of the Employment Act 1955 provides that where an employer is required to reduce his workforce by reason of redundancy, the employer shall not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee.

12. **What constitutes retrenchment?**

    Retrenchment refers to the termination of employment where, as a result of the reorganization of the employer's operations, there is a surplus of employees and they are redundant to its requirements.

MALAYSIA

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

For employees whom are not covered by the Employment Act 1955, payment of retrenchment benefits will be determined in accordance with the terms of their contract and the Company's policies. In the absence of such contractual provisions, the payment of such benefits is at the discretion of the employer. The practice however is to pay 20 days' to 1 month's salary for each year of service.

For employees covered by the Employment Act 1955, they will be entitled to termination benefits, the quantum of which is computed as follows:-

(a) 10 days' wages for every year of employment under a continuous contract of service with the employer, if he/she has been employed by the employer for a period of less than two years; or
(b) 15 days' wages for every year of employment under a continuous contract of service with the employer, if he/she has been employed by the employer for two years or more but less than five years; or
(c) 20 days' wages for every year of employment under a continuous contract of service with the employer, if he/she has been employed by that employer for five years or more:

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

Yes. Under the Employment (Termination And Lay-Off Benefits) Regulations 1980, employees covered by the Employment Act 1955 are entitled to termination benefits for any termination otherwise than for misconduct, resignation or retirement. Termination on the grounds of poor performance or medical grounds would entitle an employee to termination benefits if he is covered by the Employment Act 1955.

15. **What is the retirement age?**

60.

16. **Are there any implications if an employee is terminated before retirement age?**

Yes. An employer needs to show justifiable reasons for terminating the employee before retirement age. The employee may seek to challenge his termination in the Industrial Court. Additionally, under the Minimum Retirement Age Act 2012, an employer cannot prematurely retire an employee before he/she reaches the age of 60. An employer who contravenes this provision commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit. The employer is also liable to pay the individual's salary from the date of premature retirement until the date he/she reaches the age of 60.

MALAYSIA

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

    Yes, you can engage the same employee on a fixed-term contract.

18. **Can an employee be placed on garden leave?**

    An employee can only be placed on garden leave if it is expressly provided for under his/her contract of employment.

19. **What constitutes unfair / wrongful dismissal?**

    Under Section 20 of the Industrial Relations Act 1967, an employee or workman who considers himself to have been terminated or dismissed without just cause or excuse may lodge a complaint with the Director General of Industrial Relations. The Act does not define what constitutes “just cause or excuse”. What amounts to “just cause or excuse” would therefore depend on the particular facts and circumstances of each case. Generally, termination on the grounds of misconduct, redundancy and poor performance would be justified as long as the employer is able to establish the grounds for such termination. Termination in all other situations when there is no just cause or excuse would be unfair, and these include cases of constructive dismissal or forced resignation.

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

    The primary remedy available to a workman under Section 20 of the Industrial Relations Act 1967 is reinstatement. Compensation (in addition to backwages) is awarded by the Industrial Court only if reinstatement of the employee is deemed inappropriate. Compensation in lieu of reinstatement is usually computed on the basis of one month’s salary for every year of service and backwages are capped at 24 months for confirmed employees; and 12 months for probationers.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

    These are heard before the Industrial Court. The Labour Department may also hear claims for termination benefits, for employees covered under the Employment Act 1955.

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

    Non-compete clauses and non-solicitation clauses are in restraint of trade and would be void under Section 28 of the Contracts Act 1950.

MALAYSIA

23. **Do trade unions get involved in issues relating to the termination of employment?**

    Trade unions are not entitled to interfere with the employer's right to terminate employees, nor are they entitled to take any strike action in respect of the termination of any employees.

24. **Are there particular matters to be aware of when terminating foreign employees?**

    Foreign employees engaged under a valid work permit in Malaysia are protected by employment legislation. They are entitled to challenge their termination if they consider their termination to be unfair. When a foreign employee is terminated, there is a need to notify the Director General.

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MYANMAR

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   The following rules and sources of law apply to termination of employment:

   - The Standard Employment Contract ("**SEC 2017**");
   - The Leave and Holidays Rules 2018 passed by the Ministry of Labour, Immigration, and Population on 26th April 2018;
   - The Notification No. 84/2015 issued by the Ministry of Labour pertaining to severance payment; and
   - The Myanmar Contract Act 1872.

2. **How can an employer terminate an employment agreement?**

   The SEC 2017 generally provides for a one-month notice. Accordingly, the employer may terminate the contract by giving one-month notice to the employee (or payment in lieu of notice) and the severance payment.

3. **How can an employee terminate an employment agreement?**

   An employee can resign at any time from his/her current employment by giving one-month notice to the employer.

4. **Is an employer required to give reasons before terminating an employment agreement?**

   Yes, an employer is required to give a "valid reason" of termination before terminating an employment contract.

5. **Can an employer reject an employee's resignation?**

   No.

6. **Can a person undergoing internal disciplinary proceedings resign?**

   Yes, provided that the employee gives one-month notice. However, note that in the event the employee voluntarily resigns whilst internal disciplinary proceedings are ongoing or due to constructive dismissal, the employer is not liable to pay severance, unless the employee can prove that he/she was treated unfairly.

7. **Can you terminate the employment of an employee for poor performance?**

   Yes, but the employer must give the employee one-month advance notice and pay the statutory severance payment.

MYANMAR

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   Under the Leave and Holidays Rules 2018, the employer must not dismiss the employee, reduce the employee's salary, change the employee's position, or move the employee to another workplace on the ground that the employee is on medical leave. An employee may be terminated during the period of extended medical leave, if the dismissal occurs on a reasonable ground (other than the medical leave).

9. **Can you terminate the employment of a pregnant employee?**

   No, the employer cannot legally terminate the employment of a pregnant employee.

10. **Can you terminate the employment of an employee on maternity leave?**

    Under the Leave and Holidays Rules 2018, the employer must not dismiss the employee, reduce the employee's salary, change the employee's position, or move the employee to another workplace on the ground that the employee takes maternity leave. An employee may be terminated during the period of maternity leave, if the dismissal occurs on a reasonable ground (other than the maternity leave).

11. **Are there (other) categories of employees whose employment cannot be terminated?**

    Employment rules applicable in Myanmar do not clearly define nor regulate the types of employees who cannot be terminated.

12. **What constitutes retrenchment?**

    Under the SEC 2017, the employment contract can be terminated in the following circumstances:

    - Liquidation of factory, workshop, department and company business operation; or
    - Cessation of business due to force majeure (provided that, in our reasonable interpretation, economic difficulties are defined as a force majeure event in the employment contract or the company internal regulation or policy).

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

    There are no specific retrenchment benefits allowed or determined under Myanmar employment rules. As mentioned above, termination by an employer is generally subject to the one-month notice and severance payment, and the prescribed amount depends on the duration of service (please see our response to question 14 below).

MYANMAR

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

Yes, Notification No. 84/2015 sets out the severance payment based on the employee's continuous length of service and the employee's last basic salary (ie, without overtime pay or premium) as follows:

Period of service	Severance (Monthly basic salary)
From the completion of 6 months to less than 1 year	½
From the completion of 1 year to less than 2 years	1
From the completion of 2 years to less than 3 years	1½
From the completion of 3 years to less than 4 years	3
From the completion of 4 years to less than 6 years	4
From the completion of 6 years to less than 8 years	5
From the completion of 8 years to less than 10 years	6
From the completion of 10 years to less than 20 years	8
From the completion of 20 years to less than 25 years	10
From the completion of and more than 25 years	13

15. **What is the retirement age?**

There is no mandatory retirement age for the private sector in Myanmar.

16. **Are there any implications if an employee is terminated before retirement age?**

Since there is no mandatory retirement age for the private sector in Myanmar, the termination process is the same as mentioned above. There are no retirement benefits specifically provided for the private sector in Myanmar.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

This question does not apply to Myanmar since there is no mandatory retirement age for private sector employees. Accordingly, Myanmar employment rules do not restrict the employment of elderly workers.

18. **Can an employee be placed on garden leave?**

Myanmar employment rules do not contain any provision regarding garden leave. Accordingly, garden leave provisions may be inserted in the employment contract, subject to the relevant Township Labour Office approval at the time of registration of such employment contract.

MYANMAR

19. **What constitutes unfair / wrongful dismissal?**

Myanmar employment rules do not provide for specific definitions of unfair or wrongful dismissal. Nevertheless, an employer is not entitled to terminate an employee who did not breach existing laws, work regulations or his/her employment contract.

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

An employee can file a claim before the relevant Conciliation Body for unfair dismissal.

If the relevant dispute resolution authority considers that the termination is unfair, it may:

- order the reinstatement of the employee and treat the employee in all respects as if his/her employment had not been terminated;
- order the re-engagement of the employee in work comparable to that in which the employee was employed prior to his/her dismissal, or other reasonably suitable work; and
- order the employer to pay compensation to the employee.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

In the case of individual disputes, an employee who claims wrongful termination may file a claim before the Workplace Coordination Committee (the "**WCC**") for internal resolution. The claim shall be negotiated and settled by the WCC within five (5) days from the date of receipt of the claim. If not successful, the employee may submit a complaint to the Township Conciliation Body and if the employee is not satisfied with the outcome, he/she may file a claim before the court for unfair dismissal.

In the case of collective disputes, the workers not satisfied with the decision of the Township Conciliation Body may submit a complaint to the Arbitration Body, and then to the Arbitration Council. The Arbitration Council must form a Tribunal to settle the case .The Tribunal will make a final decision.

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

No, under the Myanmar Contract Act 1872, every agreement by which one party is restrained from exercising a lawful profession, trade or business of any kind is void. Nevertheless, the employer may include a non-compete and non-solicitation clauses with a reasonable time limit. However, it should be noted that inserting such clauses may raise issues when the employment contract is registered with the relevant Township Labour Office.

MYANMAR

23. **Do trade unions get involved in issues relating to the termination of employment?**

Yes, the reduction of workforce or termination of employment must be carried out in coordination with the Workplace Labour Organization (the "**WLO**") or, if the WLO does not exist in the workplace, with the WCC. If a WLO exists, the representative of the WLO and the representative of the WCC must coordinate with the employer's representative with respect to the workforce reduction or employment termination(s). Please note that a trade union is defined as a labour organization in Myanmar.

24. **Are there particular matters to be aware of when terminating foreign employees?**

There is no specific law or regulation in Myanmar that applies to foreign employees only with regard to termination of employment.

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NEW ZEALAND

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   Legislation:
   a) Employment Relations Act 2000 (ERA 2000)
   b) Parental Leave and Employment Protection Act 1987
   c) Human Rights Act 1993

   Case law from the Employment Relations Authority, Employment Court, Court of Appeal and Supreme Court are important sources of employment law and guidance in New Zealand.

2. **How can an employer terminate an employment agreement?**

   An employment agreement can only be terminated for cause. This requires the employer to have a substantive reason for termination and follow a fair process. The employee will need to be given his/her contractual period of notice. Where the employment agreement does not specify the notice period, a period of reasonable notice will be implied. An employer can dismiss an employee without notice, where, after a fair investigation and disciplinary process, the employee is found guilty of serious misconduct.

3. **How can an employee terminate an employment agreement?**

   An employee can terminate an employment agreement by notifying the employer that he/she will be resigning, and by giving the employer the correct notice period. Where the employment agreement does not specify the notice period, a period of reasonable notice will be implied.

4. **Is an employer required to give reasons before terminating an employment agreement?**

   Yes, procedural fairness requires that an employer give reasons before terminating an employment agreement (unless terminated under a 90 day trial period clause). Under the ERA 2000, the parties to an employment agreement must deal with each other in good faith. It would be incompatible with this requirement for an employer to fail to give reasons to an employee before terminating an employment agreement. Section 120 of the ERA 2000 also obliges employers to provide, on request, a statement of reasons for dismissal.

5. **Can an employer reject an employee's resignation?**

   An employer cannot reject an employee's resignation, provided the employee adheres to the notice requirements in their employment agreement.

NEW ZEALAND

6. **Can a person undergoing internal disciplinary proceedings resign?**

   A person undergoing internal disciplinary proceedings can resign. However, this may not prevent the proceedings from being completed.

7. **Can you terminate the employment of an employee for poor performance?**

   An employer can terminate an employee for poor performance following an appropriate performance management and warning process.

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   An employer can terminate an employee who is on extended medical leave. As with any other termination, there must be a justifiable substantive reason for the termination and an employer must follow the proper process. If the employer is dismissing the employee on the grounds of medical incapacity, the employer may also have to consider things such as alternatives to dismissal and obtaining all relevant medical evidence, to ensure that the employer has followed a fair process.

9. **Can you terminate the employment of a pregnant employee?**

   An employer can terminate an employee for a substantial reason unrelated to their pregnancy. The Human Rights Act 1993 makes it unlawful for employers to discriminate against employees based on sex. The Act defines “sex” as including pregnancy and childbirth. The Parental Leave and Employment Protection Act 1987 also protects employees from having their employment terminated due to their pregnancy.

10. **Can you terminate the employment of an employee on maternity leave?**

    In limited circumstances, an employer can terminate an employee on maternity leave. The Parental Leave and Employment Protection Act 1987 prevents employers from terminating employees during their absence on parental leave, or during the period of 26 weeks after the period of parental leave ends. The exceptions are:

    a) Where an employer terminates the employee with the employee’s consent; or

    b) Where the employee is absent from work for any period that they are not entitled to take as leave.

NEW ZEALAND

11. **Are there (other) categories of employees whose employment cannot be terminated?**

    There are no specific categories of employees who cannot be terminated. However, terminations must be justifiable. The termination must meet the statutory test of whether the employer's actions and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time of dismissal.

12. **What constitutes retrenchment?**

    In New Zealand, retrenchment is a situation where an employee's termination is due, wholly or mainly, to their position being superfluous to an employer's needs. This could arise where an employer seeks to make their business more efficient. The retrenchment also needs to be genuine, and must not be used as a means to dismiss an employee for misconduct or poor performance.

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

    There is no statutory requirement to pay retrenchment compensation to retrenched employees. Any benefit or payment must derive from the contractual terms in the employment agreement or relevant policies. All employees whose employments are ending due to redundancy must be given notice as per the terms of the relevant employment agreement. An employer can require an employee to work out their notice.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

    There is no statutory severance pay scheme in New Zealand. An employee is only rightfully entitled to severance pay if it is stipulated in their employment agreement or in the relevant employment policies.

15. **What is the retirement age?**

    There is no compulsory retirement age in New Zealand. The Human Rights Act 1993 prohibits discrimination based on age.

16. **Are there any implications if an employee is terminated before retirement age?**

    There is no compulsory retirement age in New Zealand and the Human Rights Act 1993 prohibits termination due to age. Therefore, there are no implications from terminating employees, as long as the termination is justifiable on substantive and procedural grounds.

NEW ZEALAND

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

    There is no compulsory retirement age in New Zealand. Therefore, there are no age-based restraints on employers retaining employees.

18. **Can an employee be placed on garden leave?**

    An employer can place an employee on garden leave provided the employer has a contractual right to do so, or the employee consents.

19. **What constitutes unfair / wrongful dismissal?**

    Unfair or wrongful dismissal occurs where an employee is dismissed and:

    a) There is no justifiable substantive reason for the dismissal (such as serious misconduct, performance-related concerns or redundancy) and/or:

    b) The procedure used to terminate the employee is unfair. What is fair will depend on the circumstances and adherence to the ERA 2000. An employer must follow any relevant provisions in the employment agreement and workplace policies or processes.

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

    If an employee is able to bring a personal grievance for wrongful dismissal successfully, the employee may be able to seek the following:

    a) Lost wages and benefits
    b) Damages for hurt and humiliation
    c) Reinstatement of their position; and
    d) Contribution to their legal fees.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

    Wrongful termination cases are heard before a specialized tribunal, the Employment Relations Authority (the "**Authority**"). The Authority is an independent body, established by the ERA 2000. The Authority helps to resolve employment relationship problems by looking into the facts and making a decision based on the merits of the case. Where a party is unhappy with the Authority's decision, the party can apply to the Employment Court to have the entire matter heard again or to reconsider specific parts of the Authority's decision. Parties also have the right to appeal to the Court of Appeal and the Supreme Court.

NEW ZEALAND

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

Restraint of trade clauses applying post-employment are presumed to be unenforceable because they are anti-competitive and contrary to public interest. However, they will be enforceable if they are necessary and reasonable in order to protect an employer's genuine proprietary interests. Courts will uphold restraints for reasonable periods if there is a genuine proprietary interest to protect.

23. **Do trade unions get involved in issues relating to the termination of employment?**

Yes. Where a union member is at risk of termination, the trade union will often represent them. One of the specific benefits of being a trade union member in New Zealand is being represented by the trade union at disciplinary hearings.

24. **Are there particular matters to be aware of when terminating foreign employees?**

All employees have the same rights if New Zealand law applies to the employment agreement. Employers will still need a justifiable substantive reason to dismiss the employee, and will still need to ensure the dismissal process is fair. Where the employment agreement is governed by foreign law, New Zealand law may nevertheless apply. The application of New Zealand law in these circumstances will be on a case-by-case basis.

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PAKISTAN

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   Termination is governed by employment contract or statutory rights and there are judicial precedents on both points.

2. **How can an employer terminate an employment agreement?**

   By giving a written notice of one month or salary in lieu thereof. Duration of notice may vary.

3. **How can an employee terminate an employment agreement?**

   By giving a written notice of one month or salary in lieu thereof. Duration of notice may vary.

4. **Is an employer required to give reasons before terminating an employment agreement?**

   In general, yes. But it also can terminate without assigning any reason.

5. **Can an employer reject an employee's resignation?**

   Yes, when an employee is under investigation for misconduct.

6. **Can a person undergoing internal disciplinary proceedings resign?**

   It depends on the nature of proceedings, for instance in case of proceedings for embezzlement, employee may not be allowed to resign.

7. **Can you terminate the employment of an employee for poor performance?**

   Yes

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   Yes, in some circumstances it may be possible.

9. **Can you terminate the employment of a pregnant employee?**

   Yes.

10. **Can you terminate the employment of an employee on maternity leave?**

    No.

PAKISTAN

11. **Are there (other) categories of employees whose employment cannot be terminated?**

    There is no other category of employees who cannot be terminated, however, there are situations when an employee may not be terminated for instance where an inquiry or court case is pending.

12. **What constitutes retrenchment?**

    There is no definition of retrenchment and its general dictionary meaning should apply.

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

    There are no special retrenchment benefits provided by law and they are provided by the employer on its own accord.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

    The employees are entitled to gratuity/provident fund and leave entitlements etc.

15. **What is the retirement age?**

    There is no retirement age for private sector. However, employees qualifying as workmen become entitled to old age benefits after attaining the age of 60 years (for males) or 55 years (for females).

16. **Are there any implications if an employee is terminated before retirement age?**

    No.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

    Yes, because there is no retirement age in private sector.

18. **Can an employee be placed on garden leave?**

    Yes.

19. **What constitutes unfair / wrongful dismissal?**

    The law does not specify what constitutes unfair or wrongful dismissal and it is usually determined by the court whether a particular dismissal was fair or unfair.

PAKISTAN

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

    Typically, a wrongfully terminated employee is reinstated with all back benefits.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

    Such cases are heard by Labour Courts.

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

    Yes but to the extent which is considered reasonable given the nature of job.

23. **Do trade unions get involved in issues relating to the termination of employment?**

    Trade unions normally get involved when there is a massive lay off.

24. **Are there particular matters to be aware of when terminating foreign employees?**

    No.

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PHILIPPINES

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   Primarily, Presidential Decree No. 442, or the Labor Code of the Philippines ("**Labor Code**") as interpreted from time to time by certain Department Orders issued by the Philippine Department of Labor and Employment ("DOLE"), and the decisions of the Supreme Court of the Philippines interpreting the Labor Code and other laws, govern the termination of employment in the Philippines.

2. **How can an employer terminate an employment agreement?**

   The Philippines is a "for cause" jurisdiction. As such, "at will" terminations are generally not allowed. Thus, an employer can terminate an employment agreement if (a) there are just or authorized causes for dismissal, as prescribed in the Labor Code; and (b) there is compliance with procedural due process which includes requirements relating to notice and a hearing for the employee.[2]

   The just causes for termination are: [1] serious misconduct or willful disobedience by the employee of the lawful orders of his/her employer or representative in connection with his work; [2] gross and habitual neglect by the employee of his/her duties; [3] fraud or willful breach by the employee of the trust reposed in him/her by his/her employer or duly authorized representative; [4]) commission of a crime or offense by the employee against the person of his/her employer or any immediate member of his/her family or his/her duly authorized representatives; and [5] other causes analogous to the foregoing.

   The authorized causes include, among others: [1] installation of labor-saving devices; [2] retrenchment to prevent losses; [3] redundancy; and [4] closure of business.

3. **How can an employee terminate an employment agreement?**

   Generally, an employee may terminate an employment agreement by serving written notice on the employer at least one (1) month in advance. The employer upon whom no such notice was served may hold the employee liable for damages

   By way of exception, an employee may put an end to the relationship without serving any notice on the employer if any of the following causes exist:

   a. Serious insult by the employer or his/her representative on the honor and person of the employee;
   b. Inhuman and unbearable treatment accorded the employee by the employer or his/her representative;

[2] Labor Code, Article 294 [279] and Article 292 [277] (b).

PHILIPPINES

c. Commission of a crime or offense by the employer or his/her representative against the person of the employee or any of the immediate members of his/her family; and
d. Other causes analogous to any of the foregoing.[3]

4. **Is an employer required to give reasons before terminating an employment agreement?**

Yes. The employer must have either a just or authorized cause for terminating and employment contract, and the employer is required to inform the employee of those reasons. These reasons must be set out in the written notice of termination, stating that all circumstances have been considered and that grounds have been established to justify the employee's dismissal.[4] Due process must be observed in the termination process.

5. **Can an employer reject an employee's resignation?**

No, an employer cannot reject an employee's resignation. An employee is only required to give written notice of his resignation at least one (1) month in advance. The employer's acceptance is not required to give effect to the resignation.[5]

6. **Can a person undergoing internal disciplinary proceedings resign?**

Yes. However, the employee's resignation must be voluntary.[6] If the resignation of the employee was coerced or in any way influenced by the employer, this may be considered by Philippine labor tribunals to be an illegal dismissal.[7]

7. **Can you terminate the employment of an employee for poor performance?**

Yes, an employee may be terminated for poor performance under the just cause of gross and habitual neglect of duties. Gross negligence connotes want of care in the performance of one's duties, while habitual neglect implies repeated failure to perform one's duties for a period of time, depending on the circumstances. In order to constitute a valid cause for dismissal, the following requisites must be met:

a. There must be neglect of duty on the employee's part (i.e. commission of a negligent act or omission; the employer must show absence of care or diligence in performance of the employee's duty); and

b. The negligent act or omission must be both gross and habitual.[8]

[3] *Id*., Article 300 [285].
[4] *Id*., Article 292 [277] (b).
[5] *Id*., Article 300 [285].
[6] *Central Azucarera de Bais, Inc. v. Siason*, G.R. No. 215555 , July 29, 2015.
[7] *Blue Angel Manpower and Security Services, Inc. v. Court of Appeals*, G.R. No. 161196, July 28, 2008.
[8] *Id*., Article 297 [282] (b).

PHILIPPINES

8. **Can you terminate the employment of an employee who is on extended medical leave?**

Yes, provided that the requisites to dismiss an employee due to the authorized cause of disease have been met as follows:

a. The employee has been found to be suffering from any disease or illness;
b. His continued employment is prohibited by law or is prejudicial to his health as well as to the health of his co-employees; and
c. There is medical certification by a competent public health authority that the disease cannot be cured within six months even with proper medical treatment.[9]

9. **Can you terminate the employment of a pregnant employee?**

Termination of employment of a woman on account of her pregnancy, or while on leave or in confinement due to her pregnancy is unlawful under Philippine law.[10] If some other cause justifies the termination, the employee's pregnancy should not prevent the employer from exercising its right to terminate the employee for that valid ground.

10. **Can you terminate the employment of an employee on maternity leave?**

It is unlawful to terminate an employee solely on the basis of availment of maternity leave. However, if there are just or authorized causes for her dismissal and there is compliance with the notice and hearing requirements under procedural due process, the employee may be dismissed notwithstanding the fact that she is on maternity leave.[11]

11. **Are there (other) categories of employees whose employment cannot be terminated?**

There are more.

12. **What constitutes retrenchment?**

Retrenchment is the termination of employment initiated by an employer through no fault of and without prejudice to the employees. It is resorted to during periods of business recession, industrial depression, seasonal fluctuations, or during lulls occasioned by lack of orders, shortage of materials, conversion of the plant to a new production program, or automation. It is a management prerogative resorted to in order to avoid or to minimize business losses.

Retrenchment to prevent losses is an authorized cause for the dismissal of employees. The requisites are as follows:

[9] *Id*., Article 299 [284].
[10] *Id*., Article 135. [137]
[11] Republic Act No. 11210 or the *105-Day Expanded Maternity Leave Law*, Section 15.

a. The retrenchment must be reasonably necessary and likely to prevent business losses;
b. The losses if already incurred are not merely *de minimis*, but substantial, serious, actual and real, or if only expected, are reasonably imminent;
c. The expected or actual losses should be proven by sufficient and convincing evidence, including audited financial statements;
d. The retrenchment must be in good faith for the advancement of the employer's interest and not to defeat or circumvent the employees' right to security of tenure; and
e. There must be fair and reasonable criteria used in ascertaining what positions are to be declared redundant and accordingly abolished, such as but not limited to status, efficiency, seniority, etc.[12]

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

Severance payments must be made in a retrenchment scenario. The quantum of retrenchment benefits is equivalent to one (1) month pay, or at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months of service shall be considered one (1) whole year of service.[13]

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

Yes, they have a right to severance payments if they are terminated due to other authorized causes under the Labor Code.

In case of termination due to the installation of labor-saving devices or redundancy, the worker affected thereby shall be entitled to a separation pay equivalent to at least one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher. In the case of closures or cessation of operations of an establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay, or at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months of service shall be considered one (1) whole year of service.[14]

15. **What is the retirement age?**

In the absence of a retirement plan or agreement providing for retirement benefits of employees, the optional retirement age is sixty (60) years old or more. The compulsory retirement age is sixty-five (65) years old.[15]

[12] Labor Code, Article 298 [283]. *Anabe v. Asian Construction*, G.R. No. 183233, December 23, 2009.
[13] Labor Code, Article 298 [283].
[14] *Id.*
[15] *Id.*, Article 302 [287].

PHILIPPINES

16. **Are there any implications if an employee is terminated before retirement age?**

There are no implications, provided that the employee is dismissed either due to just or authorized causes for dismissal, and there is compliance with the notice and hearing requirements under procedural due process.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

Yes, an employee who has attained retirement age may continue with his employment or be re-employed.

18. **Can an employee be placed on garden leave?**

Yes, provided that the end of employment is employee-initiated or, if employer-initiated, for cause.

19. **What constitutes unfair / wrongful dismissal?**

Termination is unfair or wrongful when the employer fails to comply with either substantive due process requirements (*i.e.*, without just or authorized cause) or procedural due process requirements (*i.e.*, non-compliance with the notice and hearing requirement) of dismissal of employees, or both, under Philippine law.

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

An employee who is wrongfully terminated may file a complaint with the National Labor Relations Commission ("**NLRC**"). If the employee is found to have been unjustly dismissed from work, he shall be entitled to reinstatement without loss of seniority rights and other privileges, to his full backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.[16]

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

Wrongful termination cases are heard before a specialized tribunal known as the NLRC. Specifically, complaints are initially raffled to a Labor Arbiter who hears and decides the case. The decision of the Labor Arbiter may then be appealed to the NLRC.[17]

[16] *Id.*, Article 294 [279].
[17] *Id.*, Article 224 [217] and Article 229 [223].

PHILIPPINES

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

Post-employment covenants are enforceable provided that they are reasonable. The following factors are considered in determining reasonableness: (a) whether the covenant protects a legitimate business interest of the employer; (b) whether the covenant creates an undue burden on the employee; (c) whether the covenant is injurious to the public welfare; (d) whether the time and territorial limitations contained in the covenant are reasonable; and (e) whether the restraint is reasonable from the standpoint of public policy.[18]

23. **Do trade unions get involved in issues relating to the termination of employment?**

No. Enterprise unions that exist at the employer level may get involved in termination cases affecting their members where the termination is argued to be union-related.

24. **Are there particular matters to be aware of when terminating foreign employees?**

Foreign employees are protected by the same legal protection mechanisms available to local employees. We have seen a spike in recent years in the incidences of foreign employee initiated labor complaints. After a foreign employee is terminated, their Pre-arranged Employment Visa under Section 9(g) (Commercial) of Commonwealth Act No. 613 or the Philippine Immigration Act of 1940, as amended ("**PIA**"), must be downgraded to a Temporary Visitor's Visa under Section 9(a) of the PIA.[19]

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[18] *Rivera v. Solidbank Corporation*, G.R. No. 163269, 19 April 2006.
[19] PIA, Section 9.

SINGAPORE

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

The Employment Act (Chapter 91, 2009 Rev Ed) ("**EA**" / "**the Act**") is the primary legislation governing the termination of employment in Singapore. The EA only applies to "employees" as defined under the Act. Previously, Section 2(1) of the EA excluded persons employed in a managerial or executive position whose salary exceeded S$4,500. The amendments to the EA (which have effect from 1 April 2019) have expanded the definition of "employees" under the EA to include all managers and executives regardless of their salary. Under Section 2(1) of the EA, domestic workers, seafarers and certain persons deemed by the Minister for Manpower in the Government Gazette are not "employees" covered by the EA.

Apart from mandatory statutes, The Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP) promotes the adoption of fair, responsible and progressive employment practices among employers, employees and the general public, through the issuance of Tripartite Standards and Guidelines.

2. **How can an employer terminate an employment agreement?**

An employer can terminate an employment agreement in four main ways: (i) providing notice to the employee of the intention to terminate as under Section 10 of the EA; (ii) under Section 11(1) of the EA, by paying the employee a sum equal to the employee's salary at the gross rate of pay which would have been accrued during the applicable period of notice; (iii) in the event of wilful breach, by terminating without notice as under Section 11(2) of the EA; or (iv) if there has been misconduct on the part of the employee inconsistent with the terms of the contract of service, by dismissing the employee without notice after due inquiry as under Section 14(1) of the EA. Additionally, if the employment agreement is for a specified piece of work or specified period of time, it terminates once the work is completed or time period expires, as under Section 9(1) of the EA.

As under Section 10(5) of the EA, notice must be given in writing. This is in contrast to the previous position at common law, which gave effect to oral notice. Further, the notice should either specify the date of termination or make that date ascertainable. The notice period can be agreed upon by employer and employee (the agreed notice period must be the same for both employer and employee). In the absence of such agreement, the notice period must be not less than the periods provided in Section 10(3) of the EA:

Length of Service	**Notice Period**
< 26 weeks	1 day
26 weeks to < 2 years	1 week
2 years to < 5 years	2 weeks
≥ 5 years	4 weeks

SINGAPORE

The notice requirement can be waived by mutual consent between the employer and the employee.

3. **How can an employee terminate an employment agreement?**

Employees can similarly avail themselves of (i) the provision of notice (ii) payment of salary in lieu of notice or (iii) termination without notice for wilful breach as means to terminate an employment agreement. The notice requirement can be waived by mutual consent between the employer and the employee.

4. **Is an employer required to give reasons before terminating an employment agreement?**

While the Ministry of Manpower ("**MOM**") encourages employers to give reasons for terminating an employment contract, employers are not obliged by law to give reasons for termination provided the employment contract is validly terminated.

5. **Can an employer reject an employee's resignation?**

No, if the employee has validly resigned.

An employee's exercise of the right to terminate the contract by one of the means stipulated in our response to question 3 above cannot be curtailed by employers.

6. **Can a person undergoing internal disciplinary proceedings resign?**

Yes. An employer cannot prevent an employee from resigning since employees have the right to resign at any time by serving notice or compensating the employer with salary in lieu of notice (see our response to question 3 above). An employee need not give notice or salary in lieu if there has been a wilful breach of the employment agreement by the employer.

7. **Can you terminate the employment of an employee for poor performance?**

As earlier alluded to in our response to question 2, wilful breach of an employment agreement and misconduct of an employee inconsistent with the terms of the contract (ascertained after a due inquiry process) are two separate grounds of terminating an employee without notice under Sections 11(2) and 14(1) of the EA respectively. If poor performance either amounts to a wilful breach or misconduct, termination is permissible under those grounds. Alternatively, employers can choose to provide notice or pay salary in lieu of notice to terminate employees as under Sections 10 and 11(1) of the EA respectively.

SINGAPORE

8. **Can you terminate the employment of an employee who is on extended medical leave?**

Under the EA, an employee who has served an employer for not less than 6 months is entitled to 14 days of sick leave each year (if no hospitalisation is necessary) and up to 60 days (if hospitalisation is necessary). Between 3 and 6 months of employment, the entitlement is as follows:

Length of Service	Paid sick leave	Paid hospitalisation leave
3 months	5 days	15 days
4 months	8 days	30 days
5 months	11 days	45 days
≥ 6 months	14 days	60 days

While there are no statutory prohibitions in respect of terminating an employee for extended medical leave, according to the MOM, "employers should treat sick employees with compassion and should not terminate employment just for taking sick leave. However, there may be situations where an employer assesses an employee to be too ill for the job, and where excessive or repeated absence adversely impacts the company's work. In such situations, the employer can terminate employment after giving due notice or pay in lieu of notice."

9. **Can you terminate the employment of a pregnant employee?**

If the employee has been serving her employer for a period of 3 months or more, that employee cannot be given a notice of dismissal without sufficient cause at any time of her pregnancy (as certified by a medical practitioner) under Section 84(1)(b) of the EA. Additionally, pregnant employees are entitled to absence from work for a period of 4 weeks immediately before their confinement (defined under Section 2(1) as "the delivery of a child") and a period of 8 weeks immediately after her confinement. In the period where she is pregnant and absent from work, Section 81 renders any attempt by an employer to give her notice of dismissal unlawful.

10. **Can you terminate the employment of an employee on maternity leave?**

Please see our response to question 11 below.

SINGAPORE

11. **Are there (other) categories of employees whose employment cannot be terminated?**

Employers are under certain restrictions when terminating employees of certain categories of people.

Specifically, employers cannot terminate: (i) female employees on maternity leave during their absence under Section 81 of the EA; (ii) employees below 62 years of age (or the prescribed minimum retirement age) on the ground of their age under Section 4(2) of the Retirement and Re-employment Act (Chapter 274A, 2012 Rev Ed) ("**RRA**"); (iii) employees for their participation in trade union activities as under Section 17(b) of the EA; (iv) employees for their national service duties or liabilities as under Section 22(1) of the Enlistment Act (Chapter 93, 2001 Rev Ed); and (v) employees on the ground that they have made a report in respect of a health and safety matter or assisted in a health and safety investigation as under Section 18(2) of the Workplace Safety and Health Act (Chapter 254A, 2009 Rev Ed).

12. **What constitutes retrenchment?**

Retrenchment is, in essence, dismissal because of reorganisation of the employer or redundancy. While there is no statutory definition of "retrenchment", the MOM, the National Trades Union Congress and Singapore National Employers Federation have defined the term in their joint guidelines as referring to "dismissal on the ground of redundancy or by reason of any reorganisation of the employers' profession, business, trade or work". This applies to permanent employees, as well as contract workers with full contract terms of at least 6 months.

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

Under Section 45 of the EA, retrenchment benefits are only available to employees who have been in continuous service with an employer for 2 or more years. No employee who has been in continuous service with an employer for less than 2 years shall be entitled to any retrenchment benefit on his dismissal on the ground of redundancy or by reason of any reorganisation of the employer's profession, business, trade or work. The amount of retrenchment benefits is to be agreed upon in the employment agreement or negotiated between the parties. The MOM has noted the norm to be "2 weeks to 1 month salary per year of service" and "1 month's salary for each year of service" for unionised companies.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

There are no statutory requirements in Singapore mandating severance payments. Severance payments may be governed by the individual employment contracts.

SINGAPORE

15. **What is the retirement age?**

Under Section 4 of the RRA, the minimum retirement age is 62 years, or such other age, up to 67 years, as may be prescribed by the Minister.

16. **Are there any implications if an employee is terminated before retirement age?**

Under Section 4 of the RRA, no employer shall dismiss on the ground of age, any employee who is below 62 years of age or the prescribed minimum retirement age.

Further, under Section 8 of the RRA, if any employee below the specified age considers that he has been unlawfully dismissed on the ground of age, he may, within one month of the dismissal, make representations in writing to the Minister to be reinstated in his former employment. If, the Minister (after considering any report made by the Commissioner in this regard), is satisfied that the employee has been unlawfully dismissed by his employer on the ground of age, he may: (a) direct the employer to reinstate the employee in his former employment and to pay the employee an amount that is equivalent to the salary that the employee would have earned had he not been unlawfully dismissed by the employer; or (b) direct the employer to pay such amount of salary as compensation as the Minister may consider just and equitable having regard to all the circumstances of the case.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

Yes. Re-employment is provided for under Part III of the RRA. Employees who are above the retirement age but below the age of 65 (or such other age, up to 67 years, as may be prescribed by the Minister) are eligible for re-employment.

18. **Can an employee be placed on garden leave?**

This depends on whether the employment contract entitles the employer to place the employee on garden leave. An express garden leave clause would entitle the employer to place an employee on garden leave. In the absence of such a clause, however, an employer might not have this right since case law has shown that employees may invoke a competing right to work. In such situations, the employer who places an employee on garden leave shall be in breach of the employment contract.

19. **What constitutes unfair / wrongful dismissal?**

Termination of an employment agreement outside of the grounds addressed in our response to question 4 above (i.e. (i) through provision of notice under Section 10 EA, (ii) by payment of salary in lieu of notice, (iii) in the event of wilful breach or (iv) in the event of misconduct inconsistent with the terms of the contract of service, after due inquiry) would amount to wrongful dismissal.

SINGAPORE

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

A statutory mechanism is available for employees to seek redress for wrongful dismissal. Prior to 1 April 2019, the mechanism for redress of wrongful termination under s14(2) of the EA was for employees who considered themselves dismissed without just cause or excuse by their employer to make representations in writing to the Minister for Manpower to ask to be reinstated to his former employment. The amendments now allow disputes relating to dismissal to be dealt with by the Employment Claims Tribunal ("**ECT**"), a court house of the State Courts.

Reinstatement and compensation are remedies available for wrongful dismissal.

Under the previous Section 14(4) of the EA, the Minister for Manpower could (a) direct reinstatement and the payment of damages from employer to employee for the wages the employee would have earned had he not been wrongfully dismissed or (b) direct the employer to pay wages as compensation in an amount to be determined by the Minister. After the amendments, the ECT may similarly award the remedies of reinstatement and compensation.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

Wrongful dismissal claims can be heard by the ECT. As noted in our response to question 20, prior to 1 April 2019, employees could seek redress for wrongful dismissal claims before the MOM. After the amendments to the EA, the ECT is now empowered to hear wrongful dismissal claims.

It should also be noted that mediation is mandatory prior to claims being heard by the ECT. Under Section 3(1) of the Employment Claims Act 2016 (Act 21 of 2016) ("**ECA 2016**"), a claimant must, prior to lodging a claim against a respondent, submit a mediation request to the Commissioner of Labour. Thereafter, under Section 3(5) of the ECA 2016, the Commissioner will refer the dispute for mediation by an approved mediator.

Other than proceeding to the ECT, the employee can commence a claim in the civil courts.

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

Such clauses are enforceable, but only in limited circumstances. Case law has shown that restrictive covenants are *prima facie* unenforceable, save for where they are necessary to protect the employer's legitimate proprietary interests, and go no further than reasonably necessary to protect those interests. The assessment of reasonableness takes into account the temporal and geographical scope of the restriction.

SINGAPORE

23. **Do trade unions get involved in issues relating to the termination of employment?**

In terms of Section 35 (3) of the Industrial Relations Act (Cap 136) ("**IRA**"), an employee who considers that he has been dismissed without just cause or excuse by his employer, may make representations in writing to the Minister through his trade union, to be reinstated in his former employment. (However, such a course of action is not available in certain circumstances, such as those arising out of a contravention of Section 82 of the IRA).

Trade Unions in Singapore are governed by the Trade Unions Act (Cap 333) ("**TUA**"), the Trade Union Regulations, the IRA and Criminal Law (Temporary Provisions) Act (Cap. 67). In order to enjoy rights, immunities and privileges under the TUA, a trade union has to be registered. To represent its members in collective bargaining, a trade union must be recognised by the employer under the Industrial Relations (Recognition of a Trade Union of Employees) Regulations. According to Section 18 of the IRA, a trade union which has been accorded recognition by an employer may serve on that employer or an employer may serve on a trade union, a notice setting out proposals for a collective agreement in relation to any industrial matters and inviting the other party for negotiation with a view to arriving at a collective agreement. However, certain matters cannot be included in such a proposal for collective agreement. These include the termination by an employer of the services of an employee by reason of redundancy or by reason of the reorganisation of an employer's profession, business, trade or work or the criteria for such termination; the dismissal and reinstatement of an employee by an employer in certain circumstances (covered by Section 35(3) of the IRA).

24. **Are there particular matters to be aware of when terminating foreign employees?**

Special regard must be had for when the Controller of Work Passes (an authority appointed by the Minister for Manpower) decides to suspend or revoke a foreign employee's work pass.

Under Section 9(1) of the Employment of Foreign Manpower Act (Chapter 91A, Rev Ed 2009) ("**EFMA**"), an employer must, upon notification by the Controller of a foreign employee's work pass being suspended or revoked, terminate the employment of the foreign employee within 7 days. An employer who fails to adhere to the aforementioned provision may be liable to a fine of up to S$10,000, as may be determined by the Controller under Section 9(3) of the EFMA.

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SRI LANKA

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   The sources of law governing termination of employment in Sri Lanka are specific statutory legislation, (the Termination of Employment (Special Provisions) Act and, (most specifically), Section 31B(1)(a) of the Industrial Disputes Act, which provides for an employee whose employment has been terminated by his employer to seek relief and redress in respect of such termination from an employer. The other important provision is Section 31C of the Industrial Disputes Act, which provides for equitable relief to be granted to such an employee. Other sources of law include decisions of Labour Tribunals and the higher Courts.

2. **How can an employer terminate an employment agreement?**

   Termination of a contract of employment by an employer should be effected in accordance with any provisions in the contract of employment in regard to termination. In the absence of any such provision, termination could be effected orally, though this would not be advisable from the perspective of evidentiary requirements. It could also be effected by conduct since our law recognizes the concept of constructive termination.

3. **How can an employee terminate an employment agreement?**

   An employee could terminate a contract of employment in writing, verbally or by conduct.

4. **Is an employer required to give reasons before terminating an employment agreement?**

   If the contract of employment provides for reasons to be stated, then, the employer should provide reasons. This is from the perspective of any contractual claims. Over and beyond this, from the perspective of employment law, an employer should have reasons and such reasons should, from the perspective of fairness and equity, be conveyed to the employee. The employer would have to justify termination in the event that an employee were to seek relief from a Labour Tribunal.

5. **Can an employer reject an employee's resignation?**

   An employee has the right to terminate a contract of employment by resignation, (whether or not in breach of any provisions contained in the contract of employment). An employer cannot "reject" such a resignation, but may have a claim based on breach of contract against the employee.

6. **Can a person undergoing internal disciplinary proceedings resign?**

   Yes.

SRI LANKA

7. **Can you terminate the employment of an employee for poor performance?**

This will depend on many factors including whether or not the Termination of Employment (Special Provisions) Act (the "**Termination Act**") is applicable and whether the poor performance is due to incompetence only, which may then not provide grounds for effecting the disciplinary termination, or whether the poor performance is due to some other ground on the basis of which a disciplinary termination could be effected. If the Termination Act does not apply, an employer terminating a contract of employment on the grounds of poor performance due to incompetence would have to justify the termination to the Labour Tribunal in the event that the termination were canvassed by the employee before a Labour Tribunal.

If the poor performance was due to negligence or some other cause which could form the basis of a disciplinary termination, the employer may have to justify the termination to a Labour Tribunal. In the case of mere incompetence, it is likely that an employer would not be able to justify the termination to the satisfaction of the Labour Tribunal, but much would depend on the actual facts. Where an employee is a probationer, termination for non-performance would generally be possible.

8. **Can you terminate the employment of an employee who is on extended medical leave?**

In a situation where an employee is on extended medical leave, this appears to connote a situation where the employer has granted medical leave. That being the case, it would not be advisable for an employer to terminate during the period of medical leave, (the ground for any such termination being the fact that the employee is away from work due to the medical leave). In the case of absence from employment purportedly or otherwise on the ground of medical necessity, if the Termination Act applies, it is unlikely that permission for the termination could be obtained from the Commissioner of Labour, but much would depend on the facts. If the Termination Act does not apply, it is unlikely that any such termination would be held by the Labour Tribunal to be unjustified and even if, having regard to all the factual circumstances, it were held to be justified, the Labour Tribunal could still, when making its just and equitable order, order compensation

9. **Can you terminate the employment of a pregnant employee?**

It would be extremely inadvisable for an employer to terminate on the ground of pregnancy itself, since the employee could then make an application to the Labour Tribunal for compensation and an order for compensation would invariably be made by the Labour Tribunal. Where the Shop and Office Act or the Maternity Benefits Ordinance applies, there are statutory provisions prohibiting termination of employment of a pregnant employee on grounds of pregnancy.

10. **Can you terminate the employment of an employee on maternity leave?**

No.

SRI LANKA

11. **Are there (other) categories of employees whose employment cannot be terminated?**

    No.

12. **What constitutes retrenchment?**

    Termination on grounds of redundancy.

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

    Much would depend on the nature of employment and the facts connected to the retrenchment.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

    An employee whose employment is terminated consequent to permission being granted in terms of the Termination Act would be entitled to statutory compensation in terms of the gazetted compensation formula. For a termination not governed by the Termination Act, in the event the employee seeks compensation and succeeds before the Labour Tribunal, the Labour Tribunal could order compensation. Quite apart from that, every employee who works for a period of a five years in a company which has more than 15 employees would be, subject to some limited exceptions, entitled to a gratuity payment calculated in accordance with the provisions of the Payment of Gratuity Act.

15. **What is the retirement age?**

    There is no statutorily prescribed retirement age.

16. **Are there any implications if an employee is terminated before retirement age?**

    Yes, – to the extent that a Labour Tribunal may, under certain circumstances, consider that a just and equitable amount to be awarded for compensation is the salary which the employee would have earned from the date of termination of employment to the date of retirement (provided for in the contract of employment). The date of retirement may be a relevant factor in the mind of the President of the Labour Tribunal when he or she decides upon the quantum of compensation.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

    Yes.

SRI LANKA

18. **Can an employee be placed on garden leave?**

    Yes.

19. **What constitutes unfair / wrongful dismissal?**

    Generally, unjust termination of employment.

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

    Reinstatement – with or without back wages or compensation.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

    A specialised Tribunal.

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

    It depends on the circumstances. They would not generally be enforceable unless the employer can show it was justified in the circumstances – such as to protect trade secrets/confidential information.

23. **Do trade unions get involved in issues relating to the termination of employment?**

    Yes.

24. **Are there particular matters to be aware of when terminating foreign employees?**

    No.

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TAIWAN

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   a. Articles 11-20, Article 74, Paragraph 2 of the Labor Standards Act ("**LSA**").
   b. Article 17 of the Business Mergers and Acquisitions Act.
   c. Articles 33 and 56 of the Employment Service Act.
   d. Article 5 of the Regulations for Implementing Unpaid Parental Leave for Raising Children.
   e. Articles 11, 17 and 36 of the Act of Gender Equality in Employment.
   f. Articles 23-26 of the Act for Protecting Worker of Occupational Accidents.
   g. Article 8 of the Act for Settlement of Labor-Management Disputes.
   h. Article 33, Paragraph 4 of the Labor Inspection Act.
   i. Article 35 of the Labor Union Act.
   j. Article 22, Paragraph 2 of the Collective Agreement Act.
   k. The Act for Worker Protection of Mass Redundancy.
   l. Article 12, Paragraph 4 of the Regulations for Implementing Labor-Management Meeting.
   m. Article 18, Paragraph 3 and Article 39, Paragraph 4 of the Occupational Safety and Health Act.

2. **How can an employer terminate an employment agreement?**

   a. Employers can unilaterally terminate an employment agreement only under the following circumstances and after having issued notifications regarding such as required under law:

   <u>General circumstances</u>:

   (1) Suspension or transfer of employer's business.
   (2) Losses or contractions in the employer's business.
   (3) A suspension of business for one month or more due to force majeure.
   (4) A change in the nature of the employer's business which requires a reduction of workforce, and there are no appropriate positions to reassign the terminated employees to.
   (5) The worker is unable to competently perform the work required for the position held.
   (6) Workers that the new and old employer have not expressly decided to continue the employment of, or otherwise have already declined the continued employment of, when the business unit of the employer undergoes reorganization or transfer, or when the employer company undergoes a merger/acquisition.

   <u>Worker on maternity or miscarriage leave</u>:

   Employer may only terminate an employment agreement for "natural disasters, incidents or other force majeure that renders it unable to continue business operations, and the competent authority has approved of the termination upon the employer's report of such circumstances".

Worker suffering from occupational hazard:

Employer may only terminate an employment agreement under the following circumstances:

(1) Suspension of business or serious losses, as approved by the competent authority after reporting.
(2) Worker has been determined by a public medical facility as mentally or physically disabled and thus unable to continue working after completing medical treatment for an occupational hazard.
(3) Unable to continue business operations due to natural disasters, incidents or other force majeure, as approved by the competent authority after reporting.

b. Employer may unilaterally terminate the employment agreement without notice under the following circumstances (Article 12 of the LSA):

(1) Worker made false representations in the execution of the employment agreement, which may mislead the employer to its detriment.
(2) Worker acted violently against or otherwise seriously insulted the employer, the employer's family, the employer's agent or other co-workers.
(3) Worker has been convicted of a crime and imposed with an imprisonment sentence without opportunity for parole or fine substitution.
(4) Worker has seriously breached the employment agreement or work rules.
(5) Worker has intentionally wasted the machinery, tools, raw materials, products or other objects owned by the employer, or worker has intentionally disclosed employer's trade and commercial secrets, and the employer has been injured as a result.
(6) Worker has been away without leave/good cause for three days continuously, or six days in a month.

3. **How can an employee terminate an employment agreement?**

a. The employee may unilaterally terminate the employment agreement without prior notice under the following circumstances (Article 14 of the LSA):

(1) The employer made false representations in the execution of the employment agreement, which may mislead the worker to the worker's detriment.
(2) The employer, the employer's family or the employer's agent has acted violently against or otherwise seriously insulted the worker.
(3) The works agreed in the employment agreement are harmful to the health of the worker, and no improvements were made despite notifying the employer to rectify.
(4) The employer, employer's agent or other workers have contracted a legally recognized infectious disease which may spread to the workers who is working with such individuals and seriously endanger their health.
(5) The employer failed to provide compensation pursuant to the employment agreement, or failed to provide adequate work for workers who are paid by items.

(6) The employer breached the employment agreement or labor laws to the extent that the worker's rights may be harmed.
(7) Occupational hazard workers may terminate unilaterally the employment agreement without notice under the following circumstances (Article 24 of the Act for Protecting Worker of Occupational Accidents):

a. Reorganization or transfer of the business unit so that it no longer exists.
b. Employer failed to provide a position that is appropriate to the worker's health and competence as well as provide him/her with auxiliary facilities necessary for engaging in work after the worker has completed medical treatment for injuries from an occupational hazard.
c. The occupational hazard worker failed to reach an agreement with the employer on the position provided per the aforementioned circumstance.

b. Employee may unilaterally terminate the employment agreement with notice under the following circumstances:

(1) The employment agreement is a fixed-term agreement for a particular task with a term of more than three years, and three years have elapsed.
(2) The employment agreement is for an indefinite term.
(3) An occupational hazard worker whose disabilities have been determined by a public medical institution as having rendered the worker unable to meet the duties of the position.

4. **Is an employer required to give reasons before terminating an employment agreement?**

Yes. Although the LSA and other related laws do not expressly require the employer to state to the worker the reason for termination, courts have held that under the good faith principle, the employer has a duty to disclose the reason for termination to the worker.

5. **Can an employer reject an employee's resignation?**

No. Under the LSA, the worker has "a right to terminate an employment agreement with notice but without providing a reason". Even if the parties effectively agree on a "**minimum term of service**" provision in the agreement, a worker who leaves the position early in violation of the agreement would at most be liable for breach of contract (the employment relationship is considered terminated upon the worker's departure from the position).

6. **Can a person undergoing internal disciplinary proceedings resign?**

Yes.

TAIWAN

7. **Can you terminate the employment of an employee for poor performance?**

   Yes.

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   Yes. As long as such medical leave is unrelated to an occupational hazard incident.

9. **Can you terminate the employment of a pregnant employee?**

   For “a worker who is pregnant and has taken maternity leave by law”, the employer may only terminate the employment agreement if “its business operations cannot continue due to natural disasters, incidents or other force majeure, and the competent authority has approved of such suspension after reporting”.

10. **Can you terminate the employment of an employee on maternity leave?**

    For a worker who has taken a maternity leave, the employer’s right to unilaterally terminate the employment agreement is restricted: the employer may only terminate the employment agreement if “its business operations cannot continue due to natural disasters, incidents or other force majeure, and the competent authority has approved of such suspension after reporting”.

11. **Are there (other) categories of employees whose employment cannot be terminated?**

    Yes, based on the Taiwan law, there are certain limits on the employer’s right to terminate a worker under certain circumstances:

    a. For “workers on maternity or miscarriage leave”, the employer may only unilaterally terminate the employment agreement if “its business operations cannot continue due to natural disasters, incidents or other force majeure, and the competent authority has approved of such suspension after reporting”.

    b. For workers “who are requesting to return after unpaid child care leave has ended”, the employer may not refuse the worker’s return unless any of the following is present and has been approved by the competent authority:
       (1) Suspension of business, losses or business contraction.
       (2) The employer is undergoing reorganization, dissolution or transfer by law.
       (3) Force majeure causing suspension of business for a month or more.
       (4) A change in the nature of the employer’s business necessitating a reduction of workforce, and there is no appropriate position to place the returning worker.

TAIWAN

12. **What constitutes retrenchment?**

Retrenchment is found under **Article 11, Sub-paragraphs 1-4 of the LSA**, which provides the grounds the employer may terminate a worker with notice (i.e., suspension or transfer of business; loss or business contraction; force majeure causing suspension of business for a month or more; or a change in the nature of the employer's business necessitating a reduction of workforce, and there is no appropriate position to place the worker).

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

Yes, severance shall be made within 30 days of the termination of the employment agreement. The amount, however, differs depending on "the pension system applicable to the worker":

(1) For workers under the old pension system (LSA pension system), the severance calculation is one month of average wages for each year of continuous work to the same employer, or a prorated amount for work of less than one year. For a work period of less than one month, it shall be regarded as a full month.
(2) For workers under the new pension system (Labor Pension Act pension system), the severance calculation is one-half month of average wages for each seniority year attained, or a prorated amount for seniority of less than one year. The maximum amount is capped at six month's average wages.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

Yes, pursuant to the Taiwan labor laws and regulations, severance payments shall also be made to the worker under the following circumstances when the employment agreement is terminated by the employer:

a. Termination of a worker on maternity or miscarriage leave, or a worker on medical treatment after an occupational hazard incident, due to government-approved suspension of business operations as a result of natural disasters, incidents or other force majeure according to the proviso of Article 13 of the LSA.
b. The employer's business unit undergoes reorganization or transfer, and the new and old employers terminate the employment agreement after deciding to no longer keep the worker on board according to Article 20 of the LSA.
c. Merger/acquisition of the employer's business unit, and the employer terminates the employment agreement after deciding to no longer keep the worker on board, or the worker has otherwise already declined the continued employment, according to Article 17 of the Business Mergers and Acquisitions Act.
d. Government-approved refusal to allow a worker requesting to return to his/her former position after the end of unpaid child care leave under Article 17 of the Act of Gender Equality in Employment.

TAIWAN

e. Termination of a worker affected by an occupational hazard upon government-approved suspension of business or serious losses, or government-approved suspension of business due to natural disasters, incidents or other force majeure pursuant to Article 23, Paragraph 1, Sub-paragraphs 1 and 3 of the Act for Protecting Worker of Occupational Accidents.

15. **What is the retirement age?**
There are two rules in the Taiwan laws and regulations regarding the retirement age, the first being the age for voluntary retirement under Article 53 of the LSA, and the other being the age for compulsory retirement under Article 54 of the LSA. Both retirement ages are with different requirements as follows:

A. For voluntary retirement, the worker shall be (i) at least 55 years old while working for 15 years or more, (ii) working for 25 years or more, or (iii) at least 60 years old while working for 10 years or more.
B. For compulsory retirement by employer, the worker shall be (i) at least 65 years old, or (ii) physically or mentally no longer able to perform the duties of the position.

16. **Are there any implications if an employee is terminated before retirement age?**

No.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

Yes.

18. **Can an employee be placed on garden leave?**

In general, garden leave would be legally acceptable if certain requirements are met. While there is no law in Taiwan specifically addressing garden leave, the concept is similar to an order to go on (un)paid leave. Based on the court practice, if the rules regarding the circumstances under which an order for a worker to go on (un)paid leave (the requirements for the order, the duration of the order, the payment of wages during the order, etc.) as well as the worker's rights regarding such leave (if applicable) are stated clearly in the work rules or the employment agreement, and there is no evidence that such mechanism is a guise to evade laws on notice requirements or a breach of other legal principles (proportionality, nondiscriminatory treatment, no abuse of power, etc.), such mechanism would not be against the law per se.

TAIWAN

19. **What constitutes unfair / wrongful dismissal?**

If a termination/dismissal fails to follow the LSA or other regulations, or if a termination/dismissal is not taken as a measure of last resort in principle, such termination/dismissal would be considered as an unfair / wrongful termination/dismissal.

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

Based on the court practice, as the employer has delayed his/her acceptance of the services for wrongful termination/dismissal, the worker may claim from the employer the amount of wages and interest due calculated from the beginning of the wrongful termination/dismissal period up to the date the amount is fully repaid, as well as require the employer to make contributions to the worker's pension account for the period of wrongful termination/dismissal. The worker may also claim for compensation of any other injuries (regardless of whether such injuries are pecuniary) caused by the wrongful termination/dismissal.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

Currently, wrongful termination/dismissal cases are heard before the labor courts under all levels of civil courts according to Article 1 of the Regulations for the Court's Handling of Labor-Management Disputes. However, once the draft Labor Disputes Act enters into effect sometime in the near future, pursuant to Article 4 of such Act, specialized labor courts will be implemented to hear such cases.

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

a. A post-termination non-compete clause must meet the following conditions for it to be considered valid and enforceable:
   (A). (i) The employer must have a proper business interest to be protected; (ii) the worker's position or duties would bring him/her into contact with or usage of the employer's business secrets; (iii) the duration, geographic area, and the scope of professional activities and employers in the non-compete clause do not exceed the bounds of reasonableness; and (iv) the employer will provide reasonable compensation to a worker who refrains from engaging in competing activities for the loss incurred by him/her (this does not include wages received by the worker during working hours). Failure to meet any one of the above will render the clause invalid (Article 9-1 of the LSA).
   (B). The duration of the post-termination non-compete period is capped at two years. Any stipulations beyond two years will be shortened to two years (Article 9-1 of the LSA).

(C). The post-termination non-compete agreement shall be in writing and clearly state the above conditions. The employer and the worker shall execute the agreement, and each party shall retain a copy (Article 7-1 of the Enforcement Rules of the LSA).

(D). The "reasonableness" standard mentioned in (A)(iii) above refer to the following: (i) The duration of the non-compete shall not exceed the usable life of the secret/confidential information that the employer is trying to protect (and capped at two years in any case). (ii) The geographic area should be limited to where the original employer is engaging in substantive commercial activities only. (iii) The scope of (restricted) professional activities shall be stipulated clearly and be identical or similar to the worker's professional activities while he or she was still working for the employer; (iv) similarly, the scope of (restricted) employers shall be stipulated clearly and limited to only those that *not only* engage in identical or similar commercial activities as those of the original employer, but *also compete* with the original employer (Article 7-2 of the Enforcement Rules of the LSA).

(E). The reasonable compensation to be provided mentioned in (A)(iv) above shall take the following into consideration, and shall be agreed to pay in a lump-sum upon termination or monthly during the non-compete period: (i) The amount of compensation per month must not be lower than 50% of the worker's average monthly wages at the time of the worker's departure; (ii) the amount must be sufficient for the worker to maintain his/her livelihood during the post-termination non-compete period; (iii) the amount must be commensurate with the losses caused by compliance of the aforementioned limit of duration, geographic area, scope of professional activities and employers stipulated in the non-compete clause. All other factors that are relevant to the determination of the reasonableness of the compensation should also be included in the consideration (Article 7-3 of the Enforcement Rules of the LSA).

b. For post-termination non-solicitation clauses: Taiwan law currently does not expressly provide guidance regarding post-termination non-solicitation clauses. However, the Taiwan High Court has ruled in the 101-Lao-Shang-62 civil decision that since a non-solicitation clause to some extent puts restrictions on the departing worker's right to work, **the evaluation must be based on whether there is a clear loss of fairness**, and the effect of such clause should in principle be limited to actions that do interfere with the business relationship of others, which may include the following: (i) spreading false negative information about competitors; (ii) solicit key workers or workers knowing commercial secrets from competitors so as to obtain the competitor's commercial secrets and weaken the competitor's market competition; and (iii) employ unethical means to solicit competitor's workers (such as offering massive awards, coercion or seduction), etc. As such, whether a post-termination non-solicitation clause is valid and enforceable or not shall be determined on a case by case basis based on the above standards.

TAIWAN

23. **Do trade unions get involved in issues relating to the termination of employment?**

Under the Taiwan labor laws and regulations, trade unions generally do not have room to get involved for ordinary terminations. However, for specific cases meeting the definition of "mass redundancy" under Article 2 of the Act for Worker Protection of Mass Redundancy , the employer must confer with the workers first, and if the workers have a union, then the union would decide the workers' representatives to attend the meeting. Therefore, trade unions are able to participate to a certain extent in mass redundancy procedures.

24. **Are there particular matters to be aware of when terminating foreign employees?**

(1) Generally speaking, under the Taiwan labor laws and regulations, the same rules apply for "the termination of a foreign worker" as those for a domestic worker.

(2) However, Article 56, Paragraph 1 of the Employment Service Act requires the employer to report in writing with statutory items within three days any termination of a foreign worker to the local labor competent authority as well as the immigration authority and the police authority. According to Article 45 of the Regulations on the Permission and Administration of the Employment of Foreign Workers, the employer must include in such report information about the foreign worker, such as name, sex, age, nationality, date of entry into Taiwan, work validity term, the number of the permit for recruiting/hiring such worker, copy of Alien Residency Card, etc.

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THAILAND

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

   Termination of employment is mostly governed by statute. The Labour Protection Act, 1998 (the "**LPA**") is the main source of law governing termination. Sections of the Thai Civil and Commercial Code address an employer's requirement to provide payment in lieu of notice. If the employees are union members or subject to collective agreements, the Labour Relations Act, 1975 may also apply.

   Thailand is not a jurisdiction in which decisions of the Thai courts constitute part of the body of the law. Nevertheless, decisions of Thailand's highest court (the Dika, or Supreme, Court) are often looked to for guidance in the interpretation of statutory language and regulation, as well as for determining whether the termination constitutes "unfair termination".

2. **How can an employer terminate an employment agreement?**

   For employees who engage in wrongful conduct (narrowly defined under the LPA), the employer may terminate the employee immediately "for cause" and without having to make statutory severance payments or give advance notice (or payment in lieu of advance notice).

   For employees who do not engage in wrongful conduct, the employer may terminate the employee "without cause", but will have to pay statutory severance and provide advance notice of termination (or make payment in lieu of advance notice). Advance notice must cover at least one full pay period, but not exceeding three months. The employer will often offer the employee an *ex gratia* payment in exchange for a waiver of claims in order to avoid potential "unfair termination" claims.

   If the employee is being let go as a result of introduction of machinery (including office equipment) or improvement in technology, 60 days' advance notice to the employee and labour inspector is required.

   The employment agreement should also be reviewed to determine other requirements for terminating the employment agreement.

3. **How can an employee terminate an employment agreement?**

   An employee can terminate the employment agreement by giving advance notice of the termination that covers at least one full pay period, but not exceeding three months.

   The employment agreement should also be reviewed to determine other requirements for terminating the employment agreement.

THAILAND

4. **Is an employer required to give reasons before terminating an employment agreement?**

   No, but in practice an employer will give reasons in the context of termination "without cause" in order to avoid a potential "unfair termination" claim by the employee following termination.

   Employers are generally advised to provide reasons in the context of termination "for cause" in order to avoid having the employee challenge the termination before the Labour Court.

5. **Can an employer reject an employee's resignation?**

   No, but an employer may be able to recover damages against the employee if the resignation is in violation of the employment agreement or other employment terms, and the employer is able to prove actual damages.

6. **Can a person undergoing internal disciplinary proceedings resign?**

   Yes.

7. **Can you terminate the employment of an employee for poor performance?**

   Yes, but in most cases poor performance will not constitute grounds for termination "for cause", and thus an employee terminated for poor performance would, in most cases, be terminated "without cause" and entitled to statutory severance payments. However, it is possible that the employer could, as a result of poor performance, avoid having to give advance notice (or payment in lieu thereof), and avoid liability for "unfair termination".

8. **Can you terminate the employment of an employee who is on extended medical leave?**

   Yes, but such termination would be treated as termination "without cause", unless the employee failed to inform the employer of the medical leave and is absent from work for at least three days, in which case the employer could terminate the employee "for cause".

9. **Can you terminate the employment of a pregnant employee?**

   Yes, provided her employment is being terminated for a reason other than her pregnancy.

10. **Can you terminate the employment of an employee on maternity leave?**

    Yes, provided her employment is being terminated for a reason other than her maternity leave.

THAILAND

11. **Are there (other) categories of employees whose employment cannot be terminated?**

    Depending on the arrangement between employer and employees, the employment of employees who are members of a labour union or collective agreement may be more difficult to terminate.

12. **What constitutes retrenchment?**

    Retrenchment is not defined under Thai labour law, but in most cases employees who are terminated in response to an employer's economic difficulties are terminated "without cause" and will be entitled to statutory severance and advance notice (or payment in lieu of advance notice), even if the retrenchment can be justified for business reasons, such as plant closures, and irrespective of the number of employees being dismissed.

    If the retrenchment involves replacing the employee with the introduction of machinery (including office equipment) or by improvements in technology, 60 days' advance notice to the employee and labour inspector is required.

    The employer may be able to defend claims of "unfair termination" if the retrenchment involves the closure of the terminated employees' entire department or business line.

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

    Yes, in most cases the quantum of retrenchment benefits is determined in the same manner as for any other termination "without cause", meaning that the employee would be entitled to statutory severance and advance notice (or payment in lieu of advance notice).

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

    Yes, employees have a right to severance payments when they are terminated "without cause", which covers termination for any reason other than those narrowly defined reasons under termination "for cause".

15. **What is the retirement age?**

    Employers have discretion in setting the retirement age for its employees. Employees who are terminated upon reaching the retirement age are entitled to the same statutory severance payments that are paid to employees who are terminated "without cause". Under a recent amendment to the LPA, employees who reach 60 are able to voluntarily retire from their employer and receive these same benefits.

THAILAND

16. **Are there any implications if an employee is terminated before retirement age?**

    The employee may bring a claim for “unfair termination” before the Labour Court.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

    Yes.

18. **Can an employee be placed on garden leave?**

    Yes, but the context of the garden leave is important for purposes of determining an employer’s financial obligations.

    If the garden leave is in the context of an investigation of an employee for potential wrongdoing, the employer may suspend the employee for up to seven days during the investigation and pay the employee 50% of his/her regular salary. If the investigation does not reveal any wrongdoing, the employee is reinstated at regular salary and paid any reductions in salary during the investigation, together with interest at 15% per annum.

    If the garden leave is in the context of a termination “without cause”, the employee is sometimes put on garden leave during the period of advance notice at regular salary.

19. **What constitutes unfair / wrongful dismissal?**

    There is no definition in the LPA or elsewhere in Thai law as to what constitutes "unfair termination" of employment. The mere fact that there is a severance pay entitlement does not mean that the termination is unfair. The Labour Court will determine the fairness or unfairness of termination on a case by case basis, although termination in the context of the closing of an entire business unit or department has been held to be “fair” termination. Furthermore, if the employer has a written policy on mandatory retirement by a certain age, termination by the employer at such age would generally be considered “fair” termination.

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

    In cases where the Labour Court determines that a termination is unfair, the normal practice is to award additional damages equal to one month's basic salary for each full year of employment completed. More recently, the Labour Court has increased these damages to one and a half month’s basic salary for each full year of employment completed for employees who are at least 40 years old.

    The Labour Court may require the employer to rehire the employee, but such a remedy is rare.

THAILAND

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

    Labour matters, including wrongful termination cases, are heard before the Labour Court.

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

    Yes, the Labour Court will enforce a post-termination covenant if it is held to be a “reasonable” restriction on an employee’s freedom to work or conduct business. For example, a non-compete clause is considered reasonable if it is narrowly tailored in time (usually no more than one year), geography (Thailand or the province where the employer is located), and type of business.

23. **Do trade unions get involved in issues relating to the termination of employment?**

    Yes, if the employee is a member of a trade union.

24. **Are there particular matters to be aware of when terminating foreign employees?**

    If an employee has been brought from elsewhere at the expense of the employer, the employer is bound, unless otherwise provided in the employment contract, to pay the cost of the employee's return journey if the employee is terminated “without cause”.

    The employer is required to notify the Department of Labour within 15 days after the termination of employment in order to cancel the foreign employee’s work permit.

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VIETNAM

1. **What are the sources of law governing the termination of employment in your jurisdiction?**

- Labour Code No.10/2012/QH13 passed by National Assembly of Vietnam on 18 June 2012 and its guiding documents (the "**Labour Code**");
  Law on Health Insurance 2008 (as amended in 2014) passed by National Assembly of Vietnam on 21 November 2007;
- Law on Trade Union 2012 passed by National Assembly of Vietnam on 18 June 2012;
- Law on Employment 2013 passed by National Assembly of Vietnam on 16 November 2013;
- Law on Social Insurance 2014 passed by National Assembly of Vietnam on 20 November 2014;
- Decree 05/2015/ND-CP of the Government of Vietnam issued on 12 January 2015 regulating and guiding implementation of a number of items of Labour Code ("**Decree 05**");
- Internal Labour Regulation and its amendment issued and registered by the employer; and
- Labour contracts and their appendices, if any, as agreed and entered into between the employees and the employer.

2. **How can an employer terminate an employment agreement?**

An employer may terminate an employment agreement in limited cases and must provide a certain period of advance notice to the employee as follows:

Item	Type of termination	Period of advance notice
1.	**Termination without cause**	
	Labour contract expires	15 days prior to the date of expiry of a definite employment agreement
	Task stated in the employment agreement completed	No procedure required
	Employer and employee agree to terminate employment agreement	
	The employee is sentenced to serve a jail term or is prevented from performing the job in accordance with a decision of the court	
	The employee satisfies the requirements of social insurance duration and pension age	
	Employee dies or is declared missing by a court	
	The employer (if an individual) dies, or is declared dead, missing or incapable of civil acts by the Court; the employer (if not an individual) stops operations	
	Retrenchment due to restructuring, change of technology, or changes for economic reasons	The employer must consult the grassroots trade union

VIETNAM

Item	Type of termination	Period of advance notice
		and notify the provincial state administrative body for labour 30 days prior to termination of the employment agreement
2.	**Termination for cause**	
	The employee repeatedly failed to perform the work in accordance with the terms of the employment agreement	- 45 days' prior notice in the case of an indefinite term employment agreement - 30 days' prior notice in the case of a definite term employment agreement from 12 months to 36 months - 3 working days' prior notice in the case an employment agreement that is seasonal or has a term of less than 12 months.
	The employee is ill or injured and remains unable to work after having received treatment for a period of 12 consecutive months in the case of an indefinite term employment agreement, or 6 consecutive months in the case of a definite term contract, or more than half the duration of the contract in the case of a seasonal or specific job employment agreement with a duration of less than 12 months	
	Where as a result of a natural disaster, fire or for any other reason of force majeure as prescribed by law, the employer, despite having taken all necessary measures to remedy the problem, still needs to narrow production and reduce the number of jobs	
	The employee failed to attend the workplace on the expiry of the suspension of performance of the employment agreement	

VIETNAM

3. **How can an employee terminate an employment agreement?**

Depending on the type of employment agreement, an employee must provide the employer with reasons for termination and where applicable, give advance notice to the employer before terminating an employment agreement, as follows:

Item	Type of termination	Period of advance notice
1.	**Termination without cause**	
	An employee with an indefinite term employment agreement may unilaterally terminate the contract without cause	- 45 days' prior notice; or - 3 working days' prior notice if he/she is ill or the victim of an accident and has received medical treatment for 6 consecutive months
	Labour contract expires	The employer must provide advance written notice to the employee 15 days prior to the date of expiry of a definite employment agreement
	Task stated in the employment agreement completed	No procedures required
	Employer and employee agree to terminate employment agreement	
	Employee is sentenced to serve a jail term or is prevented from performing the job in accordance with a decision of the court	
	The employee satisfies the requirements of social insurance duration and pension age	
	Employee dies or is declared missing by a court	
	The employer (being an individual) dies, or is declared by a court to have lost legal capacity for civil acts, to be missing or to be deceased; or the employer (not being an individual) terminates its operations	
2.	**Termination for cause**	
	The employee is not assigned to the correct job or workplace or is not ensured the working conditions agreed in the employment agreement	3 working days' prior notice
	The employee is not paid in full or on time the wages due as agreed in the employment agreement	3 working days' prior notice
	The employee is maltreated, sexually harassed, or is subject to labour coercion	3 working days' prior notice

VIETNAM

Item	Type of termination	Period of advance notice
	The employee is unable to continue performing the contract due to personal or family difficulties	- 30 days' prior notice in the case of a definite term employment agreement from 12 months to 36 months - 3 working days' prior notice in the case of an employment agreement that is seasonal or has a term of less than 12 months
	The employee is elected to full-time public office duties in a body elected by the people, or is appointed to a position in a State body	- 30 days' prior notice in the case of a definite term employment agreement from 12 months to 36 months - 3 working days' prior notice in the case an employment agreement is seasonal or has a term of less than 12 months
	A female employee is pregnant and must cease working on the advice of a competent medical consulting or treating establishment	Subject to a doctor's prescription
	The employee is ill or injured and remains unable to work after having received treatment for a period of 90 consecutive days in the case of work pursuant to a definite term employment agreement, or for a quarter of the duration of the contract in the case an employment agreement is seasonal or has a term of less than 12 months	The employee must give at least 3 working days' prior notice

4. **Is an employer required to give reasons before terminating an employment agreement?**

Yes. In certain circumstances as mentioned in our response to question 2 above (at item 1), an employer is required to give reasons before terminating an employment agreement.

5. **Can an employer reject an employee's resignation?**

In circumstances in which an employee has the right to unilaterally terminate the employment agreement (Article 37.3 of the Labour Code) or in the case of automatic termination of the employment agreement (Article 36 of the Labor Code), the employer cannot reject the employee's resignation.

VIETNAM

6. **Can a person undergoing internal disciplinary proceedings resign?**

Vietnamese law does not specifically regulate whether an employer can reject an employee's resignation when he/she is undergoing internal disciplinary proceedings. However, as a matter of practice, an employee is entitled to resign by the form of unilateral termination (Article 37.3 of the Labour Code) or automatic termination of the employment agreement (Article 36 of the Labor Code).

7. **Can you terminate the employment of an employee for poor performance?**

Yes, the employer may unilaterally terminate an employment agreement on the ground that the employee repeatedly fails to perform his/her work in accordance with the terms of his/her employment agreement as stated in Article 38.1 (a) of the Labor Code. Apart from the period of advance notice as mentioned in our response to question 2 above (at item 1), the employer is required to provide that such performance falls within the criteria assessing the level of completion of work as regulated in the internal rules, which is issued by the employer after obtaining the opinion of the grassroots trade union.[20]

8. **Can you terminate the employment of an employee who is on extended medical leave?**

Yes, the employer has the right to unilaterally terminate the employment agreement if the employee is ill or injured, and remains unable to work after having received treatment for a period of 12 consecutive months in the case of an indefinite-term employment agreement, or 6 consecutive months in the case of a definite-term contract, or more than half the duration of the contract in the case of a seasonal or specific job contract with a duration of less than 12 months.[21]

Except in the case prescribed in Article 39.1 of the Labor Code, an employer is not permitted to unilaterally terminate an employment agreement if the employee, after contracting an occupational disease or suffering from an injury caused by a work-related accident, is being treated or nursed on the decision of a competent medical consulting or treating establishment.

9. **Can you terminate the employment of a pregnant employee?**

No, an employer is not permitted to unilaterally terminate an employment agreement with a pregnant employee.[22]

[20] Article 12.1 of Decree 05
[21] Article 38.1(b) and 39.1 of the Labour Code
[22] Article 39.3 and 155.3 of the Labour Code

VIETNAM

10. **Can you terminate the employment of an employee on maternity leave?**

No, an employer is not permitted to unilaterally terminate an employment agreement with an employee on maternity leave.[23]

11. **Are there (other) categories of employees whose employment cannot be terminated?**

Yes. The employer is also not permitted to unilaterally terminate an employment agreement with the employee in the following cases:[24]

(i) The employee, after contracting an occupational disease or suffering from an injury caused by a work-related accident, is being treated or nursed on the decision of a competent medical consulting or treating establishment (except where the employee is ill or injured, and remains unable to work after having received treatment for a period of 12 consecutive months in the case of an indefinite-term employment agreement, or 6 consecutive months in the case of a definite-term contract, or more than half the duration of the contract in the case of a seasonal or specific job contract with a duration of less than 12 months).
(ii) The employee is on annual leave, personal leave, or any other type of leave agreed by the employer.
(iii) Where the employee is a female, on the grounds of her marriage or her nursing a child under 12 months, except where the female employee dies, or is declared by a court to have lost legal capacity for civil acts, or to be missing or deceased; or where the employer (not being an individual) terminates its operations.
(iv) The employee is on leave pursuant to the regime on parental leave prescribed in the law on social insurance.

12. **What constitutes retrenchment?**

Based on Article 36.10, Article 44 and Article 45 of the Labour Code, retrenchment is a form of redundancy under limited circumstances, as follows:

- Retrenchment due to technological changes or organizational restructuring;
- Retrenchment due to merger, consolidation, division, separation, or transfer of assets of the employer; or
- Retrenchment due to economic reasons.

[23] Article 39.3 and 155.3 of the Labour Code
[24] Article 39 of the Labor Code

VIETNAM

13. **Must retrenchment benefits or severance payments be made in a retrenchment scenario? How is the quantum of retrenchment benefits determined?**

Yes. In a retrenchment scenario, the employer must pay redundancy allowances (of at least 2 months' wages) to employees who have at least 12 full months of service. In order to conduct a retrenchment of its employees, the employer must have discussions with the organization representing the labour collective at the grassroots level and provide 30 days' advance notice to the provincial state administrative body for labour.

The calculation of retrenchment benefits is determined in accordance with the formula below:

Redundancy allowance	=	1	x	Wages for redundancy allowance purposes	x	Length of service (in years) for redundancy allowance purposes

In which:

- Wages for the purpose of calculating the redundancy allowance on retrenchment means the average wage (i.e. the basic salary and all allowances and additional benefits) pursuant to employment agreement for the 6 months immediately preceding retrenchment of the employee.
- Length of service for redundancy allowance purposes is calculated by total length of service where the parties did not participate in unemployment insurance.

For the purposes of calculating the redundancy allowance, where the length of service is less than 6 months in a year, it will be rounded up to half a year, and if it is between 6 months to 12 months, it will be rounded up to 1 year.

14. **Other than in a retrenchment scenario, do employees have a right to severance payments when they are terminated?**

Yes. Other than the redundancy allowance mentioned above, in the situation of automatic termination under Article 36 of the Labor Code (except in the situation of termination by dismissal) and unilateral termination of an employment agreement by the employer under Article 38 of the Labour Code, employees have a right to receive severance allowance. Accordingly, the employer must pay severance allowance to any employee who has at least 12 full months' of service, equivalent to half a month's wage for each year of service where the parties did not participate in unemployment insurance.

VIETNAM

15. **What is the retirement age?**

The compulsory retirement age is 60 years old for men and 55 years old for women. The retirement age may be increased by up to 5 years for employees with high technical expertise, for those at managerial-level positions, or in a number of other special cases.[25]

16. **Are there any implications if an employee is terminated before retirement age?**

By law, a retiree is entitled to a monthly pension financed by the social insurance fund, if that person has reached retirement age and has contributed to the fund for at least 20 years. Where an employee meets the above requirements, he/she is entitled to the same maximum pension rates. If not, lower pension rates may apply to those who are terminated before retirement age.

17. **Can you re-employ or continue with the employment of an employee who has attained retirement age?**

Yes. When the employer wishes to hire or employ a retiree and the employee who has attained retirement age (i.e. senior worker) is in good health pursuant to the conclusion of a medical diagnosis and treatment establishment established and operating in accordance with law, the two parties may reach an agreement to extend the term of the current employment agreement, or enter into a new employment agreement.[26]

18. **Can an employee be placed on garden leave?**

Vietnamese law does not specifically regulate whether an employee can be placed on garden leave. This is subject to agreement between the parties.

19. **What constitutes unfair / wrongful dismissal?**

An employer could be regarded to have carried out an unfair/wrongful dismissal in the event of:

- Failure to comply with principles for dealing with breach of labour discipline (Article 123 of the Labour Code);
- Failure to comply with the cases where the employer is permitted to apply the form of dismissal (Article 126 of the Labour Code, Article 31 of Decree 05);
- Failure to comply with the relevant procedure and sequence (Article 30 of Decree 05);
- Failure to comply with the authority to deal with (Clause 4, Article 30 of Decree 05);
- Failure to comply with the limitation period for dealing with breach of labour discipline (Article 124 of the Labour Code); or

[25] Article 187 of Labour Code
[26] Article 167 of Labour Code and Article 6 of Decree 05

- Failure to comply with the cases where the employee shall not be dealt with for a breach of labour discipline (Clause 4, Article123 of the Labour Code; Article 29 of Decree 05).

20. **What remedies (including damages) are employees entitled to in cases of wrongful termination / dismissal?**

The act of illegal termination/dismissal of an employee results in the following consequences:[27]

- The employer must take the employee back to work under his/her employment agreement, and must pay wages, social insurance and health insurance for the period during which the employee did not work, plus at least 2 months' wages in accordance with the employment agreement.
- If the employer does not wish to re-employ and has the employee's consent, then apart from the compensation prescribed above and the severance allowance, the two parties may agree upon an additional amount of compensation of at least 2 months' wages in order to terminate the employment agreement.
- In the event that the role previously held by the employee no longer exists, and the employee wishes to continue to work, in addition to the compensation mentioned, parties must negotiate an amendment or supplement to the employment agreement.

21. **Are wrongful termination cases heard before the civil courts or a specialised tribunal?**

A wrongful termination lawsuit could be heard before the civil courts (i.e. Labor court). In addition, the crime of illegal dismissal of employees could be heard before the criminal courts.

22. **Are post-termination covenants such as non-compete and non-solicitation clauses enforceable?**

For non-compete clauses: Although an employer can require a post-termination non-competition covenant from an employee, it is unlikely to be enforceable by a Vietnamese court because of the existence of a general principle of the Constitution, according to which a citizen has the right to work. Any restriction of this right would be deemed an incursion on the fundamental rights of citizens. In practice, such a restrictive covenant would be enforceable if the employer pays the employee an amount for the period during which the employee is not allowed to work for a competitor.

For non-solicitation clauses: There is no law regarding non-solicitation. In practice, the parties may agree on prohibition of solicitation and/or hiring of former colleagues (both during and after employment) but this prohibition would be difficult to enforce.

[27] Article 42 of the Labour Code and Article 3.3e of Decree 05

VIETNAM

23. **Do trade unions get involved in issues relating to the termination of employment?**

Yes, trade unions will get involved in issues relating to the termination of employment. Some examples are set out below.

- When the employer retrenches the employee as a result of restructuring, change of technology, for economic reasons, or due to merger, consolidation or separation of the enterprise or co-operative. In this regard, the trade union must review and comment on the plan to use employees before it is sent to the provincial state administrative body for labour.
- When the employer may dismiss an employee, the employer must hold a meeting to deal with disciplinary violation. The employee and the trade union are required to attend the meeting.
- When the employer unilaterally terminates the employment agreement of an employee who is a part-time trade union officer. In such event, the employer must obtain written agreement from the executive committee of the grassroots trade union or from the executive committee of the directly superior trade union.[28]

24. **Are there particular matters to be aware of when terminating foreign employees?**

No, the requirements and procedures to terminate the employment of foreign employees are the same to those for Vietnamese employees.

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[28] Article 192.7 of the Labour Code