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The International Comparative Legal Guide to: Employment & Labour Law 2011

A practical cross-border insight
into employment and labour law

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The right to work and follow a profession is provided in article 49 (1, 2) of the Constitution of Republic of Kosovo dated 15.06.2008, which expressly states that the right to work is guaranteed and each person is free to choose his/her profession and occupation. Employment relationships are governed by the recently approved Law no. 03/L-212 dated 18.11.2010 “On Labour” (LoL). Employees are also entitled to occupational safety, protection of health and an appropriate labour environment in compliance with the LoL and Law no. 2003/19 dated 06.11.2003 “On Occupational Safety, Health and Working Environment”. In regards to discrimination, employees, aside from being protected by the provisions of the LoL, they are also protected by Law no. 2004/3 dated 20.08.2004 “On Anti-Discrimination”. Another legal source covering employment issues in Kosovo is the Comprehensive Proposal for the Kosovo Status Settlement Date (Ahtisaari Plan).

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The recently approved LoL regulates the rights and obligations deriving from the employment relationship for employees and employers in the private and public sector in the Republic of Kosovo. Based on the LoL, the public sector only includes the education and health sector as well as publicly-owned enterprises by the Republic of Kosovo or any other municipality of the Republic of Kosovo. Nevertheless, the status of Civil Servants is governed by the special Law no. 03/L-149 dated 13.05.2010. “On the Civil Service of the Republic of Kosovo” which regulates the terms and conditions of the employment relationship with institutions of the central and municipal administrations. However, provisions of the LoL are applicable also to employees and employers, whose employment relationship is regulated by special law, when such special law does not provide any solution for certain issues deriving from the employment relationship. Foreign citizenship employees are also subject to provisions of the LoL after they are equipped with a Work Permit required by Law no. 2009/03-L-136 dated 17.07.2009 “On Granting the Permit for Work and Employment of Foreign Citizens in Republic of Kosovo” and with a Residence Permit required by Law no. 2008/03-L0126 dated 30.12.2008 “On Foreigners”.

The LoL distinguishes the following categories of employees: (i) foreign and stateless citizen employees; (ii) interns; (iii) under-age employees (youths); (iv) women (pregnant, breastfeeding and

women with a child under 3 (three) years); and (v) persons with disabilities.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

The LoL expressly recognises only the written form of an employment contract, signed by the employer and the employee which shall contain the minimum rights for the employee stipulated by the LoL. An employment contract shall include the minimum elements as follows: (i) data on the employer (designation, residence and business registration number); (ii) data on the employee (name, surname, qualification and dwelling); (iii) designation, nature and the form of labour and/or services and the job description; (iv) the place of work or a statement that work is performed at various locations; (v) working hours and working schedule; (vi) the date of commencement of work; (vii) the duration of the employment contract; (viii) the basic salary and any other allowance or income; (ix) the period of vacations; (x) terms for the termination of the employment relationship; and (xi) any other data that the employer and employee deem important for the regulation of the employment relationship. An employment contract may include other rights and duties provided for by the LoL.

1.4 Are any terms implied into contracts of employment?

The legal obligations for the payment of taxes, pension schemes and other contributions provided by any other special applicable law are usually implied terms in employment contracts. Also the LoL determines that the rights and duties not defined in the employment contract shall be regulated by the provisions of the LoL, Collective Contract and Employer’s Internal Act. According to article 4 of the LoL, the LoL has supremacy over the provisions of the collective contract and employment contract in cases of conflict between them.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The minimum employment terms set forth by law which are required to be considered by employers before concluding employment relationships with employees are: (i) a minimum age of 18 (eighteen) years. However, in this respect when an employee is employed for easy labour which does not present a risk to either health or development and such a work is not prohibited by any law or sub legal acts, the LoL allows an employment relationship with

persons older than 15 (fifteen) years' old; (ii) a minimum wage which will be defined annually by the Government of Kosovo based on the proposal of the Social-Economic Council; (iii) an obligation to report employees to the Kosovo Tax Administration (KTA), and to other authorised institutions for managing and administering obligatory pension schemes; and (iv) safety measures.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

The terms and conditions of collective bargaining shall not limit the rights of employees recognised by the LoL. The collective bargaining can be concluded on the following levels: (i) at the state level; (ii) at the branch level; and (iii) at the enterprise level.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The freedom for establishing trade unions with the intent of protecting interests is provided for in article 44 (2) of the Constitution of the Republic of Kosovo. Such a right may be limited by law for specific categories of employees. Freedom of Trade Union Organisations is also recognised by the LoL without undue interference from any other organisation or public authority. Currently, Kosovo does not have a special law that regulates the rights, freedoms and obligations of trade unions. According to the Kosovo Parliament Legislative Strategy, the Law on Trade Union Organisations will be approved during this legislative year.

2.2 What rights do trade unions have?

As abovementioned in the response to question 2.1 above, Kosovo does not have a special law that governs the activity of trade unions and other labour organisations. But, taking into consideration applicable Labour Legislation, trade unions are entitled to lawful strikes and the right to be engaged in social dialogue including the right to negotiate the collective contract(s).

2.3 Are there any rules governing a trade union's right to take industrial action?

The Law on Strikes does not expressly recognise the trade union's right to take "industrial action" as a specific legal category, nevertheless, after careful reading of the Law on Strikes, we conclude that the definition of 'strike' in the Law on Strikes includes the right of employees to take industrial action aiming to settle the disputes with their own employer.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Employers are not required to set up work councils.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable in Kosovo.

2.6 How do the rights of trade unions and works councils interact?

This is not applicable in Kosovo.

2.7 Are employees entitled to representation at board level?

No, they are not.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Every form of discrimination is prohibited by the Constitution of the Republic of Kosovo. The LoL prohibits all forms of discrimination in employment and occupation. Provisions of Law no. 2004/3 dated 20.08.2004 "On Anti-Discrimination" shall be directly applicable in regards to an employment relationship. Even though Kosovo is not a signatory party to the following international agreements and instruments granted with the Constitution of the Republic of Kosovo: (i) Convention on the Elimination of All Forms of Racial Discrimination; and (ii) Convention on the Elimination of All Forms of Discrimination against Women, they are directly applicable in Kosovo.

3.2 What types of discrimination are unlawful and in what circumstances?

The terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and the terms and conditions of employment. The term discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, age, family status, political opinion, national extraction or social origin, sexual orientation, language or union membership which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

3.3 Are there any defences to a discrimination claim?

In the cases of discrimination, an employee is protected by Law no. 2004/3 dated 20.08.2004 "On Anti-Discrimination" (LAD) which expressly provides procedures for discrimination in employment relationships. Any claim of discrimination shall be decided or adjudicated in compliance with the LAD by administrative authorities and the competent court.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Successful enforcement of employees' rights in respect to discrimination may commence by exhausting all possibilities with the administrative authorities and then, upon completion of the

administrative procedure related to a claim of discrimination in accordance with the applicable law on general administrative procedure, when a claimant is unsatisfied that a claim can be filed at the competent court. Such a claim shall be in compliance with Law no. 03/L-202 dated 06.10.2010 "On Administrative Conflicts". To avoid the court expenses, it is more favourable for an employer to settle a claim before the initiation of the procedure in court. Otherwise, it is not prohibited to settle a claim in any existing stage of the case.

3.5 What remedies are available to employees in successful discrimination claims?

Except for the remedies mentioned in questions 3.3 and 3.4, mediation or conciliation procedures are also available. However, the use of mediation or conciliation procedures does not preclude an employee from filing a claim with the appropriate administrative authority or at the competent court.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

An employed women is entitled to up to 12 (twelve) months of maternity leave.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Women are entitled to commence maternity leave up to 45 (forty five) days before the expected day of birth. Within the period of 28 (twenty eight) days before the childbirth is expected, the employer, with the woman's consent may request that she begins maternity leave when she is not able to perform her duties. During the period of the first 6 (six) months of maternity leave, the payment shall be paid by the employer in the amount of 70% (seventy percent) of the basic salary. During the following three (3) months (i.e. months 7, 8, 9), the maternity leave will be paid by the Government of Kosovo in the amount of 50% (fifty percent) of the average salary in Kosovo. On the basis of the LoL, the employed woman has the right to extend her maternity leave for another three (3) months (i.e. months 10, 11, 12) without payment. If a woman does not want to use the right of maternity leave for the last 6 (six) months, she shall notify the employer at least 15 (fifteen) days before the end of first 6 (six) months of maternity leave. Except in cases of collective dismissal, an employer cannot terminate the employment contract with a female employee during her pregnancy or maternity leave.

4.3 What rights does a woman have upon her return to work from maternity leave?

A woman upon her return to work from maternity leave shall not be obliged to work longer than full-time working hours and during night shifts. Such a right lasts until her child reaches 3 (three) years' old. Breastfeeding women are protected from work which is classified as harmful for the health of the mother or the child. Based on the LoL, breastfeeding women are prohibited from work involving hard physical labour, or work exposed to biological, chemical or physical factors that may risk the reproductive health as well in other specific cases. Please note that the sublegal acts for implementation of the LoL shall be approved by the Ministry of Labour and Social Welfare (Ministry) within a period of one (1)

year from the date of entering into force of such LoL which was approved very recently.

4.4 Do fathers have the right to take paternity leave?

In the cases of the sickness of the mother, the abandonment of the child or the death of the mother, the rights defined in our response to question 4.2 above for maternity leave may also be used by the father of the child. However, maternity leave rights for the last 6 (six) months may also be conveyed to the father of the child in agreement with the mother. The father of the child is entitled to: (i) two days' paid leave at the birth/adoption of the child; and (ii) two weeks' unpaid leave after the birth/adoption of the child until the child reaches 3 (three) years' old. An employer must be informed 10 days in advance if the father (employee) intends to use such a leave/right.

4.5 Are there any other parental leave rights that employers have to observe?

If an employed woman gives birth to a dead infant or if the child dies before the expiry of maternity leave, with the doctor's recommendation she is entitled to maternity leave until the recovery from birth and the psychological condition caused with the loss of the infant for no less than forty-five (45) days, during which period she shall be entitled to all entitlements under the maternity leave. Parents are also entitled to a paid absence from work with the compensation of salary for up to three (3) days for the birth of child.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

According to the LoL, a single parent with a child under three (3) years' old or with serious disabilities are exempt from working longer than full-time working hours and during night shifts. However, as abovementioned in response to question 4.3, this right is also granted to a mother with a child under three (3) years' old.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

In the case of a business transfer, which entails the change of the employer, the regulation is found in Law no. 03/L-212 "On Labour", effective as of January 1st, 2011. When the employer is changed as result of a business transfer, the new employer shall take over all the obligations of the former employer based on the individual employment agreement and collective agreement. In transactions involving the acquisition of a publicly-owned company through a concession agreement, the contracting state authority may impose limitations with respect to redundancies and employment conditions of the existing employees of the company in the transaction agreement.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

When a business sale occurs, the transfer incorporates all employee rights in compliance with a collective agreement and an individual employment contact. However, after mutual consent between the new employer and its employees for modifications in a collective

agreement within an organisation, the collective agreement can be amended and supplemented, but always within the limits provided for by the LoL.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

In the case of a business sale, the previous employer is obliged to inform properly and entirely the next employer of the rights and obligations deriving from any collective agreement and individual employment contract. Before the transfer takes place, the previous employer is obliged to inform all of its employees in writing with respect to the transfer of their rights and obligations.

5.4 Can employees be dismissed in connection with a business sale?

When an employee opposes his/her transfer to the new employer or does not express his/her decision in this regard within 5 (five) days from the notification day, then the previous employer is entitled to dismiss the employee.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

In the case of a sale transaction, the LoL does not envisage any specific provision which limits employers to change terms and conditions of employment after taking over obligations as cited above in response to question 5.1. However, in the case of changing the terms and conditions of an employment relationship, the employer shall take into account compulsory provisions stipulated by the LoL for the employment contracts.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Employment contracts in Kosovo may be concluded for: (i) an unspecified period; (ii) a specified period; and (iii) specific tasks. A contract for a specified task may not be longer than 120 (one hundred and twenty) days within a year. The period for giving notice to an employee by the employer for termination of an employment relationship depends on the duration of the contract. When an employment contract is concluded for an unspecified period, in the case of the termination of the contract by the employer, the following periods of prior notice shall be taken into consideration:

- (i) From 6 (six) months up to 2 (two) years of employment: 30 (thirty) calendar days.
- (ii) From 2 (two) up to 10 (ten) years of employment: 45 (forty-five) calendar days.
- (iii) Above 10 (ten) years of employment: 60 (sixty) calendar days.

In the cases when the employment contract is concluded for a specified period, for the prior notice for termination of employment relationships, the employer shall give the employee prior notice of at least 30 (thirty) calendar days. The decision for termination of an employment relationship by the employer is mandatory to be issued in written form and to contain also the grounds for the termination.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

The LoL expressly allows the possibility of "garden leave". The employer is entitled to deny an employee access to the enterprise premises during the termination notice period, namely prior to terminating the employment contract.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

An employee who considers that his rights arising from an employment relationship are violated can exercise his right of protection through: (i) the court; (ii) mediation; and/or (iii) the labour inspectorate. The consent of any third party in case of dismissal is not requested.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

The employer is prohibited from dismissing a woman during her pregnancy and maternity leave.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

An employer is entitled to dismiss an employee individually in the cases of serious misconduct and unsatisfactory performance. Reasons of dismissal related to business shall be justified with economic, technical or organisational reasons. An employer is obliged to pay the full salary and other allowances up to the day of the termination of the employment relationship. In the case of collective dismissals, the severance payment for employees with an employment contract for an unspecified period is calculated as follows: (i) from 2 (two) to 4 (four) years of service: 1 (one) monthly salary; (ii) from 5 (five) to 9 (nine) years of service: 2 (two) monthly salaries; (iii) from 10 (ten) to 19 (nineteen) years of service: 3 (three) monthly salaries; (iv) from 20 (twenty) to 29 (twenty-nine) years of service: 6 (six) monthly salaries; and (v) from 30 (thirty) years of service or more: 7 (seven) monthly salaries.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

The only procedure that ought to be followed by an employer in respect to individual dismissals is prior written notice by respecting the terms and conditions as determined by the individual employment contract and by the LoL, and to provide an employee with a single severance payment.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee is entitled to claim for the cancellation of a decision for dismissal, return to the workplace, and demand compensation. If conciliation between the employer and employee fails, the employee is entitled to seek his rights through the competent courts.

6.8 Can employers settle claims before or after they are initiated?

A claim between the employer and employee can be settled at any stage, including before or after the initiation of claim.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

If a number of dismissed employees does not exceed at least 10% (ten percent), but not less than 20% (twenty percent) employees within a period of 6 (six) months, an employer does not have any additional obligation, except prior notice for the termination of the employment relationship and compensation up to the last day of work. Except for the payments mentioned in *supra* question 6.5, if it is necessary for an employer to hire employees within a period of 1 (one) year from the termination of the employment contract with the same qualifications, then he/she is obliged not to hire another person before offering to hire an employee whose contract has been terminated.

These rules are not applicable for employees who are discharged as result of bankruptcy and reorganisation administered by a court.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employee's rights in respect to mass dismissals depend on the good will of the employer if the latter expresses his will to pay the severance payment. Employees can enforce their rights in this respect through courts and mediation. However, if an employer fails to fulfil his obligations in respect to mass dismissals, then the consequences for the employer are a fine and other payable amounts, which shall be set by sub-legal acts approved by the Ministry.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The LoL does not recognise restrictive covenants expressly, but parties to an employment contract are free to agree on restrictive covenants, such as preservation of industrial secrets and other personal data sensitive for employer.

7.2 When are restrictive covenants enforceable and for what period?

Parties are free to agree on the terms of covenants for an unlimited period as legislation in force does not envisage anything to the contrary.

7.3 Do employees have to be provided with financial compensation in return for covenants?

This is not applicable in Kosovo.

7.4 How are restrictive covenants enforced?

This is not applicable in Kosovo.

8 Court Practice and Procedure

8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

According to ex-Yugoslavian Law "On Courts" (in force in Kosovo until January 2013), the competent court to judge employment-related complaints are municipal courts, based on their territorial competence.

Regarding disputes arising from employment relationships, the court in the first instance is composed of a sole judge. On the other hand, the competent court for reviewing the first instance court decision is the District Court which is composed of 3 (three) judges (one professional judge and two lay judges).

8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

For employment-related complaints in court procedure, the Law "On Contested Procedure" is applicable. However, the LoL recognises mediation as an alternative means for the settlement of disputes arising from an employment relationship, based on Mediation Law. The procedure of conciliation is not mandatory for contestants, but the court during the entire procedure, especially during the preparatory procedure, may try to resolve the dispute through the conciliation without putting its impartiality at stake.

8.3 How long do employment-related complaints typically take to be decided?

On the basis of the Law on Contested Procedure, the courts shall act quickly, especially in setting the deadlines and court hearings, taking into account that these cases need to be solved as soon as possible. Although disputes related to employment may take at least one 1 (one) year (in the two instances) to be solved, taking into consideration the large number of outstanding cases and the absence of specialised courts or departments that tries employment matters, such employment cases may last longer.

8.4 Is it possible to appeal against a first instance decision and if so how long such do appeals usually take?

It is possible to appeal a first instance decision with regular and extraordinary remedies of attack. The duration of appeal will depend on the means of attack, and as described in our response to question 8.3 above, for the same reasons, the decision could take longer than one year.

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