THE EMPLOYMENT LAW REVIEW

Thirteenth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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This article was first published in February 2022
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-278-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAET SCHJØDT AS

ALC ADVOGADOS

AL DOSERI LAW, ATTORNEYS AT LAW & LEGAL COUNSELS

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SCHÖNHERR RECHTSANWÄLTE GMBH

TSMP LAW CORPORATION

VAN OLMEN & WYNANT

VIEIRA DE ALMEIDA

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PREFACE

For each of the past 12 years, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. Every year when I update this book, I reread the Preface that I wrote for the first edition in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. I have been practising international employment law for more than 25 years, and I can say this holds especially true today, as the past 13 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 13th edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see this publication grow and develop to satisfy its initial purpose: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

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

Unsurprisingly, this year's text would not be complete without another global survey of covid-19 that summarises some of the significant legislative and legal issues that the pandemic has presented to employers and employees. The updated chapter highlights how international governments and employers continued to respond to the pandemic during the course of 2021, from shutdowns and closures to remote working and workplaces reopening. Employers around the globe have needed to be nimble to deal with the constantly changing environment.

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

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

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

Global diversity and inclusion initiatives remained a significant issue in 2021 for multinational employers across the globe. Many countries in Asia, Europe and South America have continued to develop their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation, and regulations on gender quotas and pay equity, to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals in the workforce remain underprotected and under-represented, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

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

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

In addition to the six general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 38 jurisdictions around the world.

Covid-19 aside, in 2022, and looking into the future, global employers continue to face growing market complexities, from legislative changes and compliance challenges, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, addressing social media issues, negotiating collective bargaining agreements or responding to increasing public attention on harassment or equal pay issues, workforce issues can affect a company's ability to attract and retain talent, or damage its reputation and market value in an instant. These issues have created a confluence of legal and business challenges that no longer can be separated or dealt with in isolation. As a result, every company requires business advisers who can address the combined business and legal issues relating to its multinational workforce. It is my hope that this text provides legal practitioners and human resources professionals with some guidance, best practices and comprehensive solutions to significant workforce issues that affect a company's market position, strategy, innovation and culture.

A special thank you to the legal practitioners across the globe who have contributed to this volume for the first time, as well as those who have been contributing from the first year. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my Faegre Drinker associates, Katherine Gordon, Caroline Guensberg, Charlotte Marshall and Kerry Zaroogian, and my law partners, Alex Denny, Nicole Truso and Jill Zender, for their invaluable efforts in bringing this 13th edition to fruition.

Erika C Collins
Faegre Drinker Biddle & Reath LLP
New York
February 2022

Chapter 21

ISRAEL

Orly Gerbi, Maayan Hammer-Tzeelon, Nir Gal, Keren Assaf and Ohad Elkeslassy[1]

I INTRODUCTION

The employment law framework in Israel is derived from the following sources:

a legislation: statutes and regulations providing employees with certain minimal rights. Israel lacks a constitution and has basic laws instead, which are superior to regular laws, including the Human Dignity and Liberty and Freedom of Occupation Law;

b collective bargaining agreements (CBAs), either specific or general: the latter may be extended by an order of the Minister of Economy to additional groups of employers and employees, or to all employers in the economy; and

c employment contracts: provisions of employment contracts will not be enforceable if they are inferior to those prescribed by law. If several legal sources apply to an employee, the one that is most beneficial governs.

The primary means for resolving employment disputes are the labour courts, parity committees (mostly established by CBAs), internal courts that exist in several fields, arbitration and mediation.

The enforcement of employment laws may be conducted by several organisations and mechanisms, such as the Enforcement Unit of the Ministry of Economy, specific legislative authorities, state authorities and the courts.

II YEAR IN REVIEW

New Criminal Information and Rehabilitation of Offenders Law 2019

Criminal background checks are generally not allowed. The Crime Register and Rehabilitation of Offenders Law 1981[2] (the Crime Register Law) prohibits non-authorised persons, including most private employers, from accessing or requesting that candidate or employee provide criminal background information from the national crime register. The Crime Register Law imposes criminal penalties for any violation.

The Crime Register Law states that whoever obtained or required, directly or indirectly, information from the crime register that he or she was not entitled to receive will be sentenced to two years' imprisonment. It further states that obtaining consent will not legitimise seeking the information.

1 Orly Gerbi is a senior partner, Maayan Hammer-Tzeelon, Nir Gal and Ohad Elkeslassy are partners, and Keren Assaf is a senior associate at Herzog Fox & Neeman.

2 1031 S.H. 322.

The Supreme Court has previously ruled that the Crime Register Law did not, in itself, entirely prohibit employers from requiring information about a candidate's criminal past or pending investigations, as these could be relevant considerations.[3] However, the request must be relevant, proportionate and for a proper purpose, and limited to information about prior convictions and pending investigations relevant to the position in question (rather than about all offences).

However, according to the new Criminal Information and Rehabilitation of Offenders Law 2019 (although it is still not in effect), it is prohibited to ask a person to provide criminal information, whether directly or indirectly by way of a statement or questionnaire, including for the purposes of employment. Furthermore, the new law prohibits taking into account such criminal information in making a decision for the purposes of employment. 'Criminal information' is defined as any information from the criminal and police registries, both of which are managed by the police. The new law was intended to enter into effect in January 2021 but this has been postponed.

III SIGNIFICANT CASES

Reclassification of contractors as direct employees

On 7 April 2021, the National Labour Court issued a ruling in the *Kutah* case,[4] which dealt mainly with the retrospective recognition of an employer–employee relationship and the consequences thereof. Prior to this ruling, there were conflicts regarding the flexibility to change the tests used to examine the existence of such a relationship.

The ruling displayed different approaches as to whether an individual's lack of good faith may prevent employment status recognition, with the majority rejecting the attempt to determine that extreme bad faith will prevail over an employee's status, owing to the cogent nature of employment relations.

The ruling also determined a controversy between two approaches regarding the calculation of employment rights of a newly reclassified employee, whereby the compensation will be based on two layers:

a the monetary damages caused to the individual – based on a comparison between the compensation paid and that which would have been paid had the individual been classified as an employee to begin with. The difference is paid to the individual. The employer will not be entitled to set off the excess payment if the individual was paid more (however, this may serve to decrease the next non-monetary compensation); and

b compensation for non-pecuniary damage (this is a precedent). This component sets forth compensation for non-quantifiable rights that also incorporates an element of deterrence for employers.

The ruling states that such compensation should be awarded in any case where it is determined that a contractor should have been classified as an employee, even if such a reclassified employee was not materially harmed, and the employer bears the burden of proof to demonstrate that no compensation should be awarded. The amount of compensation will vary from case to case and according to criteria that the labour courts will develop over time.

3 *Raphael Dayan v. Mifa'al Hapais* (Request for Civil Appeal 8189/11).

4 Labour Appeal, 15868-04-18, *Gabriel Kutah v. The Municipality of Ra'anana* (7 April 2021).

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Generally, Israeli law does not require a written employment contract, though there are some exceptions. However, employers are required to provide new employees (and existing employees at their request) with a written notification form regarding certain employment terms and to update them in writing regarding any changes thereto.

An employer is not obliged to provide this type of notification if the employee is provided with a written employment agreement that includes all the required details.

Employment contracts may be for a fixed term or an indefinite term, at the parties' discretion. The termination of a fixed-term contract prior to its expiry by one party (the employer) may entitle the other party (the employee) to damages in the amount of the salary for the remaining term.

ii Probationary periods

Probationary periods are permitted by Israeli law, but during such a period, an employee would still be considered a regular employee for all intents and purposes. The minimum statutory written prior notice for a monthly employee[5] is one day for each month during the first six months of employment, and two-and-a-half days for every additional month. A monthly employee who has worked for a year or more is entitled to one month's notice.

According to a labour court ruling, during a probationary period, the reasons for termination of an employment agreement may be examined in a more lenient manner.[6]

iii Establishing a presence

In general, a foreign company can hire employees directly in Israel without being required to officially register a subsidiary company or have a registered branch in Israel. However, it will be required to be registered with the tax authorities as an employer.

A foreign company can also engage individuals as independent contractors or as service providers through manpower companies or service contractors. In principle, a foreign employer who employs individuals directly is required to comply with local employment legislation. In addition, the foreign company has withholding obligations to the tax authorities as the employment income is subject to income tax, social security contributions and health tax.

Generally, the engagement of individuals by a foreign company (whether as independent contractors or as employees) may expose that company to the risk of being regarded as a permanent establishment in Israel. The main outcome of this would be that general income attributed to an Israeli permanent establishment will be subject to Israeli corporate tax.

V RESTRICTIVE COVENANTS

Non-compete restrictions during and after a employment relationship are a common feature of employment agreements.

During the employment period, limitations imposed by an employer on an employee's freedom of work are likely to be enforced, if the employee is in a full-time position. However,

5 Under the Prior Notice of Termination Law 5761-2001, a monthly employee is an employee whose remuneration for work is mainly paid once a month.

6 See, for example, ASK 56412-01-17, *Kobi Shimoni v. Israel Railways Ltd* (6 September 2017).

post-termination non-compete restrictions are rarely enforced. An employee would be prohibited from competing with a former employer only if it may harm a legitimate interest of the employer.[7] According to case law, non-compete covenants will not be enforced except in the following circumstances:

a the former employer owns a trade secret that is unlawfully used by the employee;
b the former employer invested unique and valuable resources in the employee's training;
c on termination of the employment, the employee received special consideration in return for his or her non-compete undertaking; or
d when balancing the employee's conduct and good faith in taking the new position and his or her obligation of fidelity towards the former employer, the non-compete covenant can be justified.[8]

Even if a court decides to enforce a non-compete covenant, the enforcement would only be with respect to an obligation that can be considered reasonable given the scope of the employee's position, the period of the restriction, the field in which the employer operates and the relevant geographical limitation. Accordingly, the court can redraft the non-compete obligation to make it reasonable.[9]

VI WAGES

i Working time

The issue of working hours and overtime is governed by the Hours of Work and Rest Law and additional legislative sources, such as extension orders.

The Hours of Work and Rest Law was amended in April 2018, the effect of which was to shorten the working day, which now consists of 8.6 hours per day on four weekdays and 7.6 hours a day on one working day of the employer's choice (which should take into account the employee's request), amounting to 42 hours per week and 182 hours per month.

According to this Law, night work is defined as a minimum of two hours' work between 10pm and 6am. Night work must not exceed seven hours per day (not including overtime) and an employee must not carry out night work for more than one week in every two.

ii Overtime

There are limits to the amount of overtime that may be performed in a given period, other than for employees who are excluded from the Hours of Work and Rest Law (under exceptional circumstances).

Overtime compensation must be paid after working 8.6 hours per day (or 7.6 hours on the relevant shortened day) or 42 hours per week. For the first two hours of overtime, an additional 25 per cent is paid per hour, and for the third hour of overtime and thereafter, an additional 50 per cent per hour.

Employees may generally work up to 12 hours per day, in total, and up to 16 hours of overtime per week.

7 LA 164/99, *Frumer v. Radguard Ltd* PDA 34, 294 (1999); CA 6601/96, *AES Sys Inc v. Saar* PDI 54 (3), 85 (2000).

8 LA 164/99, *Frumer v. Radguard Ltd* PDA 34, 294 (1999).

9 CA 6601/96, *AES Sys Inc v. Saar* PDI 54 (3), 85 (2000).

VII FOREIGN WORKERS

An Israeli employer may employ a foreign employee in Israel provided that:

a the employee has an unrestricted visa allowing him or her to work in Israel regardless of the employer's identity; or

b the employer has a permit to employ a foreign employee who has a visa based on this permit.

The permit is usually issued for 12 months and can be extended, subject to the discretion of the relevant authorities, for additional 12-month periods, up to a maximum of five years and three months. Permits can also be issued for periods of up to 45 days, three months or two years.

In general, permits are granted in five sectors: construction, agriculture, nursing, services and industry. A common type of B-1 permit is a permit to employ 'foreign experts' in which:

a the foreign expert must demonstrate a high degree of expertise or unique and essential knowledge to the service provided by the employer, which is absent in Israel; and

b his or her monthly salary shall not be less than twice the average salary in Israel (as of 2020, 20,856 shekels).[10]

An employer may employ an unrestricted number of foreign employees who do not require a permit. There is no limit on the number of permits for which an employer can apply. However, the authorities will take into consideration the number of foreign employees an employer has, compared with the total number of its employees.

Employment of foreign employees in Israel is subject to local labour legislation, including CBAs (when applicable) and extension orders.

The duties of enterprises employing foreign workers include providing medical insurance and, in some cases, accommodation. In addition, the employment can be subject to a special tax in addition to the taxes that apply to other employees, except in certain situations, such as when an employee earns more than twice the average salary in Israel.

VIII GLOBAL POLICIES

There is no mandatory requirement for applying disciplinary rules. However, these types of rules are quite common in unionised workplaces (as part of a CBA with the employees' representative committee) and in companies that are subject to global policies in light of being part of a group of companies. Disciplinary rules are regarded as part of an employee's terms of employment.

There are mandatory rules and policies that an employer is required to adopt, such as the model rules for the prevention of sexual harassment according to the Prevention of Sexual Harassment Regulations 5758-1998.

In general, disciplinary rules are not required to be filed with or approved by any government authorities, but they should comply with applicable law and general legal principles.

10 This amount is updated annually.

Generally, for disciplinary rules to be applicable to them, employees should consent to the rules, either explicitly or implicitly. It is recommended that the employer's rules be accessible to the employees (such as on a bulletin board or intranet site) to reduce claims that the employees were not aware of them (or any amendment to them).

Disciplinary rules are not required to be written in the local language. However, they should be in a language that the employees understand.

IX PARENTAL LEAVE

The Employment of Women Law 5714-1954 and its regulations set out the rights of women and their partners in the workplace, including during fertility treatment, pregnancy and after giving birth.

Employees are entitled to statutory maternity leave (known as birth and parenting leave (BPL)), which may be taken by the mother or shared between both parents.

An employee is entitled to 26 weeks of BPL if she has worked for the same employer or at the same workplace for at least 12 months (otherwise, the entitlement is 15 weeks). The BPL may be extended in certain circumstances, such as hospitalisation of the employee or the child, or a multiple birth.

In general, the National Insurance Institute (NII) makes payment for 15 weeks of BPL, subject to certain entitlement criteria, as determined by the National Insurance Law [consolidated version], 1995. The rest of the BPL (i.e., 11 weeks) is unpaid.

According to law, an employee whose partner has given birth is entitled to BPL, to be paid by the NII, as of the end of the first six weeks following the delivery, so long as certain conditions are met. These include provision of a written waiver from his partner of her entitlement to the remainder of her BPL, and that she returns to work. In certain cases, usually when the employee has sole custody of the child or is the sole carer (e.g., because of the mother's medical condition), he will be entitled to the entire BPL.

An employee or, in certain circumstances, her partner may be entitled to statutory unpaid leave after the completion of BPL, which may equate to a quarter of the employee's length of service (less the period of the maternity leave exceeding 15 weeks that was actually taken by the employee), though in no case longer than a year following the birth.

There are a number of other employee entitlements in this area, such as time off for antenatal appointments, the right to work one hour less per day (without reduction in pay) for a limited period after returning from BPL, and time off for fathers around the time of birth, all of which are subject to requirements and conditions.

Pregnant employees, those undergoing fertility treatment and employees on BPL, statutory unpaid leave and for a certain period thereafter, are all protected from dismissal (subject to conditions). Note that specific ministerial approval may be obtained to allow such a termination in certain circumstances if the employer can show that it is not occasioned by the special circumstances of the employee. See Section XIII.i for further discussion on this point.

X TRANSLATION

There is no requirement that employment contracts be written in any specific language, as long as the employee understands the language (except with regard to foreign employees, for whom the Foreign Employees Law 5751-1991 expressly provides that the employment

contract should be written in a language the employee can understand). In this respect, it is common for global companies to provide employment-related documents (including employment contracts and confidentiality agreements) in English.

There is no clear recommendation as to whether to provide employment documents in Hebrew, and the decision usually depends on the employees in the company and the extent of their knowledge of the foreign language.

Providing employees with employment-related documents in a language they do not understand may result in employees claiming that they are not subject to their terms (as they did not understand them), and may affect the employer's ability to enforce them.

XI EMPLOYEE REPRESENTATION

Employees are permitted, but not required, to establish a union if none exists. The right of unionisation is regarded as a fundamental right of employees.

For the purpose of defining the representative organisation in the workplace, the general rule is that, in a specific workplace, there should be one bargaining unit, meaning that at least one-third of the total employees are members of the union. Splitting the natural bargaining unit can be done consensually by the bargaining parties – namely, the union and the employer.

The election procedures for representatives are set out in the articles of association of each union or employee committee. The length of the term of the representative committee may change from one committee to another, in accordance with its articles of association.

Employees have a general right to enrol as members of a trade union and to authorise the union to act on their behalf. The law defends this right by prohibiting the employer from preventing any trade union representative from entering the workplace to organise the employees and advance their interests, and revoking or reducing any employee rights, including terminating employment, on the ground of an employee's membership or activity within a trade union or on the grounds of his or her activity in establishing a representative body in the workplace.

The National Labour Court has also ruled that, during initial unionisation, the presumption is that the expression of the employer's opinion could exert pressure that may constitute an unjustified influence on the employees. Therefore, an employer is not allowed to publicly express its views against the organisation of its employees, let alone take any action in an attempt to avert it.[11] In recent years, the regional labour courts have imposed significant compensation on employers that have acted to thwart initial unionisations by various means (such as putting pressure on employees to abolish their union membership, giving legitimacy to actions against the unionisation, discriminating against unionised employees, and acute expressions of opinion against the unionisation made by senior managers).[12]

11 *Pelephone* decision: *New General Workers' Union v. Pelephone Communications Ltd* (2 January 2013) 25476-09-12. A motion to the High Court of Justice was rejected.

12 SK 49105-08-16, *New General Workers' Union v. The Medical Rehabilitation Centre 'Ba'it Balev' Bat-Yam*; ASK 61532-12-16, *The Medical Rehabilitation Centre 'Ba'it Balev' Bat-Yam v. New General Workers' Union*; SK 29252-04-18, *New General Workers' Union v. Neto Melinda Trade Ltd*; SK 52024-03-16, *New General Workers' Union v. S. Shlomo Insurance Company Ltd*.

The court has further stipulated that in an initial unionisation, a workers union has an obligation to act towards the employer with complete decency and transparency, and must avoid any action that may harm or damage the employer's assets or property.[13]

An employer has a legal obligation to negotiate with the union in the initial stages of its formation in the workplace, with respect to, among other things, hiring and firing, termination of employment, and employment terms and conditions. However, the law emphasises that this does not require the employer to sign a CBA, but rather only to negotiate with the union.

In organised workplaces, the employer is obliged to negotiate with the trade union with respect to various specific employment matters, including engagement, dismissal and terms of employment. If the employer does not respond to its employees' demands and refuses to sign a CBA, the trade union can potentially declare a work dispute and initiate a strike.

XII DATA PROTECTION

i Requirements for registration

The Protection of Privacy Law 5741-1981 regulates the matter of databases and their registration. It defines 'database' as 'a collection of data, maintained by magnetic or optical means and intended for computer processing'.

'Data' is defined under the Protection of Privacy Law as 'information about an individual's personality, personal status, intimate affairs, health condition, financial condition, professional qualifications, opinions or beliefs'.

Under the Protection of Privacy Law, it is necessary to register a database (in the databases' registry maintained by the Israeli Registrar of Databases) if, inter alia, it:

a contains data about more than 10,000 individuals;

b contains sensitive data (see Section XII.vi);

c contains data about persons that was not provided by them, on their behalf or with their consent; or

d is used for direct mailing services. Under the Protection of Privacy Law, 'direct mailing' is defined as 'approaching a specific person based on his/her belonging to a group of the population that is determined by one or more characteristics of persons whose names are included in a database', and 'direct mailing services' is defined as 'providing services of direct mailing to others by way of transferring lists, labels, or data by any means'.

Human resources databases in workplaces are generally considered to include sensitive data and, consequently, should be registered according to the Protection of Privacy Law. In addition, no person may use the data included in a registered database except for the purposes for which it was established.

Currently pending is a memorandum of law to amend the Protection of Privacy Law, which seeks to reduce the scope of the obligation to register databases and apply it only to databases that contain:

a data on 100,000 data subjects or more, that also meet at least one of the following criteria:

- the main purpose of the database is to collect data for the purpose of providing it to others, as a way of doing business, including direct mailing services;

13 SK 43286-09-17 *New General Workers' Union v. Soda Stream Industries Ltd*.

- the database includes data about data subjects not provided by them, on their behalf or with their consent; or
- the database is owned by a government ministry or other state institution, local authority or other body that performs public functions under law; or

b data of special sensitivity about 500,000 data subjects or more.

If such a bill is adopted, human resources databases will most likely fall outside the scope of the registration obligation.

ii Data security

Under the Protection of Privacy Law, the owner, the holder and the manager of a database are each individually responsible for the protection of the data held. The Protection of Privacy Law defines 'data protection' as 'protection of the integrity of the data, or protection of the data against exposure, use or copying, all when done without due permission'. It is customary to limit access to a database to individuals who have reasonable needs to use the information included in the database.

The Protection of Privacy Regulations (Data Security) 5777-2017 establish a broad and comprehensive arrangement regarding the physical and logical protection of databases and their management.

iii Notice and consent

Section 11 of the Protection of Privacy Law provides that any request for data made to a person, with the intention of keeping and using it in a database, shall be accompanied by a notice indicating (1) whether that person is under a legal obligation to deliver that data or whether its delivery depends on his or her decision and consent, (2) the purpose for which the data is requested, and (3) the person or entity to whom the data will be delivered and for what purpose. Based on case law, employees are required to provide their explicit consent to such a notice.

iv Cross-border data transfers

The export of data outside Israel from a database subject to the Protection of Privacy Law is regulated by the Protection of Privacy Regulations (Transfer of Data to a Database Outside the State Borders) 5761-2001. These Regulations prohibit the transfer of data from an Israeli database to a database located abroad, unless the receiving country ensures a level of protection of data that is not lower than the protection provided for under Israeli law.

In addition, the Regulations lay down conditions that enable the transfer of data from an Israeli database to a database abroad, even when the overseas law provides a level of protection that falls below that provided under Israeli law. These conditions include, for example, obtaining the individual's consent to the transfer of the data, the data is being transferred to a database in a country that receives data from Member States in the European Union, under the same conditions of receipt, and the data being transferred to someone who has agreed to fulfil the conditions laid down in Israel.

In addition to the fulfilment of any of the above-mentioned conditions, the Regulations state that the owner of the database must ensure (by way of written obligation) that the recipient takes steps to ensure the privacy of data subjects, and that the data shall not be transferred to any other person, whether that person be in the same country or not.

Accordingly, onward transfer of data to a third party located outside Israel is not permitted, unless the owner of the database entered into a direct agreement with that third party, which includes, inter alia, the aforementioned requirements.

On 29 September 2020, the Israeli Privacy Protection Authority (PPA) issued a statement regarding the transfer of personal data from Israel to the United States, in light of the annulment of the EU–US Privacy Shield framework for the transfer of personal data from Europe to the United States by the European Court of Justice (ECJ) following the *Schrems II* case. With the annulment of the Privacy Shield framework by the ECJ, the PPA clarifies that the exception set forth under the Regulations with respect to the sharing of personal data with an organisation residing in a country that receives data from EU Member States, under the same conditions of receipt, can no longer be relied on as basis for transferring personal data from a database in Israel to US-based organisations, even if these organisations are bound by the principles of the Privacy Shield framework. Therefore, for the time being, Israeli companies are advised by the PPA to implement, to the extent applicable, other alternatives available under the Regulations for the purpose of transfer of personal data to the United States.

In addition, the PPA published a statement of opinion according to which, in accordance with the Transfer Regulations, personal data can still be transferred to Great Britain and Northern Ireland, even after Brexit, on the basis of the exception set forth in the Transfer Regulations, since Great Britain and Northern Ireland are signatories to Treaty 108 (Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data).

v Data subject rights

According to Section 13 of the Protection of Privacy Law, every person is entitled to inspect, either by himself or herself or through a representative authorised by him or her in writing or by his or her guardian, any data about him or her that is kept in a database. In addition, under Section 14 of the Protection of Privacy Law, when a person who, on inspecting any data about himself or herself, finds that it is incorrect, incomplete, not clear or not up to date, he or she may request that the owner of the database or, if the owner is a non-resident, the holder of the database, amend or delete the data.

vi Sensitive data

Under the Protection of Privacy Law, 'sensitive data' is defined as 'data on a person's personality, intimate (i.e., private) affairs, state of health, financial conditions, opinions and beliefs'. Sensitive data is interpreted very broadly by the Israeli courts and the Israeli Protection of Privacy Authority as encompassing types of personal information that are not specifically mentioned in the definition of sensitive data, all depending on the specific circumstances of the matter.

As stated above, if a company maintains sensitive data by electronic means for processing, it is required to register a database.

vii Outsourcing

Any owner of a database who outsources services that involve the processing of personal data by a third-party service provider, must enter into a written agreement with the third-party service provider, which will determine certain security measures and safeguards, such as the purpose of the processing, the return or destruction of data on termination of the services, supervision rights on the service provider's activities and a binding security document.

viii Background checks

Background checks on candidates must respect the individual's right to privacy, and be reasonable, relevant, proportionate and carried out in good faith.

In respect of publicly available information, there is no specific requirement to obtain an individual's consent. As regards non-public information, the need for prior written notice and informed consent depends on the circumstances.

Requesting information with respect to protected criteria under the Employment Equal Opportunities Law 5848-1988 (e.g., regarding race, gender, age or religion) will usually shift the burden of proof to the company in the event of a discrimination claim, to show that it did not unlawfully take into account any protected criteria in making the employment decision.

As noted in Section II, criminal background checks are generally not permitted, other than in certain limited circumstances, where they are directly relevant to the position sought and where there are specific legal restrictions on hiring applicants with criminal convictions.

As of April 2019, a new Credit Data Law came into force (the New Credit Law). This Law completely prohibits an employer from requesting or obtaining information regarding an individual's credit data and credit rating for the purposes of employment, including through a questionnaire or declaration from the candidate (with an exception regarding credit data published in public databases according to law). The New Credit Law also provides that the courts have the power to oblige a person who has requested or received credit data information, in violation of the provisions, to pay the candidate compensation without proof of damage.

It is forbidden to request information regarding military and genetic profiles.

ix Covid-19 and employees – privacy implications

In combating the rapid proliferation of the coronavirus, the Israeli government has implemented a series of restrictive measures with the purpose of controlling and limiting its spread. These measures present privacy challenges, mainly focusing on the right balance between the protection of employees' constitutional right to privacy and the need to prevent the spread of the coronavirus.

The PPA has published guidelines referring to the major risks associated with distance or remote working and the prudent organisational and technological tools and steps that the PPA recommends to implement to reduce the associated security risks.

The PPA has also issued guidance according to which employers may be entitled to share personal data with co-workers or others regarding an employee whom they know, or reasonably suspect, has been infected with the coronavirus, even without the individual's consent. Such a disclosure may be defensible from a privacy law perspective, for example in circumstances where sharing the information is vital for the protection of the health of those who have been in contact with the employee and it is done in good faith.

A publication issued by the PPA sets out recommendations for the protection of privacy of individuals participating in epidemiological investigations that are being conducted for the purposes of containing the spread of the coronavirus, including in the private sector.

It should be further noted that it is the position of the PPA that vaccination data can be collected and stored in a computerised database provided (1) the employee has voluntarily consented to this information being collected and stored, and (2) the processing of the information is for legitimate purposes.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

As a general rule, employers must exercise their right to terminate an employee's employment in good faith, for valid reasons[14] and in compliance with applicable laws, any written employment contracts, workplace customs and CBAs or extension orders, if applicable.

In addition, according to court decisions, all employers are required to hold a hearing prior to making a decision regarding a termination of employment. The purpose of the hearing is to inform the employee of the employer's reason and give him or her the opportunity to respond. A hearing is required in all circumstances, regardless of whether the dismissal is based on redundancy, poor performance or misconduct.

In certain circumstances, terminating employment may be prohibited or subject to obtaining ministerial approval.[15] Israeli law prohibits the termination of employment for certain groups of employees, such as pregnant women, employees expecting to adopt children, become foster parents or become parents with the assistance of surrogacy, employees undergoing fertility treatment, employees on maternity or paternity leave and for 60 days thereafter,[16] employees on army reserve duty[17] and employees on sick leave.[18]

In workplaces where a collective relationship exists, or a CBA or extension order applies, the process of termination, which is often included therein, usually involves the participation of employee representatives.

In general, employees are not entitled by law to a social plan or the right to be rehired.

According to some court decisions, in certain circumstances, prior to making a decision regarding termination of employment, employers are required to consider whether they can offer the employee an alternative position within the undertaking.

Under Prior Notice Before Termination Law 5761-2001, employers must provide the employee with prior written notice when ending the employment relationship. An employer

14 Valid reasons for dismissal may include poor performance, redundancy and disciplinary action.

15 Ministerial approvals for the termination of employment may be obtained in certain circumstances if the employer demonstrates that it is not the result of the special circumstances of the employee (such as the employee being pregnant).

16 Employment of Women Law 5714-1954; ministerial approval is required for all the aforementioned groups.

17 The Discharged Soldiers (Reinstatement in Employment) Law 5709-1949. In general, unless a ministerial permit is granted in advance, the termination of employment during military reserve service is prohibited, as is termination within 30 days of reserve service lasting longer than two days.

18 Under Sick Pay Law 5736-1976, employers are prohibited from terminating the employment of an employee who is absent from work owing to an illness during the period in which the employee is using his or her accumulated sick leave.

may choose to pay the employee in lieu of notice. Payment in lieu is equal to the salary the employee would have received had the employee continued to work throughout the notice period.

Under the Severance Pay Law 5723-1963, an employee who is dismissed after completing at least one year's service is entitled to statutory severance pay. This is calculated based on the employee's monthly base salary multiplied by the number of years of service.

In general, employees can negotiate contractual payments or benefits, or reach a compromise, only if these entitlements are over and above statutory entitlements.

Furthermore, it is common for employers to ask employees to sign a letter of receipt of their final payments and a release of claims against the employer. According to case law, a release does not constitute a formal bar to future claims by employees. However, it may be enforced if certain conditions are met, such as:

a employees being aware of the rights that he or she waived;
b employees being presented with a clear and comprehensible account of the sums they received before signing the release;
c the release being clear and unambiguous; and
d employees signing the release of their own free will and not as a result of coercion by the employer.

ii Redundancies

As a general rule, Israeli case law requires an employer to inform and consult employees with respect to redundancies. However, the law does not specify the form, timing or content of these obligations. If a CBA, or any other binding legal document, applies to the affected employees, it may set out specific procedures for redundancies, including the bodies the employer must consult.

In the absence of specific provisions, there is a general duty to carry out consultation in good faith before any final decisions are made. In general, employees should be provided with relevant information regarding the anticipated dismissals, such as general information regarding the financial situation of the employer, when the redundancies need to take place owing to lack of profit.

In practice, the obligation to inform and consult employees is only practical when an employee representative body exists and can therefore be consulted.

The obligation to inform and consult employees does not detract from an employer's general obligations with respect to the termination of employment, including holding personal hearings with each employee (see Section XIII.i). Thus, employees whose contracts are terminated by reason of redundancy have the same personal rights as any other employee whose employment is terminated.

XIV TRANSFER OF BUSINESS

There are no regulations in Israel in the style of the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006 (referred to as TUPE). In principle, an employee cannot be transferred to another employer without his or her consent. Therefore, if an employee does not consent to the transfer, the seller would either continue the employment of that employee or terminate the employment relationship.

In practice, there are two methods of transferring employees, for example, on the sale of a business:

a fire and rehire, in which the original employer terminates the employees' employment and the new employer hires them; and

b continuity of rights, in which the buyer steps into the seller's position as employer for all intents and purposes. In these circumstances, subject to employee consent, the buyer assumes all the seller's obligations while maintaining employees' rights and entitlements.

When there is an active union or works council at the workplace, employers need to inform employees about the forthcoming change, and consult and negotiate with regard to their employment terms after the change.

The original employer is required to provide its employees with prior notice of termination (or pay in lieu thereof), even if the new employer is willing to hire the employees and continue their employment immediately following the termination.[19]

XV OUTLOOK

i Implementation of the Amendment to the Equal Pay for Female and Male Employees Law – reporting obligation

In 2020, an amendment to the Equal Pay for Male and Female Employees Law, 1996 was adopted and imposed a duty on all public sector employers and on all employers employing more than 518 employees to publish an annual report detailing the average salary gaps between male and female employees.

The first report, for the year 2021, must be published by 1 June 2022. Accordingly, we anticipate that the coming months will shed further light on the requirements involved in the implementation of this amendment and the employer requirements in relation thereto.

ii Legislative amendments based on the 'Package Deal'

At the beginning of November 2021, Israel adopted a 'Package Deal', the purpose of which is to calm the economy and create terms of relative stability, to enable economic recuperation. The 'Package Deal' was reached following agreements that balanced the needs of employers, employees and the government, in a manner that will promote flexibility in employment.

The main principles of the 'Package Deal' are as follows:

a Legislative amendments to employment laws – unifying a range of amendments to various employment laws within one bill, to create a quick and efficient process, namely:
- minimum wage – a gradual increase in the minimum wage from 5,300 to 6,000 shekels per month;
- hours of work and rest – a flexible working clock for certain groups of employees, subject to certain terms (e.g., the employees' rate of salary, to ensure that low-earning employees are not harmed by this change). Employers will examine employees' working hours on a monthly basis, and overtime hours (the first two overtime hours per day) will be taken into account in place of regular hours that were not worked. This arrangement is limited to 17 hours a month, and these

19 LA 28597-03-11 *Dabush v. Yardeni Locks Holdings (2005) Ltd* (11 February 2015).

hours will be paid for at the regular hourly rate, rather than the legal overtime rate. Work on the weekly rest day or national holidays will not be included in this arrangement; and

- annual leave law – an amendment to the annual leave law to add one day of annual leave for each of the first five years of employment, increasing the entitlement from 16 to 17 calendar days per year;

b formulation of an action plan in relation to employee abuse of sick leave days – it is not an uncommon practice for employees to use accrued sick leave days within termination processes, in an abusive manner, to postpone the process. Recommendations to prevent this conduct are expected to be presented by 30 June 2022; and

c increase in the daily working hours quota – an intention to increase the maximal daily working hours limitation from 12 hours to 13.5 hours per day, subject to employee consent, by way of a general permit in industrial branches.

Appendix 1

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Keren Assaf is a senior associate in Herzog Fox & Neeman's labour and employment law practice group, advising local and international clients on a wide range of labour and employment law matters.

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Orly Gerbi is the head of Herzog Fox & Neeman's labour and employment law department. Orly leads a professional team consisting of approximately 40 members, 11 of whom are partners, in what is known as one of Israel's foremost labour law practices. Orly and her team are consistently ranked in the first tier by all domestic and international ranking guides.

Orly has extensive expertise in representing leading international and local entities in both the public and private sectors. She advises these entities on a wide range of labour and employment law matters, including employee benefits and executive compensation.

Orly is a board member of the Israeli Society for Labour Law and Social Security. She has also been the leader of the employment and labour law forum of the Association of Corporate Counsel for many years. She frequently organises, moderates and lectures at a broad spectrum of local and international conferences as well as forums and seminars, including with the Ministry of Economy and the National Israeli Economic and Social Counsel.

The labour and employment law department is one of the stand-out practice groups among Israeli law firms. It combines the experience and expertise normally found in a leading boutique law firm with the capabilities of a major full-service international law firm.

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Maayan Hammer-Tzeelon is a partner in Herzog Fox & Neeman's labour and employment law practice group. Maayan advises on a wide range of labour and employment law matters, including employee recruitment, employment terms and conditions, compensation and retirement packages, human resources policies, equal opportunities and terminations. In addition, she advises on international transactions, mergers and acquisitions, organisational changes and privatisations. Maayan also represents clients in litigation proceedings in all courts, as well as arbitration and mediation proceedings.

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ISBN 978-1-83862-278-7