# The Employment Law Review

Third Edition

Editor

Erika C Collins

Law Business Research

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# THE EMPLOYMENT LAW REVIEW

Third Edition

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# EDITOR'S PREFACE

*Erika C Collins*

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

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

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

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

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

**Erika C Collins**
Paul Hastings LLP
New York
January 2012

# Chapter 39

# RUSSIA

*Irina Anyukhina*[1]

## I INTRODUCTION

The labour relationship between employees and employers of all types (including legal entities, individual entrepreneurs and natural persons) in Russia is governed by the Constitution, the Labour Code, federal laws and other statutory acts containing norms of labour law. The parties to a labour relationship cannot contract around requirements imposed by Russian labour law.

The Labour Code is the main codified statutory act that regulates labour relations based on constitutional principles. Additionally, there are federal laws regulating various important aspects of labour relations.

In Russia, cases related to employment issues are to be presented before a court of general jurisdiction. The terms and procedures of the trial are specified in the Civil Procedure Code.

Along with the judicial opportunity to protect labour rights, there are also other options set forth in the Labour Code. An employee may alternatively pursue self-protection of labour rights, protection of labour rights and legitimate interests by labour unions, state authorities' supervision, and control of labour law observance. For instance, the employee may apply to a commission on labour disputes convened on a parity basis by the employer's and employee's representatives and settle a labour dispute out of court, if the dispute is not exclusively subject to the consideration of the court of general jurisdiction.

In different areas of the employment law and employment relations, certain government agencies are competent. General issues related to state supervision and control of labour are the responsibility of the federal labour and employment agency. Migration is monitored and regulated by the federal migration service; personal data processing is the responsibility of the federal supervision agency for communication,

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information technology and mass communication; sanitary and epidemiological control is covered by the federal supervision agency for customer protection and human welfare, etc. Authorities of the constituent states of the Russian Federation, municipal bodies and the public prosecutor's office also oversee the observance of employment law.

## II YEAR IN REVIEW

This year was not marked by significant changes in employment law. Several important issues were under consideration by the State Duma: the adoption of a new Labour Code, the abolishment of employee work books and an increase in the retirement age. However, none of the above-mentioned proposals have been passed.

Changes that were introduced include the following:

*a* Changes were introduced in the procedure for handling collective employment disputes in November 2011. Specifically, time periods for handling collective employment disputes on a local level (within the legal entity), settling the matter for hearing at a collective employment case, and informing employees of the decision made were all reduced. Some additional rules for the arbitration of collective employment disputes were determined.

*b* Changes related to the 'social sphere' were implemented. In particular, the minimum wage was increased, state pension amounts were adjusted, unemployed persons were provided with a right to obtain professional training in employment centres, and special centres providing gratuitous legal assistance to vulnerable sectors of society were established.

*c* Certain amendments to migration law were adopted. Due to these amendments, foreign highly qualified specialists working in Russia are now allowed to engage in educational work without a work permit or work visa, while family members accompanying the highly qualified specialist are entitled to obtain work visas within a simplified procedure. Also, a simplified procedure for obtaining a work permit and work visa was set out for French and South Korean citizens working in Russia.

## III SIGNIFICANT CASES

In September 2011, the Supreme Court of the Russian Federation published a decision concerning public holidays (non-work days). The Supreme Court resolved that Muslim holidays – such as Eid al-Adha and Eid al-Fitr – cannot be recognised and stipulated as a public non-work holiday even for those constituent entities of the Russian Federation where the Muslim population is in the majority. Stipulating a day off for such holidays was deemed to be discriminatory on a religious basis. The effect of this decision is currently postponed because of a further appeal to the Supreme Court decision.

Furthermore, two decisions by the Russian courts of general jurisdiction were aimed at the protection of employees' rights: they imprisoned the CEO of a legal entity for the evasion of personal income tax and an individual entrepreneur for non-payment of employees' salaries. Previously, for similar violations, in the majority of cases courts only punished employers with fines.

## IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

### i Employment relationship

A written employment contract setting forth the basic terms of the employment relationship and employment duties must be concluded with every employee working in Russia. The conclusion of the employment contract is the employer's obligation. If the employee actually starts working before the conclusion of a written contract, the employment contract with such employee is deemed concluded, and the employee cannot be deprived of rights provided for by the labour law.

Employment contracts may be executed either for an indefinite period or for a fixed period, but not for more than five years (fixed-term employment contract).

A fixed-term employment contract can only be concluded on the grounds provided by law. These circumstances are divided into two groups: where a fixed-term is required and where a fixed-term can be decided upon the agreement of the parties. In all other cases, the contract should be for an indefinite period.

A fixed-term employment contract is statutorily required when the employee is hired, in particular, under the following circumstances: for the term of executing the duties of an employee who is on a leave of absence but who retains his or her job; for the term of performing temporary (up to two months) work or seasonal work; with persons who are sent to work abroad; for the purpose of performing work that goes beyond the framework of an employer's ordinary activity; with persons who work for organisations that are intentionally formed for a fixed period of time or for the purpose of completing a certain task; or with persons who are hired to carry out definite work, the term whose completion cannot be determined by a specific date, and in some other cases provided by law.

Upon agreement of the parties, a fixed-term employment contract may be executed under, *inter alia*, the following circumstances: with persons hired by small businesses (including individual entrepreneurs) having up to 35 or 20 employees; with pensioners (who obtain this status due to their retirement age); with persons who are allowed temporary work exclusively, pursuant to a properly issued medical certificate; for the purpose of carrying out emergency work aimed at preventing catastrophes, disasters, accidents, epidemics, epizootics and for the elimination of the aftermath of such and other emergencies; with creative employees of the mass media, cinematographic organisations, theatres, theatrical and concert organisations and circuses, etc. and with the heads, deputy heads and chief accountants of organisations, and in some other cases provided by law.

In all other cases, an employment contract should be for an indefinite period. An employment contract concluded for a fixed term in the absence of sufficient reasons, as established by the court, is deemed to be concluded for an indefinite period of time. Moreover, in cases where several fixed-term employment contracts have been executed to perform the same type of work, the court may decide, taking into account details of the case, that the employment contracts last for an indefinite period.

The employment contract should contain information on the parties, place and date of conclusion. It must specify the place of work, its commencement date, the position of the employee according to the staff schedule of the company, the rights and duties of the parties, remuneration (these are mandatory provisions of the contract) and other

provisions. It is forbidden to stipulate directly or indirectly any limitations or privileges depending on the age, nationality, religion, sex or political views of an employee.

It is the employer's obligation to conclude the employment contract with the employee in writing no later than within three working days from the day the employee was actually admitted to work.

Substantial provisions of an employment contract can only be modified at the mutual consent of the parties thereto, for instance, by addenda or attachments to the employment contract. In the event of changes to the organisational or technological conditions in the company, the employment contract can be amended without the consent of the employee provided that his or her function will not be changed. Such changes are subject to two months' prior notice.

### ii Probationary periods

An employer has the right to establish a three-month probation period for a newly hired employee. As an exception to the above rule, an employer may establish a six-month probation period for employees hired for certain top executive positions (e.g., head of a company, chief accountant, their deputies; head of a branch or representative office of an enterprise).

There are some categories of employees for whom the probation period should not be stated at all, such as pregnant women or women with children under one-and-a-half years old, or employees that are starting a job within one year of graduation from an educational institution.

The probation period should be specifically provided for by the employment contract. In the absence of such provision in the employment contract, no probation period is considered to be established for the employee. During the probation period, if the employer determines that the employee does not meet the criteria established for the job position for which he or she was hired, an employee can be dismissed by the employer without a severance payment by giving three days' written notice specifying the reasons for dismissal. An employee is entitled to resign during the probation period without any reason with three days' written notice to the employer.

### iii Establishing a presence

Generally, a foreign company can hire employees without being officially registered to carry on business in Russia; however, if it employs (or intends to employ) an individual to work in Russia for more than 30 calendar days (continuously or cumulatively) in a year, it is obliged to obtain Russian tax registration.

A foreign company is not prohibited from hiring employees through a specialised agency or another third party, for example under an outsourcing agreement. Since such employees conclude employment contracts with the specialised agency or another third party, a foreign company has no obligation to pay remuneration to the hired employees or withhold or pay corresponding taxes.

Under certain conditions, tax registration issues and permanent establishment risks for a foreign company may arise (see below).

A foreign company may engage an independent contractor under a service agreement (i.e. a civil law contract) without tax registration in Russia. In this situation,

under certain conditions said relationships can lead to the creation of a permanent establishment ('PE') of a foreign company in Russia. Pursuant to the Tax Code provisions, a PE is a branch, representation, department, bureau, agency or any other separate subdivision or other place of activity of the company or a 'dependent agent' through which this foreign company regularly conducts commercial activities in Russia.

A dependent agent of the foreign company for tax purposes is a Russian company (or individual or individual entrepreneur) who acts based on an intercompany agreement, exclusively represents this foreign company in Russia and conducts regular business activities (i.e., negotiates and concludes agreements) on behalf of this foreign company.

Therefore, if the activity of a foreign company through an independent contractor creates a PE in Russia, such foreign company may be subject to full taxation in Russia.

Among the statutory payments that are required to be paid to employees are salary, sick leave allowance, annual holiday pay and other additional payments stipulated for certain categories of employees.

Foreign employees are entitled to some of the local benefits provided to Russian employees (e.g., payment for annual holiday).

Some statutory benefits are not subject to personal income tax. Income that is not taxable includes:

*a* state allowances, including maternity leave and unemployment benefits; and

*b* all types of compensations payable in accordance with effective laws within established limits (e.g., reimbursement of harm caused by injury or other damage to health, dismissal of employees, including compensation for unused holiday, the expenses involved in the improvement of professional skills of employees, etc.).

The employer paying statutory benefits in favour of employees is obliged to declare them and withhold personal income tax at the source.

## V RESTRICTIVE COVENANTS

Pursuant to Russian law, non-competition clauses in employment contracts are not enforceable, since one of the main labour principles protected by law is that each employee has freedom of labour, including the right to work, and any person is free to choose his or her profession or type of activity.

Following these principles, the law does not allow a company to restrict an employee from working for another employer (a competitor). If a non-competition clause is included in an employment contract, it cannot be legally applied and will not be enforceable in Russian courts. The only statutory possibility allowing companies to restrict or control work for third parties relates to heads of companies: pursuant to the Labour Code, a general director (CEO) can work for another employer only upon the consent of the authorised body of his or her employer.

## VI WAGES

### i Working time

Employers are required to keep a record of the working hours of every employee, including any overtime. The regular working week is 40 hours, or less for certain categories of employees and working conditions.

An employee may be expressly engaged for night work under an employment agreement. In this case, the statutory requirements for payment shall be that each hour of work during the night shall be compensated at a higher amount than work during the normal working day. Such rate of pay must be at least 20 per cent greater than the normal hourly payment for a day's work.

### ii Overtime

Any time worked over 40 hours per week is classified as overtime and may only be required by employers with the employee's prior written consent. Without the employee's consent, overtime work may be required only in emergency situations (fire, accident, disasters, etc.).

Pursuant to the labour laws, overtime should be compensated as follows:

*a* for the first two hours of overtime, the compensation should be no less than one-and-a-half times the usual hourly rate;

*b* for subsequent hours of overtime, the compensation should be no less than double the usual hourly rate; or

*c* in accordance with an employee's wishes, overtime work may alternatively be compensated by the provision of additional rest periods or time off work. However, this period may not be for less time than the overtime actually worked.

An employee's overtime work cannot exceed four hours over two consecutive days or 120 hours per year.

## VII FOREIGN WORKERS

The law does not stipulate a requirement for employers to keep a register of foreign employees. Generally there is no limit on the number of foreign employees that may be engaged by Russian-registered corporations. Representative offices of foreign companies may hire up to five foreign employees. Despite the general rule, the company may not be allowed to hire as many foreign employees as it wishes: in the year preceding the prospective employment of foreign workers, the company needs to apply for a quota. The company submits a special form, indicating how many employees it expects to employ next year, their professions, job titles and countries of origin. Filling in and submitting the form does not guarantee that the company will be allowed to hire foreign employees or employees from certain professions or with certain qualifications. The decision is made by state bodies based on the current economic situation and the company's legal record (i.e., any violation of law by the company may negatively affect the decision).

The Ministry of Health and Social Development of Russia is entitled to adopt a list of those professions, positions and qualifications that are given a quota exemption in

a given year. However, these professions, positions and qualifications may vary from year to year or may not be adopted at all.

As per recent changes in Russian law, the simplified procedure for obtaining a work permit has been adopted for employees from France and South Korea. Currently, employers do not have to obtain a decision of the State Employment Centre regarding permission to engage and use foreign workers with respect to such categories of employees.

Companies may also engage foreign nationals as highly qualified specialists. The main condition for engaging a foreign worker as a highly qualified specialist is that he or she has experience, skills and achievements in the sphere he or she is to be employed in and the company will pay him or her more than 2 million roubles per year, or for teachers and scientists invited by institutions having state accreditation more than 1 million roubles per year or – for foreign nationals engaged in Project Skolkovo (the innovative project in Russia) – a salary of any amount. For these specialists' quotas, issuing invitation letters to enter the territory of Russia to work and quotas for obtaining work permits are non-applicable. Employers also do not have to obtain a decision of the State Employment Centre and permission to engage and use foreign workers in order to legally hire a highly qualified specialist.

The period of employment of a foreign national in Russia is limited by the duration of his work permit. Generally, the work permit is issued for up to one year and the work permit for highly qualified specialists can be issued for up to three years. If the employee continues working when his work permit expires, both the company and the foreign employee will be subject to administrative fines (quite considerable for the former).

Foreign nationals who will work in Russia, rather than travel to Russia on business, need to have work permits and should be staying under a work visa (except in the case of visa-free entry).

Remuneration received by a foreign employee from a source in Russia is generally subject to Russian personal income tax. It may also be subject to social insurance contributions. The employer should also provide the highly qualified specialist and his or her accompanying family members with medical insurance.

A company paying remuneration to a foreign employee is deemed a tax agent and, therefore, must withhold personal income tax from the remuneration payable to employees and remit it to the tax authorities. If the personal income tax was not withheld by a tax agent, the employee should file a tax return and pay the tax independently.

The personal income tax rate is 13 per cent for Russian tax residents (individuals staying in Russia for more than 183 days in 12 consecutive months and more than 183 days in the calendar year in whole) and 30 per cent for non-Russian tax residents (individuals staying in Russia for less than 183 days in 12 consecutive months).

For those foreign employees who have the status of highly qualified specialists (see above), the personal income tax rate is 13 per cent, irrespective of their tax residency status.

Employers (both Russian companies and Russian subdivisions of foreign companies) shall pay social insurance contributions only in respect of those foreign employees who have a long-term or temporary residence permit in Russia.

The base for calculating insurance contributions may be defined as the remuneration payable to the foreign employee under the labour and civil contracts, including salaries,

bonuses and other monetary payments and in-kind benefits. The maximum annual base for the payment of social contributions in respect of one employee is 512,000 roubles for 2012 (the limit may be further revised by the state authorities). The total rate is 30 per cent starting from 2012 (for 2011 it was 34 per cent). All payments to an employee exceeding this limit are now subject to a 10 per cent insurance contribution.

Social insurance contributions are not payable in respect of those foreign employees who temporarily stay in Russia (i.e., on the basis of a visa or in accordance with a special order whereby there is no obligation to obtain a visa).

There is also obligatory accident insurance in Russia. All individuals (including foreign nationals) working under employment agreements are subject to this insurance irrespective of their migration status. The insurance covers cases of temporary or permanent injury to the health of employees (including death) that occurs within the course of performing employment duties (as a result of a professional illness or work-related accident).

The applicable rate of obligatory accident insurance depends on the degree of professional risk that employer's activity entails and may vary from 0.2 per cent to 8.5 per cent. The base for calculating obligatory accident contributions is generally the same as the base for calculating social insurance contributions.

The foreign employee has the same rights and obligations as the Russian employees and he is granted the same level of protection under the Russian law.

## VIII GLOBAL POLICIES

The main disciplinary principles are contained in the Labour Code. Internal disciplinary rules can be adopted by the employer in the form of by-laws and regulations on discipline. As a general rule, however, such rules are incorporated into the rules of the internal labour regulations of the company.

The internal labour regulations are a local standard governing the hiring and dismissal of employees and the basic rights, obligations, and accountability of the parties to a labour contract, the work regime, the rest periods, incentives and punitive measures applied toward employees and other regulations concerning labour relations, including the disciplinary rules.

If the company has a representative body the internal labour regulations shall be approved by an employer taking into account the opinion of this representative body.

Before the employee concludes an employment agreement, he or she should be provided with the internal regulations of the employer and confirm his or her familiarity with them by signature, thereby undertaking to observe the employer's internal labour regulations.

The internal labour regulations do not need to be filed with or approved by government authorities.

The Labour Code establishes some mandatory rules prohibiting discrimination on different grounds, forced labour, etc. Everyone shall have equal opportunities to implement their labour rights under the labour laws.

Nobody may be subject to restrictions in labour rights and liberties or gain any advantages based upon sex, race, skin colour, nationality, language, ethnic origin,

property, family, social status and occupational position, age, place of residence, attitude to religion, political views, affiliation or failure to affiliate with public associations, or any other circumstances not pertaining to the employee's ability to perform his or her work.

Sanctions for sexual harassment are regulated by the Criminal Code.

The internal labour regulations of the company have to be executed in Russian, as Russian is the official language and must be used by all companies regardless of their ownership structure for their employment contracts, by-laws and record management.

When the employee is hired (before a labour contract is signed) he or she should be provided with the internal labour regulations and other internal regulations relating to his or her work as a hard copy that he or she must sign. If the internal labour regulations are altered the employee shall be provided with a revised copy.

The rules of the internal labour regulations shall be approved by an employer, taking into account the opinion of the representative body of the organisation's employees, if there is one in the company.

Generally, if there is a collective contract in the company the rules of the internal labour regulations shall be a supplement to it.

The internal labour regulations shall be freely accessible. They can be located on the company's intranet, but in any case the company must have them as a hard copy.

The disciplinary rules can be incorporated into the employment contract by reference to them.

## IX TRANSLATION

Russian is the official language of the Russian Federation and must be used by all companies — regardless of their ownership structure — for all HR documentation (including employment contracts) and records management. There are no such formalities as notarial certification of translation, use of certified translator, etc.

In the republics and other constituent territories of the Russian Federation, employment contracts can be executed in two languages: Russian and the language of the republic, or any other language used by the population of the subject. The exact rules and obligations on the use of languages are established by the relevant legislation of the Russian Federation.

As for foreign employees who know neither Russian nor the language of the constituent territory of the Russian Federation, Russian legislation contains no general requirement that the employment contract be presented in a language familiar to the individual.

However, in practice, an employment contract with a foreign employee is usually signed both in Russian and in the fluent language of the foreign employee, to guarantee that he or she has a clear understanding of rights and responsibilities under the agreement.

If the employment documents are not translated to the language familiar to the employee, the foreign employee could challenge the implication of any disciplinary sanctions upon him or her for breach of the obligations stipulated in the document on the grounds that he or she did not understand the contents of the document.

## X EMPLOYEE REPRESENTATION

The employees are permitted to form representative bodies to protect their rights. As such, there are no works councils as a form of representation in Russia. Under the Russian Labour Code, the representatives of employees shall be trade unions and other representatives. Russian law, however, does not define the 'other representatives' and the rules governing their activity. Therefore, all information regarding the employee representatives in this section concerns trade unions.

Once created at the company level, a trade union represents all workers engaged by the specific employer who have become members of the trade union, or who have authorised the trade union to represent their interests.

The trade unions shall have the right to exert trade union control over the employers and the official persons observing the legislation on labour, including on the issues of the labour agreement (contract), working hours and rest periods, remuneration for labour, guarantees and compensations, privileges and advantages, and other social and labour issues in the organisations, in which the members of the given trade union work. They shall also have the right to demand that the disclosed violations are eliminated. Employers and official persons shall be obliged, within a week of receiving a request to eliminate the exposed violations, to inform the trade union about the results of its consideration and about the measures effected.

For the trade unions to exert their control over the observation of the legislation on labour, the trade unions shall have the right to set up their own labour inspection service, which shall be vested with the powers stipulated by the legislative provisions and approved by the trade unions.

If the employees of a given employer are not united in any primary trade union organisation, or if fewer than half of the employees of the given employer are members of the existing primary trade union organisation or if no existing trade union has the power to represent the interests of all the employees in a social partnership at the local level, then another representative (or representative body) may be elected by secret ballot from the ranks of the employees at a general meeting (conference) of the employees for the purpose of exercising said powers.

The existence of this other representative shall not be deemed an obstacle to the primary trade union organisations exercising their powers.

Trade union organisations shall represent the interests of employees in collective negotiations, the conclusion or alteration of a collective contract, control over execution thereof, and in the implementation of the right to participate in the management of an organisation, consideration of labour disputes of employees with an employer.

The trade unions shall independently formulate and approve their rules. Such rules should define the length of a representative's term, how frequently representatives must meet, terms and procedures for setting up the trade union, the rules for joining the trade union's membership and leaving it, the rights and the duties of the trade union members, the authority of the trade union bodies and the term of their powers. Trade unions also determine provisions related to the structure of the union and shall hold meetings, conferences, congresses and other events.

The employer shall give the trade unions functioning in its organisation the equipment, premises and means of transportation and communication necessary for their activity in conformity with the collective agreement or with the agreement.

## XI DATA PROTECTION

### i Requirements for registration

As a general rule, prior to commencing processing personal data, an operator is obliged to notify the Federal Service for Supervision in the Sphere of Communication, Information Technologies and Mass Communications on its intention to process personal data. The notification should contain information required by the respective laws in Russia.

The 'operator' is defined as a legal entity, individual, state authority or municipal authority that individually or collectively organises or carries out the processing of personal data, and determines the purpose and content of processing that personal data or the operations to be performed with that data.

Employers have the right to process the personal data of their employees without notifying the above-mentioned authorised state body. However, if the purposes of personal data processing fall beyond the scope of labour law and employment relations, the employer is obliged to notify authorised state authorities of its intention to carry out the processing of employees' personal data.

According to the general rule, obtaining consent for the processing of employee personal data is required. If personal data may be obtained only from the third party, then the employer is obliged to notify the employee in advance and obtain his or her written consent. The employer shall inform the employee of the purposes, probable sources and methods of obtaining the personal data, as well as on the nature of the personal data to be obtained and the consequences of an employee's refusal to provide written consent regarding use of the data.

The general rule is that a subject of personal data shall make a decision to supply his or her personal data and give his or her consent to the data being processed of his or her own free will and in his or her own interest. As mentioned above, the employer is entitled to request personal data that is necessary for performance of the labour agreement with the employee. The consent of the employee will be required if the employer intends to transfer the personal data of its employee to third parties. Consent may be withdrawn by the personal data subject at any time.

To ensure the rights and liberties of the employee, the employer and his representatives must permit only specially authorised persons to access employee personal data. Moreover, the mentioned persons shall be permitted to obtain only the employee personal data which is necessary to fulfil particular functions. It shall be also noted that employers shall adopt an internal policy covering the procedure of processing the personal data of employees. Such a policy shall be adopted in Russian (or in a bilingual form) by the order of the CEO of the legal entity (or other authorised person) and all employees shall acknowledge familiarisation with their signatures.

The company is obliged to take the required organisational and technical measures, in processing the personal data, including using ciphering (cryptographic) facilities (where applicable), to protect personal data against any illegal or accidental

access, destruction, alteration, blocking, copying and dissemination and other illegal actions.

### ii Cross-border data transfers

Russian law does not require registration for the purposes of the cross-border transfer of personal data.

The general rule is that, for the cross-border transfer of personal data to other states, the employer should ensure that these states provide adequate protection of the rights of the subject of the personal data. If the employer performs a cross-border transfer of personal data to states which do not ensure an adequate protection of the rights of the subject of the personal data, the Russian company shall obtain written consent from the subject of the personal data (employee).

Russian law does not directly stipulate, however, what is considered to be the adequate level protection of the rights of the subject of personal data. Therefore, it can not be said for sure whether the safe harbour registration in the US, for example, will be sufficient or not.

Taking into account that employers are obliged to get the consent of its employees when intending to transfer their personal data to third parties (regardless of the location of the receiving third party) and to avoid any possible claims from the employees regarding the processing of personal data by the company without consent, it is recommended in all cases of cross-border transfer that the employer obtains the written consent of the subject of the personal data, stating the scope of the personal data to be transferred cross-border, the purpose of the processing and the recipients of personal data.

The employers should require the recipients of personal data to treat such data as confidential information. If the transfer is made on the ground of an agreement, the agreement should provide for an obligation of the recipient to treat the personal data as confidential.

Additional transfers of the personal data are allowed if the employee's consent covers such transfers.

### iii Sensitive data

The information relating to an employee concerning race or ethnic origin, political views, religious or philosophical convictions, state of health or intimate life is considered as sensitive data.

As a general rule, the employer may not request and process sensitive data. In cases directly associated with the issues of labour relations, the employer may obtain and process information on the private life of the employee only with his or her personal consent.

For a cross-border transfer of sensitive data the Russian company must obtain the written consent of the employee.

### iv Background checks

Russian law limits the amount and type of data that can be obtained on a candidate or an employee.

The main principle is that the volume and character of personal data to be obtained on a candidate should be justified by a lawful reason. The Russian Labour Code gives a full list of such reasons:

*a* to observe laws and regulations, for example if a certain check is prescribed by law the employer can demand this information, or if a certain job is prohibited to a specific category (e.g., employees under 18) the employer can also enquire, etc;

*b* to assist in employment, training, and promotion (this may imply any information that this reasonably and lawfully required in order to efficiently hire, train and promote);

*c* to ensure the personal safety of employees (this might seem to allow a rather broad interpretation, however the general principle of non-excessiveness is to be observed);

*d* to control performance (quality and volume of work done); and

*e* to ensure the safety of assets (the general principle of non-excessiveness is to be observed).

As mentioned above, Russian law gives a full list of documents the candidate must present, and prohibits the employer from requiring extra certifications. Thus bank account statements, credit repayment records, etc., cannot be demanded from the candidate. Moreover, even if the candidate voluntarily agrees to provide them, such requests can be interpreted as invasion of privacy and discrimination on grounds of property. Additional documents can be required only if this is explicitly provided for in the legislation (e.g., public servants should present information on their income, property and material liabilities).

Criminal record checks may be required for certain jobs. For example, applicants for teaching positions may be subject to such checks since educational work is prohibited to those with a criminal record. In other instances, inquiring about an applicant's criminal background can be considered excessive. However, there is no relevant court practice so far.

There is a statutory minimum of information an employer is entitled to learn about a potential employee. Demanding further information or documents is illegal, and requesting them might be risky, as it may imply that the candidate was not hired for a protected reason or that an invasion of privacy took place.

An employer should also avoid receiving any information about an applicant or employee's political, religious or other views, membership of social organisations, etc.

Obtaining information about an applicant or employee's private life is permitted only to the extent it is relevant to the job. For example, obtaining information about dependants is relevant to determining whether an applicant or employee is entitled to certain guarantees.

## XII DISCONTINUING EMPLOYMENT

### i Dismissal

Pursuant to the law, employment may be terminated only on the grounds provided for by the laws. The Labour Code stipulates the list of principal grounds for termination of

employment, however it is not exhaustive; it can be extended by grounds stipulated in other federal laws.

As a general rule, the company does not have to notify the state bodies of a dismissal. Among the exceptions are collective dismissals due to a company being wound up and redundancies (please see more detailed information below). If dismissing a foreign employee the company has to notify tax bodies, the employment service and labour inspectorate (or federal migration service in case of dismissing a foreign employee who comes from the visa-exempt country).

Notification of the elected body of the trade union is to take place in case the employer initiates dismissal of a trade union member for the reasons of staff reduction, insufficient qualification of the employee or numerous failures of the employee to fulfil his labour duties provided he has had a disciplinary punishment. The opinion of the trade union is not binding for the employer.

The dismissal can take place within one month after the trade union provides its motivated opinion.

If the employer decides on a staff reduction, it should submit a written notification to the elected body of the trade union organisation not later than two months before the planned action, or in three months if such staff reduction may lead to collective dismissal.

It is not common practice for employers to provide a social plan containing measures which are additional to those required by law or contained in industry or territorial agreements. However, measures aimed at reducing the number of employees subject to collective redundancy or providing re-employment may be contained in the company's collective bargaining agreement and may be implemented by the employer.

Offers of suitable alternative employment have to be made in the event of redundancy.

There are various notice periods for different types of dismissals. A notice of dismissal must be made in writing. Furthermore, it should be signed by the employee, proving that he or she received that notice. A notice period does not depend on the length of employment.

An employee who is not coping during the probation period can be dismissed by giving three days' notice.

A fixed-term contract is terminated upon expiration of its term. An employer has to notify an employee of the contract's termination three days prior thereto.

In the case of redundancy or reduction of personnel, an employer has to notify employees two months prior to dismissal. Seasonal workers are to be given seven days' notice in such circumstances and three days' notice applies for temporary employees (working under an employment contract with the term of up to two months).

In all other cases of dismissal, the notification period is not defined in Law.

If a company is being wound up or there is a reduction of staff the employer can with the written consent of the employee terminate the employment contract before expiry of the two months' notice period provided he pays additional compensation to the employee in the amount of the employee's average earnings calculated pro rata to the time remaining until the expiry of the notice period.

The general principle is that protection is granted to all employees. Special protection against dismissal at the initiative of the employer applies inter alia to the following groups of employees:

*a* pregnant employees (can be dismissed at the employer's initiative only if a company is being wound up; a fixed-term labour contract should be prolonged until the end of the pregnancy);

*b* employees under 18 (can be dismissed at the employer's initiative only upon consent of the appropriate state labour inspectorate and commission for juvenile affairs and protection of their rights (unless the company is wound up); or

*c* employees with two or more dependants.

A severance payment shall be paid to employees in the case of (1) termination of employment due to the company being wound up, as well as in case of redundancy (as described below), and (2) severance pay equal to two weeks' average wages is made to an employee in the following cases of dismissal:

*a* the employee's refusal to be transferred to another job as might be required according to his or her medical certificate[2] prohibiting him or her from remaining in the current job, or if the employer does not have an appropriate job;

*b* the employee being called to military service (or alternative civil service);

*c* the reinstatement of an employee who previously occupied that position;

*d* the employee's refusal to be transferred to a job in another location;

*e* the employee is recognised as being fully incapable of working in accordance with a properly issued medical certificate; or

*f* the employee refuses to continue working following a change in employment contract terms.

An employment contract or a collective contract may stipulate other cases of severance pay, as well as the amount of severance pay to be paid.

If the employment is terminated at the mutual agreement of the parties, then a respective agreement specifying the terms of such termination shall be concluded.

### ii Redundancies

If the company decides to apply the redundancy procedure it should first of all select the employees that can be subject to redundancy, considering the protected categories.

Each employee must be individually notified in writing at least two months before the dismissal, and each employee should confirm notification in writing. Seasonal workers will be given seven days' notice in such circumstances and temporary employees (i.e. those with an employment contract of up to two months) are entitled to 3 days' notice.

The company further offers the employees all suitable vacancies the company has (including those requiring fewer qualifications or with a lower salary).

2 Such medical certificate must be issued according to the procedure established by federal laws and other normative legal acts of the Russian Federation.

Each offer should be made in writing; the employee's refusal or consent should also be in writing. If there are no vacancies in the company, the employee should be served respective notices and confirm the receipt thereof.

Under Russian legislation there is no difference between collective dismissal or reduction in the workforce. Mass layoffs are not directly regulated by Russian legislation. However, provisions in the Russian labour legislation related to 'downtime', however, indirectly regulate layoffs.

Under these provisions, in case of temporary suspension of work due to economic, technological, technical or organisational causes, an employee may be transferred without his or her consent for up to one month to a job, with the same employer, that is not stipulated by the employment contract.

In this case, transfer to a job that requires fewer qualifications is permitted only with the employee's written consent. If transferred, the employee is paid for the work he or she performs and at a rate not below the average earnings in his or her previous job.

A period of downtime due to an employer's fault shall be remunerated in the amount of not less than two-thirds of the employee's average salary. A period of downtime due to reasons dependent neither on the employer nor on the employee shall be remunerated by not less than two-thirds of the tariff scale and salary, which are calculated *pro rata* for the duration of the downtime.

In case of collective dismissal[3] the employer must notify the State Employment Agency in two stages with the following information:

*a* first stage (three months prior to the dismissal):
- details of the employer and employees;
- a list of all the organisation's employees at the date of the notice;
- the reasons for the collective redundancy;
- the number of employees to be made redundant;
- the commencement date of the collective redundancy;
- the final date of the collective redundancy; and
- information about the employees to be made redundant (the profession, number of persons, date of dismissal);

*b* second stage (two months prior to the dismissal):
- details of the employer; and
- information about each employee to be made redundant (full name, education, profession, qualifications and average salary).

The following categories of employees cannot be made redundant:

*a* pregnant women;

*b* women with children under three years old;

*c* single mothers with children under 14 years old (disabled children under 18 years old); and

3 Dismissal may be considered to be collective depending on the number of employees that are planned to be dismissed by the company. The exact thresholds for collective dismissal are provided in agreements relevant to a specific industry sector or territory.

*d* individuals bringing up a child under 14 years old (a disabled child under 18 years old) without a mother.

Among other employees, protection should first be given to employees with higher qualifications and labour productivity. To evaluate the labour productivity a performance review can be used; however, there is no statutory procedure on how this performance is evaluated.

Among employees with equal qualifications and productivity, the following categories should be given preference:

*a* employees with dependant family members;
*b* employees who have suffered from workplace injury or work-related disease while working for this company;
*c* employees doing professional training at the employer's instruction; and
*d* disabled veterans.

Protection may be given to additional categories by regional or industrial agreements, collective bargaining agreements, company policies, employment contracts, etc.

Actual termination of the employment contract cannot take place while the employee is on holiday or on sick leave.

If the employment is terminated due to a company wind-up, as well as in the case of redundancy, a dismissed employee is to be paid severance pay equal to his or her average monthly wage. Furthermore, an employee is entitled to payment of average monthly wages while searching for a new job. These payments are limited to a two-month period upon termination of employment (including the severance pay). If the employee obtains the agreement of the State Employment Service, he or she may be entitled to severance for the third month as well.

If the employment is terminated on the ground of mutual agreement of the parties, then an agreement specifying the terms of such termination shall be concluded.

## XIII TRANSFER OF BUSINESS

In the case of a sale of shares of the employing company to another owner the employment contracts are not subject to termination since the employing company remains the same.

Thus, any changes in the terms and conditions of employment can be made only in accordance with the general procedures prescribed by the Labour Code. The Labour Code provides that the employer should notify the employee of any change to material terms and conditions of employment at least two months before such a change. The change to material terms and conditions can take place only in the case of a change in organisational or technological conditions of employment and only with prior written notice to the employee.

According to Russian law, a change of the owner of property (assets) of an organisation is not a ground for termination of employment contracts with employees except for its general director, deputies of the general director and chief accountant. The Supreme Court of Russia clarified that this applies to cases of sale of all property (assets) of an organisation. It also commented that this rule applies, for example, to

the privatisation of state-owned companies, enterprises or assets of the state-owned companies or enterprises. This rule may also apply to the sale of an enterprise as a property complex (which is considered and registered as a real estate object).

The new owner has the right to dismiss the general director, deputies of the general director and chief accountant within three months after it has obtained the ownership title to the property (assets). In this situation, these employees, if dismissed, are entitled to compensation in the amount of not less than three months' salary.

Reorganisation (merger, accession, division, split-off or transformation) of the company is also not a ground to terminate employment with a company and thus the transfer of employment agreements will be required.

An employee may refuse to continue work in connection with the change of the owner of the assets of an organisation or in connection with the reorganisation of the company.

In the case of such refusal the employment will be terminated, respectively, due to refusal to continue work in connection with the change of the owner of assets or, due to refusal to continue work in connection with reorganisation (merger, accession, division, split-off or transformation) of the company.

## XIV OUTLOOK

One of the developing 'hot topics' remains the proposed amendment of the legislation restricting contract labour (outsourcing) and the use of civil law contracts with individuals. The draft bill is aimed at increasing the authority of the Russian labour authority to reconsider civil law contracts as employment contracts and the introduction of respective fines for the non-conclusion of employment contracts if employment relations are actually in place. The bill also, effectively, prohibits the provision of personnel under outsourcing agreements, *inter alia,* in relation to foreign employees by special agencies. The bill was presented and adopted by the State Duma in May 2011 in its first reading; however, this version gave rise to a lot of disagreements and comments. Therefore, now it is being revised further in order to be presented for the State Duma's second reading. It therefore seems too early to make suppositions regarding the final version of the bill.

One of the hot topics of 2011 was adoption of the law regulating the labour activity of at-home employees. This law is aimed at a precise regulation of the working regime of at-home employees, the length of their annual leave, their place of work and at simplifying the procedure for charging personal income tax on at-home employees.

## Appendix 1

# ABOUT THE AUTHORS

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Irina Anyukhina is a partner at Alrud Law Firm and head of real estate and labour law practices coordinating work with the Ius Laboris global alliance. Irina possesses vast experience in consulting on corporate law, real estate and labour law. Irina Anyukhina is a member of the International Bar Association.

Irina Anyukhina graduated from the Moscow State Institute of International Relations under the Russian Ministry of Foreign Affairs, International Law Faculty, International Public Law Department. She is fluent in Russian (native), Ukrainian, English and French.

Irina Anyukhina joined Alrud in 2002 and has been a partner since 2007.

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