Ius Laboris

Global Human Resources Lawyers

Outsourcing and Employment: An International Guide

A Ius Laboris Publication

Printed: *November 2011*

Nothing stated in this book should be treated as an authoritative statement of the law on any particular aspect or in any specific case. Action should not be taken on the basis of this text alone. For specific advice on any matter you should consult the relevant country representative listed inside. The law is stated as at April 2011.

Ius Laboris® Is a registered trademark of Ius Laboris scrl

Global
Human
Resources
Lawyers

Outsourcing and Employment:
An International Guide

About Ius Laboris

In today's global marketplace, businesses increasingly operate on a regional or international scale. Companies that coordinate their employees across multiple jurisdictions must comply with the rules and regulations governing employment, labour, pensions, social security, tax and immigration law in each of those jurisdictions. As a result, retaining legal experts with knowledge and experience in both international and local Human Resources law is essential for businesses of all sizes.

Ius Laboris is an alliance of leading Human Resources law practitioners. We have more than 2,500 lawyers providing local expertise across the globe, with member firms in over 40 countries and coverage in more than 100 jurisdictions. Human Resources challenges need local expertise within a global framework. The complexities of national employment law demand it, and the Ius Laboris members supply it.

Each of our members must be a top-ranking Human Resources or Pensions law firm in their respective locality to be invited to join Ius Laboris. We welcome into our Alliance only firms that possess focused expertise in all disciplines of labour, employment and pensions law. Our lawyers understand the issues and challenges associated with managing a workforce, wherever it is located.

The Alliance focuses on specific areas of expertise within our eight International Practice Groups (IPGs). The IPGs bring together lawyers from across the Alliance with expertise in key areas of Human Resources law including Individual Employment Rights, Discrimination, Restructuring and Labour Relations, Pensions, Employee Benefits and Tax, Data Privacy, Occupational Health & Safety and Global Mobility.

In our experience, local expertise in these areas of law is crucial to developing coherent Human Resources strategies that work within a global framework. Our IPGs meet regularly and are well placed to coordinate regional and worldwide requests, drawing on each individual lawyer's wealth of experience. Clients can access the work of our IPGs, which complement our extensive portfolio of legal services.

For additional information, please visit our website (www.iuslaboris.com) or feel free to contact us:

Ius Laboris

280 Boulevard du Souverain
1160 Brussels
Belgium
T +32 2 761 46 10
F +32 2 761 46 15
E info@iuslaboris.com

Contributors

ARGENTINA
Eduardo Vinales
Funes de Rioja & Asociados
Av. Madero 942
C1106ACW Buenos Aires
Argentina
T +54 11 4348 4100
F +54 11 4348 4155
E ejv@funes.com.ar
www.funes.com.ar

AUSTRALIA
Drew Pearson
Freehills
QV.1 Building
250 St Georges Terrace
Perth WA 6000
Australia
T +61 8 9211 7589
M+61 403 437 599
F +61 8 9211 7878
www.freehills.com

AUSTRIA
Verena Sterner
Birgit Vogt-Majarek
Kunz Schima Wallentin
Porzellangasse 4
1090 Vienna
Austria
T +43 1 313 74 0
F +43 1 313 74 80
E verena.sterner@ksw.at
birgit.vogt@ksw.at
www.ksw.at

BELGIUM
Jean-Paul Lacomble
Maarten Simon
Claeys & Engels
280 Boulevard du Souverain
1160 Brussels
Belgium
T +32 2 761 46 08
F +32 2 761 46 70
E jp.lacomble@claeysengels.be
maarten.simon@claeysengels.be
www.claeysengels.be

BRAZIL
Luiz Guilherme Moraes Rego Migliora
Veirano Advogados
Av. Presidente Wilson, 231 – 21st° floor
Rio de Janeiro - RJ 20030-021
Brazil
T +55 21 3824-4747
+55 21 3824 4600
F +55 21 2262-4247
E luiz.migliora@veirano.com.br
www.veirano.com.br

CANADA
Douglas Gilbert
HeenanBlaikie
Suite 2200,
1055 West Hastings Street
Vancouver, B.C.
V6E 2E9
Canada
T +1 604 891 1168
F +1 866 230 3476
E dgilbert@heenan.ca
www.heenan.ca

CHILE
Enrique Munita
Jaime Salinas
Philippi, Yrarrazaval,
Pulido & Brunner
Avenue El Golf 40, piso 20
Las Condes CP 755-0107
Santiago
Chile
T +56 2 364 3728
F +56 2 364 3746
E emunita@philippi.cl
jsalinas@philippi.cl
www.philippi.cl

COSTA RICA
Marco Durante Calvo
BDS Asesores
San José
Zapote
Costa Rica
T +506 2528 3200
F +506 2283 0002
E mdurante@bdsasesores.com
www.bdsasesores.com

CZECH REPUBLIC
Natasa Randlová
Romana Kaletová
Randl Partners
City Tower
Hvezdova 1716/2b
140 78 Prague 4
Czech Republic
T +420 222 755 311
F +420 239 017 574
E randlova@randls.com
kaletova@randls.com
www.randls.com

DENMARK
Christian K Clasen
Norrbom Vinding
Partner
Amerikakaj
Dampfaergevej 26
2100 Copenhagen
Denmark
T +45 35 25 39 40
F +45 35 25 39 50
E ckc@norrbomvinding.com
www.norrbomvinding.com

FINLAND
Seppo Havia
Johanna Ijas
Dittmar & Indrenius
Pohjoisesplanadi 25 A
00100 Helsinki
Finland
T +358 9 681 700
F +358 9 652 406
E seppo.havia@dittmar.fi
johanna.ijas@dittmar.fi
www.dittmar.fi

FRANCE
Laetitia Boetto
Capstan
200 rue du Vallon
06560 Sophia Antipolis
France
T +33 4 92 38 87 87
F +33 4 92 38 87 88
E lboetto@capstan.fr
www.capstan.fr

GERMANY
Alexander Ulrich
Kliemt & Vollstädt
Speditionstrasse 21
40221 Düsseldorf
Germany
T +49 211 88288 175
F +49 211 88288 200
E Alexander.Ulrich@kliemt.de
www.kliemt.de

GREECE
Alexia Stratou
Kremalis Law Firm
35 Kyrillou Loukareos
114 75 Athens
Greece
T +30 210 64 31 387
F +30 210 64 60 313
E astratou@kremalis.gr
www.kremalis.gr

INDIA
Manishi Pathak
S Valarmathi
Kochhar & Co
11th Floor, Tower A, DLF Towers
Jasola
Jasola District Center
New Delhi – 110025
India
T +91 11 4111 5222
F +91 11 4056 3813
E manishi.pathak@kochhar.com
S.valarmathi@Kochhar.com
www.kochhar.com

IRELAND
Jennifer O'Neill
Aoife Bradley
LK Shields Solicitors
39/40 Upper Mount Street
Dublin 2
Ireland
T +353 1 661 0866
F +353 1 661 0883
E joneill@lkshields.ie
abradley@lkshields.ie
www.lkshields.ie

ITALY
Emanuela Nespoli
Toffoletto e Soci
Via Rovello, 12
20121 Milan
Italy
T +39 02 721 44 1
F +39 02 721 44 500
E sen@toffoletto.it
www.toffoletto.it

LATVIA
Toms Sulmanis
Raidla Lejins & Norcous
Kr. Valdemara iela 20
Riga, LV-1010
Latvia
T +371 6724-0689
F +371 6782-1524
E toms.sulmanis@rln.lv
www.rln.lv

LUXEMBOURG
Christophe Domingos
Castegnaro
33 Allée Scheffer
2520 Luxembourg
T +352 26 86 82 1
F +352 26 86 82 82
E christophe.domingos@castegnaro.lu
www.castegnaro.lu

MEXICO
Javiera Medina Reza
Basham, Ringe y Correa SC
Paseo de los Tamarindos No 400-A, Floor 9
Bosques de las Lomas 05120
Mexico
T +52 55 52 61 0400
F +52 55 52 61 0496
E javiera.medina@basham.com.mx
www.basham.com.mx

NETHERLANDS
Genna Wiebenga
Bronsgeest Deur Advocaten
De Lairessestraat 137-143
1075 HJ Amsterdam
Netherlands
T +31 20 305 33 33
F +31 20 305 33 30
E g.wiebenga@bd-advocaten.nl
www.bd-advocaten.nl

NORWAY
Therese Hoyer Grimstad
Advokatfirmaet Hjort DA
Akersgaten 51
P.O.Box 471 Sentrum
0105 Oslo
Norway
T + 47 22 47 18 00
F + 47 22 47 18 18
E therese.hoyer.grimstad@hjort.no
www.hjort.no

PANAMA
Jorge Quijano
Arosemena Noriega & Contreras
Elvira Mendez Street No 10
Interseco Building, 2nd floor
P.O. Box 0816-01560
Panama
T +507 366 8400
F +507 264 4569
E jquijano@anorco.com.pa
www.anorco.com

POLAND
Katarzyna Sarek
Raczkowski i Wspólnicy sp.k.
ul. Ciasna 6
00-232 Warsaw
Poland
T +48 22 537 52 88
F +48 22 531 52 81
E katarzyna.sarek@raczkowski.eu
www.raczkowski.eu

RUSSIA
Olga Pimanova
Law Firm ALRUD
2nd floor - 17 Skakovaya Street
125040 Moscow
Russia
T +7 495 234 96 92
F +7 495 956 37 18
E opimanova@alrud.ru
www.alrud.com

SWEDEN
Ola Lo Olsson
Elmzell Advokatbyrå AB
Gamla Brogatan 32
111 20 Stockholm
Sweden
T +46 8 21 16 04
F +46 8 21 00 03
E ola.lo.olsson@elmzell.se
www.elmzell.se

SWITZERLAND
Marc-Philippe Prinz
Lenz & Staehelin
Bleicherweg 58
8027 Zurich
Switzerland
T +41 58 450 8000
F +41 58 450 80 01
E marc-philippe.prinz@lenzstaehelin.com
www.lenzstaehelin.com

TURKEY
Maria Celebi
Batuhan Sahmay
Bener Law Office
Yapi Kredi Plaza, C blok, Kat. 4
34330 Levent
Istanbul
Turkey
T +90 212 270 70 50
F +90 212 270 68 65
E maria.celebi@bener.av.tr
batuhan.sahmay@bener.av.tr
www.bener.av.tr

UNITED KINGDOM
Abi Frederick
Lewis Silkin LLP
5 Chancery Lane
Clifford's Inn
London EC4A 1BL
England
T +44 20 7074 8324
F +44 20 7864 1771
E Abi.Frederick@lewissilkin.com
www.lewissilkin.com

UNITED STATES
Gerald Hathaway
Littler Mendelson PC
1085 Raymond Blvd
One Newark Center – 8th Floor
Newark, NJ 07102
USA
T +1 973 848 4706
F +1 973 643 5626
E ghathaway@littler.com
www.littler.com

EDITOR
Deborah Ishihara
Ishihara & Co Limited
writing - editing - proof reading
London
England
T +44 20 8549 2772
F +44 20 8549 5455
E deborah@ishihara.co.uk

Contents

Introduction 15
Argentina 19
Australia 25
Austria 31
Belgium 37
Brazil 43
Canada 49
Chile 55
Costa Rica 61
Czech Republic 67
Denmark 73
Finland 79
France 85
Germany 91
Greece 97
India 103
Ireland 109
Italy 115
Latvia 121
Luxembourg 127
Mexico 133
Netherlands 139
Norway 147
Panama 155
Poland 161
Russia 167
Sweden 173
Switzerland 179
Turkey 185
United Kingdom 193
United States 199

Introduction

When a business outsources an activity previously carried on in-house, staff carrying on that activity are likely to be affected in one way or another. They may be reassigned to other work; they may be made redundant; or they may be offered employment by the service provider. This guide outlines the legal implications of outsourcing in 30 countries in Europe, the Americas, Asia and Australia.

Within the EU, although there are circumstances in which the law on transfers of undertakings may apply (for example, a substantial outsourcing involving a transfer of significant assets of the business; such as premises or equipment), in practice it is only likely to be relevant in a few member states (in particular, the UK and Denmark). If outsourcing leads to a service being geographically relocated, the law on transfers of undertakings is likely to be theoretical rather than practical: it is unusual for staff to move home in connection with an outsourcing. For information on transfers of undertakings, see the Ius Laboris guide Transfers of Undertakings. This guide does not cover the position where the law on transfers of undertakings applies.

Legal regulation of outsourcing

In general, both within and outside the EU, there is no regulation that specifically governs outsourcing. However, this does not mean that a customer is always free to outsource. In certain countries within Latin America, (for instance Argentina and Brazil), there are legal constraints on a business' ability to outsource its main activity.

Individual rights

Although there is no specific legal regulation, the issues faced at a practical level are similar. Outsourcing commonly leads to redundancies. The legal protection available varies considerably between countries – but it is likely that the basic law relating to dismissal will be relevant. The protection offered may be substantial; it may relate to the severance pay received or to the process to be followed in deciding on dismissal (see, for example, Italy and the UK).

Where there is a potential redundancy, the customer is normally required to consider redeployment – particularly within the EU. A failure to consider redeployment may lead to a breach of the relevant law on dismissal.

Collective rights and bargaining

In the EU, representatives of employees (unions, works councils or elected representatives) have the right to receive information on and be consulted about potential collective (large scale) redundancies, In other countries, particularly Central and South America, formal collective consultation requirements are unusual.

Of course, collective involvement may arise not from formal legislation but from collective bargaining agreements between employers and unions either on a sectoral basis or employer specific. In many EU states, works councils are consulted before the outsourcing is effected.

Employer liabilities

Except where the law on transfers of undertakings applies, primary liability normally falls on the customer in relation to existing staff. If a service provider wishes to offer work to former employees of the customer, it may do so. If it does, it is unusual for the customer to have any continuing liability. It is rare for a service provider's employees to be treated as employees of the customer after an outsourcing has taken place. In some states there is a risk that if those staff work under the direction and supervision of the customer there may be an employment relationship with the customer (or a joint relationship with both).

In a few states within the EU, there are potential criminal sanctions for failure to comply with consultation requirements though imposition of such a sanction is unusual in practice. More commonly redundancy processes can be suspended or stopped – with commercial consequences for the outsourcing.

Steve Lorber (Lewis Silkin LLP)
Doug Gilbert (Heenan Blaikie)
Co-chairs of the International Practice Group on Restructuring

1. Law and guidance on outsourcing 21

2. Redeployment by the customer 21

3. Dismissal by the customer 21

4. Consultation and notification requirements 21

5. Where the service provider offers jobs to employees of the customer 22

6. Where the service provider's employees are found to be employees of the customer 22

7. Liabilities of the customer and the service provider 22

1. Law and guidance on outsourcing

Certain Supreme Court Rulings and section 30 of Act 20.744 cover outsourcing. The law states that the activities that can be outsourced by the customer are those that are not part of the core business of the customer. The outsourcing of core activities of the customer could imply joint liabilities in all labour related matters and special control obligations. A recent Court ruling by the Supreme Court allows for outsourcing if the customer takes a responsible stance in relation to the labour obligations of the service provider (Case Batista Heraldo Antonio c/ Parucci, Graciela y otros).

2. Redeployment by the customer

It is not mandatory for the customer to consider redeployment.

3. Dismissal by the customer

The customer may only outsource the service if the service is not the customer's main activity.

Employees of the customer may move to the service provider by agreement. The service provider must guarantee continuity of employment and equivalent terms and conditions.

If the employees of the customer do not transfer, they may be dismissed or redeployed, but in most cases dismissal will be without just cause.

Collective dismissals must be preceded by a so-called Crisis Procedure. This is an administrative procedure in which the trade union, the customer and the Ministry of Labour participate.

Note that employees could consider themselves to have been dismissed, depending on the particular situation. For example if they have been transferred to another company that does not enjoy a similar level of prestige or reputation in the market.

4. Consultation and notification requirements

There are no specific consultation or notification duties.

5. Where the service provider offers jobs to employees of the customer

Please see section 3 above. The service provider must guarantee continuity of employment and equal terms and conditions.

6. Where the service provider's employees are found to be employees of the customer

If the service is the customer's main activity, there is a risk that the service provider's employees will be deemed employees of the customer, but as long as the working conditions and salary at the service provider are similar to those at the customer, there should be no particular implications.

7. Liabilities of the customer and the service provider

The costs of dismissal, in very basic terms, will be one month's pay for each year of service, plus a fraction of one month's pay for any fractions of one year's service (provided that the fraction equates to longer than three months). One month's pay for these purposes will be the highest monthly, normal and regular salary received by the employee during the previous year (or period of service, where service is less than one year), subject to a cap. This is a statutory minimum payment and the calculation of the payment is complicated. A Supreme Court case provides that 67% of the monthly salary must be taken into consideration.

Employees must also be paid in lieu of notice and for any accrued but untaken annual leave.

The customer must monitor the service provider's compliance with employment law (i.e. salary receipts and salary payments, payments of social tax and inclusion in the CBA of the relevant service). Joint liability may arise for breaches of employment law in relation to salary, benefits, industrial injury (developed during employment with the customer) and dismissal.

Any liabilities are normally dealt with by agreement.

1. Law and guidance on outsourcing 27

2. Redeployment by the customer 27

3. Dismissal by the customer 27

4. Consultation and notification requirements 28

5. Where the service provider offers jobs to employees of the customer 28

6. Where the service provider's employees are found to be employees of the customer 28

7. Liabilities of the customer and the service provider 28

1. Law and guidance on outsourcing

The Fair Work Act 2009 covers outsourcing.

2. Redeployment by the customer

Redeployment opportunities must be explored for an employee whose position has become redundant.

3. Dismissal by the customer

Employees may move to employment with the service provider by agreement, be redeployed or dismissed.

An employer has fair grounds to make a redundancy if it no longer requires the employee's job to be performed by anyone because of changes in the operational requirements of its enterprise and it has complied with any duty in an applicable modern award or enterprise agreement to consult about the redundancy.

The redundancy will not be considered genuine if it would have been reasonable to redeploy the employee within the employer's enterprise or the enterprise of an associated entity.

A 'Transfer of Business' occurs where:

- employment with the customer terminates
- within three months, the employee becomes employed by the service provider
- the work undertaken is substantially the same as before
- there is a 'connection' between the customer and the service provider, which could be an outsourcing arrangement.

Where there is a Transfer of Business, employees moving to the service provider remain subject to the customer's 'Industrial Instrument' for as long as the customer's Industrial Instrument covers the transferring employee(s) and the service provider, or an order is made by the Tribunal that it no longer covers them. New employees of the service provider performing the same service may also be covered, if no Industrial Instrument of the service provider covers them. Existing employees of the service provider will not be covered.

4. Consultation and notification requirements

The customer is likely to have to consult with employees who will be affected under the relevant Industrial Instrument. If more than 15 employees are to be dismissed, the customer must notify Centrelink (the Social Security organisation) as soon as the decision is made to do so but before any employees are dismissed.

5. Where the service provider offers jobs to employees of the customer

This may trigger a Transfer of Business as defined in section 3 above.

6. Where the service provider's employees are found to be employees of the customer

This is unlikely. However, as a matter of commercial risk (and exposure to industrial issues) it would be common for a term in the contract between the customer and the service provider to include a provision that the service provider complies with all relevant laws and standards of employment.

7. Liabilities of the customer and the service provider

There is a statutory entitlement to redundancy pay (or 'severance' pay) on a general scale under the National Employment Standards. Dismissed employees with one year's service or more will be entitled to redundancy pay according to their length of service. For example, an employee employed for 18 months will be entitled to four weeks' pay.

If a dismissal is found to be unfair, the employer may be ordered to pay compensation, however, reinstatement is the preferred remedy. The maximum amount of compensation that can be awarded is capped at the lesser of six months' pay or half the high income threshold, i.e. AUS $ 59,050 (as at July 2011).

If the customer fails to notify Centrelink (as mentioned in section 4 above), an order may be made requiring it not to dismiss the employees, except as permitted by the order. The Tribunal may order the customer to pay compensation to the employee(s) for loss suffered or it may order reinstatement of the employee(s).

It may be possible for liabilities to be dealt with by agreement.

1. Law and guidance on outsourcing 33

2. Redeployment by the customer 33

3. Dismissal by the customer 33

4. Consultation and notification requirements 34

5. Where the service provider offers jobs to employees of the customer 34

6. Where the service provider's employees are found to be employees of the customer 34

7. Liabilities of the customer and the service provider 34

Austria

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This is implemented in Austria by the Employment Law Harmonisation Act. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

2. Redeployment by the customer

A customer is not required to redeploy staff affected by outsourcing, but it must consult the works council and discuss its recommendations, which may, of course, cover redeployment.

3. Dismissal by the customer

Outsourcing may lead to redundancy. Broadly, the customer may terminate the employment contract at any time without indicating the reasons. It can do so by simply observing notice periods and dates stipulated by law in the employment contract and in the applicable collective bargaining agreement (but see section 5 below).

In most cases both the employment contract and the applicable collective bargaining agreement ('CBA') regulate the notice periods and dates. For example, the CBA for trade contains a regulation that after five years of service, notice of termination can only be effected at the end of a quarter. Although in practice most employment contracts do not contain this clause, it must be observed. Indeed, regulations that are more favourable to the employee will prevail whether or not they are included in the CBA or in the employment contract.

Employees employed for longer than six months are entitled to general protection against termination, i.e. they may appeal against the dismissal for being unfair on social grounds or for inadmissible reasons (e.g. membership of a trade union or an employee running for the works council). The court then considers whether to continue or terminate the employment. Unfairness on social grounds may be justified by a reason related to the employee or by operational reasons.

Employees are entitled to their notice period, as Austrian employment law does not provide for payment in lieu of notice. A mutual agreement that employment will terminate is always possible.

4. Consultation and notification requirements

Both the customer and the service provider must inform and consult the works council in advance about planned 'changes of business' (such as the reduction or closure of parts of a business, the relocation of (part of) a business, a merger with other businesses or changes to the work and business organisation).

5. Where the service provider offers jobs to employees of the customer

If the service provider offers jobs to the customer's employees with the consent of the customer, no issues arise. If the service provider does so without the customer's consent, the customer could bring a claim against the service provider for competitive practices contrary to public policy.

6. Where the service provider's employees are found to be employees of the customer

The employees of the service provider are not likely to be found to be employed by the customer. However, to avoid an employment relationship between the customer and the service provider's employees, the customer should not treat them as its employees, for example, paying by them or giving them instructions. If the employees are employed by the customer as well as by the service provider the customer should ensure that their terms and conditions comply with the law.

7. Liabilities of the customer and the service provider

Severance payments are calculated according to the number of years' service. They range between twice the most recent monthly remuneration after three years' service and five times the most recent monthly remuneration after 25 years' service.

If the employee is still subject to the old severance payment system (i.e. if the employment contract began before 1 January 2003 and no transfer of severance payment claims into the 'new severance payment scheme' was agreed upon), then he or she must receive a statutory severance payment upon termination, if the employer gives notice or if there is a mutual termination.

If the employer terminates the employment contract or if a mutual termination is agreed the old severance payment system is more favourable to the employee (as he or she will receive between two and five months' salary depending on years of service). If the employee terminates the employment (without cause) the old system is to his or her detriment as there is no severance payment at all. According to the new severance payment system the employer must pay 1.53% of the monthly salary to a selected pension fund. In the case of termination, the severance pay is paid by the selected pension fund (i.e. the principal plus any return on investment) to the employee or (e.g. where the employee terminates the employment), the severance payment is assigned to a new employer. Thus, the amounts paid by that point are not forfeited irrespective of the kind of termination that would be advantageous for the employee. In addition, the employer pays the monthly amounts but is not liable for any severance pay that arises upon termination of the employment – and this is broadly advantageous for the employer as no deferred liabilities for possible severance payments are necessary.

If the outsourcing is a 'change of business' (e.g. a reduction of business activities or a mass dismissal) and causes 'fundamental disadvantages' to all employees or to a considerable part of the workforce, the works council can demand a social plan (which generally prescribes voluntary severance payments in the event of termination).

To avoid the outsourcing being considered as temporary agency work the employees of the service provider should not work in the customer's enterprise. If the rules on temporary agency work are being circumvented, the provisions of the Act on the Provision of Temporary Workers will apply. The outsourcing agreement should ensure that the terms and conditions of the employment by the service provider comply with the law. These liabilities may be dealt with by agreement.

1. Law and guidance on outsourcing 39

2. Redeployment by the customer 39

3. Dismissal by the customer 39

4. Consultation and notification requirements 40

5. Where the service provider offers jobs to employees of the customer 40

6. Where the service provider's employees are found to be employees of the customer 40

7. Liabilities of the customer and the service provider 41

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This is implemented in Belgium by 'CBA 32bis'. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

2. Redeployment by the customer

As a rule, the customer may freely choose between redeploying the employees and terminating their employment.

However, certain industry-level collective bargaining agreements impose a duty to (try to) redeploy employees whose positions disappear as a result of outsourcing.

3. Dismissal by the customer

As the customer will stop carrying out the service, the employees who are assigned to the service must either be offered alternative employment or be dismissed. The customer is not required to justify its choice (in general, an employer is not required to justify dismissals, unless the employee concerned enjoys special protection against dismissal, such as exists if he or she is an employee representative).

Dismissed employees may be asked to work out a notice period (after which the employment contract expires without further payment) or may be paid in lieu of notice. The notice period is substantially different for blue collar workers (mostly between four and 26 weeks) and white collar workers (a minimum of three months per started period of five years' continuous service, but often more). Note that the notice periods are likely to change drastically in the near future, since the Belgian Constitutional Court has declared the distinction between blue and white collar workers to be discriminatory.

4. Consultation and notification requirements

The customer must inform and consult its works council prior to making any official decision on outsourcing. The works council must be informed in detail of the contemplated outsourcing, the reasons for it and the consequences for the customer's employees. Although there is a duty to consult, the outsourcing is not dependent upon the works council's agreement. The employer can decide to outsource the service even with staff representatives' express disagreement.

The service provider must inform and consult its works council where the outsourcing will have consequences for employment within it, or for its general organisation.

5. Where the service provider offers jobs to employees of the customer

No specific issues arise. The service provider is free to recruit (former) employees of the customer, unless this has been agreed differently between the customer and the service provider. The terms and conditions of contracts with the service provider can be different from those with the customer. Employees are not obliged to agree to the new contract.

6. Where the service provider's employees are found to be employees of the customer

This is unlikely, unless the customer exercises its authority over the service provider's employees performing the service. If the customer and the service provider have concluded a service agreement, the customer may give instructions with respect to the performance of the work and this will not be considered as exercising employer's authority.

In the unlikely situation where the customer is found to be exercising employer's authority over the employees of the service provider performing the service, the customer will become their employer and must ensure that the terms and conditions of these employees comply with the law (e.g. that all employees are receiving at least the minimum wage).

7. Liabilities of the customer and the service provider

Depending on the circumstances, the customer and the service provider could face criminal liabilities for failing to inform and consult the works council. Failure to inform and consult is a criminal offence and could result in a criminal fine of up to EUR 2,750 or an administrative fine of EUR 1,375. Dismissed employees could claim compensation for insufficient consultation, but must prove the harm they have suffered (courts rarely grant more than EUR 5,000 per person).

1. Law and guidance on outsourcing 45

2. Redeployment by the customer 45

3. Dismissal by the customer 45

4. Consultation and notification requirements 45

5. Where the service provider offers jobs to employees of the customer 46

6. Where the service provider's employees are found to be employees of the customer 46

7. Liabilities of the customer and the service provider 46

Brazil

1. Law and guidance on outsourcing

Precedent no 331 of the Superior Labour Court (Tribunal Superior do Trabalho) draws the line between lawful and unlawful outsourcing and determines the customer's responsibilities in either case.

The outsourcing will only be lawful, if the service is not the customer's main activity, in which case the outsourcing will be lawful.There is no legal definition of 'main activity', but it is normally understood as the core business of the company, its mission and the activity that makes the company its profits (e.g. law firms are not allowed to hire lawyers as outsourced workers).

Outsourcing may also be considered unlawful if the service provider's employees are deemed to be employees of the customer (please refer to section 6 below).

2. Redeployment by the customer

The customer is not obliged to redeploy employees who used to perform the outsourced service.

3. Dismissal by the customer

Employees of the customer who carry out the service are likely to be dismissed and there is no regulation of this. Employment can be terminated 'at will', with or without cause, except in particular cases (e.g. pregnant employees; members of a specific commission for prevention of accidents in the workplace; employees who have suffered labour-related accidents or occupational diseases and union representatives).

If there is to be a large number of dismissals, this is likely to be discussed with the trade union.

4. Consultation and notification requirements

There are no specific consultation or notification duties.

5. Where the service provider offers jobs to employees of the customer

If the service provider offers jobs to employees of the customer, and such employees continue to render services to the customer, there is a greater chance that the outsourcing will be deemed unlawful, and the employees could claim that their employment with the customer is still continuing.

In addition, employees of the service provider carrying out the service may be able to make a claim for equality of terms and conditions with employees of the customer who are carrying out similar duties, provided that the difference in their length of service is not greater than two years.

6. Where the service provider's employees are found to be employees of the customer

If the service is the customer's main activity, the outsourcing will be unlawful and employees of the service provider performing the service will be deemed to be employees of the customer, with the customer being responsible for all their employment rights.

In addition, if the service provider's employees are found to be controlled by the customer (such that the services are rendered according to the customer's rules and schedules, with the customer being closely involved in how the employees perform their duties), they will be deemed to be employees of the customer and the outsourcing will be unlawful.

In order to mitigate financial risks, the customer could ensure that the terms and conditions of employees at the service provider comply with the law and with all voluntary employment conditions. However, if the outsourcing is unlawful, the Ministry of Labour, the trade union and the Public Attorney's Office may take legal action to require the customer to retain the workers.

7. Liabilities of the customer and the service provider

The customer will have secondary liability in the event that the service provider fails to comply with its employment duties, including in relation to employment and Social Security fees, which can be up to 66% of an employee's monthly salary.

On termination without cause, employees are entitled to accrued wages (including pro-rated vacation and '13th month's salary'). If the termination is effective immediately, there must also be a payment equal to 30 days' notice and a payment in respect of 50% of the deposits which would have been made into the 'Fundo de Garantia do Tempo de Serviço', or 'FGTS' account during the notice period. The FGTS is a statutory unemployment fund held with the Federal Bank ('Caixa Econômica Federal'), funded by the employer through monthly deposits equal to 8% of the employee's monthly wages.

These liabilities are normally dealt with by agreement and as part of the process the customer should satisfy itself of the service provider's credibility.

1. Law and guidance on outsourcing 51

2. Redeployment by the customer 51

3. Dismissal by the customer 51

4. Consultation and notification requirements 51

5. Where the service provider offers jobs to employees of the customer 52

6. Where the service provider's employees are found to be employees of the customer 52

7. Liabilities of the customer and the service provider 52

Canada

1. Law and guidance on outsourcing

Since Canada is a federal state, each jurisdiction has its own set of labour and employment law statutes. Therefore, the following information is of a generalised nature only.

Collective bargaining agreements frequently contain provisions that restrict or prohibit outsourcing.

If the customer is not unionised, there are generally no restrictions on outsourcing. However, the customer may be liable for the termination costs of displaced employees.

2. Redeployment by the customer

If the customer is not unionised, it is not required to redeploy displaced employees. If the company is unionised displaced employees may have the right to claim other positions at the customer by virtue of seniority.

3. Dismissal by the customer

If the service provider acquires the customer's essential assets or expertise to carry out the service, the outsourcing could be deemed to be a 'Sale of Business'.

If there is a 'Sale of Business' and the customer is unionised, the service provider will be bound by the collective bargaining agreement of the customer, and will be required to employ as many employees of the customer as required to carry out the service. Seniority rights must be recognised in the selection process.

Note that if there is a change in headcount, some rights (e.g. certain leave provisions, health and safety committees and group termination provisions) could be affected.

4. Consultation and notification requirements

If the employer is non-unionised, there is no duty to consult, give notice or consult over the decision to outsource.

If the employer is unionised, the collective bargaining agreement may contain notice and consultation duties.

Employees who will be terminated are entitled to notice or payment in lieu.

5. Where the service provider offers jobs to employees of the customer

If there is no 'Sale of Business' and the employer is unionised, employees of the customer will have the right to follow their jobs to the service provider to the extent employees are required.

If there is no union, an offer of comparable employment by the service provider will generally relieve the customer termination costs.

Where there is a 'Sale of Business', continuity of employment is preserved for the purposes of future statutory termination or severance duties for any employee of the customer, carrying out the service, who accepts work with the service provider.

6. Where the service provider's employees are found to be employees of the customer

It is possible for the customer and the service provider to be treated as one employer if both companies are commonly controlled or directed in a manner that would defeat rights. This would mean that both companies would remain liable for any termination or wage claims affecting employees.

7. Liabilities of the customer and the service provider

If outsourcing is found to be a scheme to defeat the statutory rights of employees, the customer will be liable for statutory termination payments.

If a unionised employer fails to comply with notice and consultation duties, it may result in a finding that the outsourcing is invalid and that compensation is payable for lost wages and benefits of employees improperly laid off.

Liability for wrongful dismissal ranges from one week to 24 months' pay or more (depending on seniority and length of service).

Unionised employees are not entitled to claim wrongful dismissal and are limited to statutory minimum payments and any enhanced severance pay that may be provided in a collective bargaining agreement.

Where there is dismissal without cause (i.e. it is not possible to justify the dismissal on the basis of serious misconduct or capability issues) shortly after an employee of the customer accepts employment with the service provider, the customer and the service provider can be jointly liable.

The outsourcing agreement may stipulate that the customer will fulfil all termination responsibilities or conversely that the service provider will employ employees from the customer.

If there is no 'Sale of Business', rights are limited to dismissal payments under statute and at common law. The rights of unionised employees are determined by statute and the terms of the collective bargaining agreement.

If employees move to the service provider, the service provider will assume responsibility for termination and severance pay.

1. Law and guidance on outsourcing 57

2. Redeployment by the customer 57

3. Dismissal by the customer 57

4. Consultation and notification requirements 57

5. Where the service provider offers jobs to employees of the customer 57

6. Where the service provider's employees are found to be employees of the customer 58

7. Liabilities of the customer and the service provider 58

Chile

1. Law and guidance on outsourcing

Both the customer and the service provider must take into account the sub-contracting regime set out in Articles 183-A to 183-E of the Labour Code.

The sub-contracting regime provides that outsourcing is subject to the following requirements:

- the employee must work for the service provider (i.e. the 'contractor' or 'sub-contractor'), under an employment agreement
- the customer must be the owner of the work, business or establishment, where the service is rendered
- there must be a commercial agreement between the customer and the service provider under which the service provider on its own behalf undertakes both the service and the risk
- the service must be performed by the service provider with employees under its direction.

2. Redeployment by the customer

The customer does not need to consider redeployment.

3. Dismissal by the customer

Permanent employees could be dismissed as redundant on grounds of 'company needs', for example, rationalisation or modernisation or any other reasonable business reason. The customer may argue that some of its employees are redundant by reason of the outsourcing of the services they were rendering.

4. Consultation and notification requirements

There are no specific consultation or notification requirements.

5. Where the service provider offers jobs to employees of the customer

No specific issues arise.

6. Where the service provider's employees are found to be employees of the customer

If employees of the service provider are found to be under the control and direction of the customer, they could be considered to be employees of the customer, rather than the service provider. The customer should prevent its employees from supervising or directing the service provider's employees in any way. Any instruction should be given by the service provider's supervisors.

If the service provider's employees are found to be employees of the customer, the customer should ensure that the terms and conditions of employees at the service provider comply with the law.

7. Liabilities of the customer and the service provider

The customer's employees are entitled to a severance payment of one month's salary per year of service, up to a maximum of 11 months and an amount not exceeding approximately EUR 2,990 (i.e. 90 Chilean inflation indexed units) if they are made redundant because of the outsourcing of their positions within the company.

If a dismissal is found to be unlawful, the employer may be liable to pay compensation in lieu of prior notice, a severance payment and a 'lawful increase' on the severance payment of 30% (plus interest, inflation adjustments and costs).

The service provider is primarily responsible for the payment of salaries, social security contributions and any legal severance payments due to its employees. However, the customer has joint and several liability for these.

Such liabilities may be dealt with by agreement. For example, the service provider could agree to assume all liability for employment and social security costs and to indemnify the customer for any liability incurred. However, note that the agreement is only enforceable between parties and not against employees.

The customer must check the service provider's compliance with the employment and social security requirements of its employees. The general rule is that the customer has joint and several liability for these requirements (including severance payments). If the customer has satisfied itself of these matters in a timely an effective way, its liability becomes secondary.

1. Law and guidance on outsourcing 63

2. Redeployment by the customer 63

3. Dismissal by the customer 63

4. Consultation and notification requirements 64

5. Where the service provider offers jobs to employees of the customer 64

6. Where the service provider's employees are found to be employees of the customer 64

7. Liabilities of the customer and the service provider 64

1. Law and guidance on outsourcing

Costa Rican employment legislation does not expressly regulate any of the different forms of productive decentralisation, i.e. sub-contracting or temporary workforce supply. However, within the local job market it is common for companies to use outsourcing. This leads to the risk that the customer, which benefits from the services provided by the employees of the service provider, may be considered as the employer.

The lack of legislation means that an outsourcing contract does not fall within the scope of regulation. Nevertheless, because the customer is the beneficiary of the services, it should verify the service provider's compliance with its duties as employer, in order to avoid a declaration of partial or total liability for any non-compliance towards the employees. This verification should include (but not be limited to) the following issues:

- payments equal to or over the minimum wage defined legally for the term, consistent with the employee's occupation and qualifications
- social security insurance, including complete and prompt payment of contributions
- the purchase of an employment risk policy, payment and employee inclusion by the service provider
- correct and complete overtime payments (if overtime is worked).

2. Redeployment by the customer

The customer is not required to redeploy employees who used to perform the outsourced task. If employees are not reassigned, the customer should pay all indemnities relating to a termination of contract without cause.

3. Dismissal by the customer

As Costa Rica does not have any legislation directly relating to outsourcing, there are no limitations that may affect the customer's ability to dismiss employees.

4. Consultation and notification requirements

There are no legal requirements for the service provider to fulfil in order to provide the services within the setting of a local job market or to execute an outsourcing agreement.

However, it is very important that the customer and the service provider should make a written commercial agreement to clarify both parties' duties. It is also advisable to inform employees in advance of the date the contract will commence, so that they will be aware of the existence of people employed by another company.

Employer representatives of the customer should be trained in how to properly manage an outsourcing contract (e.g. direct orders, schedule changes and the application of disciplinary sanctions) so as to avoid co-employment issues with the service provider.

5. Where the service provider offers jobs to employees of the customer

As mentioned, there should always be a contract that regulates the relation between the customer and the service provider. Usually this contract will contain a clause in which it is established that both parties should not hire personnel of the other company and that there will be a penalty if this happens.

If this prohibition it is not set out in the contract, there will be nothing to prevent the service provider from hiring the customer's employees directly.

6. Where the service provider's employees are found to be employees of the customer

It is very important for the customer to treat the personnel of the service provider in a way that will leave no doubt that there is no labour contract between them, therefore the customer should avoid any subordination in relation to employees of the service provider who have been assigned to the customer.

7. Liabilities of the customer and the service provider

As indicated in section 1 above, outsourcing contracts are not expressly governed by law. However, case law has laid down that if the customer and the service provider belong to the same group (e.g. having common administration), both can be jointly liable for a specific claim brought by employees or a government institution, if the service provider (as employer) fails to comply with any duty set out in local legislation.

Both companies could be required to pay legal indemnities in favour of the employee. The amount of compensation would depend on the number of years the employee worked for the company.

There is always the possibility of resolving disagreement with employees through negotiation and it is best if this is coordinated by Costa Rica's Ministry of Labour. If it is not possible to reach an agreement in this way, the employee will be entitled to bring an action against the service provider, and it is possible that if the outsourcing contract was not managed properly, the claim could also involve the customer.

1. Law and guidance on outsourcing 69

2. Redeployment by the customer 69

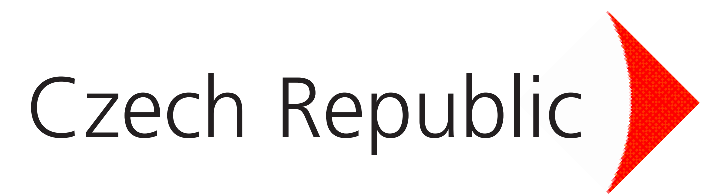
3. Dismissal by the customer 69

4. Consultation and notification requirements 70

5. Where the service provider offers jobs to employees of the customer 70

6. Where the service provider's employees are found to be employees of the customer 70

7. Liabilities of the customer and the service provider 71



1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced it may be (and in most cases is) covered by the EU's law on transfers of undertakings. This is implemented in the Czech Republic by section 338 et seq. of Act no 262/2006 Coll., the Labour Code, as amended. In accordance with national legislation, there are two forms of transfer: the transfer of an employer's tasks or activities to another employer and the transfer of part of an employer's tasks or activities to another employer.

If an employer outsources its activities to a legal or natural person who is qualified to continue the performance of tasks or activities or activities of a similar type to those of the employer, the transfer of undertaking provisions will apply.

Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

Please note that individual contracts of employment need to be considered.

2. Redeployment by the customer

If the customer has no work for such employees that conforms to the provisions of their employment contracts (i.e. the type of work and place of work), it is not obliged to redeploy them.

3. Dismissal by the customer

If the customer outsources its tasks and the transfers of undertakings provisions do not apply, it is likely to dismiss employees by reason of closure of part of it (section 52(a) of the Labour Code) or by reason of redundancies based on organisational changes (section 52(c) of the Labour Code).

Depending on the number of dismissed employees, the provisions on collective dismissals may apply. For details about collective (large-scale) redundancies, see the Ius Laboris Collective Redundancies Guide.

4. Consultation and notification requirements

If there is a trade union established within the employer, the employer must consult with it in advance of each and every notice of termination. The consultation requirement will be fulfilled even if the trade union disagrees with the notice of termination. Should an agreement on termination be concluded between the employer and the employee, the employer must notify the trade union of this.

Should the dismissal be deemed as a 'structural change influencing the employment rate', the employer must consult with the employee representatives or directly with the employees (where there are no employee representatives) regarding the intended changes.

If the collective dismissal procedures apply, the employer will have specific information and consultation duties, including information duties towards the Labour Office.

5. Where the service provider offers jobs to employees of the customer

Assuming the transfers of undertakings provisions do not apply, the service provider is entitled to offer jobs to the customer's employees who were carrying out the service, without any specific conditions applying.

6. Where the service provider's employees are found to be employees of the customer

The Czech courts have not yet ruled on such a scenario.

However, if the service provider´s employees were found to be employees of the customer, the customer would be obliged to ensure equal treatment of all its employees in terms of pay and other legal obligations (including the law as regards the minimum wage).

7. Liabilities of the customer and the service provider

In relation to dismissals caused by part of an employer shutting down or because of redundancies, employees are entitled to a notice period of at least two months. Additionally, they are entitled to at least three months' average earnings as a severance payment. A longer notice period or higher severance payment may be agreed in an individual or collective agreement.

If the dismissal is declared void by the court, the employees are entitled to compensatory salary amounting to their average earnings for the duration of the court proceedings, provided that they informed their employer of their intention to remain employed. Note that court proceedings usually last up to three years.

The customer and the service provider may agree in the outsourcing contract that if the customer becomes liable to the service provider's employees or vice versa, the respective company will indemnify the other one for any harm that arises.

1. Law and guidance on outsourcing 75

2. Redeployment by the customer 75

3. Dismissal by the customer 75

4. Consultation and notification requirements 75

5. Where the service provider offers jobs to employees of the customer 76

6. Where the service provider's employees are found to be employees of the customer 76

7. Liabilities of the customer and the service provider 76

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there are circumstances in which the EU's law on transfers of undertakings applies. This is implemented in Denmark by the Act on Employees' Rights in the Event of Transfers of Undertakings. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

Please note that individual contracts of employment also need to be considered.

2. Redeployment by the customer

The customer must consider redeployment before dismissing employees.

3. Dismissal by the customer

Outsourcing may lead to redundancy.

A shortage of work on the grounds of outsourcing is an example of a justified reason for dismissal.

Collective dismissal procedures may apply, depending on the numbers involved.

4. Consultation and notification requirements

There is no specific process to follow in relation to outsourcing.

However, a relevant collective agreement may contain an obligation to consult with the works council or employee representatives.

If collective dismissal procedures apply the relevant consultation process must be followed.

A duty to consult can also follow from the Act on Information and Consultation of Employees (which implements the EU directive on the same subject) depending on the customer and what it is about to outsource.

Failure to carry out the consultation may be a breach of duty under a collective agreement or of law and could result in a substantial penalty or fine.

If there are no aggravating circumstances, the penalty will probably be no more than EUR 25,000.

5. Where the service provider offers jobs to employees of the customer

The service provider may re-employ the employees of the customer on new terms and conditions but continuity of employment will not be preserved.

6. Where the service provider's employees are found to be employees of the customer

Generally, this is unlikely, but it is conceivable that the way the arrangement was set up could be deemed to be unlawful circumvention of the employees' rights, resulting in the employees being *de facto* employed by the customer.

The customer should seek legal advice before entering into the outsourcing contract with the service provider.

7. Liabilities of the customer and the service provider

Where the dismissal is found to be fair, the employer's main financial liability will be to pay the employee's salary for his or her notice period. Pursuant to the Salaried Employees Act, notice periods last between one and six months. Notice periods under collective agreements vary from industry to industry. In addition, an employee with the requisite length of service may be entitled to severance pay equivalent to a maximum of three months' salary. Usually the level of severance pay under collective agreements is lower or non-existent.

Where the dismissal is found to be unfair, the employer could be liable to reimburse the (salaried) employee an amount equivalent to between one and six months' salary or 52 weeks' pay under a collective agreement.

Generally speaking there are no additional rights or protections. However, a relevant collective agreement for the customer might protect the employees of the service provider by making the customer liable if the service provider does not offer the outsourced employees equivalent the terms and conditions.

The legislation cannot be avoided, but liabilities based on statutory law are often dealt with under a contract.

1. Law and guidance on outsourcing 81

2. Redeployment by the customer 81

3. Dismissal by the customer 81

4. Consultation and notification requirements 82

5. Where the service provider offers jobs to employees of the customer 83

6. Where the service provider's employees are found to be employees of the customer 83

7. Liabilities of the customer and the service provider 83

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This law is implemented in Finland by the Employment Contracts Act (55/2001) and the Finnish Act on Co-Operation within Undertakings (334/2007), the 'Co-Operation Act'. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

Some collective agreements contain specific provisions on outsourcing and the employer's freedom to use an external workforce.

2. Redeployment by the customer

An employee whose contract has been terminated has a right of precedence to any vacant positions with the former employer for a period of nine months after the termination of employment. This right of precedence applies to jobs and positions that are the same or similar to those that the employee previously performed.

3. Dismissal by the customer

If the outsourcing does not fall within the scope of the transfers of undertakings provisions, employees of the customer who are performing the activity will not become employed by the service provider (unless the service provider chooses to employ them and the employees wish to become employed by the service provider). If the service provider and the employees concerned are unwilling to conclude employment contracts, the rules on collective dismissals will apply. For details about collective redundancies, see the Ius Laboris 'Collective Redundanicies' Guide.

If the rules on collective dismissals do apply, there are two options: redeployment or redundancy. If no redeployment opportunities exist, the customer will usually need to make the employees redundant. When making employees redundant, valid reasons for redundancy must exist and the statutory dismissal procedure will need to be followed.

The employer is generally entitled to make an employee redundant, if (i) work has diminished or been materially reduced for economic or production-related reasons, or because of the restructuring of the enterprise and (ii) the reduction of work is permanent.

Note that there are no specific implications for other employees not involved in the outsourcing, although if the content of their work is materially affected, they must be consulted on the changes in advance.

4. Consultation and notification requirements

No specific consultation requirements are triggered in an outsourcing situation. Where redundancies are to be made, the consultation procedure varies depending on the size of the employer.

Minor employers (i.e. those employing up to 19 employees in Finland) have a relatively straightforward consultation procedure. An employer planning to dismiss an employee must discuss the reasons for and alternatives to termination with the employee as much in advance as possible. If many employees are to be dismissed, a joint discussion may be held.

Major employers (i.e. those employing at least 20 employees in Finland) are subject to more extensive consultation duties. Such companies are not entitled to make any final decisions on the redundancies or business decisions directly resulting in redundancies prior to fulfilling all their consultation duties. If the dismissal concerns only one employee, the negotiations must primarily take place between the employer and the employee in question. If the dismissals affect large groups of employees, the parties to the consultations are the employer and the representatives of the employees affected by the redundancies. In addition, the employer must inform the local Employment Authorities of the consultations relating to the possible reduction of manpower. The employer must invite the affected employees to the consultations five days in advance. After that, the employer must carry out the consultations with the aim of reaching an agreement with the employees. The minimum consultation period is between two and six weeks, depending on the scale of the redundancies.

5. Where the service provider offers jobs to employees of the customer

No issues arise if the service provider offers jobs to employees of the customer. The service provider may do so without being bound by their prior terms of employment.

6. Where the service provider's employees are found to be employees of the customer

This situation would not arise under Finnish law.

7. Liabilities of the customer and the service provider

The customer does not have a duty to make any termination or severance payments in relation to lawful terminations of employment contracts (although sometimes voluntary redundancy packages are offered).

An employee who has been given notice is, however, entitled to retain pay and other employment benefits during the notice period.

If the employment contract is terminated without sufficient grounds, the employee is entitled to an indemnity. The size of the indemnity is determined by the court, but it cannot be greater than an amount equal to 24 months of the dismissed employee's salary. Wrongful dismissal does not entitle the employee to be reinstated.

An employer's failure to conduct consultations could result in liability towards an employee who is made redundant. The amount of the indemnity is not linked to the harm suffered by the employee. The maximum indemnity per redundant employee is EUR 31,570.

There is a statutory notice period of between two weeks and six months, depending on the length of service. The rights of the employee continue unchanged during the notice period, including the right to a full salary.

The customer and the service provider may contractually agree on the division of their liabilities arising out of the outsourcing process.

1. Law and guidance on outsourcing 87

2. Redeployment by the customer 87

3. Dismissal by the customer 87

4. Consultation and notification requirements 88

5. Where the service provider offers jobs to employees of the customer 89

6. Where the service provider's employees are found to be employees of the customer 89

7. Liabilities of the customer and the service provider 89

France

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. The law is implemented in France by Article L.1224-1 of the Labour Code. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

2. Redeployment by the customer

The customer will be obliged to search for redeployment solutions (within the customer and in all companies belonging to the same group as the customer) for its employees before making any redundancies. The customer and the service provider may agree (though they are not legally obliged to do so) that the service provider will employ some of the employees of the customer whose positions are being cut. Such an agreement could allow the customer to fulfil part of its redeployment duty towards its employees. However its obligation to search for redeployment solutions within its own organisation and group will remain a priority.

The employees have no obligation to agree to the redeployment proposals and/or the new contract with the service provider.

If there is no opportunity to redeploy or there is refusal of any redeployment proposals, the employee will be made redundant. Redundancies will be deemed to be without just cause by the court if the customer is unable to prove that redeployment was not possible.

3. Dismissal by the customer

Employees of the customer who are 'assigned' to the service have no specific rights as a result of the outsourcing. As the customer stops performing the service, the employees may well be redundant.

The dismissal procedure varies according to how many redundancies are planned. For details about collective (large-scale) redundancies, see Ius laboris "Collective Redundanicies Guide". This provides details, for example, about

the obligations in relation to notice periods (usually from one to three months) and the obligation to produce a social plan where the redundancy involves 10 or more employees in organisations with at least 50 employees.

Generally, the main difficulty for the customer in terms of dismissals, will be to give to the dismissal a just cause within the meaning of French law which is quite restrictive. For example, the customer will need to establish that it had no choice but to outsource the service in order to cope with serious economic difficulties and/or retain its competitiveness. A simple management decision to outsource the service would not be sufficient to justify dismissals.

Note that the outsourcing could lead to a change in headcount which could have consequences for employees' rights, given that certain requirements under French labour law (e.g. the obligation to have employee representatives and the number required, and the requirement to have a profit-sharing scheme) are based on the number of employees.

4. Consultation and notification requirements

There is a duty on the customer to inform and consult the works council prior to any official decision about outsourcing. The works council must be informed in detail about the outsourcing project, the reasons for it and its consequences for the customer's employees. In practice at this stage, the customer will need to show details of the measures (notably concerning redeployment) that it intends to take towards its employees.

In certain circumstances, the customer might be required to inform and consult the health and safety at work committee.

Note however, that the duties just described do not give the works council' a right of veto. The employer may decide to outsource the service even if the employee representatives have expressed a negative opinion about it.

Nevertheless, failure to inform and consult is a criminal offence ('délit d'entrave') punishable by a fine of up to EUR 3,750 and up to one year's imprisonment.

As regards the service provider, it will be required to inform and consult the works council if it will have consequences for employment within the service provider or in terms of the general running of the service provider (that is to say, the effect must be greater than a standard new contract to provide services).

5. Where the service provider offers jobs to employees of the customer

There are no specific issues.

6. Where the service provider's employees are found to be employees of the customer

If the supply of the service from the service provider to the customer was found to be a sham, in other words, if the service provider's employees were performing the service in a way which indicated that they are subordinated to the customer, then the service provider's employees could be found to be employees of the customer. A bond of subordination is the decisive factor for concluding that a contract of employment exists. The customer should therefore avoid giving orders to employees of the service provider. If possible, the work should not be done on the customer's premises and employees of the service provider should use the service provider's materials.

7. Liabilities of the customer and the service provider

Liabilities will arise for any unfair dismissals and the employer will be required to pay damages to employees with at least two years' service of a minimum of six months' salary, with no upper limit; and to employees with less than two years' service an amount based on the tort that is established. The employer will also be required to reimburse the unemployment authorities the amount of unemployment benefits paid to the employee up to a maximum of six months' benefits.

Redundant employees are entitled to severance pay linked to length of service and the provisions contained in the relevant collective bargaining agreement. This will amount to a minimum of one-fifth of the monthly salary per year of service for employees who have served at least one year.

1. Law and guidance on outsourcing 93

2. Redeployment by the customer 93

3. Dismissal by the customer 93

4. Consultation and notification requirements 94

5. Where the service provider offers jobs to employees of the customer 95

6. Where the service provider's employees are found to be employees of the customer 95

7. Liabilities of the customer and the service provider 95

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This law is implemented in Germany by section 613(a) BGB (German Civil Code). Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

2. Redeployment by the customer

Redeployment must be considered before employees can be dismissed, based on the provisions of the Dismissal Protection Act.

3. Dismissal by the customer

If the employees attributable to the outsourced business do not transfer by operation of law as described above or exercise their right to object to the transfer, the employees assigned to the service will generally be made redundant, as the customer will stop carrying out the service. However, whether or not this can be done lawfully will depend on certain factors.

In the event that the Dismissal Protection Act applies, a dismissal is normally deemed socially unjustified and therefore unlawful. Only if specific exceptions as provided in the Dismissal Protection Act apply, will a dismissal be justified and lawful. If the lawfulness of a dismissal is contested by an employee, the employer must prove that all the prerequisites for the statutory exceptions for a lawful dismissal are fulfilled. Specifically, the employer must prove that the dismissal was for a reason that is covered by the Dismissal Protection Act, i.e. operational reasons. For more information on this please see the Ius Laboris guide on 'Individual Dismissals'.

Within the scope of outsourcing, a dismissal made by the customer for of operational reasons could be socially justified. The prerequisites for a lawful termination for operational reasons are:

- a management decision: this must have such an effect on the employment of the dismissed employee that the further employment of this employee in his or her specific job is impossible, i.e. that the employee can be spared.

- continued employment not possible: the continued employment of the dismissed employee at another job within the same business operation or in another business operation of the same company is not possible. However, termination will be considered to be ineffective if the employee can be reassigned to another vacant position within the company.
- social selection: when choosing between several employees, each of whom could be dismissed on account of operational reasons because they perform the same work at the same hierarchical level, the employer must consider social selection criteria. The social selection criteria to be taken into account are the employee's length of employment, age, obligations vis-à-vis any dependants and whether or not he or she is disabled. As a general rule, the employee who would suffer most from a termination should be the last to be dismissed.

4. Consultation and notification requirements

Almost any outsourcing project results in a change of business structure at the operational level, a so-called operational change. If so:

- the customer must consult with the works council
- co-determination rights within the service provider may be triggered
- the customer must inform the Economic Committee and the service provider may also need to do so
- the customer and the service provider may need to inform the Spokesperson's Committee
- the customer must negotiate with the works council on a so-called 'balance of interests'. This will determine the particular measures being put in place within the scope of the operational change; the number and scope of affected employment relationships; and the ways in which the employment relationships are affected
- the customer must conclude a social plan setting out how the financial disadvantages the employees will suffer as a result of the planned operational changes will be resolved or mitigated.

In the case of collective dismissals the employer must inform the employment agency about the planned collective dismissals before delivering the notice of termination to the employee.

Note that the outsourcing could lead to a change in headcount. This change could have consequences for employees' rights, as many legal requirements under German employment law depend on the number of employees (e.g. staff representation and protection against dismissal).

5. Where the service provider offers jobs to employees of the customer

If the service provider offers jobs to employees of the customer, this could trigger a transfer of undertaking (subject to certain other factors also being present).

6. Where the service provider's employees are found to be employees of the customer

This would be unlikely.

7. Liabilities of the customer and the service provider

If the employer deviates from the balance of interest without good reason or fails to consult with the works council, employees can claim severance payments (between 12 and 18 months' gross salary) and compensation for other losses for a period of up to 12 months.

An employer may be liable for a fine of up to EUR 10,000 for failing to properly disclose information to the works council.

There is no statutory redundancy pay. If a court decides that termination was unjustified, it will enforce the reinstatement of the employee into his or her former job. In practice, it is very difficult for employers to prove that the dismissal was justified. Commercial settlements usually range between 50% and 100% of the gross monthly average salary of the employee for each year of service, depending on his or her age.

Redundant employees are entitled to severance pay linked to length of service and the provisions contained in the relevant collective bargaining agreement.

1. Law and guidance on outsourcing 99

2. Redeployment by the customer 99

3. Dismissal by the customer 99

4. Consultation and notification requirements 99

5. Where the service provider offers jobs to employees of the customer 99

6. Where the service provider's employees are found to be employees of the customer 100

7. Liabilities of the customer and the service provider 100

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This law is implemented in Greece by Presidential Decree no 178/2002. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

2. Redeployment by the customer

Redeployment must be considered before an employee can be dismissed as redundant.

3. Dismissal by the customer

Outsourcing may lead to redundancy and redeployment must be considered. Depending on the numbers involved, the collective dismissal procedure may apply. For details about collective redundancies, see the Ius Laboris Collective Redundancies Guide.

A dismissal must be for economic, technical and organisational reasons, and not related to employees themselves.

Note that if there is a change in headcount, some rights (e.g. the setting up or composition of the works council) may be affected.

4. Consultation and notification requirements

The customer and the service provider need only notify staff of the outsourcing. If there are likely to be redundancies and the collective dismissal procedure applies, employee representatives must also be consulted.

5. Where the service provider offers jobs to employees of the customer

No specific issues arise.

6. Where the service provider's employees are found to be employees of the customer

This situation is unlikely to occur..

7. Liabilities of the customer and the service provider

Redundant employees with at least two months' service are entitled to a severance payment. If proper advance notice is given, the severance payment is calculated by multiplying the remuneration that the employee received in the month immediately preceding the dismissal by half the number of months' advance notice that were given. If no advance notice is given, the full number of months' advance notice that should have been given is used instead.

The customer and the service provider could face criminal liabilities as well as liabilities to pay compensation for:

- the dismissal of trade union members
- redundancies that are declared void by a court, where the employer refuses to reinstate the employees
- failing to comply with obligations regarding wages.

1. Law and guidance on outsourcing 105

2. Redeployment by the customer 105

3. Dismissal by the customer 106

4. Consultation and notification requirements 106

5. Where the service provider offers jobs to employees of the customer 106

6. Where the service provider's employees are found to be employees of the customer 107

7. Liabilities of the customer and the service provider 107

India

1. Law and guidance on outsourcing

If the service is to be performed at the premises of the customer and it employs 20 or more contract workers (who fall within the category of 'workmen', or 'blue collar workers') the Contract Labour (Regulation and Abolition) Act 1970 (the 'CLRA') will apply.

If the customer is based in India and employs 20 or more blue collar workers through one or more service provider, the CLRA and other relevant statutes such as the Industrial Disputes Act 1947 (the 'ID Act') and the state-specific Shops and Commercial Establishments Act will apply.

If the service is governed by the CLRA the following requirements must be complied with:

- a customer based in India and employing 20 or more blue collar workers must register with the appropriate authority;
- if the customer employs 20 or more blue collar workers, the service provider must obtain a licence;
- the customer and the service provider must maintain prescribed registers;
- if the work performed by the employees of the service provider is the same or similar to that performed by the customer, they must be paid an equivalent salary;
- the customer should also verify whether the service is specifically prohibited. If there is such a prohibition, the customer should not engage the services of the service provider for that service;
- the arrangement between the customer and the employees of the service provider should be such that the customer does not supervise or control the service provider's employees; and
- the customer must also ensure that all wages and statutory benefits are being paid by the service provider to its employees. If the service provider fails to make any such payments the customer will be liable for them (although the customer can recover them from the service provider).

2. Redeployment by the customer

Whether to redeploy is at the discretion of the customer.

3. Dismissal by the customer

If blue collar workers are to be terminated, the ID Act will apply. Blue collar employees with over one year's service can only be terminated in accordance with the ID Act, their contracts of employment, collective agreements, the employee handbook and the state-specific Shops and Commercial Establishments Act.

Non-blue collar workers can be terminated according to the terms of their employment and the provisions of the relevant the state-specific Shops and Commercial Establishments Act.

The customer can determine whether to terminate or redeploy blue collar workers in other businesses. If the employees are terminated by the customer, they may be entitled to a severance payment. Generally, employees of the service provider are terminated by the service provider rather than the customer so as to avoid any further claim, such as for reinstatement against the customer.

In practice, the outsourcing may result in employees of the customer being redundant, as the activities they performed have been outsourced, but the law does not define this as a redundancy situation.

Employees who have completed one year of continuous service can be terminated by giving one month's notice or a payment in lieu and severance pay at a rate of 15 days' pay for every completed year of service. If the organisation is an industrial establishment with 100 or more employees the employer must give three months' notice or a payment in lieu along with severance pay.

4. Consultation and notification requirements

There is no requirement to consult or notify in the case of outsourcing.

5. Where the service provider offers jobs to employees of the customer

Where the service provider offers jobs to employees of the customer, the employees will either resign from the customer and take up fresh employment with the service provider or be terminated by the customer before taking up employment with the service provider.

There is generally no legal requirement to follow the procedure relating to continuity of employment. However, blue collar workers with more than one year's service must have their continuity of employment maintained and the same or better terms and conditions.

6. Where the service provider's employees are found to be employees of the customer

If the court rules that the outsourcing is not genuine and was merely entered into in order to avoid regular employment and there is, for example, a relationship of control and supervision between the customer and the employees of the service provider, the service provider's employees may be found to be employees of the customer.

7. Liabilities of the customer and the service provider

If blue collar workers are dismissed in accordance with the ID Act, their contracts of employment, collective agreements or the state-specific Shops and Commercial Establishments Act, they must be given notice and compensation. There may be a requirement to give notice to the government or to obtain prior approval, depending on the nature of business activities carried on in the establishment and the number of employees.

The minimum amount of compensation is 15 days' average wages per year of employment, unless the terms and conditions of the contract of employment or the collective agreement are more generous. The employees are also required to be paid severance pay.

These liabilities are normally dealt with by agreement.

1. Law and guidance on outsourcing 111

2. Redeployment by the customer 111

3. Dismissal by the customer 111

4. Consultation and notification requirements 111

5. Where the service provider offers jobs to employees of the customer 112

6. Where the service provider's employees are found to be employees of the customer 112

7. Liabilities of the customer and the service provider 112

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This is implemented in Ireland by the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the 'Regulations'). Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

2. Redeployment by the customer

The customer is required to retain or redeploy employees where the Regulations do not apply unless it is in a position to establish that a genuine redundancy situation arises pursuant to the Redundancy Payments Acts 1967-2007 and that the employees have been fairly selected for redundancy if redeployment is not possible. If the customer wants to retain the employees who used to perform the outsourced task, they may be redeployed.

3. Dismissal by the customer

The customer may not dismiss employees as a result of outsourcing alone. However, if the customer is in a position to establish that a genuine redundancy situation arises pursuant to the Redundancy Payments Acts 1967-2007 and that the employees have been fairly selected for redundancy, it would be entitled to effect dismissals by reason of redundancy.

Genuine redundancy occurs where an employer ceases or intends to cease carrying on the business for which the employees were employed at a particular workplace (or at all) or where the requirement for employees to carry out work of a particular kind at the place where the employees are employed has ceased or is expected to cease.

4. Consultation and notification requirements

Assuming the transfer of undertakings rules do not apply, there is no specific consultation process to follow in relation to the outsourcing. However, if

redundancies are to be made, individual and collective redundancy consultations may need to be carried out.

If there are to be changes to employees' job descriptions, duties or terms and conditions as a result of the outsourcing, it should be considered whether it is necessary to consult in relation to those changes in order to avoid breach of contract or constructive unfair dismissal claims.

If there are redundancies associated with the outsourcing, the relevant employer will need to consult with both the employees carrying out the service and those employees who are not involved in the service, in relation to those redundancies.

5. Where the service provider offers jobs to employees of the customer

If the Regulations do not apply, the employees could be re-employed on new terms and conditions but continuity of employment would not be preserved.

6. Where the service provider's employees are found to be employees of the customer

This is unlikely, but it would be prudent to ensure that the service provider enters into new contracts of employment with the relevant employees.

7. Liabilities of the customer and the service provider

If the Regulations do not apply, the employees are likely to be redundant with the customer and would have a right to be informed and consulted about the likely measures and about their entitlements under the Redundancy Payments Acts 1967 - 2007 including, if applicable, a statutory redundancy payment.

If a dismissal is found to be unfair there is a potential liability of up to two years' gross remuneration (depending on losses) or reinstatement or re-engagement.

Redundant employees may be entitled to a statutory redundancy payment of two weeks' gross pay (capped at EUR 600 per week) for each year of continuous service plus one additional week's payment (also capped at EUR 600).

For breach of collective redundancy provisions there are a number of criminal penalties of between EUR 5,000 and EUR 250,000 and potential civil claims that may be brought.

The relevant mandatory legislation cannot be avoided, but liabilities arising from it may be compromised under a contract. If no agreement can be reached by the parties and employees feels that they have been unfairly dismissed, they may take their case to the Employment Appeals Tribunal ('EAT') or issue other appropriate proceedings.

1. Law and guidance on outsourcing 117

2. Redeployment by the customer 117

3. Dismissal by the customer 117

4. Consultation and notification requirements 118

5. Where the service provider offers jobs to employees of the customer 118

6. Where the service provider's employees are found to be employees of the customer 118

7. Liabilities of the customer and the service provider 119

Italy

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This is implemented in Italy by Article 2112 of the Civil Code and Law no 428/1990. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

Note also that the regulation of the employment aspects of contracts for services and contracts for works should be considered in relation to outsourcing (Article 1655 of the Italian Civil Code and Article 29 of Law no 276/2003). Individual employment contracts could also be relevant.

2. Redeployment by the customer

In order to try to avoid dismissals redeployment must be considered, but need only be offered if other positions or jobs are available.

3. Dismissal by the customer

Employees of the customer who are dismissed or made redundant as a consequence of outsourcing are protected by the general provisions of law concerning unfair dismissal.

If the customer contracts out the service to the service provider and the outsourcing of the activities does not fall within the scope of the transfers of undertakings provisions, the customer's employees who used to carry out the service will probably be made redundant. The regulations and procedures for dismissal will apply. These will vary based on the number of redundancies being made. The consequences and risks relating to unfair dismissals depend on the occupational size of the company.

There are no specific implications for other employees. However, if the outsourcing leads to a reduction in the number of employees, this could lead to a change in headcount, which would have consequences for employees' rights and protections (i.e. protection against unfair dismissal).

4. Consultation and notification requirements

The employer does not need to consult or inform the trade unions. However, in specific sectors such an obligation can be established by collective bargaining agreements.

If the information and consultation procedures provided by collective agreements are not properly complied with by the employer, it could be sued by the trade unions under a special and expedited procedure provided by law to tackle anti-trade union behaviour. The consequences of this will depend on the nature of the violation and the verdict of the judge, who can order the employer to cease the unfair behaviour and eliminate its effect.

5. Where the service provider offers jobs to employees of the customer

No specific issues arise. The service provider is free to offer jobs to the customer's employees and to negotiate the conditions of employment with them.

6. Where the service provider's employees are found to be employees of the customer

This situation could occur, but only if the relationship between the customer and service provider with regard to the service is found to be an unlawful contract for services (i.e. because the service provider's employees are actually managed and controlled by the customer and the service provider does not have its own organisational independence and does not bear the economic risk of the activity).

The customer should ensure that the terms and conditions of employees at the service provider comply with the law (e.g. that all employees are receiving at least the minimum wage).

7. Liabilities of the customer and the service provider

The relationship between the customer and the service provider is a contract for services (having as its object the service), the customer and the service provider are jointly liable, for the duration of the contract for services and for a period of two years after its termination, for the payment of salaries and social security contributions in favour of the employees who will carry out the service.

Without prejudice to the individual rights of employees provided for by law, which can be derogated from only with their consent, it is possible and common practice to provide indemnification and obligations between the parties in the commercial agreements in order to cover the liabilities.

1. Law and guidance on outsourcing 123

2. Redeployment by the customer 123

3. Dismissal by the customer 123

4. Consultation and notification requirements 123

5. Where the service provider offers jobs to employees of the customer 124

6. Where the service provider's employees are found to be employees of the customer 124

7. Liabilities of the customer and the service provider 124

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This law is implemented in Latvia by Articles 117-121 of Chapter 28 of the Labour Law. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies.

2. Redeployment by the customer

The customer must consider redeploying employees who are subject to dismissal in other positions within the same undertaking (structural unit) or in other undertakings of the employer.

3. Dismissal by the customer

Outsourcing may lead to redundancy. The customer may dismiss employees performing the service on account of economic, organisational or technical changes in the company (a reduction in the number of staff).

If the employer intends to dismiss a certain number of employees who are all in the same position, it should evaluate who is entitled to remain employed in accordance with guidelines provided by the Labour Law.

Note that in some situations where the dismissal of employees is required it may be hard to dismiss exactly those employees who perform the outsourced activity as those employees may have priority to remain employed in comparison with other employees. In such cases it is recommended to sign mutual termination agreements with the respective employees. Normally, in such cases the employer would be expected to pay some extra compensation in addition to the minimum provided by the Labour Law.

4. Consultation and notification requirements

If the redundancy qualifies as a collective redundancy (depending on the number of dismissals and the total number of employees within the undertaking), the employer must consult with staff representatives (trade

unions or elected employee representatives) in order to reach an agreement regarding the number of employees subject to redundancy, the dismissal procedure and the social guarantees in relation to the employees. The employer must also notify the State Employment Agency and local municipality no later than 45 days beforehand.

5. Where the service provider offers jobs to employees of the customer

There are no specific issues. The service provider is free to offer jobs to the customer's employees who were carrying out the service. If the offer is accepted, employees of the customer would be entitled to terminate employment by giving one month's advance notice (assuming they have not been dismissed by the customer).

6. Where the service provider's employees are found to be employees of the customer

Such a situation is not possible under Latvian law.

7. Liabilities of the customer and the service provider

Dismissed employees are entitled to severance pay (between one and four months' average earnings, depending on the employee's length of service with the customer).

If the employees are members of a trade union, the customer must request its consent to any dismissals. If consent is not granted, the customer may file a claim in the court requesting termination of the employment.

A dismissal may be found to be 'unfair', if there is a lack of genuine grounds. The costs of an unfair dismissal largely depend on the salary of the employee and how long he or she was unfairly prevented from working. Upon reinstatement in his or her position, the customer must pay his or her average earnings for the period of unfair dismissal.

If the employer fails to comply with consultation procedures, it could face an administrative fine and the dismissal could be held to be unlawful, depending on what procedures were not complied with.

If the employer fails to comply with the notification procedures, it could face an administrative fine of up to EUR 1,070.

These liabilities should be dealt with by ensuring strict compliance with the legal requirements. In order to avoid any potential disputes with employees, it is common practice to sign mutual termination agreements.

1. Law and guidance on outsourcing 129

2. Redeployment by the customer 129

3. Dismissal by the customer 129

4. Consultation and notification requirements 130

5. Where the service provider offers jobs to employees of the customer 130

6. Where the service provider's employees are found to be employees of the customer 130

7. Liabilities of the customer and the service provider 130

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This law is implemented in Luxembourg by Article L.127-1 to 127-6 of the Labour Code. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

Note also that some collective bargaining agreements may provide specific rules that apply to outsourcing.

2. Redeployment by the customer

The customer may consider whether employees can be redeployed within the customer or the service provider. Indeed, an agreement may be reached between the customer and the service provider providing that all or some of the employees of the customer will be hired by the service provider under working conditions to be determined by agreement. The employee is entitled to refuse to work for the service provider.

3. Dismissal by the customer

The customer's employees have no right to transfer to the service provider. They may be redeployed or made redundant and if made redundant, the redundancy rules will apply. The employer must have real and serious reasons to dismiss employees carrying out the service. In accordance with Luxembourg case law, the employer has the authority to manage itself and make unilateral decisions regarding its economic policy, organisation and the way it functions. It can make changes at any time it wants. A judge cannot assess the measures taken by the customer, irrespective of their impact on its level of employment.

The employees will benefit from the rights and protections provided by the Labour Code in relation to redundancy, i.e. a notice period and departure allowance. If the thresholds are met, the provisions for collective redundancies will apply (and negotiations for a social plan will take place).
If the outsourcing leads to a change in headcount, this might have

consequences for the employees' rights in future (e.g. the obligation to have employee representatives or the obligation to comply with the procedure for a preliminary meeting in the case of dismissal).

4. Consultation and notification requirements

There is a duty on the customer and the service provider to inform and consult staff representatives if the outsourcing will impact on the condition, structure and probable growth of employment within the company. The customer and the service provider also have a duty to inform and consult staff representatives regarding any potential anticipatory measures, in particular where there is a threat to employment or if the outsourcing will lead to substantial changes in the organisation of work or in contractual relations.

This information and consultation procedure must take place before the decision to outsource is made. However, the employer is not bound by the staff representatives' opinion, should they disagree.

5. Where the service provider offers jobs to employees of the customer

The service provider is free to offer jobs to employees made redundant because of the outsourcing and to offer new terms and conditions. Continuity of employment would not be preserved but the customer's employees would be free to accept jobs offered by the service provider.

6. Where the service provider's employees are found to be employees of the customer

Although unlikely, this could happen if the performance of the contract to provide services, as concluded between the customer and the service provider, results in the customer being the actual employer (e.g. when it gives detailed instructions or determines working hours).

7. Liabilities of the customer and the service provider

Failure to inform and consult is a criminal offence ('délit d'entrave') punishable by a fine of between EUR 251 and 15,000.
If a dismissal is found to be unfair, the employer is liable to pay compensation for both material and immaterial harm suffered by the employee (based on the age, functions, economic context and the state of the employment market).

Where provisions in relation to collective redundancies apply, and the employer fails to comply with the procedure laid down by the Labour Code, it will be required to proclaim the nullity of the dismissal or pay compensation, depending on the material and/or immaterial harm suffered by the employee.

1. Law and guidance on outsourcing 135

2. Redeployment by the customer 135

3. Dismissal by the customer 135

4. Consultation and notification requirements 135

5. Where the service provider offers jobs to employees of the customer 136

6. Where the service provider's employees are found to be employees of the customer 136

7. Liabilities of the customer and the service provider 136

Mexico

1. Law and guidance on outsourcing

Mexican law does not expressly make reference to the term outsourcing. However, Articles 12-15 of the Mexican Federal Labour Law and Article 15-A of the Mexican Social Security Law set out that those employers who use an intermediary for hiring employees, whatever the title is given to the parties, both the employer and the beneficiary of the services rendered by the employees will be jointly liable to comply with all mandatory employment and social security obligations.

2. Redeployment by the customer

Redeployment of the customer's employees who perform the service is not mandatory and therefore the customer can determine whether or not to redeploy at its sole discretion.

3. Dismissal by the customer

The customer cannot dismiss any employee just because he or she is an outsourced employee, since employers in Mexico can only dismiss an employee if there is a cause for termination as provided by the Mexican Federal Labour Law. This law sets out specific kinds of conduct that are considered to be grounds for termination with cause and outsourcing is not among them.

All employees who render their services in Mexican territory are entitled to the same mandatory labour rights and benefits. Note that in accordance with the provisions established by the Mexican Federal Labour Law, the customer and the service provider are jointly liable for compliance with all labour and social security obligations.

4. Consultation and notification requirements

If the provisions established by the Social Security Law apply, the customer and the service provider must file the outsourcing agreement with the Mexican Social Security Institute.

5. Where the service provider offers jobs to employees of the customer

No issues arise provided such conduct is not expressly prohibited in the outsourcing agreement between the customer and the service provider. They cannot prohibit each other from hiring an employee but if it were agreed that they would not do so, it could cause termination of the outsourcing agreement. It is advisable that prior to the hiring by the customer, the service provider terminate the employment relationship and pay to the employee any corresponding severance payments and/or fringe benefits to which he or she may be entitled. If the customer agrees to recognise the employee's full seniority, the service provider only need pay the employee his or her fringe benefits.

6. Where the service provider's employees are found to be employees of the customer

This situation might occur if the customer has direct control over the employees of the service provider who perform the service, assuming that there is a subordinate employment relationship between the service provider's employees and the customer. This would imply employment and social security liabilities for the customer.

In order to avoid potential liabilities for both companies, it is advisable to establish in the service agreement that each party will be responsible for complying with its own labour and social security obligations regarding its own employees, and that neither party should deliver to the employees of the other any document that could be presumed to imply the existence of a labour relationship between the employees of the two companies.

7. Liabilities of the customer and the service provider

If the service provider's employees who used to perform the service for the customer are made redundant without cause, they will be entitled to a mandatory severance payment consisting of: three months' full salary; twenty days' full salary for each year of service; a seniority premium equal to 12 days' salary for each year of service, capped at twice the minimum wage which is currently MXN $ 59.82 per day (EUR 3.70); and any outstanding fringe benefits.

The severance payment must be paid by the service provider, as the sole employer. However, if it does not have the economic resources to do so, the customer would be jointly liable for the severance payment, being the beneficiary of the employee's services.

In cases of employment litigation, employees are entitled to bring a claim for back pay. This is counted from the dismissal date up until the date when the final ruling issued by the employment court has been fulfilled. This will apply only if the claimant succeeds in his or her claim, meaning that he or she must have proved that the dismissal was unfair.

If either the service provider or the customer do not comply with the obligations foreseen in the Social Security Law relating to notification, they may be liable to pay a fine of between 20 and 350 times the current minimum wage (Article 304-B, section IV of the Social Security Law).

If the service provider does not comply with its social security obligations in relation to its own employees or does not pay social security dues in time, the customer will be jointly liable for all liabilities, penalties, fines and charges.

Although, Mexican Federal Labour Law does provide for this, it is advisable to establish in the employment agreement that if employees of the service provider are dismissed without cause, the customer will reimburse the service provider the total payment made by the latter in favour of its employees, or that the service provider, as the sole employer, will be obliged to redeploy its employees if the customer no longer requires their services.

The parties to an outsourcing agreement should also agree who will be responsible for employment, social security and severance costs, as this must be properly established in the services agreement.

1. Law and guidance on outsourcing 141

2. Redeployment by the customer 141

3. Dismissal by the customer 141

4. Consultation and notification requirements 142

5. Where the service provider offers jobs to employees of the customer 143

6. Where the service provider's employees are found to be employees of the customer 143

7. Liabilities of the customer and the service provider 144

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings (implemented in the Netherlands by sections 7: 662-665 of the Dutch Civil Code) applies. Although the information below does not cover transfers of undertakings, consideration should be given as to whether this law applies. However, please note that under Dutch law, in most cases the outsourcing of activities to a third party will qualify as a 'transfer of undertaking' and will fall within the scope of the EU law and national legislation. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

2. Redeployment by the customer

The customer must investigate redeployment possibilities for all the employees concerned. If no suitable positions are available within the organisation of the customer, termination of the employees' contracts will be unavoidable.

3. Dismissal by the customer

As the customer will stop carrying out the service, the positions of the employees concerned will most likely become redundant, because the activities will be performed by the service provider.

Employment contracts for an indefinite period of time cannot be terminated by giving notice without the prior approval of the Employment Centre (the 'UWV WERKbedrijf', the 'UWV') or the court. The customer must have a solid business reason for termination, otherwise the UWV or the court will not give approval to terminate the employment contracts. However, no dismissal via the UWV procedure or court is necessary if the termination is based on mutual agreement. Employees are only likely to accept a termination offer where financial compensation is offered. There is a formula (the 'Cantonal Court formula') in place for the calculation of severance payments. Compensation according to this formula is determined as follows:

Compensation = (A x B) x C

A= number of years of service related to the age of the employee (years of service under the age of 35 count as 0.5 years' service; between the ages of 35 and 45 count as 1 years' service; between 45 and 55 count as 1.5 and above 55 years of service count as 2)
B= gross monthly salary (including fixed salary components)
C= an adjustment factor (which is an element for the purpose of weighing any special circumstances).

In the case of redundancies as a result of outsourcing, the adjustment factor will generally be 1.

Note that the outsourcing could lead to a change in headcount, which could have consequences for employees' rights after the outsourcing is completed because under Dutch labour law some legal requirements regarding staff representation depend on the number of employees.

4. Consultation and notification requirements

Pursuant to Article 25 of the Dutch Works Councils Act (the 'Wet op de Ondernemingsraden', the 'WOR'), if, for example, an important part of the business of the customer ceases to exist, or there is an important change in the work performed by the customer or in the organisation of the customer, the customer must consult the works council in a timely manner so that the works council has the opportunity to influence the decision-making of the customer by giving its advice. If no works council exists, there might be a smaller employee representative body within the company, which must be consulted instead.

If the works council gives a negative opinion about (part of) the decision and the customer decides nevertheless to go ahead, the final decision may not be implemented during a statutory waiting period of one month from the date the works council was informed of it. The final decision (a written document) must contain a comprehensive response to all objections raised by the works council with regard to the envisaged decision. During the statutory waiting period of one month the works council has the right to appeal the final decision to a special division of the court of appeal, the Dutch High Court in Amsterdam. Published case law shows that the Court demands strict observance of all formalities relating to the information and consultation

procedure. If the customer ignores one or more formalities in the information and consultation procedure, this in itself would result in the Court granting the appeal of the works council. If the Court grants the works council's appeal, it could order the customer to withdraw the decision and prohibit the customer from carrying out activities in connection with the decision, i.e. the outsourcing.

Alternatively, the customer might (depending on the number of employees being made redundant in relation to the size of the company) have to consult the employees on an individual basis. This obligation arises if the outsourcing is not covered by the transfers of undertakings provisions and Article 7:665(a) of the Civil Code.

Furthermore, the Collective Redundancy Notification Act (the 'WMCO') will apply if the customer intends to dismiss 20 or more employees within a timeframe of three months. Pursuant to the WMCO, the customer must report the intended dismissal of the employees in writing to the Employment Centre (the 'UWV') and negotiate with the relevant trade unions about a social plan, i.e. a set of measures the customer offers to the employees affected by the outsourcing.

5. Where the service provider offers jobs to employees of the customer

The service provider could in principle offer the customer's employees an employment agreement on new terms and conditions. However, this might trigger the outsourcing to become a transfer of undertaking. Again, please see the Ius Laboris 'Transfers of Undertakings' Guide.

6. Where the service provider's employees are found to be employees of the customer

This would be unlikely.

7. Liabilities of the customer and the service provider

For the customer, liabilities will arise for any unfair dismissals. The customer will also remain liable towards its former employees with regard to other claims relating to their former employment agreements in compliance with the usual terms specified by law.

If the customer has not consulted with the works council regarding an outsourcing that leads to redundancies, the works council could challenge the employer's decision in court (see section 4).

It is possible for the customer and the service provider to agree that the service provider will bear financial responsibility for claims from the employees of the customer who were carrying out the service but have been made redundant. The customer will normally remain liable towards its former employees with regard to claims relating to the former employment agreement between the employee and the customer but may be able to seek payment from the service provider based on its agreement with the service provider.

1. Law and guidance on outsourcing 149

2. Redeployment by the customer 149

3. Dismissal by the customer 149

4. Consultation and notification requirements 150

5. Where the service provider offers jobs to employees of the customer 151

6. Where the service provider's employees are found to be employees of the customer 151

7. Liabilities of the customer and the service provider 151

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This is implemented in Norway by Chapter 16 of the Norwegian Working Environment Act, the 'WEA'. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

Note that the national Collective Agreement ('hovedavtalen') is also relevant regarding the rights of employee representatives in cases of transfers of undertakings.

2. Redeployment by the customer

The customer is required to try to find other suitable work for the employee before making any decision to terminate the employment, but where chapter 16 of the WEA does not apply, the customer is not required to redeploy.

3. Dismissal by the customer

Outsourcing may lead to redundancy, but the dismissal must be on justifiable grounds relating to the organisation. The dismissal procedure will vary depending on the number of job losses.

Employees of the customer have no right to transfer to the service provider. Notice of termination following structural changes follows the general rules of notice of termination contained in section 15-7 of the WEA. The notice of termination must satisfy the requirement of justifiable grounds related to the company. The customer has an obligation to offer employees vacant work available in the enterprise before deciding to terminate.

Notice of termination made as a result of an customer's actual or planned contracting-out of the organisation's ordinary operations to contractors is justifiable only if it is absolutely essential in order to maintain the continued operation of the enterprise, (see the WEA, section 15-7(3)). The objective of this is to prevent employers from giving notice of termination to employees

and rehiring the same employees as independent contractors. If this were permissible, it would undermine the employment protection rights provided by the Norwegian Working Environment Act.

'Structural redundancy' arises when there are changes to the employees' job descriptions, duties or terms and conditions within the customer, which can occur as a result of outsourcing. In such a case, the employees are in fact being made redundant from their original positions and employed in different positions within the company.

4. Consultation and notification requirements

If redundancies are to be made, the customer must consult in accordance with the ordinary rules concerning redundancies.

In an individual redundancy situation the customer must consult with the employee before any decision on redundancy is taken. The employee will be given the opportunity to put forward any information or opinion regarding a possible notice of termination. An employer must consider any suitable alternative roles that exist within the organisation. It must also adopt objectively fair and transparent criteria to determine which individuals are to be made redundant.

If the redundancy is defined as a 'collective redundancy' (i.e. the dismissal of at least 10 employees within 30 days), prior to making any decision the customer should discuss the planned measures with the Company's Working Environment Committee (the 'AMU') and the employee's elected representatives.

Failure to comply with the relevant statutory requirement to consult before making a dismissal will not automatically render the dismissal unfair. Only if the failure has been the determining factor in the decision to dismiss, will the dismissal be rendered unfair, for example if the employer has taken the decision on wrongful factual grounds. An unfair dismissal may be declared void upon the employee bringing a claim, with the result that he or she will continue in his or her position. The employee may also bring a claim for compensation.

5. Where the service provider offers jobs to employees of the customer

There are no issues. The service provider is free to offer jobs to the customer's employees and is not bound by the terms and conditions arising from the contract between the employees and the customer. Employees are free to refuse the offers.

6. Where the service provider's employees are found to be employees of the customer

Such a situation would not arise under Norwegian law.

7. Liabilities of the customer and the service provider

An employee who has been given notice is entitled to his or her ordinary salary and other agreed employment benefits throughout the entire notice period. The employee is not entitled to any other compensation during or after the notice period, unless such compensation is prescribed by a collective agreement or agreed between the parties. Pay during the notice period consequently depends upon the length of the notice period.

An employer and employee may reach an agreement to terminate the employment before a case goes to court. Severance pay is not mandatory, but financial compensation in situations where an employee waives his or her employment protection rights by agreement, is quite common. The agreement is balanced by compensation for the waiver of rights.

In situations of mass redundancy, it is quite common for an employer to offer severance pay. The employer may not want to risk having lawsuits that challenge the legality of the redundancy. If the legality is challenged, this creates great uncertainty not only for the employer but also for the remaining employees. The employees are normally entitled to remain in their positions whilst legal proceedings are on-going. Employers will usually want a mass redundancy process to be smooth and quick, so as to help it meet future business challenges. These factors tend to motivate employers to propose severance pay agreements at an early stage in a mass redundancy.

If a dismissal is found to be unfair, the employee may be entitled to compensation. The amount of compensation is determined by the court and varies from case to case. The court considers what seems reasonable in view of the employee's financial losses, circumstances relating to the employer/employee relationship and other facts of the case. It may include compensation for non-material losses. Normally, compensation for non-material losses varies between EUR 1,270 and EUR 12,700 (NOK 10,000 and NOK 100,000), depending on the case.

If the employer fails to comply with its duty to consult, it may be liable to pay the employee compensation for financial losses and in some cases compensation for non-material loss.

1. Law and guidance on outsourcing 157

2. Redeployment by the customer 157

3. Dismissal by the customer 157

4. Consultation and notification requirements 157

5. Where the service provider offers jobs to employees of the customer 157

6. Where the service provider's employees are found to be employees of the customer 158

7. Liabilities of the customer and the service provider 158

Panama

1. Law and guidance on outsourcing

There are no relevant provisions concerning the outsourcing process itself.

2. Redeployment by the customer

It is not mandatory for the customer to re-hire an employee and the customer may freely take on new staff.

3. Dismissal by the customer

Employees of the customer who performed the service will normally be dismissed, although they may be re-hired by the service provider.

Pursuant to the Labour Code, there are no grounds for dismissal or redundancy in respect of termination of employment relationships based on outsourcing. Consequently, the employer must ensure the employee receives all benefits to which he or she is entitled pursuant to the employment contract.

The only situation in which any additional protection arises is where employees are on maternity leave or are subject to special union protection, as they may not be dismissed without the prior authorisation of the Ministry of Labour.

4. Consultation and notification requirements

There are no requirements to carry out any consultation or notification before outsourcing.

5. Where the service provider offers jobs to employees of the customer

The service provider is free to offer jobs to employees of the customer and no issues will arise.

6. Where the service provider's employees are found to be employees of the customer

No such situation can be foreseen.

7. Liabilities of the customer and the service provider

Employees who are dismissed are entitled to their full package of employment benefits on dismissal (i.e. a seniority premium, pro-rated leave, a proportionate so-called '13th month's salary', to be paid in three instalments by 15 April, 15 August and 15 December, an indemnity and advance notice (for employees with less than two years' service)).

Whether a dismissal is found to be fair or unfair, the employer is liable to pay 25.88% of the total salary received by the employee during the term of the employment relationship.

Note that in the event that the service provider wishes to assume or execute a subrogation of the earnings and debts of the service provider through a commercial agreement, it will also be obliged to assume the employment debts of the customer.

1. Law and guidance on outsourcing 163

2. Redeployment by the customer 163

3. Dismissal by the customer 163

4. Consultation and notification requirements 164

5. Where the service provider offers jobs to employees of the customer 164

6. Where the service provider's employees are found to be employees of the customer 164

7. Liabilities of the customer and the service provider 164

Poland

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there is a risk that it constitutes a transfer of part of an undertaking. Thus, there may be circumstances in which the EU's law on transfers of undertakings applies. In such a case, the most important laws applicable in this respect are the Labour Code, the Act of 23 May 1991 on Trade Unions and the Act of 7 April 2006 on the Information and Consultation of Employees. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

2. Redeployment by the customer

The customer is not required to propose any other employment either inside or outside the company to the employees concerned.

3. Dismissal by the customer

The customer may dismiss an employee who used to perform the service on the basis of 'liquidation' of the job. The liquidation of the job is in itself enough to make the dismissal lawful.

However, if the employer employs at least 20 employees specific rules will apply. Most importantly, the employees will be entitled to severance pay and the procedure for collective dismissal may apply. Under the collective dismissal procedure, the number of dismissed employees varies depending on the total number of workers employed by the employer - ten or more employees when there are up to 99 employees in total, ten percent of employees when there are between 100 and 299 employees in total, and 30 or more employees when there are 300 or more employees in total. For details about collective (large-scale) redundancies, see the Ius Laboris 'Collective Redundancies' Guide.

If the customer intends to dismiss at least 50 employees within a three-month period, it must enter into an agreement with the local Labour Office in an effort to assist the dismissed employees.

If the outsourcing leads to a change in headcount, this could have the effect of changing the rights to which employees are entitled.

4. Consultation and notification requirements

If a works council exists at the customer, it must be informed and consulted about the outsourcing and all relevant information and documentation regarding the reasons for and consequences of the outsourcing must be provided.

If the collective redundancy procedure is triggered, a special information and consultation procedure will apply. It requires the employer to inform the local Labour Office of the redundancies, as well as hold negotiations with existing trade union or employee representatives for 20 days.

5. Where the service provider offers jobs to employees of the customer

No specific issues arise.

6. Where the service provider's employees are found to be employees of the customer

If the employees of the service provider are working under the supervision of the customer or in the place and at times specified by the customer, they could be found to be employees of the customer. Assuming this is not the case, the customer has no obligation to take any interest in the terms and conditions applied by the service provider to its employees.

7. Liabilities of the customer and the service provider

As stated in section 3 above, if the employer employs at least 20 employees, the dismissed employees are entitled to severance pay. The amount of severance pay depends on the length of employment, but cannot exceed the current statutory minimum remuneration multiplied by 15 (in 2011, the cap is approximately EUR 5,200, or PLN 20,790).

If the employer fails to inform and consult the works council, it could face a fine or even a penalty of 'restriction of freedom'.

If the collective redundancy procedure is not adhered to or is breached in any way, the employees may be reinstated and/or awarded compensation. In extreme cases, criminal liability for impairing union activity may be imposed.

1. Law and guidance on outsourcing 169

2. Redeployment by the customer 169

3. Dismissal by the customer 169

4. Consultation and notification requirements 170

5. Where the service provider offers jobs to employees of the customer 170

6. Where the service provider's employees are found to be employees of the customer 170

7. Liabilities of the customer and the service provider 171

Russia

1. Law and guidance on outsourcing

There are no specific provisions on outsourcing in Russian law. However, parties considering outsourcing should take into account provisions of the Labour Code to the effect that the employment relationship is considered as having arisen from the moment when an individual was admitted to work by an authorised representative of the employer or the employer was aware of such admittance to work.

General provisions of the Labour Code on hiring and termination of employment on various grounds (e.g. for redundancy or by agreement of the parties) will apply in the case of outsourcing.

When considering outsourcing the parties should also bear in mind that the Russian Parliament is considering a bill of amendment to the Labour Code which may prohibit the lease of personnel. This is sometimes confused with outsourcing owing to a lack of statutory regulation and this could result in a negative impact on outsourcing, albeit temporary.

2. Redeployment by the customer

There is a requirement to redeploy and this also applies in the case of redundancy. One of the most important statutory provisions in relation to the redundancy procedures is that the employer (in this situation, the customer) must offer to employees all available job vacancies requiring the same or lower qualifications before effectively dismissing them.

3. Dismissal by the customer

The customer cannot dismiss its employees on the grounds that it is outsourcing. Employees of the customer can be transferred to the service provider by agreement and by co-ordination between the customer and the service provider, subject to the employees' consent.

If the customer cannot provide enough work for its employees and/or employees refuse to transfer to the service provider, the customer can apply the redundancy procedure. There are certain statutory requirements in relation to the redundancy procedure.

As an alternative to redundancy, employment contracts may be terminated upon agreement by the parties. This procedure requires a termination agreement to be signed. The parties may also agree on compensation to be awarded to employees (usually not less than three months' salary, however, the exact amount can be negotiated by the parties). Note that there is no obligation on employers to pay compensation on termination by agreement, but they often agree to do so. This is because employers usually prefer to agree than to invoke the redundancy procedures. There is a risk that failure to comply with the many formalities necessary to do the redundancy procedure correctly can result in the redundancy being deemed wrongful – even where the fault has been minor.

4. Consultation and notification requirements

There are no specific consultation or notification duties in relation to outsourcing, unless provided for in a collective bargaining agreement, company policy, employment contract or other employer documents.

However, if outsourcing results in either redundancy or a change in the terms of employment contracts, the employer should notify the employees and their representatives of the planned redundancy or the change of terms. In the case of redundancy, the employer should also notify the trade unions (if any) and the state employment centre.

5. Where the service provider offers jobs to employees of the customer

If the service provider offers jobs to employees of the customer by way of their transfer to the service provider, the employees of the customer can consent to such offers, but are not obliged to. If the customer's employees consent to transfer, by law, the employment contracts of employees with the customer will terminate on the grounds of their transfer, and new employment contracts will be concluded with the service provider.

6. Where the service provider's employees are found to be employees of the customer

An employment relationship arises on the grounds of 'actual admittance to work', where the employer is aware of it or gives instructions to admit the employee to work, irrespective of whether an employment contract was properly formalised or not.

Thus, employees of the service provider could be recognised as employees of the customer from the date of their 'actual admittance to work' under the customer's instructions. In consequence, the service provider's employees could bring a claim against the customer for salary, other benefits provided by the customer to its employees, and other social guarantees that the customer should provide to its employees.

To protect itself, the customer should ensure that the instructions to employees of the service provider are given via the service provider; that employees of the service provider do not have work places on the customer's premises; and are not obliged to comply with the work time schedule and internal policies of the customer. In other words, there are no characteristics between the customer and employees of the service provider that would denote a labour relationship.

7. Liabilities of the customer and the service provider

If, as a result of outsourcing, the customer decides to make its employees redundant, such employees are entitled to severance pay (one month's average salary) and their average salary for the period of their job search, which period cannot exceed two months or in exceptional cases up to three months. The severance pay is counted as part of the payment for the period of the job search. The employee is also entitled to a notice period of two months or payment in lieu of notice, if he or she agrees to terminate the employment contract before the expiry of the two month notice period. (Payments in lieu of notice are in addition to severance pay and the average salary for the period of the job search.)

If the customer does not comply with the provisions in relation to the redundancy procedure, redundancy may be judged unlawful. If the redundancy is found to be unlawful, a court may award reinstatement of the employees (if the employees request this) and payment to the employees of their average monthly salary for the time they were not doing the job because of the unlawful dismissal. The employees can also bring a claim for compensation for non-material harm (the amount of compensation is usually small). Administrative fines are also possible (up to EUR 1,400 for the customer and a possible suspension of its operations for up to 90 days).

These liabilities are stipulated in law and cannot be avoided by agreement between the employer and employee, unless the terms of the agreement are more favourable than the statutory ones.

1. Law and guidance on outsourcing 175

2. Redeployment by the customer 175

3. Dismissal by the customer 175

4. Consultation and notification requirements 175

5. Where the service provider offers jobs to employees of the customer 176

6. Where the service provider's employees are found to be employees of the customer 176

7. Liabilities of the customer and the service provider 176

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings applies. This law is implemented in Sweden by Article 6(b) of the Employment Protection Act. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the law applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

Individual contracts of employment and any relevant collective agreements should be taken into account.

2. Redeployment by the customer

The customer must search for redeployment options for those employees who used to perform the outsourced task. If there is no possibility of redeployment or redeployment proposals are refused, the employee will be made redundant.

3. Dismissal by the customer

As the customer will stop carrying out the service, the employees concerned will probably be redundant as employees of the customer have no right to transfer to the service provider. The employees will in such a case benefit from the rights and protections provided by the Employment Protection Act in relation to redundancy, such as redeployment options, including the Last in First Out principle ('LIFO') and notice periods.

4. Consultation and notification requirements

Before the customer takes any decision regarding significant changes in its activities, it must, according to section 11 of the Co-Determination Act, on its own initiative, consult with the employees' organisation with which the employer is bound to negotiate pursuant to any applicable collective agreement ('CBA'). If the customer is not bound by a CBA no such obligation of negotiation exists.

Where the employer is not bound by a CBA, in accordance with section 13 of the Co-termination Act the employer must also negotiate with affected employees organisations in all matters regarding termination of employment by reason of redundancy. There is no obligation to consult with non-union employees.

Failure to enter into consultations with relevant trade unions may constitute grounds for general damages to the unions.

5. Where the service provider offers jobs to employees of the customer

No issues arise. The service provider is free to offer jobs to the customer's employees. Employees could be employed on new terms and conditions and continuity of employment would not be preserved. The terms and conditions of the contract with the service provider can be completely different from those with the customer.

6. Where the service provider's employees are found to be employees of the customer

No such situation can be foreseen.

7. Liabilities of the customer and the service provider

There is no statutory severance pay for those employees who are dismissed. An employee who has been given notice is, however, entitled to retain pay and other employment benefits during the notice period. Notice periods caused by termination by the employer range between one and six months, depending on the seniority of the employee. Longer notice periods may apply according to the employee's employment contract or applicable collective bargain agreement.

If a dismissal is found to be conducted without just cause, there is potential liability for compensation of up to SEK 150,000 (EUR 15,000), plus up to a maximum of 32 months' salary (depending on length of service).

For failure to inform and consult with relevant trade unions, there is potential liability of between SEK 50,000 and 150,000 (EUR 5,000 and 15,000). The figure might be even higher depending on the circumstances.

1. Law and guidance on outsourcing 181

2. Redeployment by the customer 181

3. Dismissal by the customer 181

4. Consultation and notification requirements 182

5. Where the service provider offers jobs to employees of the customer 182

6. Where the service provider's employees are found to be employees of the customer 182

7. Liabilities of the customer and the service provider 182

1. Law and guidance on outsourcing

There is no specific legislation concerning the outsourcing process itself, but where the outsourcing is deemed to be a 'transfer of undertaking' it will be covered by articles 333 et seq. of the Swiss Code of Obligations, which is the Swiss equivalent of the EU's law on transfers of undertakings. Although the information below does not cover transfers of undertakings, consideration should be given as to whether the Swiss Code of Obligations applies. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

2. Redeployment by the customer

There is no requirement to redeploy employees.

3. Dismissal by the customer

Employees are protected in the normal way against termination during a restricted period (e.g. during pregnancy, incapacity to perform work due to sickness or accident or military service) and abusive termination (e.g. termination due to an inherent characteristic of the employee such as age, race or sex).

The dismissal or redeployment of employees is the responsibility of the customer. The situation usually leads to redundancy. Generally, dismissals can be carried out if they comply with the contractual notice period, applicable employment regulations and collective agreements.

Depending on the number of redundancies, the particular procedure regarding collective dismissals may apply.

With the consent of the three parties involved (the customer and the service provider, together with the employee) the individual employment contract can be transferred to the service provider.

The service provider may therefore employ employees dismissed by the customer.

4. Consultation and notification requirements

There are no specific consultation or notification duties unless the procedure regarding collective dismissals applies. (See section 3 above).

5. Where the service provider offers jobs to employees of the customer

There are no issues here. In principle, the service provider is free to offer jobs to the customer's employees who were carrying out the service. The employees are also free to refuse such a proposal.

6. Where the service provider's employees are found to be employees of the customer

If the service provider's employees carry out the service on behalf of and under the instruction and direction of the customer, they may be considered to be employees of the customer. In such event, the customer should ensure that the service provider complies with the law in respect of these employees (e.g. in terms of workplace safety and maximum working hours).

7. Liabilities of the customer and the service provider

In the event employees of the customer are made redundant as a result of the outsourcing of the service to the service provider, certain financial liabilities may arise in respect of the redundancies. The cost of dismissals depends primarily on the length of the (individual) notice period and the individual salaries of the dismissed employees. Such liabilities are often dealt with by agreement between the two companies.

1. Law and guidance on outsourcing 187

2. Redeployment by the customer 188

3. Dismissal by the customer 188

4. Consultation and notification requirements 189

5. Where the service provider offers jobs to employees of the customer 189

6. Where the service provider's employees are found to be employees of the customer 189

7. Liabilities of the customer and the service provider 189

1. Law and guidance on outsourcing

Article 2 of Turkish Labour Law no 4857 (the 'Labour Law') and the Sub-Contracting Regulations published in Official Gazette no 27010 on 27 September 2008 (the 'Regulation') should be taken into account.

What is generally termed 'outsourcing' or 'sub-contracting' in many other jurisdictions are two very different things in Turkey. In the case of outsourcing, the customer establishes an outsourcing relationship with the service provider pursuant to an agreement for the service provider's employees to carry out the service at the workplace of the service provider. All the parties' liabilities and duties may be determined in the agreement, provided that the provisions are in accordance with relevant legislation. Such a relationship is governed by the 'Code of Obligations' and is therefore based on freedom of contract.

In contrast, sub-contracting, where the customer contracts with the service provider to engage the service provider's employees to perform at the workplace of the customer, is highly restricted under the Labour Law. If the restrictions are not complied with, sub-contracting may be considered unlawful from an employment law perspective, and therefore be highly problematic for the customer.

Pursuant to Article 3 of the Regulation, an outsourcing relationship will be considered unlawful if:

- the service constitutes a part of the customer's main activity or does not require any special expertise
- the customer establishes an outsourcing relationship with a person who was previously employed at its workplace
- the service provider hires the customer's employees while restricting their rights
- the customer establishes an outsourcing relationship in order to avoid its legal duties. For example, to avoid its public duties or to restrict or annul the rights of the employees arising from the employment agreement, collective bargaining agreement or under the Labour Law (e.g. to avoid the legal consequences of having 30 or 50 employees on the payroll because, having 30 employees entitles them to job security and having 50 employees obliges the employer to employ disabled employees and to take extra workplace security precautions).

The questions below are answered on the assumption that the relationship between the customer and the service provider is a sub-contracting one (i.e. the service will be performed in the customer's workplace).

2. Redeployment by the customer

The customer may redeploy the employees within its workplace, but this is not obligatory. However if an employee is dismissed and files a lawsuit, the customer will have to prove that the termination was made as a last resort. To do so, the customer must prove that there were no other suitable positions for the employee within the customer.

3. Dismissal by the customer

The activities that are recognised as lawful for sub-contracting purposes are limited to utility services or a part of the main activity that requires particular expertise – and the service must fall within the scope of one of these two. There are no specific provisions regarding the implications for the customer's employees of carrying out the service.

Pursuant to the Labour Code, the customer's employees may be transferred to the service provider (i.e. employed by the service provider), provided that their rights under employment law are not restricted. This issue must be included in the sub-contracting agreement. If the customer and the service provider do not comply the outsourcing relationship will be deemed unlawful. Upon a transfer, the customer will be jointly liable with the service provider for the duties arising pursuant to the Labour Code.

If an employee has acquired 'Job Security' (i.e. he or she works with an employer that has 30 or more employees and has at least six months' seniority there, meaning that he or she can only be dismissed for valid or justified reasons), the customer may only dismiss him or her on the grounds of its justifiable needs. This does not prevent the employee from bringing a claim for reinstatement.

If the employee has not acquired 'Job Security', the customer may dismiss him or her without providing valid or justified reasons. However, if it is an 'unlawful dismissal' (meaning that an employee is dismissed on specific grounds, such as age, gender, religion, union activities, legally recognised family duties or political opinion), the employee may bring a claim against the customer for a 'bad faith indemnity'.

If the total number of employees drops to 29 or less, the employees lose their rights relating to 'Job Security'.

4. Consultation and notification requirements

The service provider must notify the District Labour Directorate within one month of commencing subcontracting work. If it does not do so, it will be liable to pay an administrative fine of approximately EUR 60 (TRL 122 - for 2011).

If it is a collective dismissal, the customer must notify the workplace union representative, the relevant Labour District Directorate and the Turkish Employment Agency 30 days prior to the dismissal. If it does not do so, it will be liable to pay an administrative fine of approximately EUR 220 (TRY 442 - for 2011) per employee.

5. Where the service provider offers jobs to employees of the customer

The service provider can employ the customer's employees, provided that the rights of the employees are maintained.

6. Where the service provider's employees are found to be employees of the customer

In the event that the outsourcing relationship is considered to be unlawful, the service provider's employees will be treated as the customer's employees as of the date that the outsourcing relationship commenced.

7. Liabilities of the customer and the service provider

An employee who is dismissed unlawfully is entitled to accrued salary, accrued leave pay (if available), payment in lieu of notice (if applicable), severance pay (if applicable), contractual compensation (if any) and any payments arising from workplace custom or practice. It is difficult to give an approximate cost for these dismissal entitlements, since each case is judged on its own facts.

If the dismissal of an employee who has 'Job Security' is found to be unlawful, the employer will have two options. It must either reinstate the employee within one month or pay him or her an indemnity equal to between four and eight months' salary. The employer must also continue to pay his or her salary for up to a maximum of four months, reflecting the length of time that the employee has not been employed because of the litigation.

If an employee without 'Job Security' is found by a court to have been dismissed in bad faith, the employer must pay a 'bad faith indemnity' amounting to three times the employee's salary for the duration of the notice period.

Joint liability scenarios are often dealt with on a commercial basis.

1. Law and guidance on outsourcing 195

2. Redeployment by the customer 195

3. Dismissal by the customer 195

4. Consultation and notification requirements 196

5. Where the service provider offers jobs to employees of the customer 196

6. Where the service provider's employees are found to be employees of the customer 197

7. Liabilities of the customer and the service provider 197

1. Law and guidance on outsourcing

There is no specific legislation on the impact of outsourcing on employees.

However, if a service is outsourced there may be circumstances in which the EU's law on transfers of undertakings (implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 2006, 'TUPE') applies. Although the information below does not cover transfers of undertakings, consideration should be given as to whether TUPE applies. Note that in the UK, TUPE is very likely to apply because of its 'service provision change' provisions. For further information, please see the Ius Laboris 'Transfers of Undertakings' Guide.

2. Redeployment by the customer

Redeployment must be considered before employees are dismissed as redundant in order for the dismissal to be fair.

3. Dismissal by the customer

If the outsourcing results in redundancies being made by the customer, the legislation relating to the following should be considered in each case:

- protection against unfair dismissal; and
- collective consultation requirements.

The employee has the right not to be unfairly dismissed and dismissal will be fair if there is a potentially fair reason for it and the dismissal is fair in all the circumstances.

A redundancy occurs where an employer ceases to carry on the business for which the employee was employed at a particular workplace (or at all), or where the requirement for an employee to carry on a particular function at a particular place (or at all) has ceased or diminished.

In order for the dismissal to be fair, the employer must also follow a fair procedure. This will involve consulting individually with each employee regarding the proposed dismissal.

Where the employer proposes to dismiss as redundant 20 or more employees at one establishment within a 90 day period, it must provide information to representatives of the affected employees regarding the proposal and consult with them regarding the proposal. The employer must also notify the Government Department for Business Innovation and Skills.

4. Consultation and notification requirements

Employees being dismissed as redundant must be consulted on an individual basis. Failure to individually consult could lead to unfair dismissal claims.

Where the employer proposes to dismiss as redundant 20 or more employees at one establishment within a 90 day period, the employer must also provide information to and consult with representatives of the affected employees under collective redundancy procedures.

'Affected employees' are those who may be 'affected by the proposed dismissals or who may be affected by measures taken in connection with those dismissals'. This may include employees who are not involved in the outsourcing or at risk of redundancy.

Failure to consult collectively could lead to liability for up to 90 days' pay per employee. When collective consultation is required, the employer must also notify the Government Department for Business Innovation and Skills.

If there are to be changes to employees' terms and conditions as a result of the outsourcing, their employer (whether the customer or the service provider) would need to consult with such employees in relation to those changes in order to avoid constructive unfair dismissal claims.

5. Where the service provider offers jobs to employees of the customer

There are no specific provisions relating to this. Employees may well accept such jobs if they are at risk of being made redundant by the customer. If employees do not accept them and bring a claim of unfair dismissal against the customer (in the event that the customer dismisses them), any award of compensation may be reduced to reflect the fact that the employee has failed to mitigate his or her loss.

6. Where the service provider's employees are found to be employees of the customer

It is unlikely that the service provider's employees could be found to be employees of the customer. If, in practice the customer controls the employees of the service provider and the employees are integrated into the customer's business (for example, they work on the customer's premises, use its resources and are held out as being its employees) and the only role of the service provider is to operate the payroll, there is a risk that the service provider's employees might be found to be employees of the customer. Although the risk is small, if the customer wishes to minimise it, it should avoid fully integrating the service provider's employees into its business.

7. Liabilities of the customer and the service provider

If a dismissal is found to be unfair, there is a potential liability for compensation of up to GBP £68,400 (dependant on loss), and up to GBP £12,000 as a basic award (dependant on age and length of service) – although if the employee has received redundancy pay no basic award is made.

Redundant employees are entitled to a statutory redundancy payment of up to GBP £12,000 (dependant on age and length of service).

It is possible to deal with these liabilities by agreement through a contract between the customer and the service provider containing specific indemnities and warranties.

1. Law and guidance on outsourcing 201

2. Redeployment by the customer 201

3. Dismissal by the customer 201

4. Consultation and notification requirements 202

5. Where the service provider offers jobs to employees of the customer 202

6. Where the service provider's employees are found to be employees of the customer 202

7. Liabilities of the customer and the service provider 202

1. Law and guidance on outsourcing

In the non-union sector, there is no specific legislation or restriction.

In the union sector, there may be specific restrictions in a collective bargaining agreement (if there are no restrictions against sub-contracting, there may be a duty to bargain about the decision to sub-contract. If the company has reserved the right to outsource in its union agreement, there may be a duty to bargain about the effects of outsourcing).

2. Redeployment by the customer

There is no requirement to redeploy in the United States.

3. Dismissal by the customer

There are no specific requirements for the customer if outsourcing occurs. Many options are possible, for example, dismissal, redeployment or transfer of the employee to the service provider.

The employer does not need any grounds to make redundancies. It can unilaterally decide the size of its workforce, without consultation (except perhaps in a union setting, although even then consultation on whether to implement redundancies would still be rare. The effects of the decision to make redundancies are subject to bargaining, if they are not already addressed in the union agreement).

The displaced customer's employees would be entitled to apply for and receive unemployment insurance benefits from the state (this is a state-run programme that collects employer taxes to fund unemployment benefits – supplemented by a federal tax - and it pays a modest weekly benefit to those who lose their employment).

Depending on the number of employees affected by the outsourcing, the customer's employees may be entitled to 60 days' advance notice before they have their employment terminated (this is known as a 'WARN' obligation, under the federal Worker Adjustment and Retraining Notification Act (1988). One state (New York) would require 90 days advance notice if 25 or more employees lose their jobs.

4. Consultation and notification requirements

There is no consultation obligation in a non-union environment.

In the union sector, if the union agreement covering the customer does not address sub-contracting there is a possible duty for the customer to bargain with the union about the decision to outsource or the effects of the decision to outsource, or both.

The service provider has no specific duty to consult or notify.

5. Where the service provider offers jobs to employees of the customer

There are no issues, other than the non-discrimination rules that apply in any hiring situation.

6. Where the service provider's employees are found to be employees of the customer

If the customer is overly assertive in the operations of the service provider, with respect to the employees performing the service, this could occur. The customer could then be deemed a joint or single employer with the service provider and the customer would be jointly liable with the service provider for employment law violations.

7. Liabilities of the customer and the service provider

If there is a WARN obligation (a duty to give advance notice of employment termination), the associated liabilities are normally dealt with on a commercial basis.

The customer's employees have no statutory rights arising from the fact of outsourcing. There is no mandatory dismissal pay in the United States. If, however, a company has voluntarily adopted a severance plan, it must adhere to the terms of that plan. If an employer has a history of paying severance pay to its employees upon dismissal, such that employees come to expect severance pay, the employer may have a duty to provide severance pay, even in the absence of adopting a formal plan. Typical severance pay ranges from one to two weeks' pay per year of service, often with a minimum and a maximum amount.

The payment of severance pay is almost always conditional on the employee signing a release. To obtain a release from age-based claims, the company must disclose to those who are 40 years of age or older the selection criteria it utilised to choose the employees that would be dismissed, as well as meet other very technical disclosure requirements. It does not need to disclose the reasons for making redundancies. However, if dismissed employees bring discrimination claims, then the employer must articulate the reasons for the redundancies and the selection, once a claim is made. It is considered good practice, however, to communicate the reasons for the redundancy when it occurs.

The service provider's employees have no rights arising from the mere fact of outsourcing.

There are no transfer of undertaking obligations in the United States. Because the customer continues to operate, it is unlikely that any liability for any misdeeds that occurred prior to the subcontracting would be passed on to the service provider.

Ius Laboris | Global Human Resources Lawyers

Ius Laboris
280 Boulevard du Souverain
B-1160 Brussels, Belgium
T +32 2 761 46 10
F +32 2 761 46 15
E info@iuslaboris.com