Executive Compensation & Employee Benefits

Contributing editor
Marc Trevino

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GETTING THE DEAL THROUGH

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Contributing editor

Marc Trevino

Sullivan & Cromwell LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
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Preface

Executive Compensation & Employee Benefits 2017

Third edition

Getting the Deal Through is delighted to publish the third edition of *Executive Compensation & Employee Benefits*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Chile and Nigeria.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Marc Trevino of Sullivan & Cromwell LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

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Global overview

Marc Trevino
Sullivan & Cromwell LLP

As the geographical reach of companies expands, executive talent is more than ever spread across borders and both global executives and companies are coming to expect consistent compensation practices in both 'business-as-usual' and strategic situations. The political, cultural and legal considerations that drive the provision of executive incentives and benefits, however, are more constrained by jurisdictional boundaries. As a result, companies are more often finding – sometimes the hard way – that local requirements or expectations act as barriers to achieving global business and organisational goals.

This overview discusses these trends, and highlights how they apply in the more detailed summaries that follow.

The 'Americanisation' of compensation structures

There is continuing evidence that the strategies for delivering pay are becoming more uniform from one country to the next. American pay-for-performance systems are being deployed in many parts of the world, with a structure of limited salary, significant annual incentive and long-term incentive that increases with seniority (often equity-based and with increasing frequency employing multiple delivery systems) becoming pervasive. Relative to other jurisdictions, the percentage representing salary is lowest in the United States and the percentage representing long-term incentive is the highest. In Europe, the allocation is more balanced, and in Asia, salary continues to represent a larger percentage of compensation. Although stock option plans continue to be prevalent outside the United States, the global movement toward other equity-based long-term compensation schemes continues.

These structures were originally designed to take advantage of a combination of lax labour laws (particularly on incentives and termination), tax limits on public company salaries, well-developed securities laws and favourable accounting. Although at least one of these factors is missing from almost every other jurisdiction, there have been a number of – evolutionary but not revolutionary – changes in the rules and practices around the world to accommodate a consistent structure and to avoid placing local businesses and executives at a competitive disadvantage.

In many jurisdictions, for example, the most senior company executives are now exempted from some or all of the protections that extend to other members of the labour force, facilitating implementation of a cohesive global compensation system. There are still many jurisdictions, however, where an Americanised structure is sub-optimal. In particular, the discretion that American plans often contemplate in operation, amendment or cessation is not consistent with many stricter labour regimes, such as those in Latin America. In other jurisdictions, a global structure leaves tax advantages (for both employers and employees) on the table.

The struggle against perceived excess

Although the political and popular focus on compensation is not as intense as it was in the shadow of the financial crisis, national executive compensation agendas are dominated by attempts to address perceived excesses in public company executive compensation. It is clear that, in the current global economic environment, the continued growth of senior executive compensation stands in stark contrast to the stagnation in real wages in many parts of the world, and continues to drive legal and regulatory changes designed to address the perceived lack of fairness.

In Switzerland, for example, we have seen voters approve strict limits on signing bonuses and golden parachutes, and implement binding say-on-pay votes. (A subsequent measure that would have limited executive salaries to 12 times that of the lowest-paid employee, however, was not adopted.) In the United States, efforts have focused on disclosure, with rules requiring the disclosure of the ratio of chief executive compensation relative to that of the median employee and rules proposed to require disclosure of the relationship between executive compensation and company stock performance. In France, tax change rules have been adopted to promote broad-based profit-sharing schemes and to limit top-hat pension schemes for executives. In the United Kingdom, recent emphasis has been on long-term incentive programmes, which some view as having increased executive pay without delivering a corresponding increase in company performance. In Belgium, rules require shareholder approval of specified aspects of management committee compensation (such as severance longer than specified terms or share-based scheme with less than minimum vesting).

Globally, we continue to see heightened transparency regarding executive compensation, even in jurisdictions that have long resisted such disclosure. Other trends include continued tightening of limitations on compensation in the financial services sector. The United States has proposed sweeping restrictions on the compensation of executives and employees of financial institutions having assets for more than US$1 billion.

A developing area is the compensation of non-executive directors. In many countries, non-executive director compensation is unlimited, while in others it requires the annual approval of shareholders or is subject to strict statutory or regulatory limits. As the focus on perceived excesses in public company executive compensation continues, there has been increasing attention on the compensation of those that set executive compensation. In the United States, that attention has come through judicial action. In other areas, legislative activity has grown.

Clawbacks

The newest trend in compensation structures since the shift from options to other equity-based long-term incentives is the introduction of provisions that require the return of compensation in certain circumstances (clawbacks). Clawbacks aim to deter misconduct that may be identified (or occur) after the normal vesting cycle of awards. Common bases for clawbacks include discovery of misconduct, future competition, financial restatements and incentives based on incorrect metrics. We also have seen a migration of provisions that require clawback in the case of negative risk outcomes from the financial sector to other sectors that have 'long-tail risks', such as is the case for drug companies. In some cases we have seen the adoption of clawbacks in an attempt to respond to concerns about large bonus levels.

In many cases, clawbacks are untested. Although often favoured by both investors and government officials, labour laws in many countries limit the ability of companies to recover compensation that has previously been paid to employees. In some cases, criminal liability can attach. However, the exercise of clawbacks has become increasingly prevalent.

Deferral and vesting of compensation presented similar concerns when they were introduced into many jurisdictions (including some states in the US). Now, however, the legal regimes in most jurisdictions

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easily accommodate them. We expect that the law regarding clawbacks will expand similarly, and expect to see the continuing, but cautious, global expansion of their use.

Change-in-control protection

Providing enhanced separation protection in a context of the change-in-control or strategic transactions affecting a company, as well as protecting annual and long-term incentive awards, has been common for decades in the United States. The ongoing prevalence of these protections, even in an increasingly hostile governance environment, demonstrates their value, and research continues to support the fact that appropriate protection is associated with higher sales prices.

A variety of factors supports the continued implementation of change-in-control protections. For example, long-term incentive plans are particularly vulnerable to strategic transactions, and their sustained expansion (especially expansion to lower levels of management) requires that companies consider an appropriate balance. The acceleration of global mergers and acquisitions activity also suggests that companies should be rapidly evaluating their suite of change-in-control protections.

Outside the United States, however, the use of change-in-control arrangements continues to be mixed. For example, they are reported to be somewhat prevalent in the United Kingdom and less so in Belgium. In some jurisdictions, such as Switzerland, change-in-control protections have fallen victim to political agendas. We expect that competitive and equitable considerations will, however, place increasing pressure on change-in-control arrangements in jurisdictions in which they are not currently customary.

The continuing influence of proxy advisory firms

In 2017, we continue to observe the continuing influence of proxy advisory firms on the outcome of say-on-pay and other compensation-related shareholder proposals. In addition to the direct influence proxy advisers tend to hold over voting by investors, they also hold influence over the creation of 'best practices' in various regions, indirectly affecting voting outcomes. While much of this best practice is uncontroversial, it often lacks empirical backing and does not have the process checks and balances that apply to formal codes. As such, there is a danger of prejudice and assumptions influencing best practice, voting and – ultimately – how companies are run. In the United States, legislation has been proposed to regulate proxy advisory firms. If such legislation is adopted, we expect other countries will follow.

Conclusion

At the same time as we see a desire among global corporations for a convergence of executive compensation philosophies, we are witnessing a desire among global sovereigns to address perceived excesses and shortcomings. The structure, governance and disclosure of executive compensation remain hot topics worldwide, with regulation continuing to expand rapidly – but in different directions in different regions. Creating and executing effective global compensation strategies has always been a complex process, but is more so now than ever.

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Australia

Joydeep Hor and Therese MacDermott

People + Culture Strategies

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

National legislation, the employment contract and contract law principles are the main sources of law governing executive compensation and employee benefits. The legislative framework includes the Corporations Act 2001 (Cth), which deals with disclosure requirements and termination limitations, the Fair Work Act 2009 (Cth), which establishes minimum workplace entitlements for all employees, and anti-discrimination laws prohibiting discriminatory conduct at all stages of the employment relationship from recruitment to termination. The Competition and Consumer Act 2010 (Cth) may also have an application to the recruitment of executives with respect to any misleading or deceptive representations regarding bonuses, variable entitlements or career progression.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The Australian Securities and Investments Commission is Australia's corporate, markets and financial services regulator. The Fair Work Ombudsman and the Fair Work Commission are the principal agencies involved in the enforcement of minimum employment standards.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

There are two principal areas subject to corporate governance requirements: disclosure of executive remuneration and levels of termination payments. The Corporations Act requires that the annual director's report include a remuneration report, discussed in more detail in question 6. Pursuant to the Corporations Act and associated Corporations Regulations 2001, executive termination payments are capped at an amount equivalent to 12 months of an executive's base salary, with any termination payment exceeding the cap requiring shareholder approval.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

The schemes in some European countries for trade union and works council board-level involvement do not exist in Australia.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

The Corporations Act requires member approval for giving financial benefits to any related parties, such as a director. The 'giving of a financial benefit' is broadly defined to include giving or providing the related party with finance or property or buying an asset from or selling an asset to the related party, and therefore includes such arrangements as loans. However, member approval is not required should the giving of the benefit be on terms that are reasonable in the circumstances if the company and the related party were dealing at arm's length, or the benefit is remuneration to a related party as an officer or employee.

6 What rules apply to compensation of non-executive directors?

The Corporations Act provides that the directors of a company are to be paid the remuneration that the company determines by resolution. A company must disclose the remuneration paid to each director if the company is directed to do so by members with at least 5 per cent of the votes cast at a general meeting, or by at least 100 members who are entitled to vote at a general meeting. In the case of public companies, shareholder approval must be obtained for payments made to directors unless the payment is 'reasonable' remuneration.

The Australian Securities Exchange (ASX) Listing Rules further require that shareholders of ASX listed companies obtain approval to increase the remuneration payable to non-executive directors.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

The Corporations Act requires that the annual director's report include a remuneration report for any individual who falls within the definition of 'key management personnel', being persons having authority and responsibility for planning, directing and controlling the activities of the corporation or group. This obligation includes reporting on the board's policy for determining the nature and amount of remuneration of the key management personnel, any performance conditions, and any options granted. Continuous disclosure obligations also arise under the Corporations Act and ASX Listing Rules regarding the disclosure to the ASX of any information that may have a material effect on the price or value of the entity's securities, which may include the terms and arrangements for executive appointments in some circumstances.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

While contracts of employment do not technically have to be in writing, in the case of executive employment it would be unusual for there not to be some form of written agreement. Terms may also be implied into a contract by fact, custom or law. Executives will be subject as a matter of law to implied duties of good faith and fidelity, to work with skill and diligence, and to obey lawful and reasonable orders.

Common provisions in executive employment agreements include the nature of the position and duties attached, hours of work, remuneration structure, performance indicators, discretionary entitlements such as bonuses and incentives, termination and notice provisions, obligations regarding confidentiality and restrictive covenants.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

Executive remuneration commonly has a substantial component of performance-related compensation. Generally, this is structured in the form of short-term and long-term incentive plans. The balance

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between these components will depend on the particular financial and commercial circumstances of the company, as well as its short-term and long-term goals.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

Generally, the amount or structure of incentive compensation payable to an executive is regarded as a matter for each company to determine. There is, however, capacity for shareholders to express their views on remuneration at the annual general meeting (AGM). Under the Corporations Act a listed company must put to a vote at its AGM a resolution that the remuneration report be adopted. The vote on the resolution is only advisory, but can trigger the 'two strikes' procedure where 25 per cent of the votes cast oppose adopting the report. Restrictions apply to the capacity of key management personnel whose remuneration is included in the remuneration report, or persons closely related to them, in voting on such a resolution.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Deferral and vesting of incentive awards is permissible, with staggered vesting conditional on achieving certain performance conditions a common practice. We are not aware of any minimum or maximum vesting periods.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

Where an incentive payment, such as a bonus, is purely discretionary, the employer is subject to an implied contractual obligation not to exercise that discretion capriciously or irrationally. In order for a discretionary incentive to become a mandatory contractual entitlement, the circumstances in which this would occur would need to be clearly specified in the contract of employment or be established by some form of undertakings or assurances given.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

The type or amount of incentive compensation awarded for a particular incentive does not directly affect the compensation payable to other executives or employees. The requirement for disclosure through the remuneration report, however, imposes a level of transparency and comparability that may have an indirect impact.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

Repayment of incentive compensation may be permissible if appropriately provided for by an executive's employment contract. The ASX Corporate Governance Council publishes best practice recommendations regarding corporate governance in the form of its Corporate Governance Principles and Recommendations. These state that disclosures regarding the remuneration of executive directors and other senior executives should include a summary of the entity's policies and practices regarding the deferral of performance-based remuneration and the reduction, cancellation or clawback of performance-based remuneration in the event of serious misconduct or a material misstatement in the entity's financial statements.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

Australian companies often link part of the remuneration of executives to the financial market performance of the company in the form of shares or options. While there is no set practice as to the typical length for deferring the entitlement, vesting periods of between one and three years are common. Some plans also provide for staged entitlements in tranches linked to the particular executive meeting performance targets over a range of time periods.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

Employee share schemes (ESSs) may structure equity compensation in different forms. The type of scheme offered will generally determine the applicable tax treatment, with the default position being that such interest will be taxed in the income year in which the interest is received. Concessional tax treatment is available for employees who have received ESS interests under a taxed-upfront scheme if they also meet an income test of earning A$180,000 or less.

For employees who have acquired their share scheme interests under salary-sacrifice arrangements, or where there is a real risk of forfeiture under the conditions of the scheme, these interests will be taxed in the income year that the deferred taxing point occurs. The deferred taxing point for a share is the earliest of the following:

- 15 years after the employee acquired the share;
- when the employee ceases the employment in relation to which he or she acquired the share;
- when there is no real risk of forfeiture; or
- when the scheme no longer genuinely restricts the disposal of the share.

If ESS interests have not been granted at a discount, the benefits given to employees may be taxed under other provisions of tax law, such as capital gains tax.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

The offer of securities to investors, including to employees, is regulated under Chapter 6D of the Corporations Act. The Corporations Act requires that, unless an exemption applies, offers must be made under a disclosure document. Exemptions include offers made to senior managers of the entity and certain small-scale offers. In addition, an ESS annual report must be provided to the Australian Taxation Office after the end of each financial year.

18 Are there withholding tax requirements for equity-based awards?

Withholding tax may apply under certain ESSs where the employee has not provided a tax file number or an Australian business number by the end of the relevant financial year. An obligation to withhold tax may also arise with respect to non-resident participants in the scheme.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

In the case of stock options granted to employees of a local affiliate in a non-local parent company, a recharge (chargeback) agreement can provide that the local company agrees to reimburse the parent company for the costs associated with the equity-based compensation issued to its employees. This can be advantageous from a taxation treatment perspective, because it ensures the cost is attributed to the entity in which case a deduction may be claimed. A local tax deduction may be available in Australia if a recharge agreement is in place.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Employee stock purchase plans are available, with the most frequently encountered issue with such arrangements being the taxation treatment of such interests.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

The Fair Work Act sets out the National Employment Standards (NES), being the minimum standards of employment applicable to all employees, including executives. These include:

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- maximum weekly hours;
- requests for flexible working arrangements;
- parental leave and related entitlements;
- annual leave;
- personal/carer's leave and compassionate leave;
- community service leave;
- long-service leave;
- public holidays;
- notice of termination and redundancy pay; and
- Fair Work Information Statement.

Voluntary benefits may be provided over and above the standards set out in the NES. The capacity to limit such voluntary benefits is dependent on whether they have a contractual status, and the scope for variation under the contract of employment.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Common forms of remuneration benefits paid to executives include salary, superannuation, bonuses, incentives and termination benefits. Other non-monetary benefits may include the provision of mobile phones, company vehicles, housing, payment of health insurance or school fees for dependants. Employers pay fringe benefits tax (FBT) on certain benefits provided to their employees or their employees' associates, such as the use of a work car for private purposes.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

There are no specific prohibitions on terminating executives. The circumstances in which an executive's employment may be terminated are often governed by the terms specified in her or his contract of employment. To end employment, an employer must give notice in writing, or provide payment in lieu of notice. Minimum statutory notice periods apply under the Fair Work Act, based on length of service. A longer notice period may be specified in an executive's contract of employment to reflect the seniority of the position. In the absence of an express provision, a term may be implied requiring reasonable notice. Subject to satisfying the notice requirement, executives can be dismissed without cause.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

The Fair Work Act sets out a scale of severance pay based on years of service as the minimum entitlement for all employees. This could extend to executives, although they may be entitled to a more generous amount payable on severance pursuant to their contract of employment or any enforceable policy documentation, or as part of a negotiated settlement. Under the statutory scheme, the amount of severance pay is based on the base rate of pay for ordinary hours of work, thereby excluding bonuses and other discretionary entitlements. For service prior to the commencement of this regime in 2010 to be counted, the employee must have had an existing entitlement to redundancy pay under either an industrial instrument, contract or policy.

25 What executive severance payment level is typical?

Under the Corporations Act termination payments for any employee who holds a 'managerial or executive office' are capped at an amount equivalent to 12 months of the executive's 'base salary', with any termination payment exceeding the cap requiring shareholder approval. Where the executive has been employed for three years or more this is the average annual base salary for the past three years of employment. The Corporations Regulations 2001 (Cth) defines 'base salary' to include:

- non-performance based benefits paid in the relevant period (which is expressed as including salary, fees and short-term compensated absences, short-term cash profit-sharing and other bonuses, non-monetary benefits and other short-term employee benefits);
- a superannuation contribution that is not performance dependent and is paid in the relevant period;
- a share-based payment that is not performance dependent, is specified in column 3 of item 11 in the table in sub-regulation 2M.3.03(1) of the Regulations, and is paid in the relevant period; and
- a fringe benefit liability or prospective liability.

In order to satisfy the requirement for member approval the benefit must be approved by a resolution passed at a general meeting of the company and, if the company is the subsidiary of a listed domestic corporation, of the listed corporation.

The ASX Listing Rules prohibit payment of termination benefits to any officer of the entity in circumstances where a change in the shareholding or control of the company has occurred.

Whether a pro rata incentive is paid in the terminated year depends on the manner in which the incentive is structured and the nature of the discretion involved, if any. For example, if the incentive is based on achieving specified milestones progressively throughout the year, then those that have already been achieved will be payable. Others may be subject to the exercise of discretion, which cannot be exercised capriciously or irrationally.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

An executive's employment may be terminated without notice for serious misconduct, such as dishonesty, fraud or other serious conduct that significantly affects the employer's interests, operations or reputation so as to amount to a repudiatory breach of contract. Summary termination in such circumstances arises as a matter of common law, although many employment contracts will also contain a specific clause to this effect.

In Australia employees may challenge a termination of employment that is harsh, unjust or unreasonable. While the salary cap that applies to this regime often excludes executives, they will have access to such a claim if they earn below the threshold or their employment is covered by an award or enterprise agreement. Terminations for cause are generally regarded as those in which the conduct or capacity of the individual or the economic circumstances of the employing entity warrants termination, and appropriate procedural fairness in implementing a decision to terminate has been followed.

'Constructive dismissal' arises in the Australian context where the repudiatory conduct of the employer entitles the employee to accept the employer's fundamental breach and resign. Such a forced resignation is still regarded as a termination at the employer's initiative for the purposes of the unfair dismissal regime.

Alternatively, the circumstances surrounding an executive's termination may give rise to a claim that the general protections provisions of the Fair Work Act have been breached. An example of such circumstances includes where some form of adverse action is taken against an executive who has exercised a workplace right, such as the right to enquire about an employment-related entitlement. The salary cap applicable to unfair dismissals does not apply to the general protections provisions of the Fair Work Act.

27 Are 'gardening leave' provisions typically used in employment terminations?

'Gardening leave' provisions are common for senior management employment. Executives may be put on gardening leave, requiring that they not attend the workplace or provide any services while they are serving out a period of notice. The ability to instigate this arrangement is usually based on an express term in the contract of employment, although an implied term may arise in some factual situations.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

Settlement of termination claims either before or after claims are initiated is common, and is generally formalised in the form of a deed. An employer cannot contract out of any statutory entitlements that are payable, such as accrued leave entitlements. Moreover, while a deed of settlement may deal with any payments to which an executive may

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be entitled contractually, payment of any such benefit without the requisite shareholder approval may still contravene the provisions of the Corporations Act.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

The most common forms of post-employment restrictive covenants are non-solicitation, non-dealing and non-compete covenants. Non-solicitation covenants prevent former employees from pursuing clients, customers or suppliers they had dealings with during their employment. Non-dealing covenants prevent dealing with or doing business with anyone who has a business connection with the former employer (such as customers, clients or employees) irrespective of whether former employees seek out the clients or the clients approach the employees for services. Non-compete covenants prohibit former employees from approaching clients, working for competitors or establishing their own businesses during the period of restraint.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

While the general presumption is that a restrictive covenant is unenforceable, being contrary to public policy, it will be enforceable in circumstances in which an employer can show that it has a legitimate interest to protect, and the restraint imposed is no more than reasonably necessary to protect that interest. Legitimate interests include goodwill, protection against soliciting employees or customers, or the release of confidential information and trade secrets. Under Australian common law, covenants that are unreasonable will not be enforced. However, under the Restraint of Trade Act 1976, courts in the state of New South Wales may read down a restraint (which would otherwise be unenforceable) to what is reasonable. Most contracts, however, now have restrictive covenants that are drafted as cascading restraints with reducing restraint periods and geographical scope. This allows any restraint determined to be too wide by a court to be severed, and the remaining more limited but valid restraint to be enforced.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

Post-employment restrictive covenants are generally enforced by way of injunction. In addition, an employer may seek compensatory damages or an account of profits.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Retirement benefits are provided for in the Australian system through compulsory superannuation guarantee contributions made by employers during the course of the employment relationship. On the whole, most employment-related benefits cease once the employment relationship ends, unless specific terms of the employment contract provide otherwise. Payments of any benefits on retirement are subject to the same limitations as termination payments and require shareholder approval for payments over the salary cap threshold.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

While employer-funded superannuation schemes were once discretionary and largely confined to executive employment, a system of compulsory superannuation guarantee contributions by employers has now existed in Australia for over 20 years, and is available to all employees earning over a modest monthly threshold. Superannuation contributions receive favourable tax treatment under the Australian taxation system, and access to superannuation payments can be supplemented with some paid employment (limited by hours) post-retirement.

34 May executives receive supplemental retirement benefits?

Supplementary retirement benefits for executives may be provided for in the employment contract, but remain subject to shareholder approval where the total value of the retirement benefits payable exceeds the salary cap threshold.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

Executives may seek to minimise their risk of personal or financial liability through indemnity or insurance, but the Corporations Act imposes limitations on this process. A company must not indemnify a director or other officer of the company from a liability owed to the company itself, a liability for a pecuniary penalty, or a liability owed to a third party that did not arise out of conduct in good faith. Similarly, a company cannot pay insurance premiums for a contract insuring an officer of a company for any conduct involving a wilful breach of duty in relation to the company, improper use of position, or improper use of company information.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

While common law contracts of employment do not automatically transfer with employees in a sale of business situation, under the Fair Work Act, transfers of employment may occur between the selling and the acquiring entities where transferring employees commence work within three months of termination from the sellers' employment, the work performed is substantially the same, and one of the following connections is established:

- they are associated entities;
- there is an outsourcing or insourcing of business between them; or
- there is an arrangement concerning the ownership or the assets to which the transferring work relates.

The contractual terms under which an asset sale is implemented will often determine whether a specific executive's employment is transferred to the new entity and which benefits (if any) transfer with the executive. Contractual benefits may be subject to renegotiation by the acquirer, subject to any constraints imposed by the sale agreement and the existing contract terms.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Although retention bonuses are often paid globally by acquiring companies to ensure key executives remain with the organisation, their usage is less common in Australia.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

Some share schemes in Australia provide for the exercise of discretion to accelerate vesting for some participants in the event of a change of control. In particular, this may be used for executives who may not have a clear role in the organisation once the sale transaction is executed. This acceleration may take the form of full vesting, or only be partial subject to further conditions. There is little evidence of cashing out of equity awards within such schemes.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

Foreign exchange controls in Australia do not generally restrict the movement of funds in or out of Australia, except in the case of certain financial transactions relating to specified individuals and entities associated with certain regimes. Employers may, however, be required to deduct withholding tax from certain foreign remittances.

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40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

While there is no absolute requirement that employment agreements be in the local language, as occurs in some European countries, in the absence of translated versions of the agreements enforcement problems may arise or uncertainty may exist as to the terms of the agreements.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

To minimise the impact of tax liabilities imposed on inbound executives that are higher than they would have been in their country of origin, some employers will make up the difference with a tax-equalisation payment. This may, however, give rise to FBT liabilities.

42 Are choice-of-law provisions in executive employment contracts generally respected?

The nomination of a particular legal jurisdiction as governing the employment contract of an executive is generally respected, unless there are strong public policy reasons to do otherwise.

People+Culture Strategies

Joydeep Hor **joydeep.hor@peopleculture.com.au**
Therese MacDermott **therese.macdermott@peopleculture.com.au**

Level 9, NAB House
255 George Street
Sydney
NSW 2000
Australia

Tel: +61 2 8094 3100
Fax: +61 2 8094 3149
www.peopleculture.com.au

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Belgium

Chris Engels and Florence Sine
Claeys & Engels

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

Belgian labour law encompasses a multitude of legislation (eg, the Employment Contracts Act of 3 July 1978, the Act of 12 April 1965 on the protection of remuneration and the Act of 25 April 2014 on the status and supervision of credit institutions) regulating the various aspects of compensation and benefits. This legislation is embodied mainly in acts, royal decrees and collective bargaining agreements declared generally binding and thus applicable to the entire private sector.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The labour courts are empowered to rule on individual grievances.

In addition, the observance of provisions in the field of labour law is verified by the Social Inspection Department. The Social Inspection Department can impose administrative fines on anyone not respecting the applicable legislation. The Financial Services and Markets Authority and the Belgian National Bank are also in charge of the supervision of credit institutions. Both institutions have the power to issue circular letters and communications, which contain guidance on the practical implementation of laws and royal decrees. They also have a wide array of sanction mechanisms at their disposal in the event of breaches of applicable laws and regulations, including administrative penalties. They can also submit matters for criminal prosecution.

Furthermore, non-observance of provisions of collective bargaining agreements that are declared generally binding by royal decree is also punishable with criminal sanctions or fines.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

In publicly traded companies, shareholder approval is required for certain aspects of executive compensation of management committee members, such as any severance indemnities exceeding 18 months, any share-based compensation with vesting periods of less than three years, and variable pay schemes that do not provide for payment of at least one-quarter based on performance criteria over at least two years, and at least one-quarter based on performance criteria over at least three years.

In addition, the Act of 25 April 2014 transposes Directive CRD IV into Belgian law and imposes detailed obligations upon credit institutions concerning governance, capital surpluses and remuneration policy.

The Act obliges credit institutions to work out a remuneration policy for directors, personnel with influence on the risk profile of the institution and personnel who are situated on the same level as those two categories in terms of remuneration.

In Annex II, the principles for the fixed and variable remuneration for such categories are determined in detail. The variable remuneration is limited to the highest of the following amounts: 50 per cent of the fixed remuneration or €50,000, but not exceeding the fixed remuneration. Termination benefits are subject to a similar regime as for listed companies. Furthermore, with respect to 'signing-on bonuses' and pensions, certain principles to be respected are now placed on record.

Finally, credit institutions are obliged to abstain from effecting payments by any means that facilitate the circumvention of the principles of the Act. Credit institutions that receive exceptional government support cannot pay any variable compensation to their executives.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

In principle, remuneration is agreed freely between the parties. This freedom of negotiation is limited by the existing collective bargaining agreements and by the companies' policies.

If an executive compensation or a benefit arrangement implies a conclusion or an adaptation of a collective bargaining agreement, the trade unions will be involved. Remuneration of executives is, however, rarely laid out in collective bargaining agreements.

In publicly traded companies and in credit institutions, the remuneration committee must give its opinion regarding every variation in the remuneration policy.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

There is a maximum binding margin for remuneration costs (applicable to all employees and not only to senior management), which is determined every two years. It is prohibited to conclude any type of agreement that would lead to exceeding the maximum margin. For the 2017–2018 period, the social partners (national representative trade unions and employer federations) agreed to determine the margin at 1.1 per cent (on top of cost-of-living adjustments and pay scale increases).

Besides the above, there are in principle no specific prohibitions, rather a general prohibition on bribery.

Under Belgian law, active bribery is defined as follows: the presentation of an offer, promise or advantage to a director or an agent of a legal or natural person, to, without the knowledge or approval of the board of directors, general assembly, agents or employer, perform certain acts, proper to his or her function or facilitated by his or her function, or omit to perform these acts. Note that passive bribery (ie, accepting the offer, promise or advantage) can be sanctioned as well.

The broad definition mentioned above can render some incentives disputable, but normal relational gifts are still accepted. It is accepted that granting advantages to clients or suppliers is legitimate and is part of a normal economic or business relationship; the latter is obviously not a form of bribery.

In practice, only significant personal benefits would give rise to criminal prosecutions for bribery. A loan to a public officer or a payment of a cash amount to (for instance) a director in order to secure an action pertaining to his or her function or to obtain something through his or her function can be considered as a bribe.

Furthermore, note that there are special rules for credit institutions (see question 3).

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6 What rules apply to compensation of non-executive directors?

Non-executive directors in Belgian companies are deemed to be self-employed individuals. Their compensation is therefore not governed by labour law. In practice, non-executive directors are often unremunerated, in particular if their mandate is linked to employment in another company. Where they are remunerated, they often receive a fixed fee per year, sometimes combined with an additional fixed fee per board meeting they attend.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

Some companies have the legal obligation to disclose the compensation of their top executives: publicly traded companies (for their non-executive, and executive directors and management committee members), and banks and insurance companies (for 'identified staff').

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

A written employment contract is in principle not required (except when entering into a fixed-term employment contract, or when entering into an employment contract for the completion of a specific task, or when entering into a part-time employment contract); however, for reasons of proof and to avoid unnecessary misunderstandings, it is advisable to draw up a written employment contract at all times. In the employment contract, the monthly remuneration of the employee should be specified, and it is also possible to provide for the granting of fringe benefits or bonuses. It is not possible to derogate, by way of mutual agreement, from provisions regarding remuneration included in collective bargaining agreements or in Belgian law, unless to the benefit of the employee (not to the detriment).

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

Non-recurring result-based bonus
The company can introduce a bonus scheme that must meet a number of conditions. The most important of these is that the bonus must be subject to collective targets. The bonus plan must be adopted according to specific procedures and formalities, and apply to an objectively defined category of personnel. This may be the entire staff, but it could also be limited to a specific department or to a group of employees.

Share options (generally granted to executives)
Employers purchase such share options (also known as 'warrants') issued by financial institutions. The employer then offers these warrants to its employees, who then are able to resell them to the financial institution. By doing so, employees are exposed to stock market fluctuations for only a day or two, effectively minimising their overall market risk.

Stock options (generally granted to executives)
Stock options are granted free to the employees (beneficiaries). During a lock-up period of generally one year the beneficiary can neither exercise nor transfer such stock options. After this one-year period, the beneficiary has the option to either exercise the stock options or to sell them to any party of his or her choice except for the company-employer or any other affiliated company.

Bonus pension plan (generally granted to executives)
In the framework of a bonus pension plan, a part of the bonus budget is paid as a cash bonus (subject to ordinary taxes and social security contributions) and another part is paid as employer's contributions under the pension rules.

Bonus agreement or policy
It is possible to set for an employee, or for a specific group of employees, objectives that, if reached, will trigger a bonus for such employees. Except in specific cases (for example, the banking sector and Belgian-listed companies), the parties are free to set the objectives and the amount of the bonus.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

Non-recurring result-based bonus
The bonus paid in the framework of a plan to award 'non-recurring result-based advantages', is, within yearly indexed limits, exempt from all taxes or ordinary social security contributions. The maximum amount is set at €3,255 for 2017, but there is a personal social security contribution of 13.07 per cent due in addition to the special employer's contribution of 33 per cent.

Should the employee receive more than €3,255 in 2017, the amount of the bonus that exceeds this limit will be subject to ordinary social security contributions and income taxes.

Share and stock options
Both stock options and warrants are exempt from social security contributions (and thus also from the calculation basis for holiday pay) in certain conditions (where there is no 'in-the-money' option or no guaranteed benefit).

If such options are listed on the stock market and can be sold at very short notice, the taxable value is equal to their actual value on the stock exchange on the date preceding the offer. If such options are not listed on the stock market, and providing that they are blocked for a period of at least 12 months, the taxable value is determined on the basis of a lump-sum assessment, which depends on the value of the underlying shares at the moment of the offer.

Bonus pension plan
Occupational pension plans are subject to a very favourable tax and social security regime, compared with salary. Very briefly, instead of the normal social security contributions due on salary (32 per cent for the employer and 13.07 per cent for the employee), contributions to a pension scheme are subject to a special social security contribution of 8.86 per cent and an insurance tax of 4.4 per cent. There is an additional 1.5 per cent contribution for certain high pensions.

Bonus agreement or policy
There are no specific rules on bonus social security and taxation. Bonuses are subject to ordinary social security and income tax rules.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Deferral and vesting of incentive awards are permissible and valid, providing that the contractual provisions are correctly worded.

In publicly traded companies, stock options granted to 'executive directors' may not be exercised before the end of three years after granting. Also, deferral rules apply to their variable compensation when it exceeds 25 per cent of the total compensation.

In banks, very strict rules apply to variable compensation granted to 'identified staff'. When the variable compensation reaches or exceeds an amount of €75,000, deferral rules must be applied. Also, half of the variable compensation must be granted in financial instruments.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

If a premium is granted over several consecutive years, there will be an entitlement to this premium on the basis of 'custom'.

The employee will have to prove the existence of such custom in the event of:

- repeated payments of the premium over a certain period. The case law accepts the existence of a custom when a bonus is paid over two to three years. It is therefore recommended to the employer to specify in the contract that the employee acknowledges that, even if a premium is awarded for several years, this will not constitute a custom and that the employee acknowledges that he or she is not entitled to expect such a premium in the future;

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- payment to a certain group of employees (eg, all employees, all white-collar employees, all the managers, etc); and
- payment of a similar amount or payment based upon the same criteria (eg, a certain percentage of the profit or the turnover of the company). If the amount varies from year to year and is determined by the employer on arbitrary grounds, it could be argued there is no custom.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

The amount of incentive compensation awarded to an executive does, in principle, not affect the compensation that must be awarded to other executives or employees. In practice, however, it may be the case that employers ensure at least some sort of basic parity amongst employees of the same level or rank, possibly to avoid being subject to claims of discrimination.

An employer cannot discriminate with respect to promotion opportunities or working conditions. If an employee claims that he or she has been discriminated against before a competent court, and if he or she establishes facts from which it can be presumed that there has been direct or indirect discrimination, the burden of proving there has been no discrimination shifts to the employer.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

This is not specifically foreseen in Belgian regulation. On the basis of the general principles applicable to every contract, the repayment of a paid remuneration could be claimed by the employer if an amount was paid out by mistake, or owing to an unfair or a deceptive act or practice.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

The prevalent forms of equity compensation awards in Belgium are successive stock options, warrants, free shares, performance shares and (restricted) stock units.

For tax reasons, a typical vesting period is three years for stock options or warrants and two or five years for shares, depending on the nature of the plan.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

Unquoted stock options and warrants are tax-advantageous because they are evaluated at a flat-rate value. Shares may also benefit from a tax exemption or a tax-advantageous treatment, depending on the nature of the operation.

Quoted stock options or warrants are not advantageous from a tax point of view as they are evaluated at their fair value (but it remains advantageous for social security reasons).

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

There is no required registration or notice.

18 Are there withholding tax requirements for equity-based awards?

Professional withholding tax has to be applied in accordance with the provisions of the Belgian Income Tax Code and its Royal Decree (appendix III). Nonetheless, professional withholding tax is avoided if the benefit is awarded by a foreign company without any establishment or branch in Belgium. The social security contributions are also avoided if the benefit is awarded by a foreign company without any chargeback to the employer in Belgium and if the employer has no legal or contractual commitment to grant the benefit.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Inter-company chargeback agreements are relatively common. As explained above, the local affiliate then has to withhold and pay the social security contributions in Belgium.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Stock purchase plans are not prevalent, except in international groups of companies. This is owing to the fact that in Belgium, the conditions that must be met in order to benefit from a tax exemption or tax-advantageous treatment are strict.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Normally, minimum salaries are fixed by collective bargaining agreements in every industry branch. Apart from these 'statutory' lower limits, the parties to an employment contract are free to determine the amount of salary. Male and female employees with an equivalent job are, however, entitled to the same remuneration.

Companies often grant their employees fringe benefits, which are considered part of the employees' remuneration. The employer has no legal obligation to provide any fringe benefits (except if the joint labour committee provides for this benefit) but, once granted, they cannot be withdrawn without the employees' consent.

It is common practice in Belgium for a year-end premium to be paid to employees, usually equal to one month's salary. The rules concerning this bonus are most of the times set out in industry-level collective bargaining agreements.

Belgium has a comprehensive social security system, providing the following benefits:

- healthcare;
- disability benefit;
- work accident benefit;
- occupational illness benefit;
- retirement pension;
- family allowance;
- unemployment benefit; and
- maternity benefit.

In addition, Belgian employees are entitled to paid annual holiday. The right to such holiday is in principle accrued on the basis of the days worked in the calendar year (and assimilated periods such as periods of legal suspension of the employment contract) immediately preceding the calendar year in which the employees will take up their annual holiday.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

See questions 9, 10 and 21.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

Special rules apply to top executives of publicly traded companies and to banks (for their 'identified staff').

Harmonised dismissal rules for blue-collar and white-collar employees came into force in Belgium on 1 January 2014.

The length of the notice periods in cases of dismissal by employers can be summarised as follows:

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Seniority	Notice period
< 3 months	2 weeks
3 months < 6 months	4 weeks
6 months < 9 months	6 weeks
9 months < 12 months	7 weeks
12 months < 15 months	8 weeks
15 months < 18 months	9 weeks
18 months < 21 months	10 weeks
21 months < 24 months	11 weeks
2 years < 3 years	12 weeks
3 years < 4 years	13 weeks
4 years < 5 years	15 weeks
As of 5 years	+3 weeks per started year of seniority
20 years < 21 years	+2 weeks per started year of seniority
As of 21 years	+1 week per started year of seniority

Transitional measures apply to blue-collar and white-collar employees who entered into service before 1 January 2014. For those employees, two notice periods need to be calculated and added together: a notice period for seniority acquired up to 31 December 2013 based on the 'old' dismissal rules (modified for white-collar employees earning more than €32,257 on 31 December 2014 as one month per started year of seniority with a minimum of three months); and a notice period for seniority acquired as of 1 January 2014 based on the 'new' dismissal rules set out above.

Until recently, the employer did not, as a general rule, need a reason or a basis upon which to terminate an employment contract under Belgian law, as long as this basis was not prohibited by law; however, since 1 April 2014, employers need reason for dismissal of any blue-collar and white-collar employee with more than six months of seniority. The employer is free to communicate the reasons for dismissal at its own initiative (no obligation). If not, however, the employee can request such reason for dismissal. The employer must then mandatorily communicate these in writing by registered mail.

In general, in the event that an employer fails to communicate the reasons for dismissal within the foreseen time frame and without respecting the required formalities, the employee will be entitled to an additional lump-sum indemnity of two weeks' remuneration.

Further, the employee can claim before the employment tribunal a lump-sum indemnity of between three and 17 weeks' remuneration (if the dismissal is considered 'manifestly unreasonable'). This is the case if the dismissal is based on reasons that are not related to the suitability or behaviour of the employee, not based on the necessities of the functioning of the organisation or service, and which would have never been approved by a normal and reasonable employer.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

Deviations from the notice periods set by law at industry level are not permitted, even when they would be more favourable for the employees. Deviations on an individual level or on company level, however, are not explicitly forbidden, but would only be permitted if they are no less favourable for the employee.

Indemnities in lieu of notice are calculated based on all contractual and statutory benefits and the employee's fringe benefits. These payments are subject to social security contributions.

At the termination of the employment contract, the employee is also entitled to the holiday pay upon departure.

25 What executive severance payment level is typical?

See questions 33 and 34. Indemnities in lieu of notice are calculated based on all contractual and statutory benefits and the employee's fringe benefits. These payments are subject to social security contributions.

A pro rata bonus or year-end premium must be paid if it is foreseen in the applicable rules regarding this matter (work rules, employer's policies, collective bargaining agreement and employment contract). It can also be foreseen in a settlement agreement.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

In some cases, the law provides for grounds on which the employment contract can be terminated without notice or indemnity in lieu of notice.

Dismissal for serious misconduct

This is possible if the employee commits a serious fault that renders any further dealings between parties immediately and definitively impossible. Further, a strict procedure must be adhered to in the event of termination for serious misconduct: in brief, the employer must dismiss the employee within three working days of the moment the employer becomes certain of the relevant facts. After the first period of three working days, a second limit of three working days is imposed for notifying the serious cause that justified the dismissal. This last notification must be done by registered post. If this procedure is not followed, an indemnity in lieu of notice will be due, as for ordinary dismissals, whatever the nature of the fault committed by the employee.

Termination of the employment contract

This is possible as a result of force majeure (ie, act of God). This term is interpreted very strictly in Belgian case law as an unforeseeable event not caused by a fault by one of the parties, which is an insurmountable impediment to the further execution of the employment contract. The law provides that bankruptcy is not regarded as force majeure.

Constructive dismissal

As a rule, an employee's function, responsibilities and remuneration are essential elements of the employment contract. A substantial unilateral modification by the employer of these elements will most likely be considered an act tantamount to a dismissal, enabling the employee to invoke constructive dismissal and claim a severance indemnity.

27 Are 'gardening leave' provisions typically used in employment terminations?

Under Belgian law, garden leave is possible upon condition that the employee agrees with such garden leave. The employer cannot unilaterally force an employee to stay at home, even if this leave would be remunerated by the company.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

After the termination of his or her employment contract, the employee may in principle waive statutory and contractual rights to potential employment claims. It is not required that the employee meets a lawyer or a counsel before doing so.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

If a special non-compete clause (for companies with international activities) is agreed between parties, the applicable maximum period of 12 months after termination of the employment relationship that holds in principle for ordinary non-compete clauses does not apply. A clause being applicable for two or three years seems reasonable.

The clause must provide for the payment of a specific non-compete indemnity, equal to at least 50 per cent of the worker's remuneration during the non-compete period, unless the employer notifies the worker within 15 days of termination of the contract that it waives application of the clause. Should an employer forget to waive the clause's application, this indemnity must be paid.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Any exception or limitation to the freedom of commerce and the freedom of work must have a legal basis. If not, or if it does not satisfy the legal conditions, such contract clauses will be null and void and thus unenforceable. The most widely known and applied legal exceptions

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to this rule are non-compete clauses (see question 29). The worker can waive his or her freedom to compete with his or her former employer following the end of the employment relationship by agreeing to a non-compete clause. Courts will not rewrite non-compete clauses that do not fully respect the legal conditions: they will be considered null and void.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

When an employee violates a non-compete clause, he or she must reimburse the non-compete indemnity received from the employer and pay the employer the same amount in damages. The courts may decide, however, that the damages caused were higher and award a higher compensation to the employer. In the framework of an action in 'summary proceedings', the judge can impose upon the employee an injunction to stop breaching the non-compete clause, possibly subject to fines in case of breach of the injunction. When acting against the employee, the former employer can possibly also act against the competitor: although the competitor is not bound by the non-compete clause, its liability can be at stake in case of 'complicity' in breaching the clause, which is considered as unfair competition.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

The state pension system is financed by social security contributions paid on salary. It is a repartitioning system, and it grants pension rights based on salaried employment and assimilated days.

Occupational pension plans are not mandatory under Belgian law (except where they are imposed by a collective bargaining agreement concluded at the industry level) but are quite common.

Where a plan covers all employees and provides for employee contributions, if the company has a works council or other employee representation body, any plan change must be negotiated with the trade unions to be laid down in a collective bargaining agreement. The same is true if a plan (even though not legally required) was laid down by collective bargaining agreement. If there are no employee representation bodies in the company, but the plan still covers all employees and provides for employee contributions, the plan can be changed following a special procedure for work regulation amendments. Where this is not the case, courts generally consider that employers are not free to unilaterally change the terms of the plan, because it is deemed to be incorporated into the employment contract. For that reason, it is recommended to obtain individual (tacit or explicit) consent of the employees.

When moving from a defined benefit (DB) to a defined contribution (DC) plan, the reserves relating to the career under the DB plan must continue to evolve based on future salary increases (and other changes in the plan formula elements); this is the 'dynamic management' element of DB plans.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

In recent years, many DB plans have been closed for future participation, since employers prefer the financing predictability of DC schemes.

Occupational pension plans are subject to a very favourable tax and social security regime, as compared with salary (see question 10).

34 May executives receive supplemental retirement benefits?

There are no legal standards regarding contribution levels, and benefits can therefore differ significantly. Executive plans can be significantly more generous than broad-based plans.

Many pension formulas (both in DB and DC) are step-rate (ie, they will make a distinction for the purpose of occupational pension accrual between salary below and above the state pensionable salary ceiling – currently €54,648.70). The part below the ceiling will yield less occupational pension, as it only complements the state pension, and the part above the ceiling yields more, as there is no state pension accrual. Industry sector plans typically have DC formulas with comparatively low – sometimes extremely low – contribution levels.

Belgium has very strict anti-discrimination laws applying to the membership conditions and all other features of occupational pension plans. Every distinction made in an occupational pension plan must be objective, reasonable and proportionate.

In practice, many occupational pension plans make distinctions between blue-collar, white-collar and management plans. A law of 5 May 2014 is gradually eliminating the distinctions between blue-collar and white-collar employees. Such distinctions will be prohibited as of 2025, with a standstill obligation as of 2015. Some employers make distinctions based on internal job classification systems or scales, which will continue to be permissible.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

An employee can only be held liable for damages in a limited number of circumstances. A distinction must be made between damages caused during the execution of the employment contract and damages caused outside this context.

Furthermore, for these purposes, a director may also be considered an employee. In his or her capacity as director, it is recommended (but not mandatory) to conclude a special director's and officer's liability insurance. Indemnification by the employer is also possible, but this is not valid for liability caused by intentional wrongdoing.

During the execution of the employment contract

Under article 18 of the Employment Contracts Act, in a case of damages caused during the execution of the employment contract, the employee is only liable towards his or her employer or towards a third party if he or she is guilty of fraud or serious fault. The employee is not liable for less serious misconduct ('light fault') unless his or her behaviour is repetitive.

The employer is liable towards third parties for damages caused by its employees during the execution of their employment contracts under article 1384, 3° of the Civil Code. Under article 18 of the Employment Contracts Act, the employer may only claim back the amount it paid from the employee if the latter is guilty of fraud, serious fault or repetitive light fault.

Outside the execution of the employment contract

The limitation of the employee's civil liability provided by article 18 of the Employment Contracts Act does not apply if the employee causes damages outside the execution of the employment contract. In such a case, the employee's liability is determined under the usual civil rules governing liability. Therefore, the employee will be liable towards the employer and towards a third party for his or her ordinary negligence.

Criminal liability

Article 18 of the Employment Contracts Act does not apply in the same way to the criminal liability of employees. Even if a criminal infringement is committed during the execution of the employment contract, the employee will be held criminally liable.

The employer may, however, be held liable for the payment of the fines imposed on the employee. The employer may afterwards claim back the amount it paid by withholding it from the employee's salary. The question arises, however, as to the legality of such withholding since the fines paid by the employer based on its civil liability cannot be considered an advance.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

A 'transfer of undertaking' exists as soon as an employee is confronted with:

- a change of employer (new legal entity employing him or her);
- as a consequence of a transfer of undertaking, a business or a part of it as a going concern; and
- by virtue of an agreement (according to the European Court of Justice's case law, it is sufficient that the transfer takes place in the framework of indirect contractual relationships).

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In the event of a transfer of undertaking, there is an automatic transfer of employees attached to the transferred activity (the employees cannot refuse to transfer). The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer must, by reason of such transfer, be transferred to the transferee.

For a transfer of undertaking, business or part of a business or undertaking, the identity of the undertaking, business or part of business or undertaking, as an economic entity must be retained after the transfer. For a transfer of an economic entity to retain its identity:

- the transferee must perform the identical or similar activities as the transferor; and
- the transfer must concern a grouping of tangible assets or intangible assets that are necessary for continuing the activities.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Executive retention agreements are sometimes negotiated on a case-by-case basis in connection with acquisitions or company reorganisations, but practices differ widely. They usually take the form of a one-off retention bonus payable after an agreed retention period.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

Only the General Assembly may grant rights to third parties affecting the company's properties or implying a debt or an undertaking on the part of the company, if the exercise of these rights is dependent on the launch of a public offer on the company's shares or on a change of control.

If this decision is not filed in advance at the clerk's office of the commercial court, this decision will be null.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

No.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

The language that has to be used depends on the location of the operational office with which the employee concerned is associated.

If the operational office with which an employee is associated is located in the Dutch or the French linguistic region, Dutch (Flanders) or French (Wallonia), respectively, must be used for all the 'social relations', all 'legally prescribed acts and documents' and all 'documents addressed to the personnel'. If the employer does not respect these linguistic requirements, all documents or actions drafted in the wrong language are null. The employee can still rely on the documents, however, if favourable to him or her.

The Flemish Language Decree has recently been modified under the influence of a judgment of the European Court of Justice. The Decree now provides that for individual employment agreements, an additional valid version can be drafted in an official language of one of the member states of the EU or the European Economic Area (EEA), which is understood by all parties concerned. This applies in the event that the employee finds him or herself in one of the following situations:

- he or she is domiciled in the territory of another member state of the EU or of the EEA;
- he or she is domiciled on the Belgian territory and has made use of his or her right to free movement of employees or the freedom of establishment (according to EU law); or
- the free movement of employees applies to him or her based on an international or bilateral treaty.

If the operational office with which an employee is associated is located in one of the 19 Brussels municipalities, the legally prescribed acts and documents and the documents addressed to the personnel have to be drafted in Dutch, if addressed to a Dutch-speaking employee, and in French if addressed to a French-speaking employee. If the employer does not respect this linguistic requirement, the penalties are less severe than in the case of the wrong language being used in the Flemish or French linguistic regions. Indeed, documents drafted in the wrong language are not null and void, but the only penalty is that the employer may be obliged to replace them with the document drafted in the correct language.

Chris Engels **chris.engels@claeysengels.be**
Florence Sine **florence.sine@claeysengels.be**

Boulevard du Souverain/Vorstlaan 280
1160 Brussels
Belgium

Tel: +32 2 761 46 00
Fax: +32 2 761 47 00
www.claeysengels.be

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41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are no prohibitions on tax gross-up, tax indemnities or tax equalisation payments.

When an expatriate benefits from the special tax status for foreign executives, tax equalisation can be granted free of tax and social security (within a limit of €11,250 per year).

42 Are choice-of-law provisions in executive employment contracts generally respected?

As a rule, an employment contract is governed by the law that the parties choose. In the case of the seconding of executives, the parties will typically choose to (continue to) apply the home country law. As a result, this law will govern the employment relationship also during the secondment.

This choice of law may be expressly provided for in the employment contract or may be derived from the provisions in the employment contract or the circumstances of the case; however, the choice of law may not deprive the employee of any protection granted by the mandatory rules of law that would apply in the absence of this choice of law.

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Brazil

Dario Abrahao Rabay, José Daniel Gatti Vergna and Tomas Machado de Oliveira
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

The primary sources of law applied to executives engaged under an employment relationship are the Federal Constitution, the Labour Code, federal laws, applicable collective bargaining agreements, ordinances issued by the Ministry of Labour and Employment, employees' agreements and employers' internal policies (if any).

The primary sources of law applied to executives engaged under a non-employment relationship are the Civil Code, federal laws, the articles of association or by-laws and regulatory standards (ie, particular rules applied to a business sector or job position, if applicable), individual agreements and a company's internal policies (if any).

In Brazil, an employment relationship will be regarded as existing if the following principal elements can be satisfactorily demonstrated: work on a personal and regular basis; payment of compensation; and subordination (the individual has limited autonomy to execute his or her duties).

2 What are the primary government agencies or other entities responsible for enforcing these rules?

These rules are enforced by the Ministry of Labour and Employment, the Labour Prosecution Office and Brazilian labour courts.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

For corporations (whether publicly listed or otherwise) and executives hired as statutory officers, whether hired under an employment relationship or not, the annual total compensation and other applicable incentives (eg, stock options plans) must be submitted to the shareholders for prior approval.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

For executives engaged under an employment relationship, the establishment or change of certain benefits provided for under the collective bargaining agreement may require a prior negotiation with the applicable labour union (eg, profit-sharing plan). This obligation is not applicable to executives engaged under a non-employment relationship.

For executives engaged under either an employment or non-employment relationship who work in financial institutions, the executives' compensation must follow the restrictions of the Brazilian Central Bank Regulation No. 3921, which links 50 per cent of the variable compensation to the company's shares and share-based structures, and defers the payment of 40 per cent of the variable compensation to three years after the issuing.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

Except for the restrictions for financial institutions explained in question 4, as a rule, companies and executives are free to negotiate any type of compensation or benefit arrangement, provided these are within the limits of the applicable laws (eg, performance criteria in profit-sharing plans cannot be linked with health and safety standards).

6 What rules apply to compensation of non-executive directors?

The compensation paid to executives engaged under a non-employment relationship is subject to regulatory standards, if any (eg, banking and finance), executive agreements and internal policies (if any). The compensation paid to executives engaged under an employment relationship is subject to collective bargaining agreements, regulatory standards, if any (eg, banking and finance), executive agreements and internal policies (if any).

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

As a rule, companies are required to collect taxes and social security payments from the compensation paid to executives. In this regard, the company's payroll information must be disclosed to the applicable authorities. For listed corporations, furthermore, it is necessary to publish the financial statements, which include the total amount of compensation paid to executives (board members), but there is no obligation to disclose executives' compensation individually.

Other disclosure provisions may apply depending on the business sector and applicable regulatory standards (eg, securities).

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

As a rule, the employment parties are not required to execute a written agreement. The work engagement is completed when the employer fills in the employee's employment booklet. Although it is not a legal requirement, most companies are accustomed to executing a written agreement at the point of engagement.

The terms may vary in accordance with the employment position. Usually, employment agreements applicable to executives include but are not limited to the following:

- a description of the main duties and responsibilities;
- rules and conditions regarding benefits and compensation schemes;
- confidentiality, intellectual property and other employment covenants (eg, non-compete, non-solicitation and non-disparagement); and
- compliance and anti-corruption obligations.

Furthermore, accepted offer letters are binding in Brazil. In this regard, any term presented and agreed by the applicant shall be taken into consideration at the point of engagement and execution of the employment agreement.

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Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

The types and structures of incentive compensation usually depend on the level and type of organisation.

The prevalent types and structures of short-term incentives are bonus and profit-sharing payments; long-term incentives are usually structured thorough stock options, stock awards, restricted stocks and retention bonuses.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

Although there are no formal limits on the amount of incentive compensation, the Brazilian tax legislation may set out certain limits on the incentive structure that can restrict the incentive amount. Different incentive structures may result in discriminated tax treatments.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

No, the parties may freely decide on the deferral and vesting of incentive awards.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

Yes, legal precedents provide that continuous payment of discretionary incentive compensation to executives engaged under an employment relationship becomes a vested employment right.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

Yes, an employee (or executive engaged under an employment relationship) may claim the payment of the same incentive compensation awarded to another employee, provided that:

- they are both engaged under an employment relationship;
- one employee has less than two years' service in the company in comparison with the other employee;
- they execute the same activities and share the same responsibilities;
- they work in the same location (ie, workplace, city or greater region of a city); and
- they have the same productivity and technical skills.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

In Brazil, the applicability of the clawback clause will depend on the analysis on a case-by-case basis (eg, the company may require the repayment of a 'signing bonus' if an executive resigns before a certain date).

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

In Brazil, the prevalent forms of equity compensation are stock options, restricted stocks and stock grants. The typical vesting period varies between three and five years.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

Yes, all equity compensation structured as share-based payment directed to the employer's statutory directors will be tax-advantageous to the employer owing to the possibility of deducting the corresponding expenses for corporate income tax purposes. As a rule, expenses related to variable compensations paid to statutory directors, such as bonuses, are non-deductible for corporate income tax calculation purposes. However, because of a specific rule, share-based payments paid to statutory directors and employees can be deducted.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

Yes, stock options must be submitted to the shareholders for prior approval. Furthermore, corporations must comply with certain rules and procedures provided by the Brazilian Securities Commission.

18 Are there withholding tax requirements for equity-based awards?

Taxation of share option plans is highly controversial in Brazil. This is owing to the absence of a legal provision regulating the taxation of stock option plans. To summarise, whether a share-based plan is subject to taxation requires a case-by-case analysis to verify if the plan is a commercial contract or (deemed to be) part of the participant's compensation. Based on case law, a plan has a commercial nature if the following conditions are met:

- the participant accepts the grant as an investment opportunity, independently from the employment relationship (voluntariness);
- the exercise of share options must be performed through the payment of a certain price by the participant, and the price cannot be symbolic (burden); and
- the investment must be subject to common market fluctuations (risk).

However, if such conditions are not met, and the share-based plan has a compensation nature, withholding income tax will be levied on such payments. Note that in 2014, the Brazilian government enacted a new law (Federal Law No. 12,973/14) that, among other provisions, specifies the general rules for a company to deduct expenses incurred from share-based payments from its corporate income tax. This law refers to such payments as 'compensation in exchange of services rendered by employees or similar'. Although the law does not specifically state whether income taxes affect share-based plans or not, it is possible that tax courts may come to recognise such plans as compensation for tax purposes, regardless of their specific characteristics.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Yes, inter-company chargeback agreements between a non-local parent company and local affiliate for equity compensation purposes are common in Brazil. In such structures, Brazilian accounting rules (following International Financial Reporting Standards) will regulate the corresponding accounting adjustments to be carried out by the local affiliate in order to register the corresponding agreement.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

In general, stock options are available, but not prevalent. They are more frequent when considering large, publicly listed corporations. The main issue with such structures is related to the taxation by withholding income tax and social security contributions, as described in question 18.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Employees and executives engaged under an employment relationship are entitled to the following main benefits:

- holidays (30 calendar days' holiday after 12 months of work);
- holiday bonus (employers must pay one-third of the monthly salary as holiday bonus);
- Christmas bonus or 13th salary (corresponding to one extra monthly salary per year);
- severance fund (FGTS), which corresponds to monthly payments of 8 per cent of the employee's monthly salary and is kept in a government bank account; and
- other rights depending on the job position and applicable collective bargaining agreement.

Companies are not allowed to discontinue or modify any voluntary benefit if the change is considered detrimental to the employee.

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Executives engaged under a non-employment relationship are entitled to the benefits provided in the executive agreement and internal policies (if any).

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

In addition to the statutory employment benefits, executives engaged under an employment relationship may be entitled to vehicles, medical and dental plan, life insurance and school or nursery allowance for children, among other things. These benefits could also be applied to executives engaged under a non-employment relationship. Tax and any other applicable financial incentive will depend on the nature and circumstances in which the benefit is granted to the executive.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

In Brazil, for executives engaged under an employment relationship, termination of an employment agreement can be proceeded with or without cause, with distinct statutory severance payments applicable to each circumstance. The statutory notice period is set out at a minimum of 30 days, plus three days per anniversary of employment up to a total limit of 90 days. This period may be either worked or paid in lieu.

Executives engaged under a non-employment relationship may be dismissed in accordance with the terms and conditions set forth in the executive agreement (if any).

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

If the executive engaged under an employment relationship is dismissed without cause, he or she might be entitled to the following:

- accrued salary;
- accrued and prorated holidays;
- holiday bonus of one-third monthly salary;
- accrued and prorated Christmas bonus;
- notice period of at least 30 days plus three days per anniversary of employment up to a total limit of 90 days;
- FGTS (see question 21);
- FGTS fine (50 per cent of, and additional to, the FGTS, split as 40 per cent to the employee and 10 per cent as tax); and
- other payments that may be applicable depending on the collective bargaining agreement and internal policies (eg, a prorated portion of the profit-share agreement, continuance in the corporate health plan under certain circumstances, etc).

Executives engaged under a non-employment relationship may be entitled to the severance payments provided in the executive agreement (if any).

25 What executive severance payment level is typical?

On top of the statutory severance, provided the executive is being dismissed without cause, companies may extend the coverage of the health plan (if allowed by regulatory provisions) and pay the incentives provided in the respective executive agreement.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

For executives engaged under an employment relationship, the dismissal for cause can only be triggered if at least one of the following circumstances is met:

- practice of any dishonest act;
- lack of self-restraint or improper conduct;
- helping competitors or business competing (without the employer's consent);
- a final criminal ruling (without possibility to appeal) against the employee;
- constant laziness in the execution of employment duties;
- drunkenness during work time (if not related to alcoholism or any other illness);
- corruption or violation of company secrets;
- insubordination;
- employment abandonment;
- practice of any injurious act against the company;
- practice of any injurious act against any person during working hours;
- continuous gambling; and
- practice of any act that could undermine national security.

As a rule, performance issues are not considered a basis for a termination for cause. Further, executives engaged under an employment relationship may claim constructive dismissal only if at least one of the following circumstances is met:

- the employee is required to perform services that are beyond his or her powers or capacity or that are prohibited by law, or considered contrary to morality, or not covered by the employment agreement;
- the employee is treated with excessive severity by the employer or his or her superiors;
- the employee has a clear risk of suffering a serious injury;
- the employer fails to fulfil the obligations set forth in the employment agreement;
- the employer practices any detrimental act against the honour or moral reputation of the employee, or against his or her family members;
- the employer practices any direct injury against the employee (except in cases of legitimate self-defence or in the defence of another person); and
- the employer reduces the work of an employee in such a manner as to materially affect the amount of the compensation earned.

Executives engaged under a non-employment relationship are subjected to the rules provided in the agreement (if any) and the articles of association or by-laws. Usually, companies tend to define the conditions for good and bad behaviour in the agreement.

27 Are 'gardening leave' provisions typically used in employment terminations?

Garden leave is not applicable in Brazil.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

In Brazil, separation agreements, waivers and releases do not prevent an executive from filing labour claims against the company, regardless of whether the executive is engaged under an employment or non-employment relationship.

Update and trends

Brazil had not defined a law regarding outsourcing until recently when a new law (Law No. 13,429/2017) amended the law on temporary work (Law No. 6,019/1974), to establish new provisions for temporary work as well as outsourcing. Before the enactment of Law No. 13,429/2017, outsourcing matters were governed by Precedent 331 of the Superior Labour Court. As a rule, Precedent 331 forbids companies from outsourcing their core business, although it has not been explicit regarding the extent to which certain activities should be classified as part of the company's core business. The new law maintains this uncertainty. In theory, any 'determined and specific activity' can be outsourced, but it is not clear if this includes outsourcing the company's core business. This grey zone will be faced by labour courts in the coming years. The Superior Labour Court will most likely review Precedent 331 (that continues in effect), whether confirming its previous position or providing a new understanding on the matter. Meanwhile, there is an ongoing lawsuit before the Supreme Court claiming the unconstitutionality of Precedent 331, which might be affected by the enactment of the new law. Further, there is a potential labour reform that is at a very advanced stage, that may provide new rules for outsourcing, including the possibility to outsource a company's core business.

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Notwithstanding the above, it is common to have a separation agreement with additional compensation executed, which usually considerably mitigates the risk of litigation.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Although there are no specific provisions in the law, the main post-employment restrictive covenants are non-competition, non-solicitation, non-disparagement and confidentiality, regardless of whether the executive is engaged under an employment or non-employment relationship. The typical restricted periods vary from six to 18 months.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

In general, there are no specific limits or requirements for the enforceability of post-employment non-solicitation, non-disparagement and confidentiality.

Regarding non-competition, however, case law suggests that it may be enforced if the contract provides that:

- a fair financial compensation is paid to the executive for the non-competition period;
- the non-competition period, the jurisdiction in which the executive cannot compete and the businesses or competitors the executive cannot be engaged with are limited; and
- the restriction must be commercially significant for the company.

Since the matter is not regulated by law, companies must take extra caution when negotiating and executing non-competition agreements and clauses with executives.

Usually labour courts only decide whether the restrictive covenants are enforceable or not without modifying them to make them enforceable.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

Companies may file a lawsuit before a labour court in order to request compliance with the post-employment restrictive covenants.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Executives contributing to Brazilian social security are entitled to a public pension. As a rule, companies are required to collect social security contributions over the remuneration paid to executives. Private pension plans are not mandatory, but are commonly offered to executives.

With respect to executives engaged under an employment relationship, companies are not allowed to discontinue or modify any voluntary benefit if the change is considered detrimental to the employee.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Companies usually provide private pension plans to executives. Provided certain rules are observed, private pension plans are exempt from social security contributions and are also subject to a more favourable withholding income tax rate upon release of the corresponding amounts to the executives.

34 May executives receive supplemental retirement benefits?

For executives engaged under an employment relationship, the applicable collective bargaining agreement may provide additional retirement benefits to employees, which must be complied with by companies. Further, the company and the executive may agree other retirement benefits through agreements and internal policies.

For executives engaged under a non-employment relationship, the company may also provide additional retirement benefits through agreements and internal policies.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

Yes, depending on the business sector (eg, insurance, finance, banking, etc) and job position held by the executive in the company, companies usually negotiate a hold harmless agreement or directors and officers liability insurance in the event the executive is considered liable for any potential misconduct or loss, regardless of whether the executive is engaged under an employment or non-employment relationship.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

For employees or executives engaged under an employment relationship, the transfer of control, substantial assets and business of a certain company will cause the buyer to be deemed liable for any existing and potential labour proceeding or debt or benefit obligations of the seller (labour succession). The corporate change cannot cause any loss to the employment rights of the executive.

This rule is not applicable for executives engaged under a non-employment relationship. Usually, the buyer and executive negotiate a new agreement during or after the corporate change is concluded.

MATTOS FILHO >

Mattos Filho, Veiga Filho,
Marrey Jr e Quiroga Advogados

Dario Abrahao Rabay **dario@mattosfilho.com.br**
José Daniel Gatti Vergna **jvergna@mattosfilho.com.br**
Tomas Machado de Oliveira **tomas.oliveira@mattosfilho.com.br**

Alameda Joaquim Eugênio de Lima, 447
CEP 01403-001
São Paulo
Brazil

Tel: +55 11 3147 7600
www.mattosfilho.com.br

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37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Yes, it is common and usually is done through an incentive policy or clause (eg, restricted stock units, retention bonus, etc).

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

No, there are no legal limits or restrictions on the acceleration of vesting or exercisability of compensation in a change in control, or on 'cashing out' equity awards.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

Foreign exchange controls apply on any transfer of funds in to and out of Brazil. Usually, a foreign exchange transaction must be registered with the Brazilian Central Bank, resulting in the levy of tax on financial exchange transactions. However, similar rules do not apply on the transfer of employer equity or equity-based awards to executives.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

Yes. The Civil Code provides that all documents written in a foreign language must be translated into Portuguese to be considered valid in Brazil.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

No, tax gross-up structures are available and rather common in Brazil.

42 Are choice-of-law provisions in executive employment contracts generally respected?

No, all contracts are subject to Brazilian laws. In addition, for executives engaged under an employment relationship, the Brazilian employment laws will apply even outside the country in the case the executive is hired in Brazil and begins providing services abroad or is transferred to a foreign subsidiary of a Brazilian company.

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Chile

Ignacio García and Fernando Villalobos
Porzio Ríos García

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

The Chilean Labour Code provides the regulation at a national level on matters such as minimum salary, enforceable conditions and frequency of payment. Decisions rendered by the Supreme Court have a relevant use as a source of interpretation of the statutes. Corporations Act No. 18,046 and Securities and Exchange Act No. 18,045 provide a framework for compensation paid by corporations and entities, subject to the supervision of the Securities and Exchange Supervisory Authority.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The primary government agencies responsible for enforcing these rules are the Labour and Employment Inspection, the Courts of Justice and the Securities and Exchange Supervisory Authority.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

For companies other than corporations, there are no statutory requirements or approvals.

For corporations, in general, the shareholders need to approve compensation and benefits of the board of directors, and the board of directors has to approve executives' compensation and benefits. However, there is an exception whereby the shareholders, when approving a capital increase, agree that part of such increase will be awarded as stock option plans, which may not exceed 10 per cent.

On the other hand, the Securities and Exchange Supervisory Authority has ruled that every corporation subject to its supervision has to respond to a questionnaire regarding corporate governance good practice.

Corporations are not forced to comply with these practices, but they need to answer the questionnaire. Part of the questionnaire refers to the formal annual procedure analysing compensation structures and policies, its publicity and submission for approval of the shareholders.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Under no circumstances, for private companies.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

No, there are no special prohibitions for private companies.

6 What rules apply to compensation of non-executive directors?

Non-executive directors could be comparable to the Chilean definition of independent directors. The law provides that independent directors shall be compensated according to what the shareholders' meeting decides annually, and its compensation shall be at least equal to that of other directors, or may exceed this by no more than 33 per cent.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

Public disclosure of executives' compensation is not mandatory, notwithstanding the good corporate governance practice recommended by the Securities and Exchange Supervisory Authority for those corporations under its supervision. If five or more executives hold the same position, executive compensation shall be disclosed to unions once a year without indicating the name of the executive, but only the position they hold.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

Employment agreements are required for all dependent workers (employees). An employment agreement is defined by the Labour Code as being 'an agreement by which employer and worker commit themselves reciprocally, the latter to render personal services under dependence upon and subordination to the former, the former to pay a determined remuneration for these services'.

Common provisions of an employment agreement are as follows:

- description of the services and details of the location where the services shall be performed;
- salary;
- bonuses and incentive targets;
- term of the agreement (usually indefinite);
- severance, if higher than the statutory severance;
- non-disclosure terms;
- exclusivity terms; and
- post-employment restrictive covenants on non-solicitation and non-compete.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

A company must offer a profit-share incentive to executives by one of the two following ways:

- distribute at least 30 per cent of the company's annual net profit to executives in proportion to their respective remuneration; or
- pay each employee US$1,880.

No other incentive compensations are available. However, annual or biannual incentives related to executives' performance and the results of the whole or part of the company are common.

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10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

There are no limits, except for the limit of 10 per cent for capital increases awarded as stock option plans, discussed in question 3.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Yes, this is permissible (eg, in stock option plans). The stocks involved in the plan shall be subscribed and paid within five years of the shareholders' meeting where the capital was increased and the plan approved.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

Yes. However, compensation at the sole discretion of the company would likely be deemed unlawful because otherwise the company could decide when to pay such compensation, and employment law requires provisions on compensation to describe clearly the events that trigger the incentive and when such events can take place.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

No, provided disparate treatment exists on the basis of an illegal reason (eg, discriminatory reasons).

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

Yes, provided it is proven that the employee failed to fulfil the terms and conditions of the compensation. The company has the burden of proof in this regard.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

Usually, stock option agreements for executives are the prevalent form of compensation award. Parties are free to agree the vesting period applicable to each equity compensation award, but the stocks involved in the plan shall be subscribed and paid within five years of the shareholders' meeting where the capital was increased and the plan approved.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

There is no special tax treatment for equity compensation awards.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

No.

18 Are there withholding tax requirements for equity-based awards?

No.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Yes. They usually refer to operational services conducted by the local affiliate company. The extent of services rendered by the affiliate company on behalf of the parent company may lead to the determination that both companies are a single employer, thus considered jointly and severally liable for the obligations the executive is entitled to.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Employee stock purchase plans are prevalent. No issues arise frequently on such agreements.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Yes. The following types of paid leave are mandatory:

- annual holiday: 15 working days after one year of service;
- sick leave, provided medical certification exists (the first three days of sick leave are not covered by such medical certification);
- parental leave: 24 weeks for women employees, extendable up to 30 weeks if postnatal work is carried out part-time (the mother may transfer up to six weeks to the father);
- paternity leave: five days within the first month of the birth;
- bereavement leave: ranging from three to seven days in case of death of unborn child, child, spouse or parent;
- marriage leave: five days;
- medical exams leave: half a day once a year for mammogram or prostate exam;
- unemployment insurance: available (coverage extension is determined by the reason for termination of employment and the number of months contributed); and
- health insurance for both occupational and non-occupational events.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

This varies according to the range and size of the company, as follows:

- non-work use of work equipment (eg, company car, mobile phone, laptop);
- complimentary health insurance on top of the mandatory health insurance;
- total or partial housing;
- payment of school tuition for children;
- membership of social clubs;
- use of credit card for employment purposes;
- special allowances for certain events (eg, Christmas, Independence day, holidays);
- pension fund contribution on top of mandatory pension borne by the employee that is a non-taxable income and may only be withdrawn upon retirement; and
- equity compensation awards.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

No prohibitions exist. Termination at will is available provided the executive has been granted power of attorney or holds a trusted position. The company must give 30 days prior notice with a copy thereof to the Labour Inspection. Otherwise, the company pays the executive a compensation in lieu equivalent to one monthly remuneration up to a cap of approximately US$3,600. The 30-day prior notice requirement is not applicable for terminations with cause.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

Yes. Severance is required and shall be at least one monthly salary per year of service and fraction thereof; if the fraction is greater than six months, this is considered as a full year, subject to the following caps:

- no more than 11 years' pay; and
- each monthly salary must not exceed approximately US$3,600.

These caps may be waived if the parties consent to increase them (but never to decrease them). Executives are also entitled to outstanding holiday pay, regardless of the reason for employment termination. No other mandatory post-employment benefit exists.

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Update and trends

A labour reform on union action effective from 1 April 2017 widened the scope of employees who may bargain collectively. As a result, mid-level and even high-level executives accessing confidential information who do not hold power of attorney are permitted to bargain collectively. Such employees having access to a company's confidential information creates a clear conflict of interest when negotiating with the company. This situation has proved controversial among the legal community.

25 What executive severance payment level is typical?

For executives, the caps listed in question 24 are usually waived, in order to reflect the actual monthly salary and time of service the executive accrues. Change in control protection is common in the case of hiring, using the whole or a portion of the time of service the executive completed at his or her previous employment. Severance and other compensations are kept separate with no reciprocal discount.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

Termination for cause is limited at a statutory level by the lists of conducts included in the Labour Code (eg, serious breach of employment, harassment, act of violence, unjustified absence), mainly referred to as employees' conduct that severely endangers an employer's operations, or health and safety in the work environment. Typically, termination for cause requires a severity threshold test to be taken. Employees terminated for cause are not entitled to compensation in lieu of prior notice or severance. If the reason for termination for cause is found unlawful, the company is required to pay compensation in lieu of prior notice and severance with a 30 to 100 per cent surcharge.

Constructive dismissal is also subject to statutory regulation, and mainly occurs when the company fails to fulfil its obligations (ie, those agreed in the employment agreement or statutory requirements). If found to be constructive dismissal by the authority, statute orders the termination to be considered as a 'without cause' termination, requiring the company to pay the severance and compensation due to the employee.

27 Are 'gardening leave' provisions typically used in employment terminations?

Gardening leave is not generally used and is rarely applicable but does require the consent of the executive involved.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

Yes, these are normal and enforceable.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

See question 8. Typical restricted periods range from four months to three years.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Such covenants shall meet certain requirements to be enforceable, namely the following:

- the executive's consent;
- a legitimate supporting reason to protect the business interest of the former company in order to fairly promote trade rather than merely restricts employees' freedom of work;
- a limited scope business or geographic scope;
- a reasonable term; and
- consideration paid to the individual subject to the restriction.

Covenants are subject to judicial assessment so extensions may be modified.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

The company may seek damage compensation. No injunctions are available to protect covenants under Chilean law.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Yes. Pension funds shall be borne by the executive and withheld by the company, and shall be equivalent to approximately 13 per cent of the monthly remuneration. On the other hand, disability and survival insurance shall be borne by the company and shall be equivalent to 1.26 per cent of the monthly remuneration.

Discontinuing benefits that have regularly been provided by the company is prohibited as the company may not alter the status quo of benefits that an executive experiences from the company.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Additional contributions to pension funds borne by the company are common. This contribution is a non-taxable income that may only be withdrawn upon retirement.

34 May executives receive supplemental retirement benefits?

Yes (see question 33). There are no limitations for agreeing on supplemental retirement benefits provided the reasoning behind such benefits is a legitimate non-discriminatory reason. A discriminatory benefit is forbidden when the decision behind it is made on the basis of race, colour, age, marital status, union activity, religion, political opinion, nationality and national or social extraction. Decisions based on occupational requirements for an employment position would not be considered discriminatory.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

Yes.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

This will occur whenever a total or partial modification of ownership or possession of a company or the sale of all or part of its assets happens. This transfer is implied by the statute.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Yes, and usually structured by means of a retention bonus.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

No, provided it is agreed by the parties.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

Yes. Such control is conducted by the Central Bank of Chile and mainly refers to information on the currency and amount remitted.

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40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

This is not required, but employment authorities usually require a translation for inspection purposes.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

Yes, these are prohibited.

42 Are choice-of-law provisions in executive employment contracts generally respected?

No. Employment agreements are subject to public policy restrictions and therefore subject to the principle of territoriality. Chilean law will apply exclusively if services are provided in Chilean territory.

Porzio Ríos García

Ignacio García **igarcia@porzio.cl**
Fernando Villalobos **fvillalobos@porzio.cl**

Avenue Cerro El Plomo 5680, Floor 19
Las Condes
Santiago
Chile

Tel: +56 2 2729 0600
www.porzio.cl

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Denmark

Morten Langer and Torben Mølgaard Hededal
Norrbom Vinding

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

In Denmark, there is no single or general act covering executive compensation and employee benefits. Executive compensation and employee benefits are governed by a mixture of statutes, collective agreements and individual employment contracts between the parties. As a general rule, benefits are considered as forming part of executive compensation.

Laws

Executive compensation may be governed by the following statutory instruments:

- the Financial Business Act (including executive orders issued on the basis of the said Act) applies generally to all employees employed with a financial institution and to the members of its board of directors; however, the majority of the provisions apply only to 'risk takers', including members of the board of directors, employees registered with the Danish Business Authority as members of the company's executive board, and other employees whose activities may have a material impact on the company's risk profile. The Financial Business Act also contains provisions governing employees performing work within the scope of the EC Directive on Markets in Financial Instruments;
- the Companies Act applies to all members of a company's board of directors and to employees who are registered with the Danish Business Authority as members of the company's executive board;
- the Salaried Employees Act applies to all salaried employees (ie, white-collar workers); and
- the Stock Options Act applies to all employees who are considered 'employees' under Danish law.

As regards the Salaried Employees Act and the Stock Options Act, it should be noted that of all executives, it is normally only the CEO of a company who is not considered a 'salaried employee' or 'employee' (and only if the CEO has such managerial power and authority as to be deemed a CEO in practice). Other members of the company's executive board will therefore normally be covered by these Acts. Members of the board of directors will, however, not be covered by these Acts.

Recommendations

The Corporate Governance Recommendations of November 2014 apply. These are recommendations only, and companies may generally choose to apply them or not, but companies listed on the Nasdaq OMX Copenhagen Stock Exchange must follow a 'comply-or-explain' principle with regard to the Recommendations. They apply to members of the board of directors and to employees registered with the Danish Business Authority as members of the executive board.

Collective agreements

Collective agreements may also apply to companies that are members of an employer organisation or companies that, on an individual basis, are a party to such agreements. Most often executives are not covered by the collective agreement.

Guidelines

There are various guidelines from European financial authorities (eg, the European Banking Authority) on remuneration within the financial sector, but these are not discussed in this chapter.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

In Denmark, there is no specific government agency responsible for enforcing employment law in general. The Danish Ministry of Employment can introduce bills, issue executive orders, etc, in this field.

If the parties to a dispute are unable to resolve the dispute amicably, they can bring it before the courts or before a special employment tribunal with jurisdiction to decide certain employment-related claims for employees covered by collective agreements. If so agreed, the parties may also submit the dispute to arbitration.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

The Financial Business Act provides that a financial institution must have a remuneration policy that fulfils certain requirements set out in the Financial Business Act. The board of directors is responsible for preparing the policy and, when adopted by the board of directors, the policy must be submitted to the general meeting for approval. Whenever required and at least once a year, the board of directors must review the policy to ensure that it properly reflects the financial institution's situation from time to time. If amended by the board of directors, the amended policy must be submitted to the general meeting for approval.

Further, the Companies Act provides that in companies whose shares are listed on a regulated EEA market, the board of directors and the executive board may participate in an incentive plan only if the company's general meeting has approved general guidelines for incentive-based remuneration. A provision must be included in the company's articles of association stating that such guidelines have been approved.

Finally, according to the Corporate Governance Recommendations, the board of directors should prepare a clear and transparent remuneration policy for the board of directors and the executive board.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

It is usually not necessary to consult with unions, works councils, etc.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

Under the Companies Act, a limited liability company must not directly or indirectly advance funds, grant loans or provide security for its shareholders or management unless a number of conditions are met. The same applies to the shareholders or management of the

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company's parent and other companies exerting a decisive influence on the company.

The Financial Business Act imposes a number of restrictions on the nature, structure and extent of any form of compensation that is considered to be variable remuneration under the Act.

6 What rules apply to compensation of non-executive directors?

In Denmark, there is a two-tier system where the executive board manages the day-to-day operation of the company and the board of directors oversees the general management of the company's affairs.

Members of the board of directors are not covered by the Salaried Employees Act and the Stock Options Act since they are not employed by the company. Generally, members of the board of directors will only be covered by the provisions of the Companies Act and the Financial Business Act (if the company is a financial institution).

Members of the executive board will in most cases be covered by the Salaried Employees Act and the Stock Options Act. However, the CEO will normally not be considered a 'salaried employee' or 'employee' under these Acts and will therefore normally not be covered by these Acts. Members of the executive board (including the CEO) will also be covered by the provisions of the Companies Act and the Financial Business Act (if the company is a financial institution).

The provisions of the Companies Act and the Financial Business Act that also apply to members of the board of directors are described below.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

The Financial Business Act provides that at least once a year after the end of the financial year, financial institutions must disclose various particulars regarding the remuneration policy and practices for risk takers, including members of the executive board and members of the board of directors, but this information must not be provided on an individual basis. The information must be posted on the institution's website and some of the particulars must also be reported to the Danish Financial Supervisory Authority. Further, financial institutions are required by the Financial Business Act to disclose in the financial statements the remuneration paid to each individual member of the board of directors and the executive board. Certain exemptions do, however, apply.

The Financial Statements Act provides that for some companies certain particulars regarding the incentive schemes and the total remuneration paid to members of the company's board of directors and members of the company's executive board must be disclosed in the company's financial statements.

The Companies Act provides that companies whose shares are listed on a regulated EEA market must post its general guidelines for incentive-based remuneration paid to members of the board of directors and the executive board on their website.

The Corporate Governance Recommendations recommend that the remuneration policy is posted on the company's website.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

CEOs are not covered by the Statement of Employment Particulars Act. Consequently, there is no legal requirement to provide CEOs with a service agreement, although it is very common to do so.

Employees working at least eight hours a week on average for an intended period of employment of at least one month must be notified in writing of all material terms and conditions of employment (the Statement of Employment Particulars Act).

The statement of particulars (which will often be a contract) must at least include:

- name and address of employer and employee;
- work address;
- job description, job title or job category;
- commencement date;
- expected duration of employment (if not indefinite);
- holiday and holiday pay;
- notice periods (employee's and employer's);
- applicable or agreed pay;
- hours of work; and
- specification of any collective agreements affecting the employment.

Also, any other material terms and conditions relevant to the specific employment relationship must be mentioned, for example:

- variable remuneration and additional pay benefits;
- restrictive covenants; and
- reimbursement of expenses.

In addition to the above terms and conditions, a CEO's service agreement will often include a change-of-control clause, an IPR clause and clauses regarding mediation and arbitration, or both.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

There are many types of incentive schemes. In Denmark, cash-based incentive schemes are the most prevalent. Equity-based incentive schemes are, however, also often used by listed companies as well as some non-listed companies. Incentive schemes will often be based on achievement of not only one or more financial performance criteria but also on one or more non-financial criteria. It is normal to apply both one-year and multiyear incentive schemes and often both types are used concurrently.

The types and structures of incentives depend on a number of factors, including level and type of organisation.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

There are no general statutory limits on or guidelines governing the payment of incentive compensation and there are no limits that adversely affect the tax treatment of the employer or the executive. Typically, incentives are agreed as part of the service agreement or employment contract.

Other than for individuals working in the financial sector who are regarded as risk takers, including members of the executive board and members of the board of directors, there are no rules limiting how much employers may offer their employees in incentives.

The level of incentives varies a great deal, from relatively small amounts up to millions of kroner. In recent years, owing to the financial crisis, there has been an increased focus on the level of and criteria for granting bonuses and incentives, and employers across many different sectors have reconsidered their incentive schemes.

Individuals working in the financial sector who are regarded as risk takers, including members of the executive board and members of the board of directors, may be awarded incentives only if the incentive scheme complies with a number of rules on variable remuneration. The rules in question provide, inter alia, that the amount of any variable remuneration must be subject to a certain maximum; that a certain part of any amount of variable remuneration must be paid out in various financial instruments; and that a certain part of any amount of variable remuneration must be deferred for later payment.

The Financial Business Act bans incentives to employees covered by the MiFID Directive where such incentives are based on the employee achieving a certain volume of sales to retail customers.

Under the Companies Act, the amount of fixed or variable remuneration received by the management of a limited liability company must not exceed an amount deemed to be usual, taking into account the nature and extent of duties, and an amount deemed reasonable with regard to the financial position of the limited liability company.

In addition, the Corporate Governance Recommendations set out various recommendations, including that:

- members of the board of directors should not be remunerated with stock options;
- if members of the executive board receive equity-based compensation, the equity plans should be revolving plans and any rights under the plans should not be exercisable until at least three years after the grant; and

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- if members of the board of directors or of the executive board receive equity-based compensation, the right to be granted any rights under an equity plan or to exercise any such rights should be based on performance criteria that are linked to at least two financial years; such performance criteria should be designed to promote long-term behaviour.

The Salaried Employees Act provides that when employees covered by the Act (and thus normally not CEOs) leave their positions, whether following dismissal or resignation, the employee will be entitled to a pro rata part of the expected or agreed bonus for the relevant accrual year.

Finally, the Stock Options Act regulates the use of stock option schemes for employees (and thus normally not CEOs). Under this Act, employees have certain rights on termination of employment in the absence of more favourable rights under a stock option scheme.

The employee will retain the right to exercise any option granted, on the same terms as if he or she were still employed, if the employment is terminated (good-leaver situations):

- by the employer other than for breach;
- by the employee with immediate effect because of the employer's material breach; or
- because the employee has reached the usual retirement age in the industry or with the employer in question, or qualifies for the state old-age pension or a retirement pension from the employer.

Further, in these situations, the employee will be entitled, based on length of service in the financial year in question, to a pro rata part of the stock options that he or she would have received if still employed at the end of the financial year or at the date of the grant.

With effect from the effective date of termination, the employee will forfeit the right to exercise any option granted if the employment is terminated by (bad-leaver situations):

- the employee other than for the employer's material breach or having reached retirement age; or
- the employer for the employee's breach.

In these situations, the employee will also forfeit the right to receive any options granted after termination.

The Stock Options Act applies not only to stock options but also to other forms of equity-based compensation where an employee has been awarded an entitlement to acquire shares at a later point in time (eg, deferred share awards free of charge (also known as restricted stock unit awards)).

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Deferral and vesting of incentive awards are generally permissible and there are no limits on the length or type of vesting and deferral provisions.

The Financial Business Act contains certain provisions regarding vesting and deferral for individuals working in a financial institution who are regarded as risk takers, including members of the executive board and the board of directors. The Act provides, inter alia, that a certain part of the variable remuneration must be deferred for a vesting period of at least four years (and, in some cases, at least five years) for members of the board of directors and employees who are registered with the Danish Business Authority as members of the executive board and for a period of at least three years for other risk takers.

For employees covered by the Salaried Employees Act (and thus normally not CEOs), provisions having the effect that, on termination of employment, the employee will forfeit his or her entitlement to any cash-based incentive awards will normally not be valid under the Salaried Employees Act.

Further, provisions having the effect that, on termination of employment, employees (and thus normally not CEOs) will forfeit the entitlement to any equity compensation awards will only be valid in those situations that, under the Stock Options Act, are considered bad-leaver situations (see question 10).

It should be noted that there may be a number of tax issues involved in deferral.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

Yes. In Denmark, it does not take much for recurrent incentive compensation to become a contractual entitlement, often just an expectation based on previous years' practice.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

No, not in general.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

In some situations, it is possible to require repayment (or clawback) of incentive compensation if the incentive compensation was awarded on the basis of data that have subsequently turned out to be misstated or inaccurate and if the employee knows or should have known this. To improve the chances of success in a claim for repayment, it is generally advisable to agree on a clawback clause in writing.

Incentive compensation awarded to individuals working in a financial institution who are regarded as risk takers, including members of the executive board and the board of directors, must be subject to a written clawback clause. In some situations, the financial institution will be required to enforce a clawback clause in order to be compliant with its obligations under the Financial Business Act.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

The prevalent forms of equity compensation are stock option awards (see question 10) and deferred share awards free of charge (also known as restricted stock unit awards) (see also question 10).

The typical vesting period varies a great deal, but three to four years is quite normal.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

Equity-based compensation in the form of shares, share options and warrants awarded to employees in the course of their employment on or after 1 July 2016 may be taxed under the 7P tax scheme. Under the 7P tax scheme, equity based compensation will not be taxable for the employee until when the employee sells the shares acquired. When the employee sells the shares, the proceeds will be taxable as capital gains and not as personal income. The tax is thus capped at 42 per cent and not at approximately 56 per cent, if taxed as employment income. The relatively low taxation is counterbalanced by the fact that the value of the equity-based remuneration is not deductible for the employer.

In order to qualify for the 7P tax scheme, a number of conditions must be met. The overall content of these conditions are as follows:

- the employer and the employee must agree in writing that the equity-based compensation awarded is subject to the 7P tax scheme. The terms of this agreement must comply with a number of conditions;
- the value of the equity-based compensation awarded may not exceed 10 per cent of the employee's annual pay (annual pay being the sum of the employee's cash remuneration plus any employer pension contributions and the taxable value of any non-pay benefits). If the value exceeds the 10 per cent threshold, the excess will be taxable under the less favourable general rules;
- the equity-based compensation must be awarded by the employer company or one of its group companies;
- the equity-based compensation must consist of either shares – or share options and warrants entitling the holder to acquire shares – in the employer company or one of its group companies;
- share options and warrants may not be transferred to a third party, except on the holder's death; and
- the employer must report various particulars about the equity-based compensation to the Danish tax authorities.

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For awards agreed before 1 July 2016, there are no tax-advantaged equity compensation programmes as the value of equity-based compensation awards will be treated and taxed in the same way as other forms of employment income. Awards of stock options and warrants will normally meet various requirements in order to be taxed on exercise but some awards may be taxed on grant, which will generally be tax-disadvantageous to the employee. Depending on the terms governing the award, deferred share awards will either be taxed on grant or on vesting, in practice, most often on vesting.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

No, but when an award becomes taxable, the employer must report the award and its taxable value to the Danish tax authorities. Further, if equity-based compensation is to be taxed under the 7P tax scheme (see question 16), the employer must also report the award to the Danish tax authorities when the award is made.

18 Are there withholding tax requirements for equity-based awards?

No, but certain reporting requirements apply (see question 17).

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Inter-company chargeback agreements between a foreign parent company and a Danish affiliate are quite common. From a group perspective, and when considering the relevant tax legislation applicable to both foreign parent companies and Danish affiliates, it may be tax-advantageous to apply an inter-company chargeback agreement. When such an agreement is applied, the chargeback amount will – depending on the nature of the relevant equity compensation award – normally be based on the value of the award at the time of either vesting or exercise.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

It is possible to apply employee stock purchase plans but such plans are not common. From a legal perspective, employee stock purchase plans are generally treated as stock option plans and there are no frequently encountered issues that apply specifically to employee stock purchase plans.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

The Salaried Employees Act and the Holiday Act do not apply to CEOs and members of the board of directors. Consequently, their entitlement to paid holiday, salary during maternity, paternity and parental leave, sickness absence, etc, will be subject to agreement with the employer.

Employees who are covered by the Salaried Employees Act and the Holiday Act (and thus not CEOs or members of the board of directors) are entitled to at least 25 days of paid holiday in each holiday year in addition to the public holidays. Employees covered by the Salaried Employees Act are also entitled to receive 50 per cent of their normal pay during the 14 weeks' statutory maternity leave and full pay during sickness absence.

Employees who are covered by a collective agreement or an employee handbook may be entitled to other benefits such as extra holidays, extra payment during maternity, paternity and parental leave, or extra overtime.

There is no general legislation on other benefits such as company cars, mobile phones, newspaper subscriptions, internet connection and computers, which are therefore subject to agreement with the employer in each individual case.

The Danish healthcare system is tax-funded and, as such, employers are not required to contribute other than through payment of tax; however, some employers have taken out supplementary private health insurance for CEOs and employees. Unemployment insurance contributions are paid by the CEO and employee only. The contributions, however, are deductible.

If the employer has provided the CEO or employee (or both) with voluntary benefits, it may constitute a material change to the terms and conditions of employment if the employer then wants to withdraw such benefits. All material changes to terms and conditions must be notified to the CEO or employee by at least the same notice as their individual notice of termination.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

The most common benefits are as follows:

- health insurance;
- incentive-based remuneration;
- company car or car allowance;
- fixed-line telephone at home and mobile phone;
- home computer;
- home internet connection;
- contractual maternity and paternity pay in addition to the statutory entitlements;
- contractual holiday with pay in addition to the statutory requirements; and
- newspaper subscriptions.

For employees, there are, in practice, some minor tax incentives linked to fixed-line telephone at home and mobile phone, home computer, home internet connection and newspaper subscriptions.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

Notice periods

For CEOs the notice period is subject to individual agreement with the employer. Often, the notice will be six months for the CEO and 12 months for the company.

Employees covered by the Salaried Employees Act are entitled to a notice of between one and six months depending on length of service. During a probationary period of up to three months, the parties may agree to reduce the notice to two weeks.

Dismissal protection

For CEOs, there are no general fairness or 'cause' requirements.

For employees covered by the Salaried Employees Act who have been continuously employed by the same employer for at least one year before the date of notice, the dismissal must be reasonably justified by the conduct of the employee or the circumstances of the employer. Similar provisions are found in most collective agreements.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

Severance pay

There are no general statutory rules on severance pay.

For CEOs, severance pay is subject to individual agreement with the employer.

The Financial Business Act provides that for individuals working in a financial institution who are regarded as risk takers, including members of the executive board and members of the board of directors, severance pay is generally considered variable remuneration and any severance pay must comply with the requirements applicable to variable remuneration under the Financial Business Act; however, this does not apply to:

- any severance pay that the employee is entitled to receive under statutory rules or a collective agreement;
- severance pay based on agreement between the employee and the employer if (all four conditions must be met):
  - such agreement was entered into when the employment was commenced;
  - the employee's entitlement to the severance pay is not linked to achievement of performance criteria;

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- the severance pay does not exceed an amount equal to the remuneration paid to the employee for the two-year period preceding the effective date of termination; and
- such severance pay is allowed under the financial institution's remuneration policy; and

- severance pay based on an agreement between the employee and the employer if (all three conditions must be met):
  - such agreement is entered into in connection with termination of employment;
  - the severance pay does not exceed an amount equal to the remuneration paid to the employee for the year preceding the effective date of termination; and
  - such severance pay is allowed under the financial institution's remuneration policy.

Further, the Corporate Governance Recommendations recommend that any severance pay should not exceed an amount corresponding to two years' remuneration.

Employees covered by the Salaried Employees Act (and thus normally not CEOs) are entitled to redundancy pay if they have been continuously employed with the same employer for at least 12 years. The redundancy pay – which is payable in addition to the employee's pay during the notice period – amounts to one month's pay. After 17 years of continuous employment, the amount is three months' pay.

With regard to employees covered by collective agreements, some collective agreements contain rules on redundancy pay based on length of service.

The amount of severance pay is generally calculated on the basis of the employee's remuneration (base pay, variable remuneration, pension contributions, etc).

Other mandatory post-employment benefits

There are no other mandatory post-employment benefits. It is usual, however, for CEOs' service agreements to specify that in the event of the CEO's death during service with the company, his or her dependants will receive a set amount. In addition, it is not unusual for CEOs' service agreements to include a provision to compensate the CEO post-termination for any non-compete clauses. Unlike CEOs, employees covered by the Salaried Employees Act are entitled to such compensation under the Salaried Employees Act; see question 30.

25 What executive severance payment level is typical?

For CEOs, the severance payment level varies depending on the agreement between the parties.

For employees covered by the Salaried Employees Act (and thus not CEOs), the statutory severance payment level is one to three months' pay on top of their notice entitlement. If the employee enjoys special protection under the Anti-Discrimination Act or the Danish Act on Equal Treatment of Men and Women, the employer will often – as part of a severance agreement – offer the employee a substantial severance payment. Additional compensation may also apply if the employee is dismissed and the dismissal is not reasonably justified by the conduct of the employee or the circumstances of the employer, although normally with a lower level of severance pay.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

Salaried employees (and thus not CEOs) are entitled to compensation for unfair dismissal if they have been continuously employed with the same employer for at least a year before the date of notice and the dismissal is not reasonably justified by the conduct of the employee or the circumstances of the employer.

'Circumstances of the employer' often means for economic reasons (eg, cutbacks). Similarly, 'conduct of the employee' means sickness absence, underperformance, etc. In most cases, it will be a requirement that one or more written warnings have been given before the dismissal to allow the employee an opportunity to remedy the situation and thus avoid dismissal.

27 Are 'gardening leave' provisions typically used in employment terminations?

CEOs will normally be released from the duty to work during the notice period. It is also quite normal to release employees from the duty to work when the employee's duties, responsibilities and tasks have been properly transferred to their replacement. In both cases, however, they will be required to seek suitable alternative employment.

It is for the employer to decide whether the CEO or employee should be released from the duty to work and it does not have to be mentioned in the contract.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

As a general rule, statutory rights cannot be waived. Even if the employer offers the employee higher pay in return, employees cannot waive their statutory rights.

On termination, however, an employee will sometimes be allowed to waive certain rights in return for compensation. For example, the employer and employee may enter into a severance agreement in full and final discharge of any claims relating to the employment and its termination; however, if the severance agreement is unfair, it may be set aside or changed by the courts.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

In Denmark, the following post-termination covenants are available:

- non-compete clauses (to prevent the employee from taking employment with competitors or engaging in competing activities in general);
- non-solicitation of customers clauses (to prevent the employee from approaching and having any dealings with former customers); and
- combined non-solicitation and non-compete clauses.

Typically, the restricted period is six months to one year.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

The Post-Termination Restrictions Act governs all such covenants between an employer and an employee entered into from 1 January 2016 and forward, imposing strict limitations on their use. Further, this Act bans the use of no-hire clauses (agreements by two or more employers not to hire each other's employees).

A non-compete clause is only enforceable if the employee holds a very special position of trust, is informed why it is necessary to enter into a non-compete clause, has been employed for more than six months and is informed in writing of all terms and conditions relating to the non-compete clause.

A non-solicitation clause is only enforceable if the clause concerns customers that have had business dealings with the employee within the last 12 months before the notice of termination of employment, the employee has been employed for more than six months and is informed in writing of all terms and conditions relating to the non-solicitation clause.

The maximum duration of non-solicitation and non-compete clauses is 12 months, while the maximum duration is six months if the employee is asked to accept both clauses.

The employee is entitled to compensation for not being allowed to set up in business, seek employment with a competitor or approach or deal with former customers. The compensation must amount to 16 to 60 per cent of the employee's remuneration at the effective date of termination (including benefits), depending on the duration and scope of the restriction and whether the employee has obtained alternative employment. The first two months' compensation is always payable as a lump sum at the effective date of termination.

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If the employee is bound by a non-compete or non-solicitation clause with a maximum duration of six months, the employee is entitled to at least 40 per cent of his or her remuneration in compensation. If the employee finds suitable alternative employment during the notice period, the amount is reduced to 16 per cent of the employee's remuneration.

If the employee is bound by a non-compete or non-solicitation clause with a maximum duration of 12 months or a combined clause with a maximum duration of six months, the employee is entitled to at least 60 per cent of his or her remuneration in compensation. If the employee finds suitable alternative employment during the notice period, the amount is reduced to 24 per cent of the employee's remuneration.

Non-compete clauses are not enforceable in case of unfair dismissal or redundancy.

If a non-compete clause is too broad or onerous, the Danish courts may overrule or modify it. In the decision, the Danish courts may take into consideration whether the employer has used wording so general as to go beyond what is necessary to safeguard its legitimate interests.

CEOs are not covered by the Post-Termination Restrictions Act. This means that such covenants may be overruled or modified by the Danish courts only if they are unfair or unreasonable from a freedom of contract point of view. In addition, the Post-Termination Restrictions Act provides that a non-compete clause is not enforceable if the CEO's service agreement is terminated by the company other than for reasonable cause or if the CEO terminates the service agreement for reasonable cause.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

If the CEO or employee is in breach of a covenant, the employer may apply for an interim injunction against the CEO or employee, or claim damages, or both.

It is often difficult for the employer to prove a loss and to ensure compliance. Therefore, the covenant will often provide for an agreed penalty. If the CEO or employee disputes the amount of the agreed penalty, the Danish courts will decide whether the amount of the penalty is reasonable.

Furthermore, a CEO or employee who has engaged in competing activities, including breach of a covenant, and in so doing has caused the employer a loss will be liable for the loss in accordance with the general law of damages in Denmark. It will often, however, be difficult for the employer to show that a quantifiable loss had been suffered, as is necessary in order to be awarded damages.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

State pensions

In Denmark, all Danish citizens are entitled to the basic state pension when they reach retirement age. The state pension scheme is tax-funded.

The state pension scheme is supplemented by the mandatory 'labour market supplementary pension scheme' (ATP). The ATP scheme is a pension scheme for all CEOs and employees based on contributions made during their working lives. Employers in Denmark must contribute a specific (small) amount per employee to the pension scheme for all CEOs and employees who are subject to the Danish social security system.

Supplementary pensions

Employers are not subject to any statutory obligation to set up private pension schemes for CEOs or employees, apart from the ATP; however, such an obligation may be imposed by some collective agreements.

If the employer has provided the CEO or employee with voluntary benefits, it will constitute a material change to the terms and conditions of employment if the employer then wants to withdraw the benefits. All material changes to terms and conditions must be notified to the CEO or employee by at least the same notice as their individual notice of termination.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Employers commonly provide access and contribute to supplementary pension schemes with a pension institution for their CEOs and employees.

Pension schemes are usually defined-contribution schemes with a pension account in the name of the individual employee where the employer and employee contributions normally amount to a certain percentage of the employee's salary. Therefore, these pension schemes usually provide pensions the value of which is dependent on the agreed size of the employer and employee contributions and on the investment return on those contributions.

If the supplementary pension scheme meets the conditions for tax approval, the employer's contributions are tax-exempt. The supplementary pension scheme can be structured to ensure that the employer's contributions are tax-exempt regardless of the amount of the contributions. All pension contributions are, however, subject to labour market tax of 8 per cent.

If the supplementary pension scheme meets the conditions for tax approval in order for the employer's contributions to be tax-exempt, the employee's contributions will be deductible. Like the employer's, however, the employee's contributions are also subject to labour market tax.

34 May executives receive supplemental retirement benefits?

Yes, although this is unusual (see question 24).

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

It is possible to take out professional liability insurance for members of the board of directors and executive board for any liability that may be incurred, but this is not a statutory requirement.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

There is no law protecting CEOs in the event of a transfer of undertaking.

For employees, the Transfer of Undertakings Act provides that employees will automatically transfer with the undertaking and the acquirer will automatically enter into all of the transferor's rights, duties and obligations under the employment relationship, including benefits. The Act applies to any transfer of an undertaking or part of an undertaking where the entity to be transferred is located within the EEA and the employees affected by the transfer are subject to Danish law.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Sometimes, CEOs and other executives will be offered a retention bonus in connection with a change of control in order to incentivise the CEO or employee to stay.

Also, change-of-control clauses are quite customary in service agreements for CEOs. These are often structured so as to give the CEO an extraordinary severance payment if the company terminates the agreement within a specified period after the change-of-control event.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

The issue on whether it is legally possible to apply provisions either on acceleration of vesting or exercisability of or on 'cashing out' equity compensation awards in connection with a change in control has not been clarified in case law. It is, however, generally likely that such provisions will apply without any limits.

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Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

No exchange controls rules apply.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

Under Danish law, there is no statutory requirement that a service agreement or an employment contract be in Danish. Thus, if the corporate language is English and the CEO or employee is required to operate in English (and has been informed of this requirement), an English-language service agreement or employment contract will be permissible.

With regard to some forms of equity compensation awards, however, the Stock Options Act requires that some particulars about the award be given to the employee in Danish. The Stock Options Act only applies to employees (and thus not CEOs).

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are no statutory prohibitions on such payments. Provisions on such payments are in some cases applied to secondments and to the employment of foreign executives.

42 Are choice-of-law provisions in executive employment contracts generally respected?

Choice-of-law provisions are generally respected for CEOs.

Norrbom Vinding

Morten Langer **ml@norrbomvinding.com**
Torben Mølgaard Hededal **tmh@norrbomvinding.com**

Amerikakaj
Dampfærgevej 26
2100 Copenhagen
Denmark

Tel: +45 35 25 39 40
Fax: +45 35 25 39 50
www.norrbomvinding.com

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France

Florence Aubonnet, Stéphanie Dumas and Camille Ventéjou

Flichy Grangé Avocats

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

In France, the term 'executive' includes managers, directors and employees whose functions include a management duty without necessarily being part of the company's management. For the purpose of this chapter, 'executive' will refer either to company officers who are not employees subject to the French Labour Code but to the Commercial Code, or to upper managers holding a work contract who are subject to the Labour Code.

Where the executive holds an employment contract, his or her minimum compensation arrangements will be governed by the Labour Code and the applicable sectoral collective bargaining agreements, usages or unilateral employer decisions, and internal rules of a company as for any other employee. In practice, the main source of compensation will be each individual work contract.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

Labour courts have exclusive jurisdiction for litigation matters arising from work contracts (hence, issues on contractual compensation and benefits). The Ministry of Labour also controls and sanctions the application of these rules in the field mainly using labour inspectors.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

Where an executive is a company officer, any kind of compensation granted should be subject to corporate approval as provided for by the commercial code governing private companies, and the company's articles of association.

The adoption of stock option plans and free shares plans are also subject to a particular corporate process.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Compensation may be freely set by the company, but prior consultation of the elected staff representative bodies is required in the event of the implementation of a collective compensation plan or a change to this plan. No approval is required, but an opinion (positive or negative) should be issued by such body before such implementation or change becomes effective. This duty would not apply before changing the terms of a single executive's compensation package.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

Generally speaking, there is no prohibition, but specific rules and restrictions apply in state-owned companies and any subsidiaries within which the remuneration of company officers has been limited to €450,000 annually since July 2012.

Publicly traded companies are also subject to particular rules. Indeed, their corporate officers (administrators, general directors, deputy general directors, chairpersons of the board or permanent representatives of corporate directors) and parents, children and spouses of said officers may not receive company loans, bonds or current receivables; such agreements are null and void.

Any agreement in publicly traded companies that is not a current operation in normal conditions is a regulated agreement, which should be authorised by the board of directors (or other relevant corporate body as determined by the company's article of association) and subsequently approved by the shareholders' meeting.

Finally, particular rules apply with respect to the variable remuneration of employees in the banking and investment sector, voiding arrangements through which the amount of this variable compensation affects the company's regulatory capital.

6 What rules apply to compensation of non-executive directors?

As far as compensation is concerned, non-executive directors are subject to the same rules as those applicable to other board members. Accordingly, further to section L225-45 of the Commercial Code, they may receive an attendance fee. The amount of said fee is not regulated. According to the AFEP-MEDEF code of conduct, each board must examine the relevance of the amount granted in light of the burden (in particular time spent) and responsibilities incumbent upon the board member. The attendance fee is subject to a particular tax and social security treatment (it is not considered to be a wage).

In addition to this attendance fee, members of the board may also receive exceptional remuneration if they are asked to perform a particular task (section L225-46), but this shall then be deemed to be remuneration and subject to a particular corporate authorisation process.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

Publicly traded companies and companies controlled by publicly traded companies should publish in their annual reports the total compensation (eg, basic salary, profit-sharing, fees or life insurance premiums) and benefits in kind paid to each corporate officer.

Non-publicly traded companies enjoy a lesser obligation, which consists of publishing in their annual reports the overall attendance fees allocated to directors. This report should also show the amount of remuneration and benefits of any kind that officers received during the year from controlled companies or the company that controls the company in which the mandate is exercised.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

An employment contract requires the execution of specific functions distinct from the company's management, performed under a subordination link with the company. This is the reason why, in many cases, company officers do not hold an employment contract; the terms and conditions of their duty are determined through unilateral decisions

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by the relevant corporate body (the board of directors, for example). These decisions would usually encompass the level of fixed salary and variable bonus, benefits in kind (company car, for example) and post-termination restrictive covenants (non-compete, non-solicitation, etc). Company officers may, however, also hold employment contracts if they perform specific duties (for example, finance director or sales manager).

Standard clauses would refer to the place of work, basic salary, description of the mandatory health and retirement scheme, notice period as provided for by the applicable collective bargaining agreement; contracts will often also include a variable bonus based on the achievement of targets and benefits in kind. Post-termination restrictive covenants are also very common.

Change-in-control benefits are normally not included in the work contract but are rather unilaterally granted by the company or its shareholders as the case may be in the course of its performance, in the event of a sale of the company being contemplated.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

There are two main types of incentives compensation: 'cash' awards and share ownership schemes, such as stock options and free shares.

Cash awards often take the form of variable bonus plans based on targets and, as the case may be, retention bonuses.

In practice, ownership schemes are more prevalent in larger companies and remain rare in small entities where cash variable bonuses are more common.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

Under French law, any salary or benefit granted in the framework of the execution of a work contract of a company officer duty is subject to national dues (social security contributions), as well as a specific tax called CSG/CRDS. The employer is responsible for their payment to the collecting agency, including the employee's share of those contributions, which will be deducted from the gross amount of the compensation. The employee, however, is subject to income tax and is responsible for its declaration to the tax authorities.

Cash incentive compensation does not enjoy any favourable treatment and is subject to national dues and income tax.

There is no mandatory limit on the amount or structure. In the banking and investment sectors, however, French regulations recommend that variable remuneration is based on achievement of individual and collective targets related to performance, and a significant part of the variable remuneration is paid over several years and takes the form of shares.

As for publicly traded companies, a national code of conduct provides similar recommendations with respect to the variable part of company officers' compensation, including the requirement that this variable part be proportionate to the fixed compensation.

Ownership schemes are subject to a different tax regime and are also subject to particular restrictions. No stock options of free shares may be granted to employees already holding more than 10 per cent of the issuing company's share capital (the limit is one-third of the share capital when stock options are granted during the two years following the funding or the purchase of the company by its employees or its company officers).

In addition, the allocation of free shares is limited to 10 per cent of the capital of the issuing company or 15 per cent in small and medium-sized non-listed companies. The limit is 30 per cent of the share capital when the award relates to all employees; otherwise, the ceiling remains at 10 per cent or 15 per cent (article L225-197-1 of the Commercial Code).

Moreover, the law has limited the delta of free shares between each employee, which cannot exceed a ratio of 1:5. Thus, if 50 free shares are distributed to an employee, other employees must receive at least 10 free shares each. Since the Macron Law, dated 6 August 2015, which applies to free shares plans voted by shareholders' meetings taking place after this date, this 1:5 ratio is no longer applicable provided that the free shares represent less than 10 per cent of the share capital (or 15 per cent in small and medium-sized companies).

As regards stock options, the number of options granted but not yet exercised is limited to one-third of the issuing company's share capital.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Deferral and vesting are permissible.

As far as cash award plans are concerned, quite often plans will mention that an award is granted on condition that the executive is still working for the group at the vesting date, and so issues may arise should the executive's mandate or work contract be terminated before this date. The drafting of such clauses remains a sensitive issue.

For ownership schemes, minimum acquisition and conservation periods are required in order to benefit from a favourable social and tax regime.

For stock options, a minimal conservation period exists for those allotted before 28 September 2012. The minimal conservation period is five years for stocks allocated before 28 April 2000, and four years before 28 September 2012.

For free shares, before the Macron Law was introduced, the minimum acquisition period was at least two years (article L225-197-1, paragraph I of the Commercial Code) and the minimum conservation period was at least two years upon final allocation of the shares (article L225-197-1, paragraph II of the Commercial Code).

For free shares plans adopted during a shareholders' meeting taking place after 7 August 2015, the minimum conservation period is no longer required. However, the total duration of the minimum acquisition period and any conservation period shall be a minimum of two years.

When connected to a savings plan, remuneration is blocked for five years.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

Although French case law recognises the existence of discretionary compensation, recurrent incentive compensation may under certain circumstances be construed before the courts as a mandatory contractual entitlement.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

The general principle to abide by is equality and non-discrimination principle. The criteria to define the amount of incentive compensation should be objective and applied to all employees in the same situation on the same basis (equal work, equal compensation principle).

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

In France it is not permissible to require an employee to repay incentive compensation that he or she has received, unless the payment was the result of an error and was not due to them.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

The prevalent form of equity compensation is awarding stock options at a preferential price or free shares, which enjoy favourable social and tax treatment when conditions provided for by French regulations are met (notably minimum acquisition and conservation periods as mentioned in question 11).

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

As described above, the forms of equity compensation that are advantageous are mainly stock options and free shares.

The tax regime remains complex and the level of tax advantage has fallen in recent years.

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Capital gains from stocks or free shares are exempt from social security contributions, subject to a declaration by employers to its collection agency, as mentioned in question 17. Capital gains from stocks are, however, subject to the CSG/CRDS taxes, as well as to specific contributions (30 per cent to be paid by the company and 10 per cent by the employee). Prior to the Macron Law, the same regime applied to capital gains from free shares. Further to the Macron Law (applicable to shares issued through a shareholders' meeting taking place after the promulgation of this law), the employer's contribution is reduced to 20 per cent and is to be paid only once the shares are actually granted. A more favourable regime applies to small and medium-sized companies up to a certain threshold (€39,228 for 2017). On the other hand, the amounts of the employee's share of contributions and tax regime has also been reduced.

When free shares are connected with a company savings plan, the gain on a subsequent disposal of the shares, including the benefit related to the acquisition gain, is exempt from income tax.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

For free shares and capital gains on stock options, the exemption from social security contributions is subject to the annual notification to the collecting agency of the identity of the employees or officers to whom free shares or stock options were definitively granted during the previous calendar year, and the number and value of shares allocated to each of them (article L242-1 of the social security code).

Failing to comply with these declaration duties will mean that employers will be ordered to pay social security contributions, including the employee's part.

18 Are there withholding tax requirements for equity-based awards?

In France, social contributions are withheld on salary elements, but this does not apply to the taxes applicable to the executive's income and any capital gain that may have been made. Equity-based awards are also subject to withholding social contributions where applicable. However, in 2017, the parliament decided to implement a docking at source for income revenue as of January 2018. The scope of this withholding and its modalities have not yet been defined so there are uncertainties on that matter, particularly because a new president (Emmanuel Macron) was elected in May 2017 and a new parliament is to be elected in June 2017, which may decide to withdraw, postpone or amend this reform.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

In large groups, such agreements are common. The chargeback amounts' deductibility for French employers depends on various conditions that need to be carefully assessed.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

In large groups, employee stock purchase plans are prevalent and available. A typical issue concerns the condition of presence, which is often part of the plans in order to be able to acquire or sell the stocks. This becomes a possible source of litigation in the event that an employee is terminated or transferred, and the condition of presence is no longer fulfilled.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Mandatory benefits include health benefits, pension and unemployment benefits, business expenses and paid holidays.

The French benefits system is not based on private insurance but on state insurance, where state entities (the state social security and family affairs body, the state unemployment agency, etc) manage the scheme.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

The most common benefits for executives are individual variable bonus plans. As explained above, there is no tax or financial advantage for those schemes. From that standpoint, equity incentives remain more advantageous.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

There are no absolute prohibitions on termination of executives' employment contract specifically; however, a dismissal needs a genuine and serious cause, which can be based on a personal or economic motive, and must respect the procedure laid out in the Labour Code. Mandatory notice periods should be respected by executives, the length of which varies according to seniority level, but employers have the option to put them on gardening leave.

The dismissal conditions for corporate officers are different, depending on the company's legal form.

The principle of 'free removal' applies to corporate officers, but depending on the legal form of the company, some limits can restrict this freedom. There are no general and legal notice periods.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

Upon the expiry of his or her work contract, an employee is entitled to mandatory payments of severance pay, holiday pay and compensation for the notice period in case of gardening leave.

A minimum severance pay is provided by the Labour Code after one year of seniority. Bonuses and variables compensation should be taken into account when calculating the minimum severance. This severance is not due in the case of a dismissal for serious misconduct. These rights cannot be waived.

Company officers are not entitled to any severance except in the event that the relevant corporate body has decided differently following the applicable corporate rules.

25 What executive severance payment level is typical?

Generally, a mandatory minimum severance is provided by the applicable collective bargaining agreement. If not, the Labour Code specifies that the severance cannot be less than one-fifth of the monthly wage multiplied by years of seniority. After 10 years of seniority, each year accumulates an extra two-fifteenths of the monthly wage (article R1234-2 of the Labour Code).

The reference wage is the most advantageous wages' average of the previous three or 12 months (article R1234-4 of the Labour Code).

Apart from journalists for whom the applicable sectoral collective bargaining agreement provides a right in the case of a change of control, a change of control would normally not trigger any specific right to a particular severance, nor would it increase the amount of the mandatory severance.

The need to pay an incentive on a pro rata basis for the year of termination depends on the plan's terms and conditions.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

Dismissals should be grounded on either personal or economic cause.

A dismissal for personal cause (fault, unfitness, etc) should be based on disciplinary reasons or other reasons (professional inadequacy). Dismissals on personal grounds are considered valid when the cause is 'real and serious' (article L1232-1 of the Labour Code); that is, when it is materially and objectively verified that the employer should breach the contract.

A dismissal for economic cause should be based on economic difficulties, the need to protect the company's competitiveness or the cessation of the company's business (article L1233-3 of the Labour Code).

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Update and trends

In 2018, it may become law that income tax will be withheld at source by employers. Whether or not this change will be implemented following the election of the new president, Emmanuel Macron, in May 2017 and the parliament's election in June 2017, is uncertain. Also, the election of Mr Macron as the president is likely to trigger some changes aimed at making France more attractive to investors, so one may expect further evolutions regarding the way in which equity awards will be handled.

Constructive dismissal is a breach of contract claimed by the employee for an alleged fault of the employer before the labour courts. Where the courts decide the breach lies in a serious fault of the employer the breach will be deemed a dismissal without real and serious cause. Where the courts decide there was no fault on the part of the employer, the breach will be construed as a resignation.

27 Are 'gardening leave' provisions typically used in employment terminations?

Gardening leave may be used at the employer's discretion during a notice period the duration of which is determined by the applicable sectoral collective bargaining agreement. The employee remains compensated for his or her gardening leave period, with all due benefits and advantages as if he or she had worked.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

A general waiver or release of claims is only possible through the signing of a settlement agreement.

No settlement agreement can be negotiated before termination occurs. As a result, even though parties may have already reached an oral settlement, they must go through the dismissal process, which involves the sending of a dismissal letter, otherwise, the settlement agreement would be invalid.

A way to secure the termination is to enter into a termination by 'mutual termination agreement'. This requires both parties' consent, and a particular process involving the labour administration's approval (which may be implicit). Except in very particular circumstances in which the employee would claim that his or her consent was not valid, the employee would not be able to challenge such departure; he or she could, however, still bring a claim based on the execution of the contract (for example, to obtain certain arrears of wages).

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Non-compete is the most common type of clause. The restricted period usually varies from six months to two years.

Non-solicitation of customers is generally included in the non-compete clause, whereas a non-solicitation of employees clause is clearly distinct from the non-compete obligation as they are not subject to the same requirements for their validity.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

To be valid, a non-compete clause should be limited in time and space, proportionate to the interests of the company, and remunerated accordingly. In terms of 'geographic' restriction, the scope may encompass small areas or different countries as long as the restriction is proportionate to the company's interests. The larger the scope of the prohibition is, the larger the financial compensation needs to be (the financial compensation is usually from 30 per cent of the compensation up to 50 per cent).

The clause is automatically enforceable after the termination of the employment. If the employer intends to renounce the clause, he or she needs to do so within the deadline mentioned in the applicable sectoral collective bargaining agreement or the work contract.

If such a clause is considered as excessive, the provision is usually voided. In rare circumstances, the courts may decide to reduce the geographical or time scope to make it enforceable.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

Breaching or violating a contractual non-compete clause usually leads to the loss of the non-compete clause's value in future, the reimbursement of previous non-compete compensation and, eventually, punitive damages as may be provided for by the non-compete clause.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

All employees, as well as company officers, are required to be affiliated to the General Social Security Pension Scheme as well as to a mandatory complementary pension scheme (the Association of Supplemental Pension Plans covers all categories of employees and the General Association of Supplementary Retirement Institutions covers only managerial and executive staff). Both employers and employees contribute to the schemes. These regimes are pay-as-you-go arrangements: the active labour force finances pensions, based on the principle of intergenerational solidarity.

On top of these mandatory pension schemes, voluntary schemes may be implemented by the company, either through a collective bargaining agreement or a unilateral decision.

The procedures to discontinue voluntary pension plans may differ depending on how they were implemented. In any event, should the scheme be clearly mentioned in the work contract as being a contractual part of the employee's compensation, a discontinuation requires the employee's agreement.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Supplementary pension schemes that are defined-contribution in nature are quite common in large groups.

These schemes are attractive from a taxation standpoint as the part of the company's share of contributions to the scheme enjoys a favourable regime in terms of national dues, although it is not 100 per cent exempt. This favourable regime is, however, subject to various conditions. In particular, the scheme must be compulsory for eligible employees and applicable to all or to an objectively defined category of employees (which may be executives).

34 May executives receive supplemental retirement benefits?

Under French law, when an employee retires, the company must pay the 'retirement indemnity', which is not a pension but a type of severance that is determined by the applicable sectoral collective bargaining agreement. This does not, however, apply to company officers.

As mentioned above, the most common supplemental retirement benefit is the adoption of a defined-contribution scheme rather than a defined benefit plan.

It does, however, happen that senior management (chairpersons in particular) of publicly traded large groups are granted defined-benefit pension plans. As this has been very much criticised, the Macron Law now regulates this practice. The attribution of those 'top-hat' pensions plans is now subject to performance conditions; a mechanism to set up a cap in the yearly increase of the acquired rights has also been implemented.

Finally, the annual report of the board to the shareholders must now include the existence of such pension benefits and other lifetime advantages. A decree dated 23 February 2016 details this measure.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

Insurance can be contracted for claims related to civil grounds only.

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This insurance typically protects executives in the case of management fault, as such fault may lead to personal payments or reimbursements. This type of insurance is a personal subscription by the executive and does not involve the company. It does not cover criminal claims.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

The French Labour Code and case law provide for the same mechanism as the one set by the European Directive of 12 March 2001. In the event that an asset sale involves the transfer of an 'autonomous economic entity' to which the employee is mainly devoted, the employee should be transferred by virtue of law and the benefits obligation also transferred to the new employer. A particular mechanism for this applies should the benefits be implemented though a company collective bargaining agreement.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Where a shareholder contemplates a sale of the company, quite often in order to avoid losing talent before the sale, retention bonuses would be proposed to senior executives. The company may also decide to provide executives whose contracts are being terminated with a contractual severance in the event that they are dismissed as a result of the change in control.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

Except for free-share acquisition, which may not be accelerated, there are no legal restrictions preventing the acceleration of the vesting of stock options or cash awards because of a change of control, subject to applicable corporate rules and processes.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

There are no foreign exchange control rules.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

French law requires that French be used for work contracts as well as for all documents setting out 'obligations incumbent upon the staff member, or whose contents [must be properly understood] for him to discharge his tasks'. French law does, however, state that this obligation 'does not apply to documents forwarded from abroad, or designed [to be read by] foreigners'.

In this area, French courts have interpreted French law very broadly, and have concluded that staff members need not be bound by documents drafted in English that set out targets in respect of which contractual variable remuneration is to be defined, even where the staff member is quite used to working in both languages.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are no statutory or regulatory prohibitions on tax gross-up, tax indemnity or tax equalisation payments. As the case may be, these provisions may be agreed with executives seconded abroad or being seconded to France by a foreign group company.

42 Are choice-of-law provisions in executive employment contracts generally respected?

Despite the choice-of-law principle provided for by the Rome Convention, employees may not be exempted from the public policy laws of the country in which contracts are performed.

Flichy Grangé Avocats
droit social / employment law

Florence Aubonnet **aubonnet@flichy.com**
Stéphanie Dumas **dumas@flichy.com**
Camille Ventéjou **ventejou@flichy.com**

66 avenue d'Iéna
75116 Paris
France

Tel: +33 1 56 62 30 00
Fax: +33 1 56 62 30 01
www.flichygrange.com

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Germany

Christian Hoefs and Hendrik Bockenheimer

Hengeler Mueller

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

In Germany, the primary source of law for the compensation and benefits of executives, executive employees and regular employees are the individual employment agreements (or management service agreements). In addition, benefit plans and policies that apply to certain groups of employees are also common, for example, equity-related compensation plans, bonus schemes, pension schemes and company car policies. Moreover, for non-executive employees, employee benefits are often provided for in collective bargaining agreements or shop agreements.

Further, German statutory employment law provides for certain benefits such as paid holiday and continued remuneration in the event of illness. It should, however, be noted that German employment law only applies to executives if they qualify as employees, whereas it is generally inapplicable if an executive is a legal representative of the company, such as a management board member of a German stock corporation or managing director of a German limited liability company.

Certain specific rules apply to executives in the banking and insurance industries. Such regulations are provided for in legal ordinances that have been established by the German Ministry of Finance.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

Generally, German authorities do not have responsibility of enforcing existing regulations concerning the compensation and benefits of executives or employees. In the event of non-compliance by the employer, however, the executive or the employee may take court action to enforce his or her rights.

As regards the specific regulations in the banking and insurance industry, the German Federal Financial Supervisory Authority or the European Central Bank supervises the financial and insurance institutions' compliance with the applicable ordinances.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

The granting of stock or stock options requires the approval of shareholders and is subject to specific corporate governance rules. In particular, stock options may not be exercised earlier than four years after granting.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Management board members, managing directors and executive employees are not represented by a union or a works council, so their compensation does not require consultation with unions or works councils. The compensation and benefits of management board members of German stock corporations (and managing directors of German limited liability companies with more than 2,000 employees in Germany) need, however, to be set by the supervisory board of the company, which includes employee representatives if the company has more than 500 employees in Germany.

Benefits that are offered to all employees or groups of employees are subject to co-determination of the works council pursuant to section 87 of the German Works Constitution Act (ie, an agreement with the works council is required).

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

There is no general prohibition on any type of compensation or benefit.

6 What rules apply to compensation of non-executive directors?

German law does not recognise the concept of non-executive directors (with the rare exception of European companies with one-tier boards), since there is no one-tier board system in Germany, but a two-tier board system with the management board on one side and the supervisory board on the other. The remuneration of supervisory board members is governed by the German Stock Corporation Act and must be provided for in the articles of association of the company or approved by the general meeting of the company.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

The compensation of management board members of listed companies must be disclosed in the company's annual report. For non-listed companies, in principle, only aggregated compensation information for management board members or managing directors needs be disclosed.

Special disclosure rules apply for banks and insurance companies.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

In Germany it is a legal requirement that each employee has an employment agreement, which is typically concluded in written form. If the employment agreement has a fixed term, this must be agreed in writing, otherwise the employment relationship is assumed to be unlimited in time.

The following features are common in service agreements or employment agreements:

- a brief description of the title or function and work to be performed;
- the place of employment;
- the probationary period;
- agreed working hours;
- annual holiday entitlement;
- remuneration (including all components such as fixed salary, bonus payments and remuneration for overtime);
- other benefits such as company car or company pension;
- fixed term or notice periods;
- confidentiality obligation; and

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- non-compete undertakings (for the term of the employment agreement and, if the company is willing to pay the required compensation, also for the period after termination) as well as other restrictive covenants.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

Most common are cash bonuses that are paid annually. Long-term incentive schemes are also becoming more and more common. In listed companies, it is not uncommon to grant stock options or restricted stock, although this is less common in Germany than in other countries such as the United States.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

A strict limit on the amount of incentive compensation only exists for the banking industry, where variable compensation must not exceed 100 per cent (or 200 per cent, if there is a corresponding shareholders' resolution) of the fixed compensation of the respective executive or employee.

The compensation of management board members of a German stock corporation must be reasonable in relation to their role and tasks as well as in relation to the company's business, and must not exceed the usual remuneration without a specific reason. This, inter alia, requires a comparison with the remuneration of management board members at similar companies and of the different hierarchical levels of employees within the company. For management board members of listed companies, the compensation should be based on a multi-year basis of assessment. Moreover, the German Corporate Governance Codex recommends for management board members of listed companies that the supervisory board determines maximum amounts for the compensation of each management board member.

There are currently no limits that adversely affect the tax treatment of the employer or the executive, but there is a political debate about a potential introduction of such limits.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Deferral and vesting of incentive awards is permissible, provided that the deferral and vesting rules are transparent and do not provide an unreasonable disadvantage for the employee. Stock options relating to the stock of a German stock corporation must be subject to a waiting period of at least four years before they may be exercised.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

If a discretionary incentive compensation is granted three or more years in a row without any proviso that the grant is a voluntary benefit that does not result in any claim for the future, this in principle creates a 'standard business practice' based on which the employee has a mandatory contractual entitlement to the incentive compensation for future years.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

In principle, the type or amount of incentive compensation awarded to an executive does not affect the compensation that must be awarded to other executives or employees. If a certain incentive compensation is awarded to a group of employees, however, other comparable employees may only be excluded from the granted incentive compensation if there is an objective reason for such differentiation.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

Repayment of incentive compensation can, in principle, be requested, if this has been validly agreed upon with the employee, which, in particular, requires that repayment can only be requested in limited severe cases (ie, in particularly severe breaches of duties) and does not result in an unjustified detrimental treatment for the employee. However, contractual clauses requiring such repayment have so far rarely been implemented in Germany and there is no case law available in this respect.

Currently there are no mandatory provisions requiring repayment of incentive compensation. However, it is expected that a new version of the remuneration ordinance for banking institutions will be enacted shortly, which will permit large banking institutions to request repayment of incentive compensation if an employee:

- participated in, or was responsible for, a conduct that resulted in significant losses; or
- materially breached compliance or similar rules.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

The prevalent form of equity-based compensation is stock options, but other types of equity or equity-based compensation are not uncommon in Germany either, including, in particular, stock purchase plans and phantom stock plans.

Bearing in mind that a minimum waiting period of four years applies with respect to stock options relating to a German stock corporation, vesting periods of three to five years are most common.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

German law does not provide for specific tax advantages of equity compensation programmes compared with cash compensation, with the exception that certain equity grants with a taxable benefit of up to €360 per annum per employee are tax-free if offered to all employees with one or more years of service. The benefit from stock options is generally taxable only when the stock is transferred to the employee following the exercise of the option (unless the options are tradable), while there is in principle immediate taxation if shares are transferred, even if they are restricted.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

Equity-based compensation in principle does not require registration or notice, but proper structuring of the programme is required in order to avoid the employer being obliged to issue a prospectus in connection with the equity offering.

18 Are there withholding tax requirements for equity-based awards?

The employer is required to withhold income tax with respect to equity-based awards when the employee receives the taxable income (ie, typically upon transfer of the stock or payout of the cash benefit). This is in principle true for all types of equity-based awards (ie, there is no simplified procedure for specific types of equity-based awards).

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Inter-company chargeback agreements between a non-local parent company and local affiliates are common and should typically be concluded in order to avoid tax detriments. Such agreements must be clear and transparent and the terms and conditions need to be at arm's length.

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20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Employee stock purchase plans are available under German law, but are not broadly used. The main issue is that the plan must be structured carefully in order to avoid the employer being obliged to issue a prospectus in connection with the offering of the stock. If the stock purchase plan is offered to all employees with one or more years of service, a taxable benefit of up to €360 per annum is tax free for each employee. The co-determination rights of the works council pursuant to section 87 of the German Works Constitution Act need to be complied with unless the stock purchase plan is limited to executive employees who are not represented by the works council.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

The following mandatory (minimum) benefits exist for employees:

- minimum wage of €8.84 per hour;
- 20 days of holidays per annum (based on a five-day working week);
- severely disabled employees are entitled to five additional days' holiday per annum;
- six weeks of continued remuneration in the event of illness;
- maternity leave and parental leave; and
- coverage in the German social security system (pension insurance, health insurance, nursing-care insurance and unemployment insurance), the contributions to which are in principle split approximately equally between employer and employee.

Voluntary additional benefits can in principle only be discontinued if they were either granted without a contractual entitlement of the employee (ie, without a contractual basis and without establishing a standard business practice; see question 12) or if the employee agrees with the discontinuation.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Executives are typically granted a fixed compensation, a variable compensation (cash or equity based, or both), a company car and a company pension, and in some cases additional insurance coverage (eg, accident insurance).

Special advantageous tax rules in particular exist for the granting of company cars as well as for (certain minimum) contributions to company pensions channelled through direct insurances, traditional pension funds or pension funds.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

With respect to prohibitions on terminating executives, the following different types of executives need to be distinguished:

- management board members of German stock corporations must have time-limited service agreements with a maximum term of five years. During such term, their service agreements can only be terminated for cause, which in principle requires a severe breach of duties or complete incapability of the job;
- managing directors of German limited liability companies may also have time-limited service agreements, which may only be terminated prematurely for cause. Alternatively, they may have service agreements with an unlimited term, which can be terminated with the applicable notice (which is typically between three and 12 months) but without any particular reason for the termination being required, provided that the termination is not discriminatory;
- executive employees in principle enjoy termination protection under the German Termination Protection Act if they are employed for more than six months in an establishment with more than 10 employees. According to the German Termination Protection Act, a notice of termination of employment is only legally effective if justified by reasons relating to the employee's person (such as long-term illness with no reasonable chance of recovery), the conduct of the employee (ie, severe misconduct) or urgent operational reasons requiring a redundancy. If urgent operational reasons require a redundancy, the employee to be made redundant will have to be selected by social criteria (age, years of service, number of dependants and disability) from among all comparable employees; and
- for employees (and, according to the majority of legal scholars, also for managing directors), the following statutory minimum notice periods apply, increasing with the years or service of the respective employee:

As of day 1 of employment	Four weeks to the 15th or the end of a month
Two years of service	One month to the end of a month
Five years of service	Two months to the end of a month
Eight years of service	Three months to the end of a month
10 years of service	Four months to the end of a month
12 years of service	Five months to the end of a month
15 years of service	Six months to the end of a month
20 years of service	Seven months to the end of a month

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

German law does not provide for any statutory or mandatory minimum severance entitlements of executives or employees. If a notice of termination of employment is legally valid, in principle no severance needs to be paid unless a collective bargaining agreement, social plan or other shop agreement is applicable that provides for a severance entitlement of the employee.

Since, however, notices of termination are often not legally valid, or are at least subject to a material risk of being invalid (owing to the strong termination protection of employees), it is customary practice to make a severance payment in return for the employee agreeing to the termination of employment. Such severance payments are typically calculated on the basis of the following formula: years of service multiplied by gross monthly remuneration multiplied by a certain factor that typically ranges between 0.5 and 1.0. 'Gross monthly remuneration' typically includes one-twelfth of the annual variable compensation.

No other mandatory post-employment benefits exist under German law.

25 What executive severance payment level is typical?

Management board members and managing directors are typically not entitled to severance payments (on top of a potential payout of their contractual entitlements) in the event of termination of their service agreements. Based on the German Corporate Governance Codex, it should be ensured that management board members of listed German stock corporations in the event of a premature termination of their service agreements do not receive payments exceeding the lower of two years' compensation or the compensation for the remainder of the term of their service agreement. In the event of premature termination of the service agreement following a change in control, the payment should not exceed 150 per cent of the aforementioned amount.

Severance payments to executive employees typically range between 50 per cent and 150 per cent of a gross monthly remuneration (including one-twelfth of the annual variable compensation) per year of service.

It is typical to pay a pro rata portion of the variable incentive compensation for the termination year. Based on case law, this is even, in principle, a legal requirement, at least for cash-based incentive plans.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

A dismissal for cause requires that the employee severely breaches his or her obligations under the employment relationship and, further, it is absolutely not acceptable for the employer to continue the employment relationship until the next possible date of an ordinary termination. The

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hurdle is rather high and a German court will take all circumstances of the individual case into account when assessing whether the termination for cause is valid. A notice of termination for cause must be given within two weeks of the day on which the employer learns about the relevant facts.

The concept of constructive dismissal is generally unknown in German law. Whether the employer induced a termination by the employee may, however, play a role if a social plan or similar regulation or guideline exists under which employees are entitled to severance or other benefits (or both) in the event of termination of the employment relationship. Such regulations usually provide that the benefits are only payable if the employment relationship was terminated on the initiative of the employer.

While rarely seen in Germany, it is, in principle, legally permissible to contractually define 'good reason', which would entitle the employee to terminate employment and receive a defined severance payment.

27 Are 'gardening leave' provisions typically used in employment terminations?

It is common that employees, in particular executives, are put on gardening leave and released from their contractual duties during the notice period. During gardening leave, compensation and benefits, in principle, have to be continued. It is open to debate whether and in which cases a company is entitled to put an employee on gardening leave without the employee's consent, but in practice the employees concerned in most cases agree with being put on gardening leave.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

A general waiver or release of claims is a standard component of a separation agreement with an executive or an employee, provided that the waiver is in principle only valid and enforceable if it is reciprocal (ie, if it not only covers the claims of the employee against the company, but also the claims of the company against the employee). Claims based on mandatory law, collective bargaining agreements or shop agreements, however, are generally not covered by such waivers.

It is, in principle, not possible to agree upon a waiver or release of claims already in the employment agreement, but such waiver or release can only be validly agreed upon in connection with a termination of employment.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Undertakings requiring the non-solicitation of employees for a period of two years following termination of employment are fairly common. Post-contractual non-compete and post-contractual non-solicitation of customers, both of which are permissible only for a maximum of two years following termination, are less common, particularly because they are, in principle, only valid if the company undertakes to pay additional compensation for such restrictions.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Generally, under German law, the scope of a post-contractual non-compete clause must be justified by legitimate business interests, and thus be restricted to those areas (both in terms of region and definition of the business) in which the employer is active. Further, its term cannot exceed two years from the termination of employment. Furthermore, the covenant must provide for compensation that is payable throughout the term of the post-contractual non-compete and amounts to 50 per cent of the employee's last full remuneration, whereby other earnings of the employee during the term of the post-contractual non-compete covenant must be accounted for if, and to the extent that, the compensation and the other earnings exceed 110 per cent of the employee's last remuneration. While these statutory rules do not strictly apply to management board members of a German stock corporation or managing directors of a German limited liability company, according to settled case law of German courts, similar strict rules apply to these persons, whereby there are good arguments that it would be sufficient that the compensation amounts to, for example, 50 per cent of the fixed salary (as opposed to 50 per cent of the full remuneration in the case of employees).

Whether a court would reduce the scope of the post-contractual non-compete covenant to the permissible scope is disputed and will, inter alia, depend on the contractual regulations. It is generally recommended to determine the scope as clearly as possible and to restrict it to the scope that can be justified by legitimate business interests.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

The main remedies are that the employer can claim cessation of the competitive engagement of the relevant employee (which can also be enforced by way of temporary injunction) and damages, be it on the basis of an agreed contractual penalty or based on a factually suffered damage.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

With the exception of management board members, for all other executives membership in the statutory pension system is mandatory. Contributions are shared 50/50 between company and executive. Moreover, employees can request that a company pension financed by deferred compensation be offered, but the legal claim for such a deferred compensation model is currently limited to an amount of €254 per month.

A discontinuation of voluntary pension benefits is in principle only permissible with the consent of the respective employee in the course of an ongoing employment relationship (ie, not in connection with a termination of employment).

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

In Germany, the prevalent types of pension commitments towards executives are direct pension commitments and direct (life) insurances. Pension commitments that are channelled through a traditional pension fund, a pension fund or a support fund are used less frequently.

Direct pension commitments are generally defined benefit pension schemes under which the company directly pays the pension to the pensioner; the employer will have to make reserves on its balance sheet. The company is not obliged to provide for a funding of the commitment; it has, however, become more common to (partially) fund existing pension commitments, for example, by way of a contractual trust arrangement.

Under a direct pension insurance, the company enters into a (life) insurance contract to the benefit of the employee and pays the insurance contributions. Direct pension insurances thus generally work as defined contribution schemes (although a secondary liability of the company always remains).

As regards the tax treatment on the employee's side, both direct pension commitments and direct pension insurances are in principle only taxable upon receipt of the pension; however, as regards direct pension insurances, the non-taxability of the employer's contributions only applies up to a certain maximum amount (currently €3,048 per annum).

34 May executives receive supplemental retirement benefits?

Executives quite often receive more favourable retirement benefits than the general workforce. This is typically not done by way of a supplemental benefit, but rather by way of more generous pension contributions or a more generous calculation model. The differentiation is typically not considered to be discriminatory, provided that for management board members the total compensation must be reasonable, which, inter alia, requires a comparison with the remuneration of management board members at similar companies and the different hierarchical levels of employees within the company.

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Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

Generally, directors' and officers' insurance is permissible under German law. As regards management board members of stock corporations, a minimum deduction of 10 per cent of the damage is mandatory, capped at 150 per cent of the management board member's annual fixed salary.

Indemnifications and similar arrangements are in principle not permitted for management board members of German stock corporations. For other executives, regulations under which they are indemnified for actions taken during the course of their function are generally permissible, provided that an exclusion of the executive's liability cannot apply in cases of wilful acts and may not relate to certain mandatory obligations of the executive (eg, the filing for insolvency if the company is insolvent).

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

Under German law, an asset sale may trigger a transfer of undertakings pursuant to section 613a of the German Civil Code. This is generally the case if an economic unit is transferred to a new owner on the basis of a legal transaction. As a consequence of a transfer of undertakings, employees who are assigned to the transferred undertaking also transfer to the acquirer (provided that each employee has the right to object to the transfer of his or her employment and, as a consequence of such objection, would remain with the current employer). The transfer of employees pursuant to section 613a of the German Civil Code includes all rights and obligations existing under and in connection with the employment relationships. Thus, the obligations and liabilities towards the transferring employees, both with respect to past and future periods, transfer to the acquirer.

Management board members and managing directors do not qualify as employees and are thus not within the scope of a transfer of undertakings. The benefit obligations towards these persons would only transfer if agreed upon between the individual, the current employer and the acquirer.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

It is not very common to include change-in-control provisions in employment agreements or service agreements with executives. In connection with an envisaged transaction, however, transaction bonuses or retention arrangements are sometimes agreed upon with key executives or employees. The structure of such arrangements varies significantly, whereby cash bonuses are most often seen. Transaction bonuses are most commonly granted as compensation for extraordinary efforts in connection with the transaction and conditional upon signing or completion. Retention bonuses are most commonly paid over a period of between one and four years and are conditional upon the continuation of the relationship (sometimes in connection with criteria relating to business success). For management board members of listed German stock corporations, the German Corporate Governance Codex regulates certain caps with respect to payments that become due upon termination of the service relationship in connection with a change-of-control (see question 25).

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

There are no special limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control, provided that the minimum waiting period of four years for the exercise of stock options relating to the stock of a German stock corporation is complied with. There are also no restrictions on 'cashing out' equity awards, provided that this has been agreed upon in the underlying award agreement.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

Under German law no foreign exchange rules specifically prevent the remittance of funds or transfer of employer equity or equity-based awards to executives.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

There is no requirement that employment agreements, employee compensation or benefit plans, or award agreements be in German provided that the employee concerned has sufficient knowledge of the language in which the contract is written.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are no prohibitions on tax gross-up, tax indemnity or tax equalisation payments.

42 Are choice-of-law provisions in executive employment contracts generally respected?

Choice-of-law provisions are generally respected in executive employment contracts. Based on article 8 of the Rome I Regulation, German mandatory employee protection laws will, nevertheless, apply in favour of the employee if the employment relationship is considered to have a closer relationship to Germany than to the country whose law has been chosen.

HENGELER MUELLER

Christian Hoefs **christian.hoefs@hengeler.com**
Hendrik Bockenheimer **hendrik.bockenheimer@hengeler.com**

Bockenheimer Landstraße 24
60323 Frankfurt am Main
Germany

Tel: +49 69 17095 0
Fax: +49 69 17095 099
www.hengeler.com

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India

Rahul Chadha, Savita Sarna and Natasha Sahni
Chadha & Co

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

Employee benefits and compensation in India are regulated by various statutes and regulations, the main ones being as follows:

- the Constitution of India;
- the Companies Act 2013 (for managerial remuneration);
- the Indian Contract Act 1872;
- the Securities Contract (Regulation) Act 1956;
- the Banking Regulation Act 1949;
- the Foreign Exchange Management Act 1999;
- the Reserve Bank of India (RBI) Guidelines on Compensation of Whole Time Directors/Chief Executive Officers/Risk Takers and Control Function Staff, etc, 2010;
- the Listing Agreement of the Securities and Exchange Board of India (SEBI) (the Listing Agreement);
- SEBI (Share Based Employee Benefits) Regulations 2014 (the SEBI Regulations);
- the Payment of Gratuity Act 1972;
- Shops and Establishments Acts of various states;
- the Equal Remuneration Act 1976;
- the Employees' Compensation Act 1923; and
- the Ministry of Corporate Affairs' Voluntary Guidelines for Corporate Governance 2009.

Various other labour statutes, including the Payment of Wages Act 1936, the Minimum Wages Act 1948, the Employees' Provident Fund & Miscellaneous Provisions Act 1952, the Payment of Bonus Act 1965 and the Employees' State Insurance Act 1948, are also applicable in determining employee benefits, but these are applicable to the category of employees known as 'workmen' (as defined in the Industrial Disputes Act 1947) rather than to executives and employees at managerial level, who fall under the category of 'non-workmen'.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The government agencies or entities responsible for enforcing the aforesaid legislations and rules have been designated under the specific legislation and include the RBI and SEBI, as well as various labour departments.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

Certain types of compensation and benefits provided to executives of a company are regulated as follows. According to the provisions of the Companies Act, if the proposed managerial remuneration payable by a public company to its directors (including managing directors, full-time directors and managers, as defined in the Companies Act) in respect of any financial year exceeds 11 per cent of the net profits of that company for that financial year, the company would need the approval of its shareholders and the central government.

Further, in the following scenarios, approval is required from the shareholders of the company in a general meeting if:

- the remuneration payable to any one managing director, full-time director or manager exceeds 5 per cent of the net profits of the company and, if there is more than one such director, the remuneration exceeds 10 per cent of the net profits to all such directors and managers taken together; and
- the total remuneration payable to directors who are neither managing nor full-time directors exceeds 1 per cent of the net profits of the company (if there are managing or full-time directors or managers at the company), and in any other case 3 per cent of the net profits.

The aforesaid situation will vary in the case of a company having no profits or inadequate profits in a financial year, for which the Companies Act lays down further limits on remuneration.

Further, as per clause 49 of the Listing Agreement (applicable to listed companies), all remuneration including maximum number of stock options granted to non-executive directors or independent directors of listed companies is required to be fixed by the board of directors and approved by shareholders in general meeting.

These conditions are not applicable to private companies or unlisted companies.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Executives of a company fall under the category of non-workmen, and an establishment is not required to consult with a union or a similar body for changes in executive compensation or benefit arrangements.

Changes in compensation and provision of benefits to non-workmen are typically governed by the Shops and Establishments Act of the state in which the company is situated, and the employment contracts as entered into with the company or as per the company policy, if available.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

Under Indian law, no company can offer loans or give any guarantee or provide any security in connection with any loan to its directors or to any other person in whom the director has an interest, except in the following cases:

- where such director is a managing director or a full-time director and such proposed loan is either a part of the conditions of service extended by the company to all its employees, or pursuant to any scheme approved by its shareholders by passing a special resolution; or
- such company is in the business of extending loans or giving guarantees or securities for the due payment of any loan.

Further, under the Companies Act, the above restrictions shall not apply to a private company satisfying all of the following conditions:

- if no other body corporate has invested any money in the share capital of the company;

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- if the borrowings of the company from banks, financial institutions or any body corporate are lower than twice the amount of paid-up share capital or 500 million Indian rupees; and
- if there are no subsisting defaults in repayment of such borrowings at the time of making such transactions.

Further, as per the Banking Regulation Act 1949, banks are prohibited from entering into any commitment to grant any loans or advances to or on behalf of any of its directors, or any company or firm in which any of its directors has an interest as a partner, manager, employee or guarantor. As per recent RBI guidelines, however, banks have been permitted to give loans to the chairperson or managing director or CEO (who are not employees of the bank) and whole time directors of the lending bank for purchasing a car, personal computer, furniture, constructing or acquiring a house for personal use, festival advance, and credit limit under a credit card facility without seeking prior approval of RBI, provided that such loans form part of the compensation or remuneration policy approved by the board. Restrictions have also been imposed on making loans and advances to relatives of the chairman, managing director or directors of the bank.

Further, where a company has no profits or inadequate profits in any financial year during the tenure of a managerial person, it may pay remuneration to a managerial person not exceeding the limits as provided under Schedule V of the Companies Act without any approval from the central government.

6 What rules apply to compensation of non-executive directors?

Compensation for non-executive directors of listed companies has been prescribed by SEBI under the Listing Agreement governing listed companies. As per the Listing Agreement, all fees or compensation paid to non-executive directors (including independent directors) must be fixed by the board of directors and receive prior approval from the shareholders of the company. However, the requirement of obtaining such prior approval of shareholders does not apply to payment of sitting fees to non-executive directors, if the same is made within the prescribed limits under the Companies Act (ie, 100,000 Indian rupees). Further, the limit for the maximum number of stock options to be granted to the non-executive directors in a financial year must also be approved by the shareholders. Independent directors are not entitled to any stock option.

The compensation packages for non-executive directors in the case of private sector banks are governed by the RBI Guidelines. As per these guidelines, the compensation policy for non-executive directors should be formulated by the board of directors in consultation with the remuneration committee of the bank, and such compensation must not exceed 1 million Indian rupees per annum for each director.

In addition to the aforesaid compensation, banks may pay sitting fees to non-executive directors and reimburse their expenses subject to compliance with the provisions of the Companies Act for participation in board meetings and any other statutory meeting.

Non-executive directors of companies other than listed companies and private banks are entitled to a sitting fee for attending meetings of the board or committees. The said fee has to be decided by the board and should not exceed 100,000 Indian rupees per meeting per director. The aforesaid provision is applicable to non-executive directors of private limited companies and unlisted public companies.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

Yes, executive compensation in listed companies must be disclosed in the annual report of a company as per the provisions of clause 49 of the Listing Agreement. Clause 49 mandates that all elements of a director's compensation package be disclosed in the annual report and should include salary, benefits, bonuses, stock options, pension, fixed-component and performance-linked incentives and service contracts.

The disclosure is also required to contain the criteria for making payments to non-executive directors and the number of shares and convertible instruments held by non-executive directors in its annual report. Alternatively, this may be published on the company's website and reference made thereto in the annual report.

Companies having paid up equity share capital not exceeding 100 million rupees and with a net worth not exceeding 250 million rupees, and whose equity share capital is listed exclusively on the small and medium enterprises (SME) platform and the SME-institutional trading platform, are not, however, required to make the aforesaid disclosures. The foregoing is not applicable to private companies.

Further, as per the Companies Act, companies (including private limited companies) are required to make a disclosure in their director's report pertaining to the compensation of all executives whose remuneration exceeds the following thresholds:

- if employed throughout the financial year, was in receipt of remuneration for that year that, in the aggregate, was not less than 1.2 million rupees;
- if employed for a part of the financial year, was in receipt of remuneration for any part of that year at a rate that, in the aggregate, was not less than 850,000 rupees per month; and
- if employed throughout the financial year or part thereof, was in receipt of remuneration in that year that, in the aggregate, or as the case may be, at a rate that, in the aggregate, is in excess of that drawn by the managing director or whole-time director or manager and holds by him or herself or along with his or her spouse and dependent children, not less than 2 per cent of the equity shares of the company.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

Yes, certain state-specific statutes such as the Delhi Shops and Establishments Act 1957, the Karnataka Shops and Establishments Act 1961 and the Andhra Pradesh Shops and Establishments Act 1988 require an employer to issue an employment letter covering limited aspects. Moreover, it has been held by various courts that failure to issue appointment letters to an employee would amount to an 'unfair labour practice'. Even as a matter of practice, written employment contracts are generally executed between the employer and the employee, which set out the terms and conditions of employment. The employment contracts generally used in India contain the following information:

- name and address of the employer and employee;
- title of job or nature of work;
- place of work;
- hours of work;
- probationary, confirmation and notice period;
- transfer;
- date of commencement of employment;
- remuneration and other benefits;
- leave entitlement;
- details of termination and consequences of termination;
- any non-compete, confidentiality and non-solicitation provisions; and
- dispute resolution, etc.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

Although the compensation structures and practices followed by different companies and industries vary, executive pay packages tend to contain four basic components: base salary, annual bonus, stock options and long term incentive plans.

In addition to these basic components, some companies provide other benefits, such as health insurance, life insurance, travel and housing allowances, and executive retirement plans.

While certain parts of an employee's compensation may depend upon his or her position within the organisation, companies in India are placing more stress on the performance factor in determining their executives' compensation. Practically speaking, the majority of companies consider the education and experience of an individual as one of the criteria for determining compensation, along with other factors such as ability and responsibilities. Companies also consider market and economic conditions important in determining executive compensation and therefore compensation can vary according to the sector in which the company operates.

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10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

Yes, there are limits on overall managerial remuneration in the case of absence or lack of profit in the company and on the total compensation and remuneration payable by a public company to its directors, including managing director, full-time directors and managers. These limits do not, however, apply to private companies.

Any upward change in the overall limits must be approved by either the central government or by the shareholders' meeting of the company.

These compensation packages and remuneration can be bifurcated into different tax-friendly components of which the tax exemptions and deductions can be availed of, as per Indian income tax law.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Deferral of incentives is an arrangement in which a portion of the executive's compensation is paid at a date after which the income was actually earned by the executive. The same is practised in India and some examples of deferred compensation common in India are pensions, retirement plans and employee stock options. The main reason behind deferral of incentives is the taxation benefit derived by executives as tax on such benefits is required to be paid at a later date. While designing compensation plans, companies seek to ensure that there is a balance between fixed pay and variable or deferred pay.

With regard to the vesting of awards, Indian companies follow two types of schemes for stock options: employee stock options schemes (ESOS) and employee stock purchase schemes (ESPS). While the minimum vesting period prescribed by the SEBI Regulations is one year, most companies provide a time frame of two to five years for employees to exercise their vested options.

The provisions with regard to pension and retirement benefits are provided in questions 32 to 34.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

With regard to executives and non-workmen, there are no legal provisions mandating that recurrent discretionary incentives provided to employees will become a contractual entitlement over time. Companies do tend, however, to provide the same as a part of their company policy and the compensation or incentive package of the executives. Once certain benefits have been provided to employees repeatedly, they are generally not withdrawn by the company unless there are compelling reasons for this, such as economic conditions.

Labour laws are generally read in a pro-employee manner and in furtherance of such intention, companies also tend to take a conservative view in favour of the employees, including non-workmen.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

Generally, the type or amount of incentive compensation awarded to one executive does not affect the compensation being provided to other executives or employees.

The compensation awarded to executives may vary depending on various factors such as the qualification, type of work, experience and responsibilities and availability, and is governed by the company policy or its service rules in that regard.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

The primary objective of providing incentive compensation to executives and employees is to reward them when the organisation grows in profitability and value over time. Profitability of the company and potential and performance of an employee, etc, are factors that influence incentive compensation. However, there are no provisions under present Indian laws wherein the incentive compensation, which has already been paid, would have to be repaid to the company by an employee, except in cases where such incentive compensation was received fraudulently.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

There is a variety of equity incentive plans – or, as is more commonly referred to in India, employee stock option plans (ESOPs) – available to employees in India and some of the most prevalent ones are:

- ESOS: this scheme grants a right to employees to buy shares of the employer company at a predetermined price;
- ESPS: this scheme provides employees with the right to purchase company shares, usually at a discount from the fair market share value;
- restricted stock unit: under this plan, employees are entitled to receive company stock on a specific date in the future, subject to fulfilment of certain conditions, such as tenure of employment;
- restricted stock award: under this plan, an employee receives an award of stock subject to certain underlying conditions (if the underlying conditions are not met, the shares are forfeited);
- stock appreciation right (SAR) or phantom equity plan: these plans do not actually allot the company's stock to the employees, but reward employees with compensation that is tied to the performance of the company's stock. The employees are allotted notional shares or units at a predetermined price and once the vesting conditions are fulfilled, the employee is paid the cash equivalent of the net gain;
- general employee benefits scheme (GEBS): this scheme entitles employees to welfare such as health benefits, hospital care or benefits at the time of accident, sickness, etc; and
- retirement benefit scheme (RBS): this scheme allows for providing benefits to employees post retirement, entitling them to cash, health insurance etc.

However, the SEBI Regulations are silent on the aspect of both GEBS and RBS as being cash-based or equity-based. Since the Regulations are silent on any restrictive implementation of GEBS and RBS, apart from a cap (ie, total value of the shares of the company or shares of its listed holding company should be under 10 per cent of the book value or market value or fair value of the total assets of the scheme, whichever is lower, as appearing in its latest balance sheet) on the total value of both schemes, companies have some freedom and flexibility in administering the schemes.

There are some less frequently used programmes like performance share plan, performance unit plan and deferred compensation system.

Vesting ESOPs usually come with a vesting period and employees can exercise these rights only after such period is over. In the event that the employee leaves the company before the vesting period is over, the employee may lose his or her rights over the company's shares. The SEBI Regulations prescribe a minimum vesting period of one year in the case of ESOSs and SARs and a minimum lock-in period of one year in the case of ESPSs, along with certain other conditions to be followed with regard to ESOPs.

Practically speaking, most companies in India use a vesting period of up to three years for the options or stock, and such awards are generally based on the tenure of the employee and not employee performance.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

The forms of equity compensation provided above are definitely tax advantageous for employees as well as for employers, as lower taxes are paid on such awards in comparison with cash awards given to employees, which attract higher rates of tax.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

Generally, no registration or notice for ESOPs is required, but the ESOP plan must be approved by the shareholders of the company by passing a special resolution with an explanatory statement. Also, an ESOP register is required to be maintained by the company providing such benefits. Further, in the case of a listed company, where a trust has been

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set up, the trust deed must be filed with the stock exchange in India at which the shares of the company are listed. It should also be borne in mind that prior approval from shareholders is required before the granting of such schemes or the modification of existing schemes. The board of directors, in the director's report, must provide the details of such ESOP plan.

18 Are there withholding tax requirements for equity-based awards?

In India, benefits derived from ESOPs are taxable as part of the income of the employee and are treated as perquisites. The perquisite's value is calculated as the difference between the fair market value of the share on the date of exercise of the option by the employee and the exercise price paid by the employee. Accordingly, an employer is required to calculate the benefit under the ESOP (including the same as part of the salary) and withhold or deduct tax in respect of any arising tax liability.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

The RBI now permits employees of Indian subsidiaries of foreign companies to acquire shares of the foreign holding company. Thus, in order to provide employees with the option of holding shares of the non-local parent company and to make it tax efficient for the company, some Indian affiliates enter into chargeback agreements with their respective parent companies.

The issues that arise relate to transfer pricing under the Indian Income Tax Act 1961 (the IT Act) and service tax on the reimbursement under indirect tax laws in India.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

ESPSs are quite popular in India. The SEBI Regulations define an ESPS as 'a scheme under which a company offers shares to employees, as part of public issue or otherwise, or through a trust where the trust may undertake secondary acquisition for the purposes of the scheme'. Further, the shares issued under an ESPS must be locked in for a minimum of one year from the date of allocation except in the following situations:

- where shares are allocated by a company under an ESPS in lieu of shares acquired by the same person under an ESPS in another company that has merged or amalgamated with the first company, the lock-in period already undergone in respect of shares of the transferor company should be adjusted against the lock-in period required under this sub-regulation; and
- the ESPS is part of a public issue and the shares are issued to employees at the same price as in the public issue.

Some of the issues that arise with regard to ESPSs relate to the requirement of obtaining approvals from shareholders in certain circumstances and the various disclosures and compliances required towards ESPS under the SEBI Regulations, the Companies Act, the Foreign Exchange Management Act, the IT Act, etc.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Labour statutes determine the benefits that should be provided by the employer to its eligible employees.

Some of the most important employee benefits that are statutorily required to be provided to an employee include the following:

- entitlement of paid leave (annual, sick and casual), accumulation of annual leave and right of encashment of annual leave by an employee at the time of termination;
- enrolment of eligible employees under the Employees' Provident Funds and Miscellaneous Provisions Act (ie, employees earning wages of up to 15,000 rupees per month) and required contributions by the employer with the concerned provident fund department;
- maternity benefit to women workers (under the Maternity Benefit Act 1961, which also regulates the employment of women workers before and after childbirth);
- payment of a gratuity (after completion of five years of continuous service) to be paid by the employer to the employee at the time of termination of employment, etc (under the Payment of Gratuity Act);
- enrolment of eligible employees under the Employees' State Insurance Act (ie, employees earning wages of up to 21,000 rupees per month) and the deposit by employers of the required contributions into a bank duly authorised by the Employee's State Insurance Corporation; and
- entitlement of compulsory bonus to eligible employees (ie, employees earning wages of up to 21,000 rupees per month) as per a recent amendment under the Payment of Bonus Act.

Of these benefits, the last two are only extended or given to workmen. While there is no statutory bar on withdrawing the voluntary benefits given by an employer over and above statutory ones, companies typically issue a notice to the employee before doing so.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Employee benefits prevalent for executives include performance bonuses, stock options and other discretionary benefits or perquisites, such as life insurance or retirement plans, free lunches, holidays, company cars, leisure facilities, club memberships and child education allowance.

Certain incentives or benefits (such as rent allowance, conveyance allowance, medical reimbursement and child education allowance) are exempt from tax liability either fully or to the extent allowed under the prevailing IT Act and the rules thereunder.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

Certain state-specific Shops and Establishments Acts stipulate that employees can only be terminated by the employer for 'reasonable cause' by giving one month's notice or wages in lieu thereof. In many states, however, such provisions do not apply to employees engaged in a confidential capacity or employees occupying positions of management. In the said scenario, such executives may be terminated in accordance with the terms and conditions of their employment contracts.

In practice, employment contracts provide for termination by either party 'without cause' by giving a notice. Such clauses have, however, been challenged by employees before the courts in India.

In a case of termination for misconduct, the cause would have to be established by the employer by conducting an enquiry as per the procedure laid down under the relevant Shops and Establishments Act prior to terminating the contract of the employee.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

Non-workmen are entitled to notice periods, or notice pay in lieu thereof, as per the relevant Shops and Establishments Act and the terms of their contracts. There are no statutes in law governing severance pay to non-workmen, but a non-workman is entitled to any encashment of unused leave, gratuity or any other contractual benefits as may be agreed upon between the parties.

25 What executive severance payment level is typical?

There are no principles or statutes in law regarding severance pay to high-level executives. Such packages are usually governed by the contracts of employment or negotiations with the individuals concerned, or company policy, if any. Typically, executives receive their gross salary as severance payment, and executives generally also receive pro rata severance pay on their annual wage. Severance payments increase in the case of termination resulting from a change in ownership or a corporate takeover. Such uncertainties (ie, change in control) are usually adequately safeguarded by golden parachute clauses. Golden parachute clauses generally extend pay and benefits such as severance pay, stocks, bonuses, heath and insurance benefits from one to five years.

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26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

As per various state-specific Shops and Establishments Acts, dismissal of an employee by an employer can only be for reasonable cause (such as redundancy, organisational restructuring or closure) by giving one month's notice or salary in lieu thereof.

Dismissal can also be on account of misconduct (such as poor performance, wilful insubordination or habitual neglect of work) and can occur with immediate effect after such misconduct has been established by an enquiry.

The definitions of 'constructive dismissal' or 'good reason' have not been provided under Indian statutes.

27 Are 'gardening leave' provisions typically used in employment terminations?

The Indian courts in several judicial precedents have refused to enforce post-termination restrictive covenants or clauses of employment. Non-compete clauses as well as clauses styled as 'gardening leave' are considered 'restraints of trade' and thus void under Indian contract law. In practice, however, it is common to include such covenants in India in employment contracts as they have a deterrent value and prevent employees from engaging in competing activities post-employment. Typically, the time varies from three to six months.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

Waiver or release of statutory claims or benefits is not permitted by entering into a contract. Accordingly, an employment agreement waiving the statutory benefits of an employee may be considered voidable and can be challenged on the ground that the consent of the employee for the said contract has been obtained by coercion owing to disparity in the bargaining position of the employer and the employee.

Waiver of contractual benefits may, however, be enacted subject to agreement between the parties.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

The post-employment restrictive covenants usually present in employment contracts in India are non-compete, non-solicitation of employees and customers, non-disclosure of confidential information and trade secrets, non-poaching and non-disparagement. Generally, restricted periods may vary from one year to five years.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Non-compete post-employment provisions must be considered in light of section 27 of the Indian Contract Act, which stipulates that an agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is void. A restrictive non-compete covenant extending beyond the term of service is unenforceable, irrespective of the reasonableness of such restrictions, except in cases involving sale of goodwill. Accordingly, Indian courts have determined that post-termination non-compete restrictions are unenforceable.

Although covenants with respect to post-employment non-solicitation and non-disclosure of confidential information and trade secrets may be enforced depending upon the circumstances of each particular case, evidence adduced by the employer and the parameters under which the clause is drafted will be taken into consideration.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

The remedy available to an employer for breach of restrictive covenants such as non-solicitation is to claim damages for losses suffered by the employer on account of such breach.

Where confidential information or trade secrets are concerned, an employer may also approach a competent court to seek an injunction so that the employee does not disclose the employer's confidential information or use trade secrets, or to claim damages for losses suffered by the employer as a result of misuse of such information.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Yes, employees are provided with the benefits of a pension, the Provident Fund Scheme and a gratuity under the provisions of the Employees Provident Funds and Miscellaneous Provisions Act 1952, the Employees Pension Scheme 1995, the National Pension Scheme, the Employees' Deposit-linked Insurance Scheme 1976 and the Payment of Gratuity Act, respectively.

Voluntary or non-statutory benefits, once provided, are generally not discontinued. Given the competitive market and anti-discrimination laws in place, most companies try to continue the benefits being offered to their employees to retain talent.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Most executives are provided with provident fund benefits voluntarily and a gratuity as per the terms of the corresponding legislation. Some companies offer superannuation plans to selected employees but these are not currently very popular since they have a long vesting period and funds can only be withdrawn after a certain time.

Pension plans are popular with government employees but very few private companies offer such plans in India.

Certain tax incentives are available to both employers and employees under employee benefit arrangements; for instance, a gratuity is tax-free up to 1 million rupees; contributions to the national pension scheme reduce tax liability up to 15,000 rupees; and the interest and final amount under the Provident Fund Scheme is tax-deductible.

34 May executives receive supplemental retirement benefits?

Yes, employers like to provide certain additional benefits to their most valued employees, mostly in the form of private provident funds (as opposed to such funds under the Employees Provident Fund Organisation), post-employment insurance policies and post-employment medical care.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

As per the provisions of the old Companies Act 1956, a company was not permitted to indemnify its directors and officers and there was an express restriction to this effect therein. A company could indemnify its directors and officers only for liabilities incurred in a matter in which they are acquitted or discharged, or judgment is given in their favour.

There is, however, no such express restriction under the new Companies Act and it is now possible for directors and officers to obtain indemnities from their company. Thus, companies prefer to obtain directors' and officers' insurance policies in India. It is pertinent to note that such policies typically do not cover claims arising out of fraud, wilful misconduct and other forms of dishonest acts.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

In the event of an asset sale in India in which a company or business division thereof is acquired, its employees are not automatically transferred to the acquirer by operation of law. The rights of the employees in question vary significantly depending upon whether they are workmen or non-workmen. The acquirer is under an obligation as per the Industrial Disputes Act to provide transferred workmen with continuity of service and terms of employment that are no less favourable than their earlier terms of employment.

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Executive and managerial-level personnel fall within the category of non-workmen and their rights in the case of an acquisition are governed purely by the terms and conditions of their employment contracts. The acquirer can execute fresh employment contracts with retained executives, which need not contain the same benefit obligations. Typically, however, the acquirer will offer the same terms and conditions of employment to retain certain executives.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

There is no law requiring that executive retention or related arrangements be made in connection with a change in control. Practically speaking, however, in order to prevent disputes and claims from employees during or after an acquisition or a change in control, companies in India have started incorporating provisions relating to executive retention, either directly in employment contracts or by executing separate executive retention agreements with high-level executives and key employees.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

Companies sometimes offer accelerated vesting in a change-of-control situation to certain key employees, and the prohibitions or terms and conditions of the same are governed by agreements between the company and its employees and the terms and conditions of the acquisition, merger or amalgamation. Acceleration is usually a negotiable term depending upon the role and position of the employee in the organisation.

'Cashed-out' equity awards are subject to capital gains tax, except in the case of listed companies.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

Foreign exchange controls in India as prescribed under the Foreign Exchange Management Act, the amendments made thereto and the rules made thereunder are applicable on all foreign exchange transactions. Thus, the foreign exchange control rules would be applicable to and govern the remittance of funds, transfer of employer equity and equity-based awards to executives.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

There is no law in India that requires the translation of employment-related documents, including employment agreements, into the local language and accordingly, there is no penalty for not translating such documents into the local language or the employee's native language.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are generally no prohibitions on tax gross-up and tax equalisation payments in India. As per the relevant taxation laws in India, all taxes grossed up are included in the income of the employees to ascertain their tax liability. Tax equalisation policies are common in Indian companies and India has also entered into treaties with various countries to grant double taxation relief to foreign employees working in India and Indian employees working abroad. Tax indemnity may be governed by the terms of the employment contract.

42 Are choice-of-law provisions in executive employment contracts generally respected?

The choice of law in an employment contract between an Indian employer and an Indian employee should be Indian law. The Supreme Court of India has held that if both the parties to a contract are Indian, they cannot derogate from Indian law. Therefore, the choice of two Indian parties to choose a foreign law is not recognised. However, in a contract between an expatriate employee and an Indian employer, the parties may choose foreign law as the governing law, and the same would generally be respected by Indian courts.

Chadha & Co.
Advocates and Legal Consultants

Rahul Chadha **rchadha@chadha-co.com**
Savita Sarna **ssarna@chadha-co.com**
Natasha Sahni **natasha.sahni@chadha-co.com**

S-327, Greater Kailash – II
New Delhi 110 048
India

Tel: +91 11 4383 0000
Fax: +91 11 4163 9295
info@chadha-co.com
www.chadha-co.com

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Italy

Emanuela Nespoli

Toffoletto De Luca Tamajo e Soci

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

The main framework affecting executive compensation or employee benefits can be found in the following:

- Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010;
- Legislative Decree No. 72-2015, implementing Directive 2013/36/EU (CRD IV);
- Circular No. 285 of 17 December 2013 issued by the Bank of Italy (updated 10 March 2015);
- Italian Insurance Supervisory Authority (IVASS) Regulation No. 39 of 9 June 2011: remuneration policies in insurance companies;
- Disposition of Italy's Central Bank (the Central Bank Regulation) on the subject of remuneration usage and policies adopted by the banks;
- article 51, paragraph 2, letter g of the Consolidated Income Tax Code (TUIR);
- Legislative Decree No. 259 of 30 December 2010, which inserted article 123-ter into Legislative Decree No. 58/1998 on financial brokerage;
- the National Commission for Companies and the Stock Exchange (CONSOB) Regulation of 14 May 1999 as amended on 27 April 2017 (CONSOB is the public authority responsible for regulating the Italian financial markets);
- Law No. 262 of 28 December 2005, which inserted article 114-bis into Legislative Decree No. 58-1998 on financial brokerage.
- Code of Conduct for Listed Companies (the Preda Code) of March 2010 containing compensation structure, remuneration report and compensation committee, and subsequent amendments;
- Prime Ministerial Decree of 23 March 2012; and
- EBA Guidelines, dated 21 December 2015, effective on 1 January 2017 (they are not binding for banks, but consist of instructions for national government agencies of the banks sector).

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The primary entities responsible for enforcing such rules are the Bank of Italy, IVASS and CONSOB.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

According to the Italian Civil Code the remuneration of board members is determined by the shareholders' general meeting. Executive directors' remuneration is determined by the board, within the limits set by the shareholders' general meeting.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Consultation with a union, works council or similar body is not required in such cases, apart from cases in which remuneration is provided for in company-level collective bargaining agreements (CBAs).

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

Yes, for example, up-front and cash-based payments in advance of bonuses paid to risk-takers in the financial sector.

With specific reference to the public sector, the Prime Ministerial Decree of 23 March 2012 set the maximum annual salary for those receiving annual salaries or fees from public financing at the same total annual salary paid to the general president of the Court of Cassation, which amounted to €293,658.95 in 2011, to €311,658.53 in 2013 and now to €240,000.

This salary is also used in the regulation of the maximum salaries of the president and members of independent administrative authorities (the Antitrust Authority, CONSOB, the Electricity and Gas Authority and the Communications Safeguard Authority). The maximum salary of the members of these independent authorities is set at 10 per cent less than the total annual salary of their respective presidents.

6 What rules apply to compensation of non-executive directors?

In general the rules for executive directors also apply to the compensation for non-executive directors. Legislative Decree No. 72-2015, relating to financial and private insurance sectors, specifies that incentive mechanisms for non-executive directors are normally avoided; and in case they are provided, they still represent an immaterial portion of the remuneration.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

Decree No. 259 states that a company must issue an annual report on the compensation received by its directors, general managers and top executives. This information must be published either on the company's website or made available at the company's premises at least 21 days before the annual shareholders' meeting. The report must be divided into two sections. In the first, the remuneration policy for such positions and the procedure used to adopt and implement this policy must be set out. The second section must contain a full analysis of each item that makes up the remuneration, including the economic provisions laid down in the event of the termination of the office or the employment relationship. The National Commission for Companies and the CONSOB Regulation specify in detail the information that must be included in both sections of the annual report.

According to the Central Bank Regulation, Regulation No. 39-2011 of the Supervisory Authority for Private Insurance Undertakings and Insurance Undertakings of Public Interest) (the ISVAP Regulation) and the Code of Conduct of the Italian Stock Exchange, as amended in December 2011 (the Stock Exchange Code of Conduct), the annual

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remuneration report must disclose remuneration policies and the specific compensation amounts.

Section 3 of Law No. 244 of 24 December 2007 and the government regulation of 10 June 2010 state that the names of the individual executives of public entities and their respective levels of compensation must be disclosed on the website of the relevant state-owned body and must also be communicated to the government and parliament.

Law No. 262 of 28 December 2005 states that any financial organisation must publish:

- the reasons for which it has adopted its incentive plan;
- the names of the employees and self-employed collaborators who benefit from the incentive plan;
- the method and the conditions it is implementing; and
- the approach used for determining the stock option price.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

There is no specific requirement for a written employment contract; however, in order to be deemed valid, certain terms and conditions must be in writing, such as those regarding probationary periods and fixed-term validity periods or non-compete agreements. In addition, the employer must inform the employee in writing (within 30 days of the employment start date) of some of its terms including salary and the number of paid holiday days.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

Under Italian law it is possible for an employer to grant employees special kinds of variable compensation, which, in the majority of cases, are linked to the achievement of predetermined individual targets or the company's economic results. Such variable compensation may be in addition to the employee's minimum and fixed wage.

Many employers in Italy offer bonuses to their employees and there are myriad bonus schemes that could relate to an individual's performance or that of a particular team or even of the company as a whole. For example, it is common for a salesperson to receive 'commission', which is normally a fixed percentage of any sales he or she has made. As another example, in the banking and financial sector, bonuses have traditionally formed a very significant part of employees' overall remuneration, sometimes even exceeding the basic salary. Such practices have come under increasing scrutiny and regulation in recent times.

Specific restrictions may apply to bonuses paid in the financial services and private insurance sectors. The Bank of Italy regulations and the Italian supervisory body regulations for private insurance companies include detailed provisions regarding bonuses – including retention and guaranteed bonuses – for banks, building societies, investment firms and private insurance companies. Further, in the financial sector, an Italian law introduced specific provisions on bonus taxation in 2011. Specifically, any bonus payments made or stock options awarded after 17 July 2011 to employees in the banking sector will attract a mandatory additional tax, at a rate of 10 per cent, on any amount that exceeds the individual's fixed remuneration.

Generally speaking, the objectives linked to variable payments and the related calculation system could lawfully be modified, as long as permission to do so is expressly given in the employment contract and in the bonus scheme itself or in an individual letter to the employee. An employer must ensure that any discretion as to whether to pay a bonus and the amount of any bonus is exercised in good faith and in a non-discriminatory manner.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

With reference to the public sector, see question 5.

With reference to the financial sector, the Central Bank Regulation provides for several limits for directors and employees of this sector, including the ratio of fixed to variable remuneration not being able to exceed 1:1 (but if there is shareholders' general meeting approval, the aforementioned ratio could be raised to 1:2); the deferment of a substantial part of the variable remuneration; and the material portion of the bonus not being able to be paid in financial instruments.

Under the Central Bank Regulation, the ISVAP Regulation and the the Stock Exchange Code of Conduct, bonus incentive schemes must be linked to risk-taking and long-term company strategies. The remuneration policy must set a maximum limit for variable remuneration, with an appropriate balance in place between the fixed and variable remuneration components.

The Central Bank Regulation and the ISVAP Regulation state that variable remuneration is forbidden to members of control boards and is not recommended for non-executive directors. Furthermore, they also state that in any event, it must not represent a significant part of the individual's remuneration. The Stock Exchange Code of Conduct states that for non-executive directors, variable remuneration must not be linked to company performance and that in any event, it must not represent a significant part of the individual's remuneration.

The Central Bank Regulation states that there must be no guaranteed bonuses, with the only exception being first-year welcome bonuses.

The Central Bank Regulation and the ISVAP Regulation state that non-financial criteria must be taken into account when awarding bonuses. Bonuses must be based on predetermined and measurable individual, business unit and company performance criteria. A multi-year accrual period must be the preferred option. Bonuses must be linked to the level of risk being taken.

The Central Bank Regulation and the ISVAP Regulation state that bonuses must be subject to clawback and malus clauses in order to reduce or to reclaim payments.

The Central Bank Regulation states that all severance payments provided for in the case of early termination of an employment contract (eg, a 'golden parachute') must be connected to performance and to the risks undertaken. Banks must establish severance payment limits.

The ISVAP Regulation states that companies must establish specific circumstances in which severance payments may not be paid to directors.

The Stock Exchange Code of Conduct states that severance pay must not be higher than an amount calculated in relation to one or more years' remuneration and that it must not be paid if the performance has been inadequate.

Law No. 214 of 22 December 2011 states that any portion of severance pay that exceeds €1 million gross is subject to a higher taxation rate than that generally applied to severance payments.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Yes, deferral and vesting of incentive awards is permissible. The Central Bank Regulation states that 40 per cent of variable remuneration must be deferred and paid three to five years after the end of the accrual period (60 per cent for top executives and directors).

Under the ISVAP Regulation and the Stock Exchange Code of Conduct a substantial and relevant portion of the variable remuneration must be deferred for a reasonable period of time.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

Yes, this could potentially happen, but a company could minimise the risk by using adequate wording in employment contracts or agreements.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

No.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

Yes, it is permissible and requested in banking and insurance sectors and, in general, for listed companies.

Malus or clawback arrangements are provided for either the up-front or deferred part of the payment in the following cases:

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- where the employee participated in or was responsible for conduct that resulted in significant losses for the company;
- where bonuses have already been paid on an 'obviously incorrect' basis;
- the employee commits fraud;
- the employee is negligent; and
- the employee violates his or her legal obligations.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

The removal of previously existing tax benefits has reduced the use of financial instruments. The remaining main forms of equity compensation are stock grants and stock options, the typical vesting period of which is three years.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

In general, there are none; however, under article 51, paragraph 2, letter g of the TUIR, for instance, shares that are offered to employees are excluded from the calculation of the employee's taxable income as long as:

- the shares are offered to all employees;
- the shares have a total value of less the €2,065.83 for each tax period; and
- the shares are not repurchased by the issuing company or the employer or, in any case, sold within three years of them being received.

Stock options count as income deriving from an allocation that is not subject to social security contributions. This is a genuine discount for the employer.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

Yes (see question 7).

18 Are there withholding tax requirements for equity-based awards?

Typically, yes, as equity-based awards are paid to the employee and are taxable for income tax purposes. The employer is therefore usually required to withhold the amount due as income tax from the awarded sum.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Yes, they are quite common overall in Italy. The main issues for the parent company could be the determination of the cost of the employee benefits and the deductibility of such cost.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

No, they are not, particularly following the 2008 reform that eliminated the favourable tax treatment for this type of award.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

There is no requirement for employers to provide employees with any particular benefits other than state pension contributions, which are mandatory and subject to a separate set of rules. Employers must contribute to state social security, health and unemployment insurance. The total rate for these state mandatory insurance schemes amounts to approximately 35 per cent, depending on the employer's sector of activity. Further, national CBAs may provide for additional contributions to be made by the employer to the pension fund or to private healthcare plans provided by those national CBAs.

The employee's length of service may give rise to a number of statutory benefits (eg, the right to increased severance pay). Collective agreements also provide for various benefits for employees depending on their length of service, including automatic salary increases, longer periods of sick leave and longer notice periods.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Employers are free to decide the benefits to be granted to executives. The most common benefits offered include:

- use of a company car or payment of a car allowance;
- mobile phone;
- laptop;
- accommodation allowance;
- restaurant vouchers;
- life insurance or death-in-service insurance;
- private medical insurance;
- health insurance;
- share incentives; and
- stock options.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

Under general provisions, an employer can unilaterally withdraw from an employment contract with an executive without cause only by giving notice (or paying the indemnity in lieu). The length of the notice period is usually determined by CBAs (in general ranging between six and 12 months, depending on the length of service).

The executive is not entitled to a notice period if the employer withdraws from the contract for 'just cause' (just cause is a serious act of misconduct that prevents the employment from continuing, even on a temporary basis).

Many CBAs qualify any dismissal as unfair if it is not 'justified'. Therefore, if a CBA applies and a dismissal is found to be unfair, the employer will have to pay the executive a 'supplementary indemnity', as provided for by the applicable CBA.

Also, if a dismissal is deemed as having a discriminatory nature and when the law expressly provides for the nullity of the dismissal, the dismissal is declared null and void and the judge will order the employer to reinstate the executive in his or her job.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

In the case of termination of an employment contract, the employee has a right to severance indemnities (TFR) already accrued by the employer or paid to pension funds during the course of the employment relationship. The TFR is calculated by adding for each year of service an amount equal to the annual salary divided by 13.5. The reference salary is made up of all the amounts, including the equivalent of any benefits in kind, paid to the employee not just on an occasional basis, with the exclusion of what is paid to cover expenses.

As a general rule, employees cannot waive mandatory rights provided for by the law or by CBAs and related to their employment relationship. They therefore have six months to withdraw such waivers, unless the agreement was signed before one of the competent bodies provided for by the law, which grants a particular protection to employees. In this case, the waivers are effective upon signing the agreement.

When one of these agreements is signed, the parties can also generally negotiate the payment of further sums (see question 25) as compensation for the termination of the contract. Furthermore, if the executive satisfies the criteria required, he or she may be granted unemployment indemnities provided for by the law.

25 What executive severance payment level is typical?

The only mandatory severance payments are the TFR (see question 24) and the payment in lieu of notice, if due.

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Update and trends

A new bill, introducing a more favourable tax regime for carried interest, will shortly be approved. Specifically upon the occurrence of certain conditions, the taxation on carried interest will decrease to 26 per cent, rather than the current rate, which is approximately 45 per cent.

Also, if the employer and the executive enter into an agreement, the latter is often awarded additional compensation, which is usually calculated taking into account the possible penalties provided for by the applicable CBA. In fact, there is no general rule to assess the actual amount. Therefore, it usually depends on the reasons for the possible dismissal and on the supplementary indemnity provided for by the applicable CBA in case of unfair dismissal (supplementary indemnities range, for example, between two and 24 months' salary under the CBA for the industry sector and between the equivalent of the payment in lieu of notice and 18 months' salary under the CBA for the trade sector).

However, if an employee intends to file claim against the dismissal he or she has to first formally challenge the dismissal within 60 days and then file a claim in court within the following six months.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

Italian law does not foresee 'constructive dismissal' as such. However, an employee may resign for just cause (see question 23) with the right to receive the notice period payment. As for dismissal for 'cause', executives can always be dismissed for just cause. Also, CBAs often require dismissals to be justified. The criteria used to assess the fairness of the dismissal of an executive, differently from those used for other employees, is that of *giustificatezza*. In general terms, this could include any reasons for dismissal that are not arbitrary, merely at the discretion of the employer, or discriminatory, and that are compliant with the general principles of fairness and good faith.

27 Are 'gardening leave' provisions typically used in employment terminations?

Gardening leave provisions would not be enforceable in Italy given that they violate the rule according to which employees cannot be demoted. In fact, employees not only have an obligation to work but also a right to do so. Therefore, keeping an employee at home without working would be considered a demotion in the case of a claim.

However, when signing a settlement agreement concerning the termination of the employment contract, the parties may agree that the executive, while generally maintaining his or her right to salary, will be exempted from carrying out his or her job.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

An executive can always waive his or her right to file judicial proceedings against a dismissal found to be unfair by signing a settlement agreement before one of the competent bodies provided for by the law (as described in question 25).

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Non-compete covenants and covenants concerning non-solicitation of employees or customers are very common under Italian law. The restricted period is typically about one year.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Pursuant to article 2125 of the Italian Civil Code, the employer and employee can enter into a non-compete agreement either at the beginning of or during the employment relationship (including during the probationary period) or after its termination. Article 2125 of the Italian Civil Code sets out the following formal conditions in order for the non-compete clause to be valid.

The non-compete agreement must be in writing. Furthermore, pursuant to article 2125 of the Italian Civil Code, the non-compete clause is valid only insofar as it complies with certain statutory limitations. It must specify the activity forbidden to the employee, its length and the geographical scope of the obligation, and also provide for compensation in favour of the employee.

The exact amount of the compensation is not provided for by the law, but must be 'congruous' in relation to the activity, the territory and the duration of the covenant, otherwise the entire non-compete clause will be deemed void.

The geographical scope of the non-compete clause must be evaluated in relation to the amount of the agreed compensation and the extent of the forbidden activities. The scope of the covenant, however, must not prevent the employee from having a source of income; if it does, it could be considered void.

Finally, the duration of the non-compete agreement signed with an executive cannot be longer than five years. If a non-compete clause provides for a longer period, it will automatically be reduced to the statutory maximum period.

As regards non-solicitation covenants, parties can freely agree to include them in the employment contract.

Companies usually outline in such clauses the kinds of acts that are forbidden to the employee, also providing for penalties in case of infringement of the obligations undertaken.

Non-solicitation clauses are considered similar to non-compete clauses; therefore, they should also be limited in their scope.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

In the case of a breach of post-employment restrictive covenant, the employer can file a claim that could be decided through a particularly accelerated judicial procedure provided for by the Italian Civil Procedure Code in order to immediately prohibit the employee from continuing with the violation.

Moreover, penalties in case of a breach of the restrictive covenants are usually provided for by the covenants themselves and consist in economic compensation.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

The Italian pension system is basically made of two pillars: the compulsory social security system (managed by the public body, the National Institute of Social Security) and voluntary supplementary private pension schemes.

As regards executives, CBAs often also provide for specific supplementary pension schemes, which vary according to the sector (eg, industry, trade and insurance). Also, companies are free to provide for specific supplementary pension schemes for their employees.

If pension and other retirement benefits are provided for by CBAs or by the individual employment contract, the employer cannot unilaterally discontinue them. Also, according to case law, the employer may not have the right to discontinue economic benefits that it has repeatedly and of its own accord given to its employees. Should this rule be violated, the employer could be liable for damages.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

The most common retirement benefits are those provided for by CBAs. Insurance companies usually also grant their employees additional supplementary pension schemes.

Supplementary pension schemes benefit from a particularly favourable fiscal regime, provided for by Legislative Decree No. 252/2005.

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34 May executives receive supplemental retirement benefits?

Yes. The most common supplemental benefits are the special pension schemes provided for by CBAs (see question 32) and the pension plans usually granted by insurance companies.

General principles against discrimination apply, but parties are usually free to negotiate the terms of the individual employment contract.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

Yes. The law and usually also CBAs (eg, for trade and industry) provide for the obligation of the employer to indemnify executives against claims relating to actions taken in the exercise of his or her functions, except for in the case of wilful misconduct and serious negligence.

Also, in order to comply with these obligations, companies often provide for insurance policies.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

Under Italian law, a transfer of undertaking is defined as any operation that, by means of 'a transfer of contract or a merger', transfers the ownership of an undertaking (or a part thereof) 'regardless of the type of legal procedure or legal act by which the transfer is made'. A mere transfer of shares does not constitute a transfer of undertakings.

Pursuant to article 2112 of the Italian Civil Code, in the event of a transfer of undertaking, there will be an automatic transfer of the employees belonging to the undertaking to the transferee.

Also, in principle, the employees must benefit from the same conditions of employment as they held with their former employer and any benefits provided under the employment contract must be maintained after such transfer. If these cannot be replicated by the transferee, employees must be compensated according to general principles.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

It is not customary in Italy but it could happen, especially in favour of top-level managers.

If the change of control is because of the sale of company assets, the last paragraph of article 2112 of the Italian Civil Code provides that if the employee's work conditions undergo a substantial change in the three months following the transfer, he or she may resign and he or she has the right to receive payment in lieu of notice.

Also, if the change of control is owing to a mere transfer of shares, some CBAs provide that, in the event of a change in control, executives have a right to resign within a set time frame and to obtain an indemnity. The time frame and the amount of the indemnity are determined by the CBA applied. For example, under the CBA for the industry sector executives may resign within 180 days of the date of the transfer, with no obligation to give notice, and they will be paid an indemnity equal to one-third of the indemnity in lieu of notice, due in case of dismissal. Under the CBA for the trade sector, said time frame is six months and the executive has the right to the payment in lieu of notice.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

There is no general rule concerning such restrictions, but they may be provided for by internal company regulations (see questions 10 and 11).

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

If the law applicable to the employment contract provides for exchange control rules, these must be respected.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

No, provided that both parties fully understand the terms of the agreement.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

No, there are no prohibitions, but it is not typical to include this kind of provision in an employment contract.

42 Are choice-of-law provisions in executive employment contracts generally respected?

Choice-of-law provisions are usually respected generally, but there is always the risk of claims being filed to challenge some clauses of the contract if they violate mandatory provisions.

Ius Laboris Italy Global HR Lawyers
Toffoletto De Luca Tamajo

Emanuela Nespoli **sen@toffolettodeluca.it**

Via Rovello 12
20121 Milan
Italy

Tel: +39 02 721 441
Fax: +39 02 721 44500
www.toffolettodeluca.it

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Japan

Hiroko Shibata*
Nishimura & Asahi

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

Executive compensation is primarily regulated by the Companies Act. A listed company must disclose certain details of executive compensation in its annual securities report. The securities report must be prepared in accordance with the requirements of the Financial Instruments and Exchange Act (FIEA).

Employee benefits are primarily governed by the Labour Standards Act and Labour Contract Act. If employee benefits are set out in a collective labour agreement, the Labour Union Act also applies.

Individual executives and employees are taxed according to the Income Tax Act, and companies are subject to the Corporate Tax Act with respect to executive compensation arrangements and employee benefits.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The Financial Services Agency and the Tokyo Stock Exchange oversee disclosure regulations for executive compensation. The Labour Standards Supervision Office is the primary government agency tasked with the enforcement of employee benefits. Finally, the Internal Revenue Service is the primary enforcement agency dealing with taxation regulations.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

All types of compensation and benefits are subject to the specific corporate governance requirements that apply to a company based on its corporate governance structure. Under the May 2015 amendment of the Companies Act, a stock corporation may be composed of one of three corporate governance structures: a company with auditors; a company with three committees; or a company with an audit committee. (Note: In this chapter, 'executives' refers to directors in a company with auditors, directors in a company with an audit committee and both directors and officers in a company with three committees.)

Company with auditors

The company with auditors is the most common of the three corporate governance structures. In a company with auditors, any type of compensation or benefits provided as consideration for the execution of the duties of directors and corporate auditors must be approved by a resolution of a shareholders' meeting, unless the compensation was provided for under the company's articles of incorporation. Directors are primarily responsible for the execution of operations, and corporate auditors are responsible for supervising directors. While the title 'officer' may be used, it is not a legal title under the Companies Act. (Note: A company with auditors must have at least one corporate auditor.)

Company with three committees

A shareholder resolution is not required for this type of corporate governance structure. Instead, the compensation committee must approve compensation or benefits for officers and directors as well as the underlying policy rationale behind them through a resolution. Under this corporate governance structure, officers are primarily responsible for the execution of operations, and the term 'officer' is a legal title that triggers requirements under the Companies Act. Officers are supervised by the board of directors and the three committees, which consist of the nominating committee, the compensation committee and the audit committee. Each committee must consist of at least three directors and a majority of the members of each committee must be outside directors.

This type of corporate governance structure was introduced in 2003 by the amendment of the Commercial Code, which was incorporated into the Companies Act in 2006. Currently, among the listed companies, about 60 companies have adopted this corporate governance structure.

Company with an audit committee

As with a company with auditors, under this type of corporate governance structure, compensation and benefits must be approved by a shareholder resolution unless the compensation was provided for under the company's articles of incorporation.

Here, directors are primarily responsible for the execution of operations. Directors are supervised by the board of directors and the audit committee. The committee must consist of at least three directors and the majority of the members must be outside directors. While the title 'officer' may be used, it is not a legal title under the Companies Act in this type of governance structure.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Executive compensation is generally outside the scope of consultation or collective bargaining with a union.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

There is no specific type of compensation subject to such prohibition; however, any arrangement that entails a conflict of interest between a company and executives (eg, a loan to a director) requires the approval of the board of directors.

6 What rules apply to compensation of non-executive directors?

There are no specific rules for compensation of non-executive directors. However, if such directors are outside directors (as defined in the Companies Act) in a company with auditors (see question 3), when obtaining the resolution of the shareholders' meeting on directors' compensation, the compensation to be granted to the outside directors must be separately indicated in the applicable agenda. Also, if such directors are serving in a company with an audit committee (see question 3), when obtaining the resolution of the shareholders' meeting on directors' compensation, the compensation to be granted to directors

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serving as audit members must be separately approved, and such directors have the right to state their opinions regarding the agenda in the shareholders' meeting.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

All companies must disclose to shareholders the total amount of compensation paid or agreed to be paid to executives in a fiscal year in an annual business report. The amounts can be given as the total for officers and directors, respectively.

Listed companies must disclose more detailed information to the public. This information includes the company policy regarding executive compensation, the names of executives who receive compensation of ¥100 million or above, and the individual amounts received by such executives. Such companies must disclose this information in the company's annual securities report in the manner prescribed by the FIEA. Also, listed companies must provide similar levels of disclosure in their corporate governance reports, according to the format designated by the applicable stock exchange rules.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

Employment agreements are required. An agreement does not necessarily need to be in writing, but, according to the Labour Contract Act and the Labour Standards Act, when concluding an employment agreement, an employer must indicate the following listed matters in advance and in writing. If the following terms indicated in writing differ from the actual conditions of employment, the employee can immediately cancel the employment contract:

- term of employment, and if the specific term is designated, the conditions for renewal;
- place of work;
- job description;
- working hours, overtime work, rest periods, holidays and leave, and if the employees work in two or more shifts, matters regarding change in shifts;
- methods regarding determination, calculation and payment of wages (except retirement allowances and extra payments), payment date or period of wages, and matters regarding wage increase; and
- matters regarding termination (including resignation, retirement, dismissal or any other cause for termination).

In addition, if the following matters or terms are to be included in the employment agreement, the employer must also indicate them in writing:

- the scope of workers covered by retirement allowance, and the methods regarding the determination, calculation and payment thereof, and the payment date or terms thereof;
- bonuses and minimum wages;
- meal expenses, work supplies, etc, to be borne by employees;
- matters regarding health and safety;
- matters regarding vocational training;
- matters regarding compensation and allowances for injury or illness suffered off-duty;
- commendations and sanctions; and
- conditions regarding leave of absence.

In practice, employers often satisfy the above requirement by publishing their 'working rules', which all employers with at least 10 employees are required to provide. The working rules present the basic rules, terms and conditions of employment.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

In current practice, cash compensation linked to the annual net income of a company seems most prevalent. For listed companies, equity-based compensation (see question 15) is also prevalent.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

There are no limits generally on the amount or structure of incentive compensation. From a corporate tax perspective, however, with respect to performance-based compensation paid to executives, in order for employers to treat the compensation as a deductible expense under article 34, paragraphs 1 to 3 of the Corporation Tax Act, the following requirements must be satisfied:

(i) the company is not a private holding company (except for a private holding company wholly owned by a non-private holding company);
(ii) the target executive is engaged in the management and operation of the company (a managing executive) and all managing executives receive profit-based compensation in compliance with requirements (i) to (vi);
(iii) the total amount of compensation during the fiscal year is reasonable (considering the contribution of the executive, the size of the company, etc);
(iv) the compensation is paid, or is expected to be paid, within one month of deciding the amount;
(v) the amount is treated as an expense for accounting purposes; and
(vi) the procedures and calculation method comply with the following:
  - the amount is determined according to an objective method based on indexes related to:
    (a) profits referenced in the securities reports (eg, earnings before interest, tax, depreciation and amortisation, return on assets and return on equity);
    (b) stock price in the market (eg, stock price on a specific date, comparison to the Tokyo Stock Price Index, market capitalisation and total shareholder return); or
    (c) sales referenced in the securities reports (only if this index is used together with any index falling under (a) or (b));
  - the maximum amount is fixed and the calculation method is consistent with that used for other managing executives;
  - the calculation method is determined under appropriate procedures (such as obtaining the approval of the compensation committee within three months of the beginning of the accounting year); and
  - after the calculation method is determined, the method is reported in the securities report without delay.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

It is permissible for executive compensation. It is also permissible for employee benefits, as long as such an award is characterised as a discretionary bonus and is outside the scope of wages or base salary under the Labour Standards Act.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

In general, no. If a fixed amount is routinely paid regardless of the achievements or performance of employees, however, such amount may possibly be deemed a mandatory contractual entitlement.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

The type and amount of incentive compensation offered to an executive can affect what is offered to other executives, but not what is offered to employees, because the primary sources of law governing executive and employee compensation are different (see question 1).

With respect to executives, profit-based compensation satisfying the requirements of the Corporation Tax Act (see question 10) will be paid to all managing executives in a consistent manner. Therefore, any amount of incentive compensation paid to a managing executive will affect that of the other managing executives. Also, in practice, a company will adopt a common rule or method for determining the incentive compensation offered to all executives.

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14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

Currently, there are no circumstances under which repayment of incentive compensation is mandatory under Japanese laws. Nevertheless, some Japanese finance institutes have adopted clawback provisions regarding executives' compensation in response to the Financial Stability Board's 'Principles for Sound Compensation Practices – Implementation Standards' (as of 24 September 2009). With respect to employees' compensation, if the repayment of compensation is characterised as payment of damages, certain restrictions under the Labour Standards Act apply.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

In current practice, the prevalent forms of equity compensation awards are stock options and stock compensation using a trust. In addition, while stock purchase plans using a general partnership used to be prevalent, recently, 'restricted stocks' (see 'Update and trends') are gradually gaining prevalence.

Among the four forms of equity compensation awards, stock options are the most common, especially as executive compensation. The maximum amount of the fair market value of stock options at the time of issuance must be within the applicable executive compensation amount that is either approved by a shareholders' meeting, or provided for in the articles of incorporation (in the case of a company with auditors or a company with an audit committee), or approved by the compensation committee (in the case of a company with three committees). The Companies Act sets out mandatory terms and procedures for stock options in general, but leaves the details of the structure of stock options to the company's discretion.

Stock compensation using a trust is also frequently used as an employee benefit and has also recently become popular as a form of executive compensation. A company will establish separate trusts for employment benefits and executive compensation. The trusts will acquire the company's shares from the stock market or treasury shares from the company by using the money entrusted, and will distribute shares to the beneficiaries. The beneficiaries are the executives or employees that have satisfied the requirements for benefits set out in predetermined rules on share distributions. The total (maximum) amount of the funds entrusted by the company for executive compensation, the calculation method of the shares and other details must be approved by the same corporate organ as for stock options.

Stock purchase plans using a general partnership used to be the most prevalent form of incentive compensation. Under such plans, eligible executives and employees, respectively, establish or join a general partnership to acquire and hold the company's shares. The funds necessary for the acquisition of shares and operation of the general partnership are technically contributed by the member executives and employees, but the plan substantially functions as an equity compensation award since the company effectively bears the burden by increasing the compensation or salary to cover the amount of such contribution. In addition, the company is allowed to provide subsidies to employees (not to executives) to be used as part of the contribution to the stock purchase plan for employee benefits.

There is no standard vesting period for the above four types of equity compensation. The award is often structured, however, as a substitute for a retirement allowance for executives (a one-time payment at the time of retirement), and in such cases the vesting date is typically scheduled on or after the retirement date (see question 33 for tax benefits).

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

Tax-qualified stock options are available and are advantageous to employees and executives since only the amount of capital gain arising from a sale of shares obtained through the exercise of a stock option is recognised as taxable income. Only capital gains tax applies, not income tax. In contrast, for non-tax qualified stock options, in addition to the capital gains, income arising from the exercise of stock options is recognised as salary and is subject to income tax. On the other hand, tax-qualified stock options are disadvantageous for employers as this is not a deductible expense under the Corporation Tax Act (the deduction is allowed only if the income on the side of the relevant employee is recognised as salary subject to income tax).

The tax qualified stock options need to satisfy the following:

- the company issues them by resolution of a shareholders' meeting or the board of directors (as required under the Companies Act);
- they are granted to executives or employees of the issuing company or its subsidiary;
- they are exercised by the executives, employees or their heirs; and
- the subscription agreement between the issuing company and the executives of employees includes the following conditions:
  - the exercise period must fall within the period commencing from two years and ending 10 years from the date of the resolution regarding the issuance of the stock options;
  - the aggregate exercise price of all tax-qualified stock options will not exceed ¥12 million per year per individual recipient;
  - the exercise price per share is equal to or more than the value of one share at the time of the execution of the subscription agreement;
  - the stock options are non-transferable;
  - the shares should be granted upon the exercise of the stock options in accordance with the resolution of the shareholders' meeting or board of directors approving the issuance of the stock options; and
  - in accordance with a prior agreement between the company and a financial instrument operator, shares granted upon the exercise of the stock options must be either:
    - duly recorded in the relevant share transfer account registry of the financial instruments operator; or
    - kept in custody or managed in trust by the financial instruments operator.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

Among the three prevalent equity-based compensation methods, stock options and stock compensation using a trust are subject to the following registration and notice requirements under both the FIEA and Companies Act.

FIEA

Stock options

Under the FIEA, a foreign or domestic company offering shares, stock options and certain other types of securities designated by FIEA to persons in Japan is required to file a registration statement with the local regulator regarding the offering and deliver a prospectus to each offeree. Thus, stock options are subject to these registration and prospectus requirements when a company offers stock options to its employees and executives in Japan.

The FIEA also provides several exemptions for the requirements. The exemptions need to be considered mainly in connection with companies whose shares are not listed in Japan, because once the company files a registration statement, it is thereafter required to comply with periodic disclosure and reporting requirements under the FIEA. For companies whose shares are listed in Japan, since they are already subject to periodic disclosure and reporting requirements under the FIEA, there is less need to consider the exemptions than for non-listed companies.

The following is an outline of the three types of exemptions that are typically examined when a company is considering offering stock options to employees and executives.

Exemption 1: offerees are limited to the company and its wholly owned subsidiaries

Companies are exempted from the registration and prospectus requirements when the newly issued stock options are non-transferable and are granted solely to employees, executives or statutory auditors of: the issuing company, the issuing company's direct wholly owned subsidiary (first-tier subsidiary) or the wholly owned subsidiary of the first-tier subsidiary (second-tier subsidiary).

As long as all of the offerees in a particular offering are limited to employees, executives, or statutory auditors of the issuing company

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or its first or second-tier subsidiaries, there are no other criteria for qualifying for the exemption (such as the number of offerees and stock options' value).

Exemption 2: the aggregate value of the newly issued stock options is under ¥100 million

Companies are exempted from the registration and prospectus requirement when the sum of the offer price and exercise price of the newly issued stock options is below ¥100 million.

If, however, the company concurrently makes any other offering of shares, stock options or certain other types of securities designated by the FIEA, or has made such an offering within one year of the date on which the newly issued stock options were issued, the total offer price (and exercise price, if applicable) in such other offerings will need to be included in determining whether the aggregate value of the newly issued stock options has reached the ¥100 million threshold.

Exemption 3: the number of offerees is fewer than 50

Companies are exempted from the registration and prospectus requirements when the sum of x and y is fewer than 50, where x is the number of offerees of the newly issued stock options and y is the aggregate number of offerees of the same kind of stock options as in x, which were issued within six months of the date on which the newly issued stock options were issued.

Whether the previously issued stock options are of the 'same kind' as the newly issued stock options is determined by the type of shares subject to both stock options. The previous stock options will be considered of the same type as the newly issued stock option when both options are issued by the same entity, and the surplus dividends, distribution of residual property and items for which they are allowed to exercise voting rights of such shares are the same.

Stock compensation using a trust

With respect to stock compensation using a trust, if a company allocates its shares or disposes of its treasury shares to the trust, such offering to the trust will also be subject to the registration and prospectus requirements. In this case, the exemptions typically examined are exemptions 2 and 3.

Companies Act

By two weeks prior to the allocation date of stock options and the payment date of shares, an issuing company is required to issue a public notice regarding such in a manner designated by its articles of incorporation (for listed companies, electronic announcement or posting in a daily newspaper is common, and for non-listed companies, posting in an official gazette is common). This public notice can be replaced by individual notices to all shareholders. A company can, however, be exempted from this notice requirement if it files a registration statement or obtains a shareholders' resolution regarding the contemplated issuance.

18 Are there withholding tax requirements for equity-based awards?

With respect to equity-based awards, except for tax-qualified stock options (see question 15), the issuing company is subject to withholding tax requirements. However, the timing of withholding differs depending on the structure of the equity-based awards.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

They are commonly used, and are allowed as long as there exists economic substance and a legitimate business purpose for the underlying payments or structure, as such payments often entail a transfer pricing taxation issue.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Stock purchase plans using a general partnership are available and used to be prevalent. One frequently encountered issue with this arrangement is how to treat the shares owned by the general partnership when the issuing company faces squeeze-out transactions, such as a tender offer.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

There are three major mandatory benefits for employees: employment insurance, health insurance and industrial accident compensation insurance. The following chart summarises the main features of these mandatory benefits.

	Employment insurance	Health insurance	Industrial accident compensation
Primary source of law	The Employment Insurance Act	The Health Insurance Act	The Industrial Accident Compensation Act
Grounds for benefits	Leave and unemployment	Injury, disease, disability or death not resulting from employment-related cause or commuting	Injury, disease, disability or death resulting from employment-related cause or commuting
Insured employees	All employees, except for: • those who work for a natural person (as opposed to a corporation) operating certain exempted businesses, such as agriculture and forestry; • those who were 65 years old or older when they were first hired; • temporary employees who have worked less than four months; • students (with certain exemptions); and • public employees (with certain exemptions)	All employees who work for: • a legal entity that continuously hires five employees; or • a natural person with more employees (except for certain exempted businesses, such as agriculture and forestry)	All employees, except for those who work for a natural person operating certain exempted businesses, such as agriculture and forestry
Premium	Equally borne by the employees (during the employment period) and employer The employer is obliged to withhold the employee's contribution from his or her salary	The same as employment insurance	Borne by employer

Employers who wish to discontinue voluntary benefits are subject to certain restrictions. If the employer voluntarily introduced benefits through certain programmes that are stipulated by law (such as the Defined Contribution Pension Act or the Defined Benefit Corporate Pension Act), then the discontinuation of those benefits will be subject to the terms of the relevant law. If, however, the employer voluntarily provided benefits outside the scope of any specific regulations, then they can discontinue or change the benefits in accordance with the working rules or labour agreement.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Executives are insured under the Health Insurance Act, but they are not eligible for employment insurance. Also, executives are generally not eligible for industrial accident compensation insurance, but there are certain exceptions, as with executives of certain small businesses (such as retail businesses with up to 100 full-time employees).

From a tax perspective, the premiums paid by employees for the mandatory employee benefits are deducted from taxable income.

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Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

Under the Companies Act, directors can be dismissed at any time by a resolution of a shareholders' meeting. Officers in a company with three committees (see question 3) can also be dismissed at any time by a resolution of the board of directors. As long as the resolution is obtained, there is no requirement that the dismissal be 'for cause'.

Under the Companies Act, however, dismissed executives are allowed to demand damages arising from the dismissal, unless the dismissal was based upon 'justifiable grounds'. The courts tend to interpret justifiable grounds narrowly. Examples of justifiable grounds are the abolition of the department or division of which the relevant executive was in charge, an act committed by the executive that violates laws and regulations or the company's articles of incorporation, a mental or physical disorder, or a lack of ability to perform the required duties of the executive's position.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

There are no statutory or mandatory minimum severance requirements or post-employment benefits. At minimum, employees may receive employment insurance payments after their employment has been terminated (see question 21).

25 What executive severance payment level is typical?

Under the Corporate Tax Code, if a severance payment is 'unreasonably high', the company cannot treat it as a deductible expense. Although there are no clear official guidelines as to what is a 'reasonable' severance payment, the Order for Enforcement of the Corporate Tax Code provides the following as examples of relevant factors in that determination:

(i) the number of years of service;
(ii) the individual situation regarding the retirement; and
(iii) the average annual amount of retirement allowance of comparable companies.

In practice, item (ii) is generally considered to include the amount of monthly remuneration immediately prior to the retirement and the executive's personal contributions to the company. Accordingly, the amount of retirement allowance tends to be proportional to the duration of service. However, external events, such as a change in control, are highly likely to undermine the reasonableness of the amount.

In addition, under the Companies Act, executive severance payments need to be approved by a shareholders meeting or the compensation committee (see question 3); therefore, from a procedural perspective, there is limited flexibility in determining the amount of the severance payment.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

With respect to the dismissal of executives, see question 23.

With respect to dismissal of employees, employers are subject to the judicially developed doctrine of abusive dismissal. Under this doctrine, employers are prohibited from dismissing employees unless the dismissal has objectively reasonable grounds and is considered to be appropriate in general societal terms. A dismissal conducted in violation of this doctrine will be invalid. The scope of 'objectively reasonable grounds' under this doctrine is limited and include, for example:

- the employee's lack or loss of the skills or qualifications required to perform the work;
- a breach of working discipline committed by the employee;
- managerial reasons arising from compelling business necessity, such as an adjustment in the number of employees required owing to a severe business downturn; or
- where a union demands the dismissal of an employee based on a union-shop agreement.

In general, the courts will only uphold the propriety and validity of a dismissal if the reasons are grave and there are few options on the part of the employee by which to mitigate the gravity.

27 Are 'gardening leave' provisions typically used in employment terminations?

Such provisions are occasionally used. They are permitted as long as the compensation provided during the period of leave and the length of the leave are reasonable.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

A general waiver or release of claims on termination is generally permitted; however, such waiver or release by an employer that is a corporation is not enforceable without the unanimous consent of the shareholders or unless it accords with one of the following procedures:

Procedural requirements	Applicable executives	Highest amount to be waived
A special resolution of a shareholders' meeting	Executives (see question 3)	Any amount exceeding that calculated by using a certain metric stipulated by the Companies Act (including the highest compensation paid to the executive)
A specific provision in the articles of incorporation	A resolution of the board of directors – directors in a company with auditors (see question 3)	The same as above Any liability arising from gross negligence or wilful misconduct cannot be waived
The articles of incorporation	Directors who are not engaged in the execution of operations	The higher of the amount (x) provided in the articles of incorporation or (y) the amount obtained by using a method similar to that used in the special resolution of a shareholders' meeting Any liability arising from gross negligence or wilful misconduct cannot be waived

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

In general, non-compete and confidentiality covenants are common post-employment restrictive covenants.

Covenants regarding non-solicitation of customers or employees are also common, but their use depends on the position held or the business engaged in by the relevant employee or executive.

With respect to a restriction period, for a post-employment restrictive covenant to be deemed valid and enforceable, the period cannot exceed what an employer's reasonable business necessity would demand. There are no clear standards for judging necessity and reasonableness, and the courts decide these issues by considering various factors (see question 30).

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Since post-employment restrictive covenants may restrict the employee's freedom of choice in employment and limit his or her livelihood, there are limits on their enforceability. Specifically, the courts will uphold their validity only if the restrictions are within the employer's reasonable business necessity, and will often modify the covenant and admit its enforceability in a narrower scope. In general, in judging necessity and reasonableness, the courts consider the following:

- the period;
- the geographical scope;
- the targeted business activities and scope of the restriction;

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Update and trends

Certain preferential tax treatment for a new type of stock compensation (restricted stocks) has become available by an amendment of the Corporation Tax Act and relevant orders, which came into effect on 1 April 2017. The requirements regarding restricted stocks were further amended in April 2017.

For restricted stocks satisfying the relevant requirements, the following tax treatment is available:

- on the side of the executives, the income tax on the restricted stocks is deferred until the transfer restriction actually expires, and the taxable income is calculated based on the fair market value of the stock as of the transfer-restriction expiry date; and
- on the side of the company, it may deduct expenses under the Corporation Tax Act in such amount of the rights (see (iii) below) contributed by the executives in exchange for the restricted stocks that is in proportion with the number of restricted stocks that actually become transferable.

The major requirements for the above tax treatment under the Corporation Tax Act and the orders are that:

(i) they must be stocks that have market prices (or stocks to be converted into such stocks);
(ii) they are granted to the executives or employees of the company issuing such stocks or its subsidiaries of which the majority of voting rights are held (and expected to continue being held) by the issuing company;
(iii) they may be issued by a contribution-in-kind of executives or employees' rights to claim a specific amount of monetary compensation;
(iv) they must be subject to a transfer restriction for a specific duration; and
(v) they must be subject to an obligation for their return to the company if the executive or employee has not continued to provide his or her service throughout a predetermined period.

Further, by an amendment of the Corporation Tax Act and relevant orders, which came into effect on 1 April 2017, in order for any equity-based compensation for executives to be treated as deductible expenses, such forms of compensation also need to satisfy the same requirements for the deduction applicable to cash compensation for executives. Therefore, for instance, a company may treat the cost regarding stock options as deductible expenses if the stock options satisfy the applicable requirements for the following:

- predetermined salary (in short, compensation for continued services throughout a predetermined period, to be paid in a defined amount and at specified times, as provided in article 34, paragraphs 1 to 2 of the Corporation Tax Act);
- performance-based compensation (see question 10); or
- retirement allowance (see question 34).

- the position or business that the relevant employee or executive held or engaged in; and
- any compensatory measures provided to the employee.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

The employer may seek forfeiture of unpaid severance and recoupment of paid severance as long as such arrangements are clearly provided for in advance by the relevant employment agreement or working rules. In connection with employees, however, the courts often deem severance as 'a deferred payment of wages'; therefore, a reduction in an employee's wages is usually permitted only if significant misconduct substantially undermined his or her past contribution. This is the case even if the employer is entitled to forfeiture or recoupment by relevant employment agreements or working rules.

The employer may also seek compensation in damages, but it bears the burden of proof regarding the amount of damages. If breach of a restrictive covenant falls under trade secret misuse under the Unfair Competition Prevention Act, the employer may utilise statutory presumption. Statutory presumption assumes that the profit obtained by a trade secret infringer is the damage suffered by the trade secret holder when calculating compensatory damages.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Welfare pension insurance is required for employees and executives who work for an employer that is:

- a legal entity and continuously hires at least one employee; or
- a natural person who continuously hires five or more employees (except for certain exempted businesses, such as agriculture and forestry).

The welfare pension is intended to support the living expenses of participants who reach the age of 65 in accordance with the Welfare Pension Insurance Act. Premiums are equally borne by the employees and employer (except for certain exempted employees, such as those on maternity leave) and the employer is obliged to withhold the employees' contribution from their salaries.

With respect to the discontinuation of voluntary benefits, see question 21.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Employees who become executives remain beneficiaries of welfare pension insurance (see question 32). Japanese companies rarely offer additional pension plans for executives. Therefore, welfare pension insurance is the most common pension benefit for executives.

With respect to other retirement benefits for executives, cash retirement allowances (see question 25) are still prevalent for both executives and employees. Upon satisfaction of the following requirements, executives and employees receive favourable tax treatment regarding income tax (in short, only half the amount of the retirement allowance is taxed):

(i) the retirement allowance is a lump-sum payment received on retirement; and
(ii) (only for executives) the length of service exceeds five years.

These requirements also apply to stock options and stock compensation using trusts (see question 15). In practice, the tax authority currently treats a 'one time exercise of stock options within 10 days following retirement' as satisfying requirement (i).

From the perspective of the company (ie, an employer), in order for the retirement allowance for executives to be deemed a deductible expense under the Corporate Tax Act, the following requirements must be satisfied:

- the amount of retirement benefits is reasonable (considering the contribution of the executive, the size of the company, etc); and
- the amount of retirement benefits is not linked to the performance of the company (ie, linked only to the length of the service) or, if the amount is linked to such performance, the requirements regarding incentive compensation (see question 10) are satisfied.

34 May executives receive supplemental retirement benefits?

Such retirement benefits are allowed provided they are approved by a shareholders' meeting or the compensation committee (see question 3).

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

A company is permitted to indemnify its executives to a certain extent in connection with a shareholder derivative action if the executive in question did not commit wilful misconduct or gross negligence regarding his or her duties and the board of directors approves such indemnification.

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With respect to insurance, particularly directors' and officers' liability insurance, although there has been some controversy as to whether a company should bear the premium, it is generally considered permissible if the board of directors approves the company bearing the insurance premium and the content of the insurance is subject to the supervision of outside directors (such as approval of all outside directors or a committee of which the majority of the members are outside directors).

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

Unless both parties agree to the transfer of benefit obligations associated with the asset, no 'automatic' transfer will occur, because an asset sale is only effective to the extent specifically agreed upon by the acquirer and the transferee.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

It is not customary, but if the acquirer wishes to retain a current executive, the acquirer will often require that executive to sign a letter of acceptance or a retention agreement (which is typically prepared by the acquirer), and its submission will be a closing condition for the acquirer in the agreement for the underlying transaction.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

Executive compensation must be approved by a shareholders' meeting or by the compensation committee (see question 3). Therefore, if any change of compensation exceeds the scope of the approval, that change cannot be put into effect.

With respect to 'cashing out', there are no restrictions, but if an employee or executive intends to sell shares of the company (ie, the employer) to the company itself, the sale must comply with the procedural requirements for stock repurchases in the Companies Act and, if the company is listed, the sale will be subject to insider trading rules.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

An employer must file an after-the-fact notification with the Bank of Japan if it pays monetary compensation exceeding ¥30 million to a non-Japanese resident.

If a non-Japanese resident receives shares as compensation or upon the exercise of stock options, he or she must file an after-the-fact notification with the Bank of Japan. In addition, if the shares are those of a non-listed company or 10 per cent or more shares of a listed company, an additional after-the-fact notice requirement will apply.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

There is no such requirement. However, working rules often include basic terms of employee compensation or benefits, and an employer must file its working rules with the competent Labour Standards Supervision Office. Upon filing, a Japanese translation will be required.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

While there are no such prohibitions, in current practice, these kinds of provisions are not typical with respect to Japanese domestic executives and employees. They are sometimes used, however, with respect to non-Japanese executives who work away from their home countries.

42 Are choice-of-law provisions in executive employment contracts generally respected?

They are generally respected for executive (but not employee) contracts, unless the application of the agreed upon governing law would be against public policy, in accordance with the General Rules for Application of Laws.

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NISHIMURA & ASAHI

Hiroko Shibata **h_shibata@jurists.co.jp**

Otemon Tower, 1-1-2 Otemachi
Chiyoda-ku
Tokyo 100-8124
Japan

Tel: +81 3 6250 6200
Fax: +81 3 6250 7200
www.jurists.co.jp

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Mexico

Monica Schiaffino and Mario Yañez
Littler Mexico

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

In Mexico, the main statutes and regulations governing executive compensation arrangements and employee benefits are as follows:

- the Federal Labour Law;
- the Social Security Law;
- the Mexican Income Tax Law; and
- the Retirement Savings System Law.

In Mexico, all employment relationships are governed by the Federal Labour Law. The Law does not establish any difference between blue-collar employees and executives, since the important factor regulated is the existence of an employment relationship. Such a relationship is established when an employee renders personal and subordinated service to an employer in exchange of remuneration.

Compensation is also governed by the Federal Labour Law. The Federal Labour Law applies to the entire Mexican Republic and can be enforced by federal and local authorities.

Written employment agreements are mandatory pursuant to the Federal Labour Law however the lack of a written agreement does not deprive the employee from his or her rights. The key element of an employment relationship is control (subordination), which is understood as the power of the employer to control the employee in relation to the work that must be performed and the obligation of the employee to obey such orders. Therefore, if there is control, then an employment relationship exists, regardless of whether there is an employment contract or whether a contract characterises the relationship as something other than an employment relationship.

The Federal Labour Law provides general and specific rules for all employment relationships. It establishes the minimum mandatory benefits that all employees must receive (eg, holidays, holidays premium, Christmas bonus and profit sharing), and that cannot be waived or contracted out by employees, the rights and obligations for both parties, and the causes justified to terminate the employment relationship.

The Social Security Law also provides the rules for social security and retirement pension plans for employees. The Social Security Institute enforces the Social Security Law. The National Workers' Housing Fund Institute (INFONAVIT) administers a national fund from which employees can request low interest rates to buy a house or remodel their existing house. Both Institutes are part of the social security system, which is mandatory, meaning that all employees must be registered in it. Contributions to the social security system are done by the employer, the employee and the government as determined by the law.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The Ministry of Labour and Social Welfare, which is part of the executive branch of the federal government, is in charge of enforcing the labour laws. The Ministry of Labour can enact regulations and official standards to provide specific rules for employment relationships.

The local governments, through their labour ministries, can also enforce some of the rules contained in the Federal Labour Law.

Therefore, the Ministry of Labour and Social Welfare, the Local Labour Ministries, the Mexican Social Security Institute, INFONAVIT and the National Commission of the Retirement Savings System, among other governmental institutions, are the most important authorities governing the employer–employee relationship, including executive compensation arrangements and employee benefits.

Further, local and federal conciliation and arbitration boards are the administrative agencies in charge of solving employee–employer disputes.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

As a general rule, no obligation or specific rule requires corporate bodies to approve compensation packages for executives. It is, however, common in industries, such as banking, automotive and mining, to condition compensation plans to the board of directors' approval.

In the banking industry, which is highly regulated, the federal government has established several rules to control and manage certain aspects related to the compensation of top executives (eg, certain bonuses must be deferred to avoid executive misconduct).

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

In Mexico, there is no need to consult union work councils or similar bodies to establish or change executive compensation. Such compensation is regulated in the employment agreement executed individually with each employee.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

From a legal standpoint, there are no prohibitions regarding compensation or benefits for senior management.

6 What rules apply to compensation of non-executive directors?

No special rules apply to compensation of non-executive directors. There are mandatory benefits that cannot be waived or contracted out and that are applicable to all employees regardless of their position. For any benefit or compensation that is a contractual benefit or compensation plan and that is above the minimum benefits provided by the Federal Labour Law, the parties are entitled to agree on the terms and conditions to which such compensation will be subject to.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

Not as a general rule. It is possible for an authority to require information from companies on the stock market regarding the total compensation paid to the top executives of the company; however, this information is confidential and cannot be disclosed without the employee's consent or upon order issued by an authority of competent jurisdiction.

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Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

Written employment agreements are mandatory. Furthermore, taking into account that the burden of proof belongs to the employer, it is advisable to execute employment agreements with each employee that will regulate labour benefits, compensation, performance bonuses and stock options. According to the law, the following information should be included in all individual employment agreements (section 25 of the Federal Labour Law):

- the employee's and the employer's name, nationality, sex, civil status, the unique population registry code, tax identification number and address;
- whether the employment agreement is executed for an indefinite term, for a specific job or term, for initial training or for a season, and whether it is subject to a probationary period;
- a description of the services to be provided;
- the place or places where the work is to be performed;
- the length of the work shift;
- the salary, start date and place of payment;
- an undertaking that the employee will undergo training pursuant to the procedures and programmes established by the employer as required by the Federal Labour Law; and
- other terms and conditions of employment, such as days off and holidays agreed upon by the employee and the employer.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

In our experience, there are two main objectives of incentive compensation schemes: to reward the employee for his or her individual performance and the financial results of the corporation, and to encourage the employee to remain with the company. The structures of incentive compensation will vary depending on the organisation since each incentive is established unilaterally.

Other incentive compensations are established through stock options, capital accumulation programmes, equity or deferred-cash compensation, which can be used as an incentive to the employee, but also can be used as retention benefits since the employee must be active to receive the payment.

For multinational companies, it is common to find stock option plans and capital accumulation programmes; however, it is also common to find compensation programmes based on the achievement of specific financial goals and the company's earnings before interest, taxes, depreciations and amortisation, among other calculations.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

No, generally there are no limits on the amounts or structures of incentive compensation. Depending on the industry and the company, however, it is advisable to establish certain limits in the employment agreement or incentive document to control and manage the compensation that will be paid to executives. Incentive programmes do not receive special tax treatment and are taxable income for employees.

For tax purposes, the employer must consider the type of benefits granted to the employee in order to determine the amount to withhold. In general incentive or variable compensation plans are taxable. In case the employer grants an incentive or bonus that is non-taxable income for the employee, the employer will not be able to deduct it.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Yes, deferral and vesting of incentive awards are permissible. These compensation packages are more common in multinational companies, in which it is possible to offer stocks, awards or options from the holding company. Although the vesting and deferral provisions do not have limits, it is common to consider between four and six years as a period for vesting. As mentioned, these benefit packages are used not only as a form of compensation, but also as a strategy for companies to retain talent, especially experienced executives.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

If no document is executed to limit the granting to a fixed period or a one-time grant or payment, the recurrent discretionary incentive compensation can be considered as an acquired right. However, it is possible to establish a term in each compensation agreement and agree with the employee that once the term of the agreement finishes the inventive will end too.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

No. From a legal standpoint, it is possible to grant these benefits only to a select group of executives, as opposed to all or other employees.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

Yes, it is permissible to establish repayment of incentive compensation under certain circumstances; however, the rules for repayment must be clearly established and the employee must agree with such rules. Notwithstanding the aforementioned, it is important to take into consideration two different aspects that can affect the repayment:

- the incentive could be considered as an acquired right of the executive if he or she complies with the requirements to obtain the incentive and, in case of litigation, the Labour Board may rule that the executive is not obliged to refund the incentive. Therefore it is very important that it is documented as an advance payment and not as an earned benefit (earned benefits cannot be withdrawn form employees); and
- the Federal Labour Law sets forth provisions to protect the salary (and incentives) establishing that the employer can only claim the repayment of an amount equivalent to one month of the employee's salary and the same will be paid in allocations also regulated by the law.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

For certain companies in Mexico it is typical to have capital accumulation programmes (stocks), stock option plans and deferred cash plans. Lately restricted stock units are more common. A typical vesting period is four to six years.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

There are no tax advantages to equity compensation programmes. For stock option plans, when the employee receives the vested stocks, he or she must calculate the accumulated income to calculate the income tax, which will be determined by the difference between the vested price and the market price.

As for the employer, stock option plans are considered derived financial operations, therefore, when the employees receive the vested stocks, the company will not accumulate the price or the premium received for the execution of the derived financial operation, nor the income the company receives for the vesting right, both amounts being considered contributions to corporate capital.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

No, equity-based compensation is considered private, so does not require any type of registration.

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18 Are there withholding tax requirements for equity-based awards?

Equity-based awards are subject to taxation in accordance with the tax laws and employees must pay the corresponding tax, which must be withheld by the company and paid directly to the tax authority.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Yes, such agreements are common. No issues arise as long as such a transaction is duly registered in the accounts.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Yes, they are very common for multinational companies operating in Mexico. As previously mentioned, it is necessary for such compensation to be established in an agreement or in a policy, which has to be signed by the employee. This policy must include all the terms and conditions of the plan.

Owing to the complexity of such plans, which include financial terms and stock values, it is important to establish the terms and conditions as clearly as possible to avoid issues when the compensation has to be calculated.

A common problem may arise when an employment relationship is terminated for just cause, for example, because of employee misconduct. In such situations, if there are pending payments or unvested options, the company typically has the right to cancel the stock or shares and avoid payment; however, if the employee has acquired the right to receive the payment, it will generate a labour liability for the company since employment rights cannot be waived or cancelled. Therefore, it will be important to identify whether the employee has acquired the right to receive the payment.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

The Federal Labour Law entitles employees to the following mandatory benefits:

- a year-end bonus equivalent to at least 15 days' wages, payable prior to 20 December each year;
- a yearly holiday period, the length of which depends on the employee's seniority;
- a holiday premium of 25 per cent of the salary payable to the employee during the holiday;
- mandatory payment for all holidays established by federal or state law (including 1 January; the first Monday in February; the third Monday in March; 1 May; 16 September; the third Monday in November; 1 December (every six years when a new president is inaugurated); and 25 December); and
- profit-sharing, in which 10 per cent of the company's profits is shared among the employees.

Any other benefit granted to the employee will be considered an additional legal benefit or contractual benefit, and the terms and conditions of these benefits can be agreed upon by the parties. The contractual benefit may consist of granting additional days off, a year-end bonus or holidays, or a higher percentage of the holiday premium. Likewise, different benefits can be paid into a savings fund (the company and the employee contribute to a fund that generates interest) or in grocery coupons, inter alia.

Mandatory benefits cannot be waived and must be granted to all employees, regardless of their level. Contractual benefits cannot be voluntarily discontinued, but modification can be agreed upon by the parties. In case of benefit elimination or discontinuation, it is customary for the company – but not mandatory – to pay an amount to the employee in exchange for his or her waiver of the benefit.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

It is common to award executives with bonuses that are based on performance goals or in the event that the company meets specific goals. Pension plans also are common. When the employee meets the requirements to receive pension plan benefits, special tax treatment may be applied to the amount paid to the employee. Some of these benefits also allow the company to deduct the contributions it has made to the funds.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

Unlike other jurisdictions where employment-at-will is the general rule, an employer in Mexico may dismiss an employee without incurring liability only if a cause for the dismissal exists. Article 47 of the Federal Labour Law enumerates specific kinds of conduct that are deemed cause for dismissal:

- the use of false documentation to secure employment;
- dishonest or violent behaviour against the employer, customers or service providers;
- dishonest or violent behaviour against co-workers that disrupts work discipline;
- threatening, insulting or abusing the employer or his or her family, unless provoked or acting in self-defence;
- intentionally damaging the employer's property;
- negligently causing serious damage to the employer's property;
- carelessly threatening workplace safety;
- immoral behaviour, bullying and sexual harassment against any person in the workplace;
- disclosure of trade secrets or confidential information;
- more than three unjustified absences in a 30-day period;
- disobeying the employer without justification;
- failure to follow safety procedures;
- reporting to work under the influence of alcohol or non-prescription drugs;
- a prison sentence;
- lack of documents required under Mexican laws and regulations; and
- the commission of any other acts of similar severity.

In the case of a termination with cause, the employer must deliver a termination notice to the employee, either directly to the employee or through the corresponding conciliation and arbitration Labour Board.

There is no difference when terminating an employment relationship where an executive is involved. Likewise, in Mexico, the Federal Labour Law does not establish a notice period. A notice period is required only if it is a term or condition of the employment agreement and since the severance is high it is unusual to agree on a notice period. Where the termination is without cause, the employee's consent is required (as discussed further below) and the employer is required to pay severance owed to the employee, as required by the Federal Labour Law.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

Where the termination is without cause, the employer is required to pay severance owed to the employee, as required by the Federal Labour Law. The severance established by the law consists of three months' full salary and 20 days of salary per each year of service. The definition of 'salary' for severance purposes includes all payments that may be considered 'wages', such as premiums, bonuses and commissions.

Employees dismissed with or without cause, as well as those who resign with 15 or more years of seniority, are entitled to a seniority premium equivalent to 12 days' salary for each year of service provided, as well as prorated holiday, holiday premium, and year-end bonus.

The seniority premium may not exceed twice the minimum wage in effect in the economic zone in which the employer is located. In Mexico, the current daily minimum wage is 80.04 pesos per day.

No other mandatory, post-employment benefits are required.

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Update and trends

An amendment to the Federal Constitution regarding employment dispute process and union representation has been approved by the Mexican Congress and by the state legislatures to create new tribunals and specialised authorities that will adjudicate labour disputes and govern union relationships, including collective bargaining, union registration and employee representation verification.

This amendment would replace the current Labour Boards with federal and state labour courts. These courts would be under the judicial branch of the government or a part of federal entities, and they would be responsible for issuing rulings and judgments in order to resolve conflicts between workers and employers. Currently, Labour Boards are administrative agencies and part of the executive branch of the government. Regarding collective matters, the amendments strengthen the rights of workers by ensuring a free, individual and confidential vote to choose union leaders, to request the execution of a collective bargaining agreement and to resolve conflicts with unions. Under this amendment, any union aiming to hold the collective bargaining agreement of a given establishment shall demonstrate to the labour authority that it has the representation of the employees of that establishment, before filing a call for strike.

To implement the amendment to the Federal Constitution, the Mexican Congress must approve, within a year, several changes to the Federal Labour Law; however, because of the current economic conditions and the presidential elections that will take place next year, this process could take more than the year established by the Constitution.

25 What executive severance payment level is typical?

The same formula is used to calculate severance payment, whether the employee is an executive or non-executive (see question 23, to see how severance payment is calculated). It is expected that severance payments for executives will be considerably higher than for non-executives, since severance is calculated based on aggregate salary, which includes all benefits, including bonuses and commissions.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

The only causes of termination are those set out in article 47 of the Federal Labour Law (see question 22). In addition, the Federal Labour Law establishes that the employer is entitled to terminate the employment relationship of employees in position of trust when there is a reason for the employer to lose the confidence placed on the employee. Article 51 of the Federal Labour Law sets out the causes for which an employee can terminate the relationship with employer's liability (constructive dismissal), which, on the most part, are similar to the grounds set out in article 47.

Likewise, the federal courts and the Supreme Court have issued decisions further defining dismissal for 'cause' and 'constructive dismissal'. They can be defined as misconduct, either by the employee or the employer, which makes it impossible for the employment relationship to continue.

27 Are 'gardening leave' provisions typically used in employment terminations?

Gardening leave provisions are not included in our legal framework. The use of 'gardening leave' is not common in Mexico. In the event that the employee is involved in any misconduct, gardening leave could be granted while the company carries out internal investigations, but it must be formalised as a written permission granted by the employer, and salary and benefits must be paid during that period. Since gardening leave may have an impact on an employee's compensation or imply unilateral modification of working conditions, the employee could file for constructive dismissal; this underlines the importance of properly formalising the arrangement. Gardening leave at the end of the employment relationship to prevent the employee from working for a competitor is not enforceable even if the company pays it.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

Yes, it is common that when the employment relationship is terminated, the employee grants a full release to the employer and related companies. This release is binding as long as it has been duly ratified with the Conciliation and Arbitration Board. Recent case law issued by the Supreme Court states that the fact that a release is not ratified with the Conciliation and Arbitration Board does not make the release invalid or ineffective. However, the employee could challenge the validity or argue that it was executed under duress or coercion, for which we would deem it necessary to ratify the termination agreement to make it fully binding and enforceable. If an employee further files a complaint, the employer will be required to appear before the court to provide evidence that it paid all applicable benefits and severance if applicable.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Non-compete and non-solicitation agreements are not enforceable in Mexico owing to the fact that article 5 of the Federal Constitution contains a basic principle of law that establishes that no person may agree not to engage in any lawful economic or professional activity. Thus, non-compete agreements may be subject to challenge on the grounds that they violate a constitutional right and, thus, may be declared unenforceable.

As a result of the foregoing, non-compete restrictions included in a Mexican employment agreement would only give the employer, in the event of violation by the employee, the right to terminate the employee 'for cause' without the payment of severance.

To overcome the obstacles set out above and taking into account the protective nature of the Federal Labour Law towards employees, companies in Mexico commonly enter into civil law agreements (as opposed to employment agreements). Specifically, it is common practice to execute a non-compete or non-solicitation agreement as part of the civil law agreement at the time of the termination of employment, where the employee agrees to refrain from competition during a specific period of time in exchange for a compensation paid by the company. A contractual penalty may be included in the agreement, allowing the company to seek the payment of compensation paid to the employee, plus a contractual penalty, in the event of the employee's breach. Note that the 'contractual penalty' cannot be higher than the amount paid to the employee.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

For the aforementioned reasons, it is highly probable that courts will not allow post-employment restrictive covenants if any right of the employee is affected or limited. Note that confidentiality obligations, however, are enforceable.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

Since post-employment restrictive covenants are not enforceable in Mexico, no severance, compensation or remedies can be obtained. See, however, question 29, outlining other options.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Retirement benefits are part of the social security system and are granted by the Mexican Social Security Institute. As mentioned above, all employees must be registered with the Institute, to which the government, the employee and the employer contribute.

If the employee meets the legal requirements and has the necessary contributions, he or she may be entitled to receive 100 per cent of his or her pension at the age of 65. Early retirement is applicable when the

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employee is 60 years old and the percentage of the pension will vary depending on their age.

Private pension plans may be established and these can be modified by the employer or discontinued only when the employee has not met the requirements to obtain the pension. In case employees have acquired rights under the plan, the same cannot be cancelled unilaterally.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Although executives are entitled to receive the benefits from the Mexican Social Security Institute and from the social security system, it is common for some companies to establish a pension plan for their executives as an additional source of income. When the employee meets the requirements to receive the pension plan benefits, special tax treatment may be applied to that amount, which typically is less than what would apply to other types of income.

34 May executives receive supplemental retirement benefits?

Yes, it is possible to establish supplemental retirement benefits, such as private medical coverage, in addition to the pension benefits required under the Federal Labour Law.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

In Mexico, it is not common to use directors' and officers' liability insurances for executives while still employed, but this depends on the industry and on the responsibilities of the employee. Many professional organisations have insurance in place for any claim in which malpractice is argued, but these insurances are typically for the organisation, not the employee.

It is, however, common to agree with the employee to indemnify him or her for his or her actions as an executive, officer or director with certain exceptions or when the employment relationship is terminated. In certain cases, the employee could request a guarantee that the employer provide a legal defence in the event of any claim deriving from his or her actions as an executive; this is not mandatory, however, and will have to be agreed by the parties.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

In the event of an asset sale, employer substitution may be applicable. The Federal Labour Law does not provide a specific definition of employer substitution, but the federal courts have established that an employer substitution is deemed to exist when the essential assets required to perform the work are transferred, by any means, from one employer to another.

As previously mentioned, article 41 of the Federal Labour Law does not provide a definition for employer substitution, but considering the provisions of the Social Security Law and the judicial precedents, employer substitution originates with the transference of: a workplace as a legal-economic entity; one of the legal-economic entity's establishments; or part of the assets of the legal-economic entity with which the work performed by the original employer can be continued; along with the uninterrupted continuation of the activities inherent to the business.

It is important to remark that an employer substitution necessarily requires the transfer of assets from the original employer to the new employer for the latter to continue with the commercial or industrial operations.

With an employer substitution, the employment relations of the company or establishment are not affected. Rather, the employment relations continue, and the new employer must honour the existing working conditions under which employees render their services, including salaries, benefits and other conditions at the workplace.

Article 41 establishes that the original (former) employer will be jointly responsible with the new employer for the obligations derived from employment relations and from the Federal Labour Law, which originated before the date of the substitution and up to a period of six months thereafter. Said period of joint liability commences on the date employees have been informed of the employer substitution.

Note that an employer substitution transfers to the new employer not only rights, but also existing duties and future obligations and liabilities that were generated before the substitution, as well as those derived from employees' seniority.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Yes. It is common to establish a retention bonus to keep key executives (for additional discussion on retention bonus, see question 9).

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

No, there are no limits or prohibitions on the acceleration of vesting or exercisability of compensation in case of a change in control. Owing to the fact that these kinds of benefit are of a contractual nature, the parties can agree the terms and conditions, including the acceleration of vesting or exercisability of compensation in the event of a change in control. Therefore, it may be necessary to include a special provision in the incentive plan in which a change in control is addressed in order to avoid liabilities or conflict with executives.

Littler

Monica Schiaffino **mschiaffino@littler.com**
Mario Yañez **myanez@littler.com**

Park Plaza – Torre 1
Av Javier Barros Sierra No. 540, Floor 7
Col Santa Fe, Del Álvaro Obregón
01210 Mexico City
Mexico

Tel: +52 55 5955 4500
www.littler.com

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Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

No, in Mexico there are no exchange controls rules. In the past, there were many such controls, but as part of the open market economy, this is no longer the case. Notwithstanding that all obligations can be agreed in foreign currency, obligations established in a foreign currency should be paid in Mexican currency using the exchange rate of the day on which the payment is made as published by the Official Gazette.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

No, the Federal Labour Law does not require for documents to be in Spanish. However, in case of litigation any document to be filed with the labour court must be written in Spanish. Therefore, it is recommended that all documents be translated into Spanish.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are no legal provisions prohibiting tax gross-up. It is not typical to make gross-up payments in order for Mexican companies to assume tax liability except for application of tax equalisation policies for expatriates.

42 Are choice-of-law provisions in executive employment contracts generally respected?

No. All employees who render a service on Mexican territory are protected by the Mexican law and the labour courts may exert jurisdiction over such cases. Therefore, if an employee renders services in Mexico, Mexican law governs the employment relationship and the Mexican labour courts will have competent jurisdiction over any dispute arising from such employment relationship regardless of any choice of law provision.

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Nigeria

Jumoke Lambo, Ozofu Ogiemudia and Mary Ekemezie
Udo Udoma & Belo-Osagie

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

The primary source of law that governs executive compensation arrangements in Nigeria is the Companies and Allied Matters Act Cap c20 of the Laws of the Federation of Nigeria 2004 (CAMA), which applies to all companies incorporated in Nigeria.

There are also other industry-specific regulations, which contain provisions on director and senior management compensation arrangements and remuneration, such as the following:

- the Central Bank of Nigeria (CBN) Code of Corporate Governance for Banks and Discount Houses (CBN Code), which applies to banks and discount houses in Nigeria;
- the Securities and Exchange Commission (SEC) Code of Corporate Governance for Public Companies in Nigeria (SEC Code), which applies to public companies and companies seeking to raise funds on the capital market through the issuance of securities or seeking listing by introduction;
- the National Insurance Commission (NAICOM) Code of Corporate Governance for the Insurance Industry in Nigeria (NAICOM Code), which applies to all insurance and reinsurance companies;
- the National Pension Commission (PENCOM) Code of Corporate Governance for licensed pension operators (PENCOM Code), which applies to pension fund administrators and pension fund custodians; and
- the Nigerian Communications Commission (NCC) Code of Corporate Governance for the Telecommunications Industry 2016 (the NCC Code), which applies to telecommunications licensees, that:
  - have a spread of operations covering a minimum of three geopolitical zones;
  - have a turnover in excess of one billion naira;
  - have over 200 employees; or
  - have a subscriber base of 500,000 or more.

It should also be noted that it is not unusual for organisations, and in particular financial institutions and multinational corporations, to engage the services of tax consultants to review and advise on the compensation package for their executives.

CAMA confers the power of determining the remuneration of directors on the shareholders and that of a managing director on the directors of the company. CAMA also provides guidance on the nature of expenses, in respect of which a director can seek to be reimbursed and the basis for paying directors' fees, where the company has not entered into a contract with the director.

The CBN and SEC Codes provide the most guidance in structuring the remuneration of directors and senior management personnel for employers. Both the CBN Code and SEC Code prohibit executive directors (EDs) from determining the remuneration of EDs and require companies to which the codes apply to have a remuneration policy. Companies are also obliged to make certain disclosures with regard to director remunerations. In addition, the CBN and SEC Codes contain restrictions on the remuneration of non-executive directors and restrictions on the pricing of stock options. EDs are prohibited under both codes from receiving sitting allowances or directors' fees.

Under the CBN Code, banks are required to align the executive and board remuneration with the long-term interests of the bank and its shareholders. The banks are also required to establish a board governance and nominations or remuneration committee comprised only of non-executive directors to determine the remuneration of EDs. Similar to the CBN Code, the SEC Code requires companies to develop a comprehensive policy on remuneration for directors and senior management personnel, and also provides that the remuneration of EDs should comprise a component that is related to long-term performance and may include stock options and bonuses. The NCC Code provides that executive remuneration and rewards should be linked to individual as well as corporate performance beyond the short term and should give executives incentives to perform at the highest levels.

Unlike the CBN and SEC Codes, the NAICOM and PENCOM Codes do not contain comprehensive provisions on the remuneration of directors. The NAICOM Code merely states that shareholders have the right to make their views known on the remuneration policy of board members and key executives of the company while the PENCOM Code requires the board of directors to provide a report on the remuneration of directors to shareholders annually.

With respect to employees who perform manual labour and clerical work, the Labour Act, Chapter L1 of the Laws of the Federation of Nigeria 2004 (Labour Act) sets out the minimum standards of employment benefits to be provided to this category of employees. The benefits include annual leave, maternity leave, sick leave and transport allowance. In relation to employees who exercise administrative, executive, technical or professional functions other than directors and senior management employees, their employment benefits are determined by their respective contracts of employment.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The CBN is responsible for enforcing the provisions of the CBN Code while the SEC enforces the SEC Code. The NCC enforces the provisions of the NCC Code, PENCOM, the PENCOM Code and NAICOM, the provisions of the NAICOM Code.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

Yes. CAMA requires that the remuneration of directors shall be determined by the shareholders of the company (section 267(1) of CAMA). Companies are also prohibited from making payments to directors for loss of office, or as consideration for, or in connection with the director's retirement from office, unless the particulars of the proposed payment and the amount have been approved by the company (section 271 of CAMA).

Where the remuneration of directors comprises share options, the CBN and SEC Codes prohibit the company from issuing the shares to the directors at a discount, except with the authorisation of the relevant regulatory authorities including the SEC. In addition, such options must be subject to the approval of the shareholders.

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4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

The Trade Unions Act, Chapter T14 of the Laws of the Federation of Nigeria 2004 as amended by the Trade Union (Amendment) Act 2005 (the Trade Unions Act), prohibits the management personnel of a company from being members of, or from holding offices in, a trade union if such membership or holding of such office in the trade union will lead to a conflict between such officer's loyalty to the union and the management of the company. In practice, directors and senior management officers of a company are not members of a trade union. Consequently, other than the approval of the affected employee, and in relation to executive directors the approval of the shareholders, the establishment or change of an executive's compensation or benefit arrangement does not require any consultation with or consent of a trade union. Where, however, the remuneration of directors is prescribed in the articles of association of a company, any amendments to the director's remuneration must be approved by a special resolution of the shareholders (section 267(3) of CAMA). A special resolution is a resolution approved by not less than three-quarters of the votes cast at a shareholders' meeting.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

Companies are prohibited from providing loans to any director or a director of a holding company or giving guarantees or providing security in connection with a loan given to a director or a director of a holding company. This restriction, however, does not apply to companies who provide such loan or guarantee in the ordinary course of business, provided that such company's ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons (section 270 of CAMA).

Where a company proposes, in connection with the transfer of the whole or any part of the undertaking or property of the company, to pay a director compensation for loss of office, or as consideration for, or in connection with his or her retirement from office, such payment may only be made with the prior approval of the shareholders of the company.

6 What rules apply to compensation of non-executive directors?

Non-executive directors are entitled to be reimbursed for travelling, accommodation and other expenses properly incurred by them in attending and returning from meetings of the directors or shareholders of the company, or in connection with the business of the company (section 267(2) of CAMA). In relation to banks and discount houses, non-executive directors can only receive directors' fees and sitting allowances for board and board committees, in addition to reimbursable travel and hotel expenses; they are prohibited from receiving any benefits or salaries, in cash or in kind. With respect to public companies, the SEC Code prescribes that the compensation for non-executive directors should be fixed by the board and approved by the shareholders. The NCC Code provides that the remuneration of non-executive directors should be designed to reflect the expectations of time, commitment and responsibilities required of the role.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

Public companies, pension fund administrators, pension fund custodians, banks and discount houses are obliged to disclose their respective remuneration policies in their annual reports and accounts. In addition, public companies, banks and discount houses are required to disclose details of the shareholding of their directors in the annual reports. The reporting requirements for public companies also include the requirement to publish all material benefits and compensation paid to directors in the annual report and accounts. Every company is also obliged to maintain a register (which can be inspected at the company's registered office) that sets out directors' interest in the shares or debentures of the company.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

Employment agreements are the principal documents that regulate employment relationships in Nigeria and are a requirement of the law in relation to workers. The usual provisions include the following:

- the term of the agreement (if fixed);
- the employee's position, duties and responsibilities;
- the place of work and work hours;
- the remuneration and other employment benefits such as medical, insurance, annual leave, maternity or paternity leave and sick leave;
- restrictive covenants and confidentiality obligations;
- provisions on the right to process personal information;
- termination requirements; and
- governing law.

In addition to the terms agreed between the employer and employee, the SEC and NCC Codes require employment contracts of executive directors to include the following:

- an explanation of the duties of care, skill and diligence and other responsibilities of the director;
- the requirement to disclose any material interests in the company and other entities related to the company;
- the requirement to disclose, periodically, material interests in contracts in which the company is interested or involved; and
- specific requirements such as attendance at board meetings.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

The compensation structure varies depending on the policies, size, profitability and type of organisation, as well as the level of seniority of the employee. This notwithstanding, the more common compensation structures include salaries and merit-based increases to salaries, performance bonuses, allowances, such as housing and transport and, in corporate organisations (other than partnerships), share options schemes and profit sharing.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

There are no generally prescribed share options limits that apply to all companies in Nigeria. In relation to public companies, the SEC Code provides that where share options are granted as part of the remuneration to directors, the limits of such share options should be as determined in any given financial year and must be subject to the approval of the shareholders of the company in a general meeting. In addition, both the SEC and CBN Codes (in relation to banks and discount houses) provide that share options cannot be exercisable until one year after the expiry of the tenure of the director. According to section 269(1) of CAMA:

> *It shall not be lawful for a company to pay a director remuneration (whether as director or otherwise) free of income tax, or otherwise calculated by reference to or varying with the amount of his income tax, or at or with the rate or standard rate of income tax.*

Any incentive compensations to employees that are above the employment incentives permitted by law will be taxed in accordance with the Personal Income Tax Act, Chapter P8 of the Laws of the Federation of Nigeria 2004 (as amended by the Personal Income Tax (Amendment) Act 2011) subject to a maximum of 24 per cent of each employee's remuneration.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

The deferral and vesting of incentive awards is permissible, subject to the provisions of the employment contract and any applicable laws and regulations. The SEC Code requires that any deferred compensation,

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such as stock options, should not be exercisable until one year after the expiry of the minimum tenure of directorship. The CBN Code also provides that share options rights cannot be exercised by directors until one year after the expiry of their tenure.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

Yes. Where an employer provides discretionary incentive compensation on a recurring basis, the employer could create an entitlement to such compensation.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

Nigerian law requires that employers treat employees fairly. Although an employer has the right to determine the type and amount of incentive compensation awarded to executives, this discretion must be exercised fairly and in a non-discriminatory manner.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

An employer may, subject to the terms of the employment agreement, agree the circumstances under which an employee may be required to repay sums that have been paid to the employee. In relation to directors, they are required to return any compensation for loss of office paid to them if such compensation was not approved by the shareholders.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

The prevalent forms of equity compensation awards in Nigeria include share options and employee share schemes. The vesting period varies depending on the relevant organisation's policies and the applicable codes of corporate governance, but a vesting period of between two and five years is not unusual.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

The shares granted to employees as part of their employment compensation, which are not paid for, will be deemed to comprise part of the salary of the employee and will therefore be taxed as a benefit-in-kind. A fair market value will be attributed to the shares and these will also be subject to personal income tax at the prescribed rate. If the employee pays for the shares, the shares will not be regarded as a benefit-in-kind and, as such, will not be subject to personal income tax. Tax-advantaged equity compensation programmes are not available.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

Public listed companies are required to provide the Nigerian Stock Exchange with details of any share scheme including the persons to whom the shares may be issued or sold, the total amount of the shares subject to the scheme and the maximum entitlement for any one participant in the scheme.

18 Are there withholding tax requirements for equity-based awards?

There is no withholding tax requirement for equity-based awards. As indicated above, if the award comprises part of the remuneration of the employee, such award will be subject to personal income tax. The employer will have an obligation to deduct the appropriate tax and remit to the relevant tax authority.

Any dividends paid by the company on the shares will be liable to a withholding of tax at the applicable rate and such withholding tax is the final tax payable on the dividends.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Inter-company chargeback agreements between foreign parent companies and local affiliate companies are common. In order, however, for the local company to be able to make any payments to the parent company under any such agreement, the agreement must be registered with the National Office for Technology Acquisition and Promotion. The agreement must also be structured to comply with the requirements of the Nigerian Income Tax (Transfer Pricing) Regulations No. 1, 2012 (the TP Regulations). The TP Regulations regulate transactions and dealings between or among related parties and cover all transactions between 'connected taxable persons' carried on in a manner not consistent with the arm's-length principle.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Employee share purchase plans are permitted under Nigerian law. Some of the concerns that the employer is required to address include the price at which the shares are purchased, the number of shares to be allotted to the plan – so as to minimise the dilution of the majority shareholders – and the category of employees that will be entitled to purchase the shares so as to ensure that the employer is not regarded as being unfair or discriminatory to other employees. With respect to public listed companies, under the Rules of the Nigerian Stock Exchange 2015, such companies may only reserve a maximum of 10 per cent of its issued share capital for its employees.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Under the Labour Act, workers are entitled to annual leave of not less than six working days, annual leave allowance, sick leave of up to 12 working days in any one calendar year and 12 weeks of maternity leave. The Labour Act does not prescribe the minimum amount payable as annual leave allowance but provides that, in computing the annual leave allowance, the employer shall not include overtime or other allowances. The provision of medical insurance under the National Health Insurance Scheme Act is not mandatory but an employer that enrols its employees in the scheme is prohibited from discontinuing the provision of the scheme. Employers are also obliged to provide group life insurance for employees with a minimum value of three times their total annual emoluments and to contribute a sum equivalent to 10 per cent of the employee's monthly emoluments into an employee's retirement savings account, with a pension fund administrator of the employee's choice. Nigeria does not currently have an unemployment benefit scheme but employees are entitled to receive compensation for work-related disability from the Employees Compensation Fund, to which employers are obliged to remit 1 per cent of their total monthly payroll every month.

Voluntary benefits that are incorporated in an employment agreement cannot be discontinued without the consent of the employee. Employers may, however, discontinue or vary discretionary benefits provided that any accrued benefit is paid to the employees prior to the discontinuance.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

In addition to the mandatory benefits mentioned in question 21, usual forms of benefits provided to executives in Nigeria include ticket allowance, company car, bonus, entertainment allowance and equity-based compensation, such as share options.

Any employee benefits that form part of the employee's remuneration will be subject to personal income tax. CAMA prohibits a company from paying a director remuneration (whether as director or otherwise) free of income tax.

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Update and trends

The NICN is modifying the common law principle that an employer can terminate the employment of an employee for a good or bad reason or for no reason at all. In a number of cases, including the case of *Mr Ebere Onyekachi Aloysius v Diamond Bank PLC* (2015) 58 NLLR (Pt 199) 92, the court held that this principle does not align with international best practice on the termination of employment. The current position of the NICN is that the termination of an employee contract must be for cause and a reason must now be given for the termination of an employee's contract of employment.

The NICN has also introduced the concept of 'constructive dismissal' or 'constructive termination' of employment, which was previously not part of the Nigerian labour and employment law jurisprudence. This principle provides that an employer would be regarded as having constructively terminated the employment of an employee where an employee resigns from his or her appointment because of the employer's actions having a material adverse effect on working conditions or where the employer significantly changes the terms and conditions of the employment (*Miss Ebere Ukoji v Standard Alliance Life Assurance Co Ltd* (2014) 47 NLLR (Pt 154) 531).

In addition, the NICN has also modified the principle that required an employee to forfeit accrued benefits if such employee was dismissed from employment for misconduct. The current position requires that all such terminal benefits be paid to the employee upon the termination of his or her appointment irrespective of the cause of the termination of the employment.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

A company that wishes to terminate the appointment of an ED must give the ED the notice set out in the employment agreement between the ED and the company. At the expiry of the notice period, the ED's employment relationship with the company would be determined. Until some recent decisions by the National Industrial Court of Nigeria (NICN), which has exclusive jurisdiction over labour and employment matters in Nigeria, executives could be dismissed without cause as long as the company complied with the notice requirement. The NICN now requires an employer to provide a reason for the termination of any employee and has held that termination without cause is contrary to international labour standards and international best practice.

Where the executive is also a director of the company, unless the company procures his or her resignation or he or she is removed by an ordinary resolution of the shareholders (50 per cent +1 vote of the shareholders present and voting) at a general meeting of the shareholders, the executive will continue to function as a director. Special notice (ie, 28 days) of the resolution must be given to the shareholders. The company must provide a copy of the notice to the director and allow the director, if he or she so elects, to be heard on the resolution at the meeting (section 262 of CAMA). This procedure also applies to the removal of non-executive directors.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

No, there are none, except for those enumerated in the relevant employment agreement and any other applicable employment-related document such as the employee handbook, and in relation to employees that are members of a trade union, the applicable collective bargaining agreement. These terms will be based on what the parties agreed between themselves and will, therefore, vary.

25 What executive severance payment level is typical?

This is subject to the provisions of the executive's employment agreement. It is, however, not unusual for the severance payment to be calculated as a multiple of the employee's salary. It is unusual to pay a pro-rata incentive where an employee's contract is terminated, save for instances where the employment agreement reserves this right.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

Although the terms 'dismissal' and 'termination for cause' are not defined in any statute, Nigerian courts have held that an employer may terminate an employee's appointment for cause where the employee's action or conduct is of such a grave and weighty nature as to undermine the relationship of confidence that should ordinarily exist between an employer and an employee. Typically. employers reserve the right to terminate an employee's contract for cause on specific grounds, which would usually be listed in the employment agreement or employee's handbook. In order, however, for the employer to terminate the employee's contract for cause, the employer must afford the employee the opportunity to defend him or herself.

There is also no statutory definition of the term 'constructive dismissal' under Nigerian law but the NICN has held that the term could be applied to a situation where an employer has introduced significant unilateral changes to the terms and conditions of employment, or where an employer's actions have a material adverse effect on the conditions of work, which has resulted in an employee resigning from his or her appointment.

27 Are 'gardening leave' provisions typically used in employment terminations?

The use of gardening leave provisions is not uncommon in Nigeria. The extent of their use is determined, not by law, but by the terms of the agreement negotiated between the employer and the employee.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

The use of a general waiver or release of claims on termination of an executive's employment is permitted and is commonly used in Nigeria. In order, however, for the waiver to be enforceable, the employer must have paid all accrued contractual entitlements or benefits to the executive and the executive given an opportunity to review the waiver. The executive must also not have signed the waiver under duress.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Non-competition, non-solicitation of customers and non-solicitation of employees are the more common forms of restrictive covenants in Nigeria. Subject to the limits set out in question 30, restrictive covenants for a period up to 12 months after the termination of the contract are common.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Post-contractual restrictive covenants are generally not enforceable under Nigerian law unless the covenants are reasonable with reference to the interest of the parties concerned and that of the public. In deciding whether such clauses are reasonable, the courts will have regard to the nature of the business, trade or occupation, the area over which the restraint is to be imposed and the length of time for which it is to continue. In addition, the courts have held that there must be a legitimate proprietary interest that the employer seeks to protect as the courts will not enforce such clauses if the clause merely seeks to prevent competition. Where the courts find the length of such restrictive covenants to be excessive, it will hold such clauses to be void and unenforceable. This is because the courts are reluctant to modify the terms of a contract of employment entered into between parties.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

Remedies available to employers for breach of post-employment restrictive covenants include an action for damages for breach of contract and a court injunction to restrain the employee from continuing the restricted activities.

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Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

The Pension Reform Act 2014 requires an employer to make a minimum contribution equivalent to 10 per cent of the employee's monthly emoluments, to deduct 8 per cent of the employee's monthly emoluments and remit the total sum to the pension fund administrator of the employee's choice. In addition, employers are also required to obtain life insurance for each employee of a value that is at least three times the total annual emoluments of each employee. With respect to the discontinuance of voluntary benefits, see question 21.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Save for the mandatory pension contributions under the Pension Reform Act, which is the most common retirement benefit, other forms of retirement benefits will be as agreed in the contract between the executive and the employer. It is, however, not unusual for executives to be entitled to receive share options. Other than pension contributions, which are exempt from tax for the employee and are allowable deductions for tax purposes for the employer, all other benefits provided to an employee that exceed the permitted allowances are subject to personal income tax.

34 May executives receive supplemental retirement benefits?

Executives may receive supplemental retirement benefits. Such benefits are not standard and will be as agreed between the executive and the employer and stipulated in the respective employment contract.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

Nigerian companies law prohibits a company from indemnifying an executive against any liability that would otherwise, by virtue of any rule of law, attach to such executive in respect of any negligence, default or breach of trust. Where a company enters into any such arrangement with any of its executives, such an arrangement will be void. A company may, under the terms of any agreement between the company and an executive or pursuant to the terms of its articles of association, indemnify an executive in respect of anything done or omitted to be done by the executive provided such act or omission does not fall within the activities listed above in respect of which a strict liability is imposed. A company may also indemnify an executive against any liability incurred by such executive in defending any civil or criminal proceedings arising out of the actions or omissions of the executive in the course of his or her employment with the company, in which judgment is given in the executive's favour (section 67 of CAMA).

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

Employment agreements are contracts of personal service and can only be transferred with the consent of an employee. An asset sale may only result in an automatic transfer of employees to the acquirer if the asset sale is effected via a scheme of arrangement and the court, in sanctioning the scheme, orders the transfer of employees.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Arrangements of this nature are not unusual in Nigeria and are common in acquisitions involving private equity firms. The incoming majority shareholder would usually require the seller to undertake that it would procure that the key executives would not resign.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

Under the SEC and CBN Codes, share options cannot be exercised until one year after the expiry of the tenure of the director.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

A Nigerian company that proposes to pay its executives compensation in foreign currency may do so only if the payments are made from its domiciliary account, in accordance with extant exchange control regulations. The employer would, however, have to confirm the modalities for making the payments from its bankers.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

There is no requirement for employment agreements to be translated into any local language.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

No.

42 Are choice-of-law provisions in executive employment contracts generally respected?

Although choice-of-law provisions in contracts are generally respected, employment agreements are usually governed by Nigerian law. Notwithstanding parties' agreement to a foreign choice of law, Nigerian courts have, however, indicated that in certain limited

Jumoke Lambo **jumoke.lambo@uubo.org**
Ozofu Ogiemudia **ozofu.ogiemudia@uubo.org**
Mary Ekemezie **mary.ekemezie@uubo.org**

St Nicholas House, Floors 10 and 13
Catholic Mission Street
Lagos
Nigeria

Tel: + 234 1 462 2307 10 / 462 2312 / 277 49202
Fax: + 234 1 4622311
www.uubo.org

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circumstances, it will assume jurisdiction. Some of the factors that the court will consider in making this determination include the location of the evidence, the convenience in terms of accessibility and expenses between the domestic and foreign courts and the countries with which the parties are connected.

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Russia

Anna Maximenko and Elena Klutchareva
Debevoise & Plimpton LLP

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

The principal law regulating executive compensation and employee benefits is the Labour Code of the Russian Federation No. 197-FZ, dated 30 December 2001 (the Labour Code). It regulates remuneration, paid leave, termination payments and benefits provided to certain categories of employees, etc. The Tax Code of the Russian Federation (Parts I and II) No. 146-FZ and No. 117-FZ dated 31 July 1998 and 5 August 2000, respectively (the Tax Code) regulates the taxation of compensation and benefits. The other main laws relevant to the regulation of compensation and benefits are:

- Russian Law No. 1032-1 on Employment of the Population in the Russian Federation, dated 19 April 1991, regulating unemployment benefits;
- Federal Law No. 167-FZ on Compulsory Pension Insurance in the Russian Federation, dated 15 December 2001 (the Law on Compulsory Pension Insurance), regulating pensions in the Russian Federation;
- Federal Law No. 255-FZ on Compulsory Social Insurance for Temporary Incapacity to Work and in Connection with Maternity, dated 29 December 2006, regulating mandatory social insurance for temporary incapacity to work owing to illness or injury and in connection with the birth of a child;
- Russian Law No. 4520-1 on State Guarantees and Compensation for Persons Working and Residing in the Regions of the Far North and Comparable Areas, dated 19 February 1993, regulating benefits provided to employees working or relocating to work in the regions of the far north or areas comparable to them;
- Federal Law No. 39-FZ on the Securities Market, dated 22 April 1996, regulating the placement of securities, which is relevant for various stock-based incentive plans; and
- Federal Law No. 173-FZ on Currency Regulation and Currency Control, dated 10 December 2003 (the Currency Control Law), regulating the currency of benefits payments.

Russia does not have a precedential system of law, so court decisions do not establish precedent for similar cases; however, decisions of the Russian Constitutional Court, Russian Supreme Court and former Higher Arbitrazh Court (which was liquidated on 6 August 2014) are of considerable importance for lower-level courts, which may use these decisions as guidance in the resolution of similar issues. Among such decisions, the following decisions are of importance in the area of executive compensation or employee benefits:

- Constitutional Court Ruling No. 3-P, dated 15 March 2005, interprets the purposes of executive termination payments and sets forth criteria for their determination. This reasoning is used by lower courts for assessment of amounts of compensation;
- Plenum of the Supreme Court Resolution No. 2 on Enforcement of the Labour Code by Courts, dated 17 March 2004, gives important clarifications of Labour Code provisions, including termination and salary issues;
- Plenum of the Higher Arbitrazh Court Resolution No. 28 on Certain Issues in respect of Challenging Major Transactions and Interested Party Transactions, dated 16 May 2014, clarifies the cases in which employment compensation should be approved either by a board of directors or by a general shareholders' or participants' meeting (see question 3 for more details);
- Supreme Court Ruling No. 307-14-8853, dated 30 March 2015, invalidates a termination payment that is not based on the company's economic performance during the term of an executive's office; and
- Plenum of the Supreme Court Resolution No. 21 on Certain Issues of Enforcement of the Legislation on Employment of the Chief Executive Officer and Members of the Management Board, dated 2 June 2015, provides guidance on the status of executives as employees and, inter alia, allows courts to deny or limit termination payments claimed by executives if such payments constitute abuse of rights or otherwise violate the interests of a company, its other employees or other persons.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The primary government agencies responsible for enforcement of regulations applicable to executive compensation and employee benefits are:

- labour inspection offices, responsible for compliance with employment regulations;
- the Bank of Russia, responsible for regulation of the securities market and compliance with currency control laws;
- the tax authorities, responsible for compliance with taxpayers' obligations; and
- prosecutor's office, responsible for oversight of compliance with laws and observance of employee rights.

Disputes related to executive compensation and employee benefits are heard by Russian courts of general jurisdiction unless the dispute is qualified as a corporate dispute (eg, if connected with challenging corporate resolutions), in which case it will be considered by the arbitrazh (commercial) courts.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

Compensation or benefits that qualify as a major transaction are subject to approval either by a board of directors or by a general shareholders' or participants' meeting. Compensation or benefits that qualify as an interested-party transaction are subject to approval either by a board of directors or by a general shareholders' or participants' meeting provided that respective approval is requested by a company's chief executive officer (CEO), member of management board, member of board of directors or shareholder or participant that owns more than 1 per cent of voting shares (charter capital) of the company.

A major transaction is a transaction or a series of inter-related transactions that is not committed within the boundaries of ordinary business activities and that is related to the direct or indirect acquisition, disposal or potential disposal of property equal to or exceeding 25 per cent of the balance sheet value of a company's assets as of

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the latest reporting date or to the company's obligation to lease or to license property equal to or exceeding 25 per cent of the balance sheet value of the company's assets as of the latest reporting date. For example, an employment agreement will be qualified as a major transaction if it provides for termination payments or payment of salary that are equal to or exceed 25 per cent of the balance sheet value of a company's assets and it is not qualified as a transaction within the boundaries of the company's ordinary business activities.

An interested-party transaction is one involving a party in which: (i) a member of a board of directors, CEO, member of a management board, controlling person or a person entitled to direct the activities of a company; or (ii) his or her spouse, parent, children, brother, sister or person under their control:

- is a party, beneficiary or intermediary;
- controls a legal entity that is a party, beneficiary or intermediary; or
- holds office in the governing bodies of a party, beneficiary or intermediary.

For example, an employment agreement with a CEO setting out additional compensation benefiting the CEO will qualify as an interested-party transaction, as the CEO will be one of the parties, and this will require approval as an interested-party transaction provided that respective approval is requested by a company's CEO, member of management board, member of board of directors or shareholder or participant that owns more than 1 per cent of voting shares (charter capital) of the company. The interested party will be excluded from voting.

Remuneration and compensation of expenses of members of boards of directors should be approved by a company's general shareholders' meeting.

Compensation or benefits of certain types of companies are subject to additional statutory approvals. For example, a bank's board of directors must approve the bank's internal regulations on the salary of the CEO, and compensatory and incentive payments to the CEO and directors of certain departments (eg, risk management and internal audit). The owner of the property of a state or municipal entity represented by an authorised state body must approve the compensation and benefits provided to the CEO of such entity.

Additionally, compensation or benefits may be subject to specific corporate governance requirements (eg, requiring approvals) set by the internal regulations or the charter of a company.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

The establishment or change of an executive compensation or benefit arrangement generally requires consultation with a union if such arrangement is adopted as a local normative act of a company (ie, the company's internal regulations (policy) on compensation or benefits), or where provided for in a collective bargaining agreement.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

No types of compensation or benefit arrangements are prohibited, either generally or with senior management.

6 What rules apply to compensation of non-executive directors?

There are no specific rules governing compensation of non-executive directors. However, the Code of Corporate Governance approved by Letter No. 06-52/2463 of the Bank of Russia, dated 10 April 2014, does not recommend including non-executive directors in pension, insurance and investment programmes (especially option or other programmes leading to obtaining shares of a company), as well as providing them with other benefits and bonuses (see question 9). The Code of Corporate Governance also warns companies against setting forth severance payments for non-executive directors in case of early termination of their service. The provisions of the Code of Corporate Governance are not mandatory for companies, but compliance with it is considered as good practice, especially for listed companies.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

According to the Bank of Russia Regulations on Disclosure of Information by Issuers of Securities No. 454, dated 30 December 2014, the details of an executive's compensation should be disclosed in the following documents:

- annual and quarterly reports;
- securities prospectus; and
- corporate action notices (eg, on entering into material, major and interested-party transactions).

An annual report is published by public joint stock companies, and non-public joint stock companies that have gone public with bonds or other securities or that have more than 50 shareholders. The annual report must disclose the remuneration and compensation policies for members of governing bodies and the total payments for each governing body for a reporting year (excluding the CEO).

A securities prospectus is published if a company issues securities by subscription in certain circumstances set out by the Russian securities markets legislation. It makes the same disclosure on amounts of executives' compensation as the annual report for the latest completed reporting year and the latest completed reporting period. Additionally, an issuer discloses information on all corporate resolutions or arrangements regarding levels of remuneration and compensation.

Quarterly reports generally are published by issuers who have registered securities prospectus or submitted it to a stock exchange. It makes the same disclosure on amounts of executives' compensation as the securities prospectus for the latest completed reporting year and first three months of the current reporting year, and then six, nine and 12 months of the current year.

Corporate action notices are published by issuers obliged to disclose quarterly reports. They disclose information on executive compensation and employee benefits if they qualify as material or interested-party transactions (see question 3) or otherwise influence the value of securities. Corporate action notices are published after the occurrence of each event required to be reported.

Special disclosure requirements apply to directors of state and municipal institutions. They must annually disclose information on their and their spouse's and minor children's income, property and liabilities to authorised state and municipal bodies. Income includes salary, pensions and other compensation. In addition, information on the average monthly salary of CEOs, their deputies and chief financial officers of state and municipal institutions and enterprises for a calendar year is disclosed on official websites of respective entities.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

Under article 16 of the Labour Code employment agreements are required. The employer must prepare a written employment agreement and offer it to the prospective employee, and two original employment agreements (one for the employer and one for the employee) must be signed by both parties within three business days of the first day of employment. If a person starts working with the express or implied consent of the employer but without a written employment agreement, articles 19.1 and 67 of the Labour Code recognise the existence of an employment agreement between the parties, even though it has not yet been made in writing. In the absence of a written employment agreement, Russian law does not, however, recognise certain restrictions that may have been intended for the employment arrangement, such as a fixed term of employment or a probationary period.

The written employment agreement should include all of the terms set out in article 57 of the Labour Code, including the names of the employer and the employee, the position to which the employee has been appointed, the required qualifications, the terms of payment, individual benefits and compensation.

Neither the employer nor the employee may amend the material terms and conditions of an employment agreement without the other's consent. Furthermore, the provisions of an employment agreement are invalid if they attempt to exclude or restrict the employee's rights guaranteed by the Labour Code. In the event of a dispute, the employer

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bears the burden of proof for establishing the material terms and conditions of the employment contract.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

The prevalent types and structures of incentive compensation are as follows.

Short-term incentive programmes

The payment of these bonuses is calculated on the basis of a company's operational results for a month, quarter, half-year or year. Such arrangements are managed directly by the Russian employer under Russian law.

Long-term incentive programmes (usually lasting for three to five years)

Long-term bonus programmes

Employees are granted a bonus payment calculated on the basis of long-term key performance indicators (KPI); the set of KPI depends on management level and position. Such arrangements are managed directly by the Russian employer under Russian law.

Option programmes

Employees are granted call options for a certain number of the company's shares to be exercised after the expiry of a certain period; when the option is due, employees are entitled either to receive the shares or conclude a share purchase agreement under which shares will then be transferred. Since 1 June 2015, option programmes can be managed directly by the Russian employer under Russian law as options are now set forth by Russian legislation. However, they still have to be tested by courts (in particular, the Supreme Court). Previously, option programmes were either structured using a foreign special purpose vehicle (SPV) or managed through the employer's foreign parent and governed by foreign (usually English) law. Such structure can still be used but Russian law restrictions applicable to circulation of foreign securities in Russia will need to be considered upon its establishment (see below).

Restricted stock purchase programmes

Employees are granted a certain number of the company's shares that they cannot transfer or otherwise dispose of. Each employee becomes the absolute owner of the shares after the expiry of a certain period. Apart from the shares, employees receive dividends paid during the term of the programme. Alternatively, the company may redeem the shares from the employee at the end of the programme term. Restricted stock purchase programmes are governed by foreign law and operated through a foreign company as Russian law does not permit contractual limitations of shareholders' rights other than under shareholders' or participants' agreements. Russian law restrictions applicable to circulation of foreign securities in Russia will need to be considered upon establishment of the restricted stock purchase programme and its extension to employees in Russia (see below).

Phantom option or shares programmes

Employees are assigned a certain number of 'phantom' shares of the company that give no shareholders' rights. After the expiry of a certain period employees receive an adjustment between the current value of the company's shares and the value of the 'phantom shares'. Being cash-based, phantom programmes may be operated by Russian employers directly under Russian law.

The programmes vary by level or type of organisation. Small or medium-sized companies usually implement short-term incentive programmes that provide monetary awards or a long-term bonus programme, while major companies usually implement long-term incentive programmes based on profits from shareholder capital (comparing with competitors' results). In addition, the Code of Corporate Governance recommends that all public companies adopt option programmes.

In non-public companies the operation of real share option plans is exceedingly difficult because of shareholders' or participants' pre-emption rights, which means that participants and shareholders have the right to purchase shares that are offered for sale or newly issued by a company before any other persons.

Restricted stock purchase programmes do not work under Russian law. It is prohibited to restrict the disposition of shareholder rights (other than under shareholders' or participants' agreements), thus an executive's ownership rights to shares cannot be contractually limited (eg, by consent of the board to the disposition of shares).

Option programmes structured via a foreign entity are subject to regulatory restrictions. For public placement and circulation in Russia foreign securities and their issuer must satisfy certain requirements and a prospectus must be registered by the Bank of Russia or submitted to a Russian stock exchange. Foreign securities that have not been admitted to public placement or circulation in Russia may only be transferred to a limited number of employees that are 'qualified investors'. If foreign shares are recognised as securities from a Russian law perspective they may also be transferred via a Russian licensed broker, unless the investment in the foreign entity is structured as an integral part of an employment agreement.

A person is either directly referred to as a qualified investor by the Russian legislation (eg, banks, insurance companies, brokers or the Bank of Russia) or may be classed as a qualified investor if any of the following requirements are met:

- the individual holds securities or financial instruments of a total value of at least 6 million roubles;
- the individual has professional experience performing transactions with securities or other financial instruments by virtue of his or her employment with a Russian or foreign organisation as a general rule for at least three years;
- the individual has performed on the whole at least 10 transactions with securities or other financial instruments per quarter over the past four quarters and at least once in a month, for a total value of at least 6 million roubles;
- the individual owns certain property of aggregate value not less than 6 million roubles; or
- the individual has received higher education in economics or has certain certificates (eg, 'chartered financial analyst').

There are exceptions to the limitations, for example, if such sale or acquisition is made by:

- a foreign citizen; or
- a Russian citizen under his or her employment agreement (including fulfilment of his or her duties thereunder) or in connection with his or her membership of the board of directors or supervisory board of a legal entity.

These restrictions do not apply to phantom programmes.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

Generally, the amount or structure of incentive compensation is not subject to maximum limits, with certain exceptions. According to Russian court practice an employer is not limited in the options or structure of incentive compensation and determination of the amount of benefits unless otherwise provided by law.

The Labour Code stipulates certain exceptions for executives of state corporations, state companies, state and municipal enterprises and institutions and entities that are at least 50 per cent owned by the state or municipal bodies. According to article 349.3 of the Labour Code, compensation for termination of an employment contract with the CEO, his or her deputies or the chief financial officer in the event of change of control (or termination of an employment agreement with the CEO without cause), and cumulative remuneration in the event of dismissal of executives for any reason must not exceed the amount of three average monthly salaries. In addition, according to article 145 of the Labour Code, the amount of the average monthly salary of CEOs, their deputies and chief financial officers of state and municipal institutions and enterprises is calculated on the basis of the level of the average monthly salary of other employees of respective organisations. Respective maximum ratios are set forth by legal acts of authorised state bodies. Breach of these ratios will lead to early termination of an officer.

There are also limits on the amount of compensation for executives of Russian credit organisations. At least 40 per cent of the total amount of remuneration must be flexible, and payment of at least 40 per cent of the flexible part must depend on the financial performance of the

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credit organisation (including deferral or instalment). A combination of monetary and non-monetary forms of compensation may be provided for in the internal regulations of a credit organisation. Monetary forms of the flexible part of the compensation must be linked to changes in share price.

Apart from this, an employer has the right to limit the amount of its incentive compensation at its discretion by its rules and programmes and in collective bargaining or employment agreements.

Compensation stipulated by labour contracts and internal company regulations is treated as employees' income and is taxed on the same basis and with the same rates applied regardless of the amount of the compensation. Compensation paid to executives in Russia is treated as income received in Russia regardless of the actual place from which the programme is managed. There are no statutory limits on sums of incentive compensation, but in cases where large sums of compensation are paid to executives (who have the right to act on behalf of the company) the risk may arise of such payments being considered as having no reasonable basis.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Deferral and vesting of incentive awards is permissible. There are no limits on the length or type of vesting provisions (or any minimum vesting periods for types of awards). Deferral that restricts the shareholder rights of an employee who is granted shares is, however, illegal (see question 9).

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

It cannot be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement; however, if internal regulations provide that incentive compensation will not be paid in only limited cases, such as violations of work discipline or other particular grounds, an employee who has not received such compensation may file a suit with the court. In this case the employer must provide evidence to the court that there were grounds for refusal to pay compensation.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

The type or amount of incentive compensation awarded to an executive potentially affects the compensation that must be awarded to other executives or employees. Article 132 of the Labour Code prohibits any discrimination in remuneration, and the remuneration of an employee must be based on his or her qualifications, complexity of work, and quality and quantity of work, and is not subject to maximum limits. If employees hold the same positions, carry out the same type of work, have the same qualifications and achieve the same work results, the incentive compensation awarded to one employee and not provided to another employee may potentially give rise to claims against their employer.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

It is permissible to require repayment of incentive compensation if such compensation does not form part of an employee's salary according to his or her employment agreement. If incentive compensation forms part of an employee's salary, an employer can request its repayment only in cases provided by the law (ie, error in calculations, the employer's guilt in failure to meet labour standards or time off confirmed by an authorised body, or unlawful actions of an employee that lead to payment of the incentive compensation confirmed by the court). The law does not set forth the circumstances under which repayment of incentive compensation is mandatory.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

These days equity compensation is being replaced by other forms; however, it is still used and the prevalent form of equity compensation is a share option plan operated by SPVs abroad or in Russia (subject to certain restrictions; see question 9). Options are structured either as option agreements, under which the SPV grants shares to employees, or as options for conclusion of a share purchase agreement in the future, under which the SPV sells shares to employees (see question 9). The typical vesting period is between three and five years.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

The Tax Code does not envisage specific rules for taxation of participants of option programmes. Tax liability arises if the employee exercises option and obtains shares from a company. The tax base is calculated as the difference between the share price set forth in the option programme and the fair market value of the shares. Equity compensation is taxed at a rate of 13 per cent for residents, and at a rate of 30 per cent for non-residents unless a double taxation treaty provides for a lower rate, exemption or relief.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

The transfer of shares of a Russian issuer must be registered in the shareholders' register, which is held either by the issuer or a registrar. A new issuance of shares must be registered with the Bank of Russia (for foreign securities, see question 9).

18 Are there withholding tax requirements for equity-based awards?

Russian employers are normally required by law to withhold and transfer income tax in the event of payment of any kind of taxable income from employment. The withholding of tax does not depend on the type of award. If the employer cannot withhold the tax by the end of the tax period, a notification is to be sent to the tax office and the employee. Thus, the responsibility for calculating and withholding income tax may be passed to the employee.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Inter-company chargeback agreements are not common in Russia, since under Russian tax law a company must provide justification for the deduction of any expenses. The deduction of expenses related to an inter-company chargeback from a Russian company's profit may be deemed illegal by the tax authorities. Owing to the tax risk, companies more often use an arrangement in which a Russian company pays management or services fees to a non-local parent company; however, this arrangement is also not tax risk-free and applying such a model may be considered illegal if the company fails to prove the necessity and authenticity of such services. The amounts of such fees are subject to tax control.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Employee stock purchase plans are available, but not prevalent. Frequently encountered issues related to such arrangements are:

- structuring and enforcement of options (see question 9);
- regulatory restrictions on placement of foreign securities (see question 9); and
- unlawfulness of deferral provisions (see questions 9 and 11).

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

There are mandatory benefits, including the following.

Paid annual leave and additional paid annual leave

Each employee is entitled to 28 days of paid annual leave. In addition, certain categories of employee are granted additional paid leave in excess of this (eg, employees with unlimited working hours have at least three additional holiday days; and employees working in harmful

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or dangerous working conditions have at least seven additional holiday days).

Paid sick leave
An employee who has fallen ill is entitled to receive a temporary incapacity allowance from the Social Insurance Fund out of insurance payments made by an employer. This amount depends on length of service and varies from 60 to 100 per cent of an employee's average salary for the past two years, but may not exceed 1,901.37 roubles per day.

Maternity and parental leave
Under article 255 of the Labour Code, women are entitled to leave of 70 days prior to, and 70 days after, the birth of a child (maternity leave) and until the child reaches the age of three (parental leave). Parental leave is also granted to fathers, grandmothers, grandfathers and other relatives or guardians of a child. During maternity leave an allowance is paid from the Social Insurance Fund out of insurance payments made by an employer. The allowance constitutes 100 per cent of an employee's average salary for the past two years, but not more than 1,901.37 roubles per day. Allowance during parental leave is paid monthly until the child reaches one-and-a-half years of age and constitutes 40 per cent of an employee's average salary for the past two years, but not more than 23,120.66 roubles per month.

Salary indexation
An employer must adjust salaries to ensure that they correlate with increases in consumer prices for goods and services. The terms and procedure for indexation must be set out in local normative acts and the collective bargaining agreement.

Unemployment allowance
Persons officially recognised as unemployed (ie, registered with employment agencies) may receive an unemployment allowance paid out of the state budget, as a general rule, for a year. The amount depends on whether the unemployed person previously held a job and why this job was terminated.

Compensation for work in harmful and dangerous working conditions
Employees working in harmful and dangerous working conditions have shorter working hours and a shorter working week, and their salaries increased by at least 4 per cent above the salary for this type of work in normal conditions.

Termination payments
See question 24.

Compensation for work in the far north or comparable regions
Increased salary as well as additional days off, holiday days and shorter working hours are provided to employees working in the far north and comparable regions. There are no limits, other than contractual (if any), on discontinuing voluntary benefits that have been provided to an employee.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

The following types of employee benefits are prevalent for executives:
- short and long-term incentive plans;
- termination payments;
- provision of a company car with driver;
- provision of additional paid annual leave; and
- increased level of coverage of various expenses, including business trips, accommodation and relocation.

In general, taxable compensation includes compensation received in cash or in kind (housing, meal allowance, etc), or in the form of imputed income (eg, under stock-based incentive plans). Income received in kind is valued at fair market value.

Some areas of income are exempt from taxation, such as the following:
- reimbursement of employees' business trips expenses within certain limits;
- fees paid by an employer for employees' medical treatment;
- employer-paid education expenses; or
- fees paid by an organisation for study by an individual in a licensed educational institution.

The tax rate depends on the tax residence status of the employee. An individual is considered a Russian tax resident if he or she has spent at least 183 calendar days in Russia within the past 12 calendar months.

Resident individuals are subject to personal income tax on their worldwide income at a general flat rate of 13 per cent on most types of income. Non-resident individuals pay tax on their Russian-sourced income at a general flat rate of 30 per cent. Lower rates, exemption or relief may be available under a double taxation treaty between Russia and the country of the employee's tax residence. Employment income is treated as Russian-sourced income where it relates to activities performed in Russia, except for remuneration of directors of Russian companies, which is subject to Russian income tax irrespective of the place of their work.

Foreign nationals employed in Russia under a 'highly qualified specialist' regime enjoy a 13 per cent tax rate that applies to salary set out in an employment contract and other income directly related to their labour activity, while other types of taxable income are subject to a 30 per cent rate. Highly qualified specialists are defined as employees who are foreign citizens with a monthly salary exceeding at least 58,500 roubles (the exact amount depends on occupation and business field). The status of highly qualified specialist is granted to an employee by the migration authorities by issuing special permission to work.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

There are no prohibitions on terminating executives. The notice period depends on the grounds for termination. For example, in the event of the liquidation of a company or redundancy the notice period constitutes two months prior to termination.

Russian law provides for special regulation of the employment of a company's CEO and members of a company's management board, if provided for in the company's charter. Under article 278 of the Labour Code, the CEO of a company and the management board may be dismissed without cause by a decision of the authorised body of the company.

Executives who do not belong in this category cannot be dismissed without cause by the employer unless the dismissal is owing to the liquidation of the employer or redundancy, or if full-time employees are hired to the positions that they have occupied on a part-time basis.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

Employees whose employment is terminated owing to liquidation or reduction in the number of employees are entitled to a severance allowance equal to their average monthly wage. If the employee is still unemployed two months after the date of discharge, he or she may retain his or her average monthly earnings for a second month; if they have applied to an employment agency within two weeks of discharge, and such agency has not found them a job three months after the date of discharge, employees may also retain their average monthly earnings for a third month. The average monthly salary of a particular employee used for the calculation of such severance payment is calculated based on payments provided by an employer's remuneration plan (including salaries and bonuses) by taking all payments accrued for the previous 12 calendar months and dividing them by the number of actual working days in this period and then multiplying by the number of days in the respective month.

Employees are entitled to a severance allowance equal to their average earnings for two weeks if, inter alia, employees are called up for military service or assigned to equivalent alternative civilian service, or reject a transfer in connection with relocation of the employer to another locality. The average daily wage of a particular employee used for the calculation of this severance payment is calculated by taking all payments accrued for the previous 12 calendar months and dividing them by the number of actual working days in this period.

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The CEO of the company and the members of the management board dismissed without cause by a decision of the authorised body of the company are entitled to a severance payment in the amount of at least three average monthly salaries.

Statutory severance payments cannot be waived because the provisions of local normative acts, collective bargaining agreements and employment agreements may not worsen the legal position of an employee. The following types of incentive compensation affect the amount of severance payable if they are included in an employer's remuneration plan:

- monthly bonuses;
- bonuses for periods of over a month;
- annual bonuses; and
- non-recurrent bonuses for length of service.

There are no other post-employment benefits.

25 What executive severance payment level is typical?

The statutory severance payment amount depends on the reasons for the termination and varies from two weeks' to three months' average earnings. In the event of termination by mutual agreement, the amount of the severance payment is usually established in the termination agreement. Such severance payment amount typically ranges from three to six months' salary and includes bonuses.

There is no statutory limitation on the maximum payment level that can be provided to executives (except for credit organisations, state corporations, state companies, state and municipal enterprises and institutions and entities that are at least 50 per cent-owned by the state or municipal bodies) (see question 10).

It is typical to pay an annual bonus for the financial year on a pro rata basis for the period worked.

In the event of a change in control, the amount increases only if provided for by the employment contract or internal regulations, while a minimum compensation payment for the CEO (three times the average monthly salary) is provided for by the Labour Code.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

An employer may terminate an employee's employment for cause only on the grounds provided for by article 81 of the Labour Code:

- the employee's repeated failure to perform duties without cause, if he or she has already been the subject of disciplinary measures;
- a single severe violation of the employee's duties (eg, absenteeism, disclosure of commercial secrets, pilferage, embezzlement, wilful destruction or damage or certain violations of safety requirements);
- acts resulting in the employer's loss of confidence in the employee;
- committing an immoral deed in educational functions;
- presenting false documents for conclusion of the employment contract;
- an unjustified decision made by the head of the company or branch, or representative office or his or her deputies or chief financial officer, resulting in a breach of the safety of property, its illicit use or other damage to the property of the company;
- a single gross breach by the head of the company or branch or representative offices or his or her deputies of their official duties; and
- grounds provided for under an employment agreement with the CEO of the company or members of the company's management bodies.

There are no such concepts as constructive dismissal or good reason dismissal under Russian law.

Although there is no such concept as good reason dismissal under Russian law, the following may be similar:

- an employer may terminate an employee for insufficient skills, as confirmed by the results of 'attestation', but only if it is not possible to transfer the employee, with his or her consent, to another position within the company; and
- an employee's employment may be terminated for repeated failure to perform duties without cause if he or she has already been the subject of disciplinary measures, requiring compliance with the following procedure: after revealing a disciplinary misdeed the employer should request a clarification (written statement describing the reasons for, or circumstances of, the misdeed) from the employee and if the clarification is not satisfactory, the employer issues a termination order, which the employee signs to confirm having read.

27 Are 'gardening leave' provisions typically used in employment terminations?

'Gardening leave' provisions are not used in employment terminations. Russian law does not have such a concept and, moreover, lists the cases in which an employee may be suspended (eg, alcohol or drug intoxication, failure to fulfil work safety training or compulsory medical check-up). The effect of gardening leave might be achieved if the employer and the employee agree that the employee take holiday until his or her finishing date. This will, however, require the employee's consent and further payment of salary. Moreover, the employer cannot terminate the employee's employment during such holiday (except in the event of liquidation of the employer).

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

A general waiver or release of claims on termination of an executive's employment is used in practice; however, under articles 45 and 46 of the Russian Constitution, court protection of civil rights is guaranteed and no one can be deprived of such right. Moreover, article 22 of the Civil Code prohibits agreements aimed at full or partial waiver of legal capacity or capability. Thus, a general waiver or release of claims on termination of an executive is not enforceable under Russian law. This allows the employer or the employee to apply to the court with claims arising from or connected with termination regardless of the provisions of the termination agreement.

When considering a claim brought in court for violation of a waiver, however, an employer may refer to the principle of good faith and abuse of rights by an employee. If successful, the court may reject any remedies sought by an employee as a sanction for unfair actions. Furthermore, the employer may use any defence relevant to challenging the employee's claim.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Non-compete and non-solicitation clauses regarding key employees and executives are used in practice, but as the Constitution of the Russian Federation declares an individual's right to engage in work, these provisions are generally not enforceable. Consequently, an employer may not bar its employees from seeking employment or accepting the offer of a competitor. Moreover, if the employee meets its competence and qualification requirements, the competitor cannot legally reject his or her application.

An employer has certain similar options to consider after termination of an employee:

- former employees are obliged to preserve the confidentiality of information qualified as a commercial secret or know-how of an employer during the whole term of existence of the respective confidentiality regimes; and
- joint venture arrangements may include non-solicitation clauses in respect of customers and employees, but such arrangements must comply with antitrust law provisions.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Not applicable.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

An employer may sue an employee who has violated post-termination arrangements for breach of contract and claim withdrawal of paid compensation and compensation of other losses. Violation of an employee's post-termination obligations may also entitle an employer to suspend or reject any further payments provided for by the termination agreement.

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Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

According to the Law on Compulsory Pension Insurance an employer must participate in the compulsory pension insurance scheme in respect of all employees by making insurance payments to the Pension Fund of the Russian Federation. Employees registered in the pension insurance system are entitled to receive a retirement pension granted to men who have reached the age of 60 and women who have reached the age of 55.

Government pensions consist of an insurance component and a funded component. Their amounts depend on the length of service of the retired employee and on their investment by pension funds.

Besides compulsory state pension insurance, employers may participate in private pension programmes. Such programmes may provide for additional benefits for employees, for example, in facilitating pension payments before the legally stipulated retirement age or in granting supplementary payments.

There are no limits on discontinuing voluntary benefits that have been provided to employees.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Russian law does not provide for any additional pension or retirement benefits for executives in comparison with other employees. Private pension insurance is not a widespread practice among Russian companies, but private insurance programmes, if adopted, provide for any additional support only to executives and other key employees. Such benefits usually consist of increased pension payments.

Pensions formed by the contributions of employers to non-state pension funds are taxed at the personal income tax rate of 13 per cent for residents and 30 per cent for non-residents, while state pensions and pensions formed by the employee's contributions to a non-state pension fund are exempt from personal income tax.

34 May executives receive supplemental retirement benefits?

The executives of Russian companies that participate in private pension insurance programmes may receive supplemental retirement benefits. Supplemental retirement benefits usually provide for increased pension payments.

Generally, Russian law prohibits discrimination in labour and post-employment relations, but the provision of benefits under private pension programmes is an issue at the sole discretion of an employer and an employer is fully authorised to select participants for a particular programme. Thus, it is difficult to support claims arising from the provision of discriminatory benefits, and such claims are very rare in Russian practice.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

Under Russian law executives may be insured for claims related to actions taken as an executive, officer or director (D&O insurance).

A company's ability to provide D&O insurance is limited to civil claims against executives. It may include only the types of insurance expressly provided for by insurance legislation, thus a Russian D&O insurance policy may cover damages caused by an executive in his or her capacity as such to a third party, and defence costs and other costs and expenses incurred by an executive. In addition, a D&O insurance policy covering executives of a Russian company in their capacity as such may be issued only by a Russian insurer holding all the necessary licences.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

Under Russian law an asset sale will result in an automatic transfer of benefit obligations to the acquirer only in the event of the sale or purchase of stock in a company. In all other cases employees will be transferred to the new employer; thus, its own benefits will apply.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Executive retention or related arrangements after a change in control depend on the character of the acquisition:

- if a company or asset is acquired by a competitor, it is customary for the management team to be replaced; or
- if stock or an asset is sold to a financial investor, the parties will usually agree upon executive retention arrangements. Such arrangements are usually structured as granting additional retention bonuses to the management team with deferred payment.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

Russian law does not provide for any limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control, but this is possible if provided by an employer's internal regulations or employment agreement. There are also no restrictions on 'cashing out' equity awards.

Debevoise & Plimpton

Anna Maximenko **avmaximenko@debevoise.com**
Elena Klutchareva **emklutchareva@debevoise.com**

Business Center Mokhovaya
Ulitsa Vozdvizhenka 4/7
Stroyeniye 2
Moscow 125009
Russia

Tel: +7 495 956 3858
Fax: +7 495 956 3868
www.debevoise.com

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Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

Under the Currency Control Law foreign exchange control rules will apply to the remittance of funds, and the transfer of employer equity or equity-based awards to executives if they are qualified as currency transactions. So, for example, the transfer of foreign or Russian currency and securities from the account of a Russian resident (Russian entities and Russian citizens) opened abroad to the account of another Russian resident opened in the Russian Federation, and vice versa, is a currency transaction; however, currently article 9 of the Currency Control Law permits such transactions without any limitations.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

Employment agreements, employee compensation or benefit plans, or award agreements should be translated into Russian, as, according to Federal Law No. 53-FZ on the State Language of the Russian Federation, dated 1 June 2005, the Russian language must be used in the activities of all entities located on the territory of the Russian Federation, including documentary turnover. If a compensation or benefit plan is provided solely by a foreign parent company to an employee of its Russian subsidiary and is not part of the employee's employment arrangements with the Russian subsidiary, such document does not have to be translated into Russian.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

Tax gross-up, tax indemnity or tax equalisation payments are not directly prohibited. However, Russian law does not recognise the concept of tax gross-up, tax indemnity or tax equalisation and they are not common and workable in Russia.

42 Are choice-of-law provisions in executive employment contracts generally respected?

Choice-of-law provisions in executive employment contracts are not respected. Under articles 5 and 9 of the Labour Code, employment relations and, consequently, employment agreements are Russian law-governed. Moreover, under article 22 of the Civil Procedure Code of the Russian Federation any employment-related disputes must be resolved by Russian courts of general jurisdiction.

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Switzerland

Martin L Mueller

Pestalozzi Attorneys at Law Ltd

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

Executive compensation arrangements are primarily governed by the federal statutory provisions contained in the Swiss Code of Obligations (CO), specified to a certain extent by cantonal or federal case law. The CO does not distinguish between executive and non-executive employees. The provisions set out in the CO regarding (executive) compensation include regulations on salary, commissions, bonuses, payment terms and periods, and participation in the success of the business.

With regard to listed Swiss companies, the federal Ordinance against Excessive Compensation in Listed Companies (CompO) is applicable. The CompO sets out, inter alia, the permissible types of compensation for executive management, board members and the advisory council (if any), and states' obligations relating to the disclosure of such compensation as well as the shareholders' say-on-pay rights.

Specifically regarding the banking industry, the Swiss Financial Market Supervisory Authority has issued Circular No. 2010/1 'Minimum standards for remuneration schemes of financial institutions'.

Mandatory payments and salary deductions must be made for the benefit of different social security institutions (eg, pension fund, unemployment insurance and accident insurance). These obligations are primarily set out in the following statutes:

- the Federal Law and Ordinance on Old-Age and Survivors' Insurance;
- the Federal Law and Ordinance on Invalidity Insurance;
- the Federal Law and Ordinance on Occupational Benefit Plans concerning Old-Age, Survivors and Invalidity;
- the Federal Law on Vested Benefits in Occupational Benefit Plans concerning Old-Age, Survivors and Invalidity;
- the Federal Law and Ordinance on Accident Insurance;
- the Federal Law and Ordinance on Income Compensation Allowances in case of Service and in case of Maternity;
- the Federal Law and Ordinance on Compulsory Unemployment Insurance and Allowances in case of Insolvency; and
- the Federal Law on the General Part on Social Insurance Law.

Finally, with regard to taxation issues especially, the following legislation is pertinent:

- the Federal Income Tax Law;
- the Federal Law on the Harmonisation of Direct Taxes;
- Cantonal Income Tax Acts;
- the Federal Ordinance on Certification Obligations in connection with Employee Participations; and
- Circular No. 37 of the Federal Tax Administration regarding Taxation of Employee Participations.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

Mandatory Swiss legal provisions are enforceable through the Swiss judicial system. Mostly cantonal courts are competent for enforcement at first and second instance. At federal level, the Swiss Federal Tribunal ultimately hears executive compensation or employee benefit cases. Monetary claims may be enforced through expedited debt enforcement proceedings initiated by the competent cantonal debt enforcement authority.

Notwithstanding the aforementioned and in terms of mandatory social security contributions, taxes or the regulated financial sector, the competent cantonal or federal authorities may impose sanctions for non-compliance on companies subject to their supervision.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

The opportunity of granting employees new shares or pre-emptive rights to new shares (conversion or option rights) may require a share capital increase subject to shareholders' approval.

Within the scope of the CompO (ie, for listed Swiss companies) shareholders must take a binding vote each year on the compensation of the members of the board of directors, the executive management and the advisory council (if any). In this context, 'compensation' is understood in a broad sense including wages, fees, bonuses, waiver of claims and assignment of participation rights.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Swiss law does not provide for any such consultation obligation in the event of the establishment of, or a change in, an executive compensation or benefit arrangements.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

Yes, companies falling within the scope of the CompO are subject to numerous restrictions on the type of benefits and compensation permissible for the executive management, board of directors and the advisory council (if any). Two types of compensation are prohibited:

- compensation that is absolutely forbidden (ie, severance payments, compensation paid in advance, and 'commissions' for the acquisition or transfer of enterprises or parts thereof by the company or enterprises directly or indirectly controlled by the company); and
- compensation that is only allowed if a corresponding provision is contained in the articles of incorporation (ie, loans, credits, post-retirement benefits beyond occupation pensions, performance-based compensation, grant of equity securities, conversion rights and option rights).

Furthermore, any director, officer, board member or other such person representing a company is limited in such transaction in which the same person is also acting as the counterparty but in a capacity as a natural person (self-dealing). The Swiss Federal Tribunal generally deems such transactions invalid unless they are retrospectively approved or are at arm's length. In any event, such transactions exceeding a value of 1,000 Swiss francs must be in writing.

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6 What rules apply to compensation of non-executive directors?

No special rules apply to the compensation of non-executive directors. The CompO applies to all directors, whether executive or non-executive.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

Publicly traded Swiss companies must disclose their compensation reports on an annual basis. The report must be included in the yearly reporting in the notes to the balance sheet of each company. The compensation report must include all compensations by the company, whether directly or indirectly disbursed, to all current members of the board of directors, of the executive management and of the advisory board (if applicable). The compensations to be disclosed include fees, salaries, bonuses, benefits in kind, participation in turnover, loans and credit facilities. The amounts as well as the recipients of the aforementioned benefits should also form part of the compensation report.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

While oral or tacit employment agreements suffice, written employment agreements are standard. Such employment agreements will regularly contain provisions on the commencement of employment, on the position itself, on the duties of the employee, the place of work and remuneration, and expenses and other benefits. Also, such agreements will normally set out the working hours, the amount of paid holiday, the term (unlimited or fixed duration) and the duration of the notice period. Finally, such agreements may contain provisions regarding confidentiality, non-competition and other general provisions (eg, severability, assignability, choice of law and jurisdiction).

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

While there are no data available for private companies, the annual PwC survey 'Executive Compensation & Corporate Governance 2014' found that the base salary of the CEOs of Swiss listed blue-chip companies never amounted to more than 30 per cent of compensation. The long-term incentives, in turn, were never less than 40 per cent of the compensation. Other components of the compensation include performance-based cash bonuses and other payments. It is important to know that the term 'bonus' is not explicitly regulated under Swiss employment law. Rather, a bonus may qualify as gratification (in accordance with CO article 322d), or as salary (in accordance with CO article 322–322b). A bonus will likely be considered a salary component if it is determined by objective criteria, factors or targets (eg, achievement of financial or other reasonable business goals), which allow the employer no discretion in calculating the actual amount. Should a bonus qualify as salary, the employee is entitled to it as soon as the specific targets are met irrespective of any discretionary wording in the respective rules. In contrast, a bonus will generally qualify as gratification if the decision as to whether a bonus will be paid as well as its amount is at the employer's discretion.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

There are no general statutory limitations on the amount and structure of incentive compensation, but it is not possible to base an employee's salary solely on incentive compensation without ensuring that such employee will have a minimum annual income. Companies subject to the CompO must respect the obligations and limitations set out therein. These include the mandatory and binding vote of the shareholders on the compensation of certain key employees, reporting obligations in the compensation report, and certain forms of compensation that are forbidden (see question 5). Finally, specific restrictions may apply within certain industries (eg, the banking industry, especially in connection with capital requirements).

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

As long as incentive awards qualify as gratification and not as salary (see question 9), deferral and vesting of such awards is permissible under Swiss law (both as cliff and graded vesting). Gratification is compensation in addition and ancillary to the employee's salary and it is at the sole discretion of the employer to what extent such gratification is paid, if at all. In contrast, salary is the consideration for the employee's work and can be fixed or variable (eg, depending on achievement of certain benchmarks). Such deferral or vesting limitations on salary are null and void.

Even with regard to gratification, however, there are certain limitations. Excessively long vesting or deferral periods will likely not be upheld by the Swiss courts. Depending on the individual case or the wording of the relevant provision, further restrictions may apply in situations in which the employment relationship is terminated.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

Generally, the recurrent payment of discretionary incentive compensation will not become a contractual entitlement. According to the case law of the Swiss Federal Tribunal and a large block of Swiss scholars, however, the repeated payment of such incentive compensation without interruption and reservation during three years will suffice for an entitlement to such compensation to arise. Employers wishing to increase the degree of protection against such entitlements are advised to explicitly state with each such payment that the payment is made on a voluntary basis.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

Neither the type nor the amount of incentive compensation awarded will per se affect the compensation that must be awarded to other executives or employees. Employees contractually participating in the same compensation schemes may, however, generally not be discriminated against in equal situations. Furthermore, based on the Federal Act on Gender Equality, employees may not be discriminated against based on their sex, especially with regard to salary.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

As a general rule, Swiss law does not allow repayment obligations of incentive compensation. There is, however, an exception to this rule for listed companies: remuneration paid to employees that is either not permissible under the CompO (see question 3) or that has not been approved by the shareholders, has to be repaid.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

There are no typical employee participation programmes. Rather, it depends, for example, on the company structure, the funding possibilities for the company and the influence of the employees who are allowed to participate. In terms of the form in which equity compensation is awarded, the most prevalent appear to be shares or stock options. The most common length of vesting periods is three years. Excessively long vesting periods (eg, longer than 10 years) are not permissible.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

Shares and other participation rights in a group company of the employer, as well as listed options and options to acquire such rights that are not blocked, are taxed when the employee legally acquires such rights or options. A discount applies if the sale of such shares or other participation is blocked. Any other equity compensation instrument

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(eg, blocked or unlisted options, derivatives or phantom stock) is only taxed when the employee realises the income.

Pro rata taxation in Switzerland applies if the employee's tax residence in Switzerland starts or ends during the vesting period.

Depending on the (expected) price development of the employee shares or options, the tax structuring of such equity compensation can be advantageous or disadvantageous (eg, if blocked options are given to the employee, which gain in value during the vesting period, the taxation may be higher than the taxation of non-blocked options). Note that the above answer is only a summary overview and the legal situation for each individual case may vary from case to case.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

In order to provide employees with necessary shares, the company may obtain such shares either by increasing its share capital (usually from authorised share capital designated for such purpose) or by using treasury shares. Increasing the company's share capital requires the submission of various forms of documentation to the relevant cantonal company registry.

In situations in which a foreign or Swiss company issues new shares and such issuance is considered a 'public offer', an offering prospectus may be necessary. Such a public offering is triggered if the shares are offered to an indefinite number of potential investors. Whether such situation exists in the context of equity-based compensation must be analysed on a case-by-case basis.

If new shares are issued that are to be listed on the SIX Swiss Exchange, applicable listing rules will have to be respected and a listing prospectus may be necessary. An exemption, however, from the requirement to draw up a listing prospectus exists, inter alia, for shares offered to employees, board members or executive management, provided such shares are of the same class as those already listed, and that a document containing information on the number and type of shares, and the reasons for and details of the offer, is made available.

18 Are there withholding tax requirements for equity-based awards?

To the extent that the employee: does not have Swiss citizenship or a permanent residence permit in Switzerland; is not tax-resident in Switzerland; or moves his or her tax residency outside of Switzerland during a vesting period, the employer must remit withholding tax from the employee's salary. In particular, should the employee leave Switzerland during such a vesting period, the Swiss employer will be able to reclaim withholding tax from the employee.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Such agreements do not seem to be common. In any event, VAT issues as well as the price charged, hidden profit distributions or tax evasion issues should be considered.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Especially in larger companies and start-ups, employee stock (shares or options) purchase plans are prevalent. The purchase of such shares or options at a discount may trigger tax and social benefits payment obligations. Furthermore, such shares or options given to an employee at a discount may either qualify as part of the salary or as a gratification. While salary is considered compensation for performance of work and can include a variable component (eg, reaching a specific target in order to receive the variable part of the salary), a gratification is in addition to salary and it is at the employer's sole discretion whether and in what amount such gratification is granted.

In situations where such compensation qualifies as salary, many protective provisions must be respected, including limitations on the withholding of salary by the employer and restrictions regarding the waiver of employee rights during the employment. When assessing whether such restrictions are applicable, the Swiss Federal Tribunal differentiates between situations in which the purchaser of such shares or options acts primarily as an employee and situations in which the purchaser is considered to be acting primarily as an investor. Generally, if the employee is considered an investor, protective employment provisions may not apply.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

The following mandatory benefits under Swiss law are the most notable:

- a mandatory minimum of 20 work days' paid holiday is set out by the CO, and a minimum of 25 for all employees up to the age of 20;
- in an employment relationship that has lasted or has been concluded for longer than three months, the employer must continue to pay the employee salary for a limited time if such employee is prevented from working by no fault of his or her own (eg, illness, accident, legal obligations);
- the employer is generally obliged to deduct from the employee's gross salary certain social contributions while making matching contributions. These contributions include payments towards the old-age and survivors' insurance, disability insurance, pension fund, unemployment insurance and accident insurance; and
- maternity leave of at least 14 weeks must be granted to female employees after having given birth.

Should voluntary benefits have been contractually agreed upon, the employer may only discontinue such benefits with the consent of the employee or after the notice period when terminating the employment contract.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

In addition to certain mandatory benefits (see question 21), executive employment contracts will often grant incentive-based compensation (see questions 9 and 10), which regularly will include equity compensation (see question 15 et seq). Additional fringe benefits (eg, costs of mobile phones, company cars, gym membership, health insurance) are commonly granted, whereby certain benefits are often granted only to expatriates (eg, housing and school allowance, tax equalisation). Supplemental pension fund contributions are also prevalent (see question 34). Moreover, it is common for executives to receive a tax-exempt lump-sum allowance covering petty expenses.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

While respecting the applicable notice period, an employment relationship may be terminated without stating a specific cause.

The first month of employment is considered a probationary period in which either party (ie, the employer or the employee) may terminate the employment contract by giving seven days' notice. This notice period, as well as the duration of the probationary period, may be altered or waived by the parties, but the probationary period may not exceed three months.

After the probationary period, or in the case of a waiver, the parties may terminate the employment relationship in accordance with the contractual notice periods. If no such notice periods have been agreed upon, the statutory default notice periods of between one and three months apply, depending on the years of service of the employee. In most cases, the contractual notice periods for executives will be between three and six months; for listed Swiss companies the CompO limits the maximum notice period to 12 months.

Without respecting any notice period, the employment contract may be terminated by mutual agreement or for cause (ie, for a justified reason), in which case the employment relationship ends immediately. This is true even if insufficient cause for such immediate termination is given, but in such latter case the terminated employee may have certain compensation and penalty entitlements. The threshold for proving a justified termination for cause is very high (see question 25).

Finally, there are certain mandatory limitations to the right to terminate (see question 26).

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24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

As a general rule, employees are not entitled to severance payments unless otherwise agreed in the employment contract. Severance payments are often used in the context of a termination by mutual consent. If, however, the employer has not funded adequate pension insurance for an employee, the termination of the employment relationship of an employee of at least 50 years of age and with 20 or more years of service triggers a severance payment. The amount of the severance payment may be fixed by written agreement, but may not exceed two months of the employee's salary.

Within the scope of the CompO, applying to listed Swiss companies, severance payments to executive employees are forbidden and their payment may result in criminal liability – however, the term 'severance payment' is not defined in the CompO. In this context, the term 'severance payment' is understood in a broad sense.

Mandatory accident insurance for the employee will continue for 30 days after the end of employment. The employer must grant the employee the option to extend such insurance for a total of up to 180 days.

25 What executive severance payment level is typical?

As pointed out above (see question 24), severance payments are not mandatory and may even be prohibited.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

An employment relationship may be terminated without having to state a specific cause; however, the employee may request a written statement of the reasons for the termination. Reasons may exist for the termination to be considered abusive (eg, if given based on the ethnic origin of an employee or in order to prevent employment entitlements). In such case a court may order the terminating party to pay an indemnification of up to six months' salary (the termination remaining effective). Furthermore, termination given at an inopportune time within a certain time frame (eg, during pregnancy or 16 weeks after childbirth) may be considered null and void.

An employee contract may also be terminated with immediate effect if valid reasons are given. Such reasons are given when circumstances exist under which the terminating party cannot in good faith be expected to continue the employment relationship. The courts are rather strict in accepting such valid reasons; in any event, such termination must be made without any delay.

27 Are 'gardening leave' provisions typically used in employment terminations?

Key employees are often put on gardening leave following a notice of termination. A contractual provision stating such an option is not necessary and, therefore, such explicit provisions are very often not seen in Swiss law-governed employment contracts. During such gardening leave, the employee is entitled to his or her salary until the end of the notice period. Variable salary during the gardening leave is calculated based on prior compensation periods.

In exceptional cases gardening leave is not permissible; these are such cases in which employees need to be able to effectively work in order to safeguard their professional future (eg, a leading heart surgeon who is dependent on regular practice to maintain his or her skill).

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

The Swiss Federal Tribunal held that employees need to be justified in waiving or releasing claims against employers: often, severance pay qualifies as such justifying reason. Further, employees may not, during the employment relationship and one month after its end, waive claims arising from mandatory legal provisions or mandatory provisions of collective bargaining agreements. Such mandatory provisions include certain salary payments, compensation for unjustified termination, and reimbursement of expenses paid by employees.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Employment agreements with executives often include provisions on post-contractual non-competition and non-solicitation. In order for such non-compete and non-solicitation agreements to be valid, they must be in writing and the employee must have had insight into the employer's client base or business secrets; furthermore, the employee must be able to severely damage the employer using such insight. Finally, such clause may not unduly restrict the professional advancement of the employee – thus, such a provision must be restricted with regard to geographical scope, duration and subject matter – and it may not have lapsed owing to the fact that the employer no longer has a material interest in such a restriction. The statutory maximum duration for a non-compete covenant is three years, but the usual restriction period is one year.

Swiss law does not require that the employer compensate the employee for a post-contractual non-compete covenant, but a judge will take such payment into consideration when assessing the reasonableness of the covenant.

It is important to note that a post-contractual non-compete covenant generally lapses if it is the employer who gives notice of termination.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Yes, there are such limits and requirements (see question 29). An excessively restricting non-compete or non-solicitation covenant is valid but may be limited by a court at its discretion to a reasonable standard, taking due account of all circumstances of the individual case (including any compensation payment made by the employer).

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

An employee breaching the relevant covenant is liable to pay compensation for any damages caused by the breach. It is common to include a provision according to which the employee is liable to pay liquidated damages in the event of such a breach, and the amount of liquidated damages generally should not exceed the employee's annual salary. Additionally, and if expressly agreed upon in writing, the employer may under certain circumstances request that the (former) employee cease and desist from the offending behaviour and restore the status quo.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Swiss law requires employers and employees to each pay contributions towards old-age and survivors' insurance. Currently, the contributions are 4.2 per cent of the employee's salary for both employer and employee. Additionally, employers must make contributions to pension funds for employees earning more than 21,150 Swiss francs annually. The amount of the contribution varies depending on the employee's salary and the pension fund chosen by the employer.

In the event that voluntary benefits have contractually been agreed upon, the employer may only discontinue such benefits with the consent of the employee or after the notice period when terminating the employment contract.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Generally, the mandatory contributions also apply to executives (see question 32). Beyond the maximum coordinated salary – currently 84,600 Swiss francs annually – for which pension contributions must be made, the employer may opt to make additional pension fund contributions (see question 34). Pension fund contributions made on salaries up to the current maximum insurable annual salary of 846,000 Swiss francs are tax-exempt. Additionally, tax-deductible

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compensatory payments into the pension fund may be made for such years in which no contributions had been made, but taxes will become due once the employee is retired and receives a pension or a one-off payment (as taxable income to be paid by said former employee). One-off pension fund payments will be taxed at a reduced rate.

34 May executives receive supplemental retirement benefits?

Under Swiss law, it is permissible – and in fact common – that executives receive supplemental retirement benefits. These supplemental benefits usually result from higher amounts of the insured salary, additional risk coverage or additional pension fund contributions exceeding the statutory minimum contributions. All pension benefits must be applied on a basis consistent with similar groups of employees. Within the scope of the CompO, applying to listed Swiss companies, post-retirement benefits beyond the occupational pensions granted to the executive management, board of directors or the advisory council (if any) are forbidden.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

It is permissible under Swiss law to insure executives, officers and directors against claims related to their actions in such functions (directors' and officers' insurance) and such insurance premiums may be paid by the company. Limitations to such insurance may be set out in the insurance policy (eg, for wilful misconduct or gross negligence). In any event, such policies may not cover criminal offences or deliberate damaging actions.

The question whether an executive may be indemnified by the company for such claims is less clear. Recent Swiss legal doctrine deems such an indemnification permissible (except in winding-up proceedings), at least to the extent concerning (slight) negligence.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

Generally, if the transferred assets constitute a 'business' under Swiss law (an organisational unit) the employees employed in the respective business will automatically transfer. The employment relationships will transfer along with all rights and obligations, including benefits granted through an employment agreement with the former employer or granted based on a collective bargaining agreement. Of course, the purchaser or new employer – if subject to Swiss law – will also be bound by the mandatory contributions to old-age, survivors' and invalidity insurance, as well as mandatory pension fund contributions.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Usually, such arrangements are not put in place prior to a potential transaction. Upon a sale, it is often seen that the new owner grants retention bonuses. Numerous restrictions apply to listed Swiss companies within the scope of the CompO with regard to such retention provisions, including prohibited commissions for the acquisition or transfer of enterprises (see question 5).

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

Accelerated vesting remains permissible even under the rules of the CompO, applying to listed Swiss companies, and in change-of-control situations; however, within the scope of the CompO it is not permissible for an executive to be paid any compensation in the event that there is a change in control and such executive is let go (double-trigger payments). Furthermore, payments made solely based on a change in control (single-trigger payments) are not considered best practice and may qualify as impermissible 'commissions for the acquisition or transfer of enterprises' (see question 5).

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

There are no foreign exchange controls restrictions regarding remittance of funds, transfer-of-employer equity or equity-based awards.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

There is no obligation under Swiss law to translate employment agreements, employee compensation or benefit plans, or award agreements as long as the employee is able to read and understand such documents in their original language. Should the employment relationship end in litigation, all documents submitted as evidence must be translated into the official language of the court hearing the case.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are no prohibitions on tax gross-up, tax indemnity or tax equalisation payments; however, such payments by the employer for the benefit of the employee will themselves be considered taxable income. Generally, the income tax burden is on the employee; it is often seen, however, that expatriates are paid an agreed net salary and the employer covers the respective taxes on the employee's salary.

Martin L Mueller **martin.mueller@pestalozzilaw.com**

Loewenstrasse 1
8001 Zurich
Switzerland

Tel: +41 44 217 91 11
Fax: +41 44 217 92 17
www.pestalozzilaw.com

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42 Are choice-of-law provisions in executive employment contracts generally respected?

Generally, the law of the state in which the employee habitually performs his or her work is applicable. According to the Swiss Private International Law Act, parties may only submit the employment contract to the law of the state in which the employee has his or her habitual residence, or in which the employer has its place of business, domicile or habitual residence. Any other choice of law is not permitted under the applicable Swiss legal provisions. Furthermore, certain Swiss minimal protection provisions will remain in place regardless of any choice-of-law provision.

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United Kingdom

Chris Walter, Guy Dingley, Hannah Bradshaw and Richard Surtees
Covington & Burling LLP

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

The primary source of legislation dealing with employee incentives is found in the Income Tax (Earnings and Pensions) Act 2003 (ITEPA).

There are various provisions in the Listing Rules and the Disclosure and Transparency Rules that relate to executive remuneration for companies admitted to the main market of the London Stock Exchange. The UK's Corporate Governance Code (the Code) is also relevant in the context of executive compensation. All companies admitted to the main market are required to report how they have applied the Code in their annual report. Several organisations, for example, the Investment Association (IA) and the Pensions and Lifetime Savings Association, issue guidelines on executive remuneration in public companies, and how their members should vote at companies' annual general meetings on resolutions concerning executive remuneration.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The rules relating to share incentives are enforced by the UK tax authority, HM Revenue & Customs (HMRC).

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

Certain employee share schemes (such as company share option plans (CSOPs), share incentive plans (SIPs) and save as you earn (SAYE) schemes) require registration with HMRC. Since 6 April 2014, companies must declare that the requirements of the applicable CSOP, SIP or SAYE legislation are being met by way of online self-certification.

The IA Principles of Remuneration (IA Principles) set out institutional shareholder expectations for executive remuneration practices (see question 10).

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Executive compensation is generally not an issue that requires consultation with employee representatives.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

No. Loans to directors are generally permitted, but should be recorded appropriately in the company accounts.

6 What rules apply to compensation of non-executive directors?

A non-executive director (NED) is treated as an employee for UK income tax and social security purposes. Therefore, a company is obliged to deduct income tax and social security from the payment of fees to a NED.

The IA Principles encourage NEDs to own shares in the company on whose board they sit, and specify that NEDs may receive part of their fees in shares acquired at the market price. However, institutional shareholders consider it inappropriate for independent directors to receive incentive awards connected to the share price or corporate performance, as this could be relevant to the determination of a NED's independence.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

The directors of quoted companies have a duty to prepare a directors' remuneration report for each financial year ending on or after 30 September 2013. This requirement applies to every person who was a director of the quoted company immediately before the end of the period for filing the accounts, and failure to comply constitutes an offence punishable by a fine. The directors' remuneration report comprises an annual report on remuneration and the directors' remuneration policy.

Quoted companies must make available on their website:

- their annual accounts and reports (including the directors' remuneration report and any revised directors' remuneration policy);
- details of particulars of any remuneration payment made or to be made to a person ceasing to be a director (including how it was calculated); and
- details of any payment for loss of office made or to be made to departing directors (including how it was calculated).

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

An employee must be provided with a written statement of particulars within two months of commencing employment, incorporating at least:

- names and addresses of both parties;
- start date or date of continuous employment, if earlier;
- job title and description of work;
- place of work;
- additional details for work outside of the United Kingdom;
- remuneration details;
- hours of work;
- holiday and holiday pay;
- sickness and sick pay;
- pension;
- notice period;
- temporary or permanent work;
- collective agreements; and
- disciplinary and grievance procedures.

In addition, employers generally include provisions protecting confidential information and intellectual property, and prohibiting certain competitive activities post-termination (particularly if the employee is senior).

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Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

Companies normally offer some form of equity incentives to their executive directors and employees (see question 15). In addition, the following incentives may be offered:

- annual incentive compensation: typically paid in cash either upon achievement of pre-established performance hurdles or on a discretionary basis;
- long-term incentive compensation: in the form of long-term incentive plans (LTIPs), which are discretionary share incentive arrangements operated by listed companies. Under an LTIP, shares are awarded to senior executives at nil or nominal cost, usually subject to the satisfaction of a performance condition; and
- phantom option plans are cash awards, the value of which is linked to the value of the company's shares. They are often used by private or overseas companies to grant awards to employees that mirror share options in circumstances where actual share options are not appropriate or possible.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

There are generally no limits on the amount or structure of incentive compensation in the UK. However, the IA Principles set out institutional shareholders' expectations for executive remuneration policies and practices. These are the overarching best-practice principles rather than strict rules that are most influential for listed companies.

The IA Principles recommend that long-term incentives should not be paid out until at least five years after the award date. This consists of the usual three-year performance period, and includes a further 'holding' period of two years.

One of the recommendations from the Executive Remuneration Working Group Final Report (July 2016) is that there should be more flexibility afforded to remuneration committees to choose a remuneration structure that is most appropriate for the company's strategy and business needs.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Deferral and vesting of incentive awards is permitted. Some types of deferral and vesting is standard in most incentive planning, especially in LTIPs.

According to the IA, threshold vesting amounts reflecting expected performance, should not be significant by comparison with annual base salary.

Awards structured with a marked 'cliff-edge' vesting profile are considered inappropriate. Full vesting should reflect exceptional performance and so be dependent on achievement of significantly greater value creation than that applicable to threshold vesting.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

Generally not. There are no specific rules, but typically executive service contracts exclude the possibility of recurrent discretionary incentive compensation becoming a mandatory contractual entitlement.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

Generally not. There are no specific rules, but employers should be aware of potential risks of awarding different levels of compensation to executives or other employees of the same level or position, which could lead to potential discrimination or constructive dismissal.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

The inclusion of clawback and malus provisions in share scheme designs and executive contracts is a recognised way to prevent executives receiving rewards that are undeserved. Shareholders now expect to see such provisions included in relevant arrangements and for them to be enforced when appropriate. Broadly, malus provisions apply before awards or remuneration have vested or have been paid, while clawback provisions apply to awards or remuneration that have already vested or been paid.

In 2014 the Code was amended to require performance-related incentive schemes to include arrangements to recover or withhold variable pay where it is appropriate to do so.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

There are a number of tax-enhanced incentive arrangements permitted by the UK tax legislation. Enterprise management incentive (EMI) options as well as CSOP options provide capital gains tax treatment for specific employees selected by their employer. SAYE and SIP arrangements can also give capital gains tax benefits, but must be offered to all employees. In situations where it is not possible to offer tax-enhanced incentives, it is common to grant unapproved share options (often to executives through an LTIP (see questions 9 and 22)). These different arrangements are summarised below, although the beneficial tax treatment is addressed at question 16.

The EMI regime is the most generous tax-enhanced incentive arrangement. It is targeted at small and growing companies and so EMI options can only be granted over shares in a company or group with gross assets worth less than £30 million (looked at on a group-wide basis) and has fewer than 250 employees. Employees must satisfy a minimum working-time commitment, being at least 25 hours per week, or if less, 75 per cent of their working time. An employee may only hold options over £250,000-worth of shares (valued at the date of grant) at any time within a period of three years and the employer can only issue EMI options over shares worth £3 million (at the date of grant) within a three-year period. Various other conditions relating to the employee, the company and the plan must also be satisfied.

HMRC-approved CSOPs offer tax benefits in relation to options over shares worth £30,000 (measured at the date of grant). A number of statutory conditions relating to the company, the employee and the plan must be satisfied in order for CSOP treatment to apply.

The SAYE regime comprises two elements: a savings arrangement and a share option component. Under the savings arrangement, an employee is entitled to save up to £500 per month out of post-tax income. SAYE schemes are all-employee schemes, therefore meaning that all eligible UK-resident employees must be invited to participate. The qualifying contribution period cannot be more than five years. After the end of the qualifying period, the employee is able to take out the savings together with a tax-free savings bonus or use the savings to acquire shares at an exercise price that can be up to 20 per cent below the market value of the shares at grant.

Finally, under an SIP, the company operating the SIP can decide to offer free shares. In accordance with the legislation (ie, Schedule 2, ITEPA), a company can choose to award up to £3,600-worth of free shares to each eligible employee in any tax year. The company may also enable employees to purchase partnership shares out of their pre-tax income, up to a maximum of the lesser of £1,800 per year or 10 per cent of pay. If an employee buys partnership shares then the company can award additional free shares ('matching shares') up to a maximum of two shares for every one partnership share.

Deferred vesting is certainly possible, and for many tax-advantaged employee share schemes, deferred vesting may be required to realise the tax advantage. For example, in the context of CSOPs and SIPs, the incentive should be held by the employee for three years in order for the tax advantages to apply (although earlier exercise may be permitted in certain circumstances, such as a takeover). Similarly, the SAYE regime requires that the grant of the option be conditional upon a three- to five-year savings period (again, earlier exercise may be permitted in certain circumstances, such as a takeover.)

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For executive remuneration arrangements (eg, LTIP awards), the IA Principles state that the use of additional holding periods is now routinely expected by institutional investors, so that shares and options should not vest or be exercisable within five years from the date of grant. In addition, performance measures and vesting conditions should be fully explained and clearly linked to the achievement of appropriately challenging financial performance of the relevant company, which will enhance shareholder value.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

The grant of an unapproved share option (including an option forming part of an LTIP) is not subject to income tax or social security contributions. The exercise of an unapproved share option is subject to income tax on the difference between the exercise price and the market value of the shares on the date that the option is exercised. The option gain is also subject to employee and employer national insurance contributions. Depending on the employee's marginal tax rate, the option gain could be subject to income tax at the rate of 20, 40 or 45 per cent and national insurance at the rate of at least 2 per cent.

In addition the amounts subject to income tax are also subject to employer's national insurance payable by the employer company at a rate of 13.8 per cent. It is possible to transfer this cost to the employee with the employee's consent. The employer national insurance cost is a deductible expense in calculating the employee's income tax on the option gain.

The HMRC-approved schemes described above (EMI, CSOP, SAYE and SIP) provide for a broad exemption from income tax and national insurance contributions on the option or incentive gain meaning that the employee is usually only subject to capital gains tax when the shares received as a result of the exercise of the option or (in the case of a SIP) the vesting of the award are subsequently sold. Depending on the employee's marginal tax rate, the capital gains tax rate is normally 10 or 20 per cent and the employee may also benefit from an annual capital gains tax allowance of (currently) £11,300. The tax rate for the disposal of shares received following the exercise of an EMI option may be subject to capital gains tax at the special 'entrepreneurs' rate of 10 per cent, provided that the EMI option has been held for one year prior to exercise and certain other conditions are satisfied.

Since the HMRC-approved schemes do not give rise to employee national insurance charges, similarly no employer national insurance cost arises.

The employer company may be able to obtain a corporate income tax deduction for amounts that are subject to income tax or would have been subject to income tax if an exemption did not apply. However, certain conditions need be satisfied for the deduction to apply.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

UK company law determines that any issue or transfer of shares should be registered with Companies House. This requirement applies to employee share schemes.

Employee shares, even where no particular tax-advantaged scheme is being operated, are classed as 'employment-related securities' and the employer is therefore obliged to notify HMRC on an annual basis of any employee share scheme activity (using a Form 42). From 6 April 2014, all filings relating to employee share schemes are submitted online. In the context of CSOPs, SAYE, SIPs and EMI, the new online regime requires employers to 'self-certify' that they meet the requirements of the respective scheme legislation. Otherwise, the question of notice and registration is specific to the type of scheme being operated. The EMI scheme requires an agreement in writing between the employer and employee. The grant of an EMI option must be notified to HMRC within 92 days of grant.

18 Are there withholding tax requirements for equity-based awards?

For tax-advantaged share option schemes (eg, EMI or CSOP) or for shares purchased at market value, there is generally no employee tax liability, and consequently no withholding tax requirement. Where the employee faces an income tax or national insurance contributions liability, tax is normally deducted at source through the employer's PAYE system if the share is a 'readily convertible asset'.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Many scheme rules allow shares or options in a parent company to be granted to employees of one of its subsidiaries. This gives rise to transfer pricing concerns, whether parent and subsidiary are both UK companies, or where the parent is non-UK and the subsidiary is in the UK. The general transfer pricing principle suggests that there should be a charge levied by the parent to the subsidiary for the cost of providing the shares.

The issues caused by transfer pricing in relation to share or option schemes are often negated by the fact that small and medium-sized businesses are exempted from the transfer pricing regime.

Where the above exemption does not apply, and a chargeback is levied by the parent on the subsidiary, a number of issues may arise concerning the tax deductibility of the chargeback in the UK subsidiary, and in particular the interaction with the corporation tax deduction given to the employer company when share-based incentives become subject to tax (the Part 12 deduction). HMRC has confirmed that where a Part 12 deduction has been claimed by an employer company, it cannot claim any further deductions in respect of the share issue. This means that a chargeback would not be deductible.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

It is possible to use stock purchase plans. Provided that there is at least one restriction attaching to the shares used for the plan that is capable of being lifted within five years of the issue of the shares, there is no income tax charge on the issue of the shares (even for nil consideration) and the income tax and national insurance charge only arises when the shares vest or the restriction is lifted. In practice, there is no real benefit to a stock purchase plan over an unapproved option and so the perceived simplicity of an unapproved option means that these tend to be used in preference to stock purchase plans.

Some bespoke incentive arrangements involve the issue of partly paid shares under which the employee agrees to subscribe the market value of the shares (measured on the date of issue) at a future date. The aim is to secure capital gains tax treatment on the uplift in value of the shares rather than income tax if an unapproved option had been granted; however, the employee is treated for tax purposes as having received a deemed loan from the company in an amount equal to the outstanding subscription price and must pay income tax on the deemed interest expense on that loan.

As noted above, all-employee stock purchase plans are encouraged through the tax benefits provided by the SAYE and SIP regimes.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Employers must provide 28 days' paid holiday per year. In addition, the principal statutory leaves of absence are as follows:

- maternity leave: up to 52 weeks, with up to 39 weeks paid;
- paternity leave: one whole week or two consecutive weeks' paid leave;
- adoption leave: same as maternity;
- shared parental leave: same as maternity but split between both parents (with the exception of the first two weeks' leave, which must be taken by the mother);
- parental leave: up to 18 weeks for each child, unpaid;
- dependant leave: 'reasonable' unpaid time off to deal with emergencies; and
- jury service: length of jury service, payment at discretion of employer.

All employers must automatically enrol eligible job-holders into a qualifying workplace pension. Employers must also pay at least the national minimum wage, set by the government.

No other mandatory elements apply.

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22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

There are two types that are common: LTIPs (see question 9) and EMIs.

Normally, only senior executives participate in LTIPs although it is possible to extend it to more junior employees. The incentive is normally provided in the form of free shares, although sometimes the payout is in cash, or the executive is allowed to exercise an option. Performance is most commonly measured between three and five years (see question 10).

Employees given EMI options enjoy favourable tax treatment. EMI options are specifically targeted at small, higher-risk trading companies and may be granted under a set of plan rules, or by way of standalone EMI option agreements. The EMI legislation requires that the EMI option terms take the form of a written agreement between the option holder and the grantor, which states the main terms of the option, including how and when it may be exercised. The EMI legislation requires that EMI options must be capable of being exercised within 10 years of the date of grant, and options can only be exercised within 12 months of the option holder's death.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

There is no prohibition on terminating executives.

Required notice periods

Other than for gross misconduct, notice of at least the statutory minimum must be given prior to termination (contractual notice generally exceeds the minimum). For executives who have worked less than two years, the notice period is one week. Thereafter, executives are entitled to one week's notice for each year of completed employment, up to a maximum of 12 weeks' notice.

Employers are entitled to dismiss a senior executive without any prior notice if that executive has committed an act of gross misconduct, negligence or other repudiatory breach.

Dismissal without cause

In addition, employers wishing to avoid statutory claims for unfair dismissal must have grounds justifying termination (ie, capability, conduct, redundancy, breach of statutory enactment or some other substantial reason). Failure to provide a fair reason risks a claim of unfair dismissal – although executives tend not to pursue such claims, since compensation for unfair dismissal is generally capped at £80,541.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

Employees with two or more years' service who are terminated for economic reasons are entitled to a statutory redundancy payment of approximately one week's pay per year of service. The exact amount is linked to the length of service, age of the employee and statutory cap on 'weekly pay'. There is also a cap on statutory redundancy pay of 30 weeks' pay, capped for 2017 at £14,670 (or a weekly cap of £489). Severance for redundancy is often enhanced by the employer, including by custom and practice.

Statutory entitlement to severance payments cannot be waived (contractual entitlements can be).

Incentive compensation does not affect the amount of severance payable.

There are no other mandatory, post-employment benefits, but any accrued but unused holiday must be paid out on termination.

25 What executive severance payment level is typical?

There are no legal restrictions on executive severance payment levels – although public companies are required to publish their executive termination packages on their websites (see question 7). Shareholders have become increasingly critical of large executive termination payments – often perceived as rewards for failure – over recent years. Guidelines published by the Association of British Insurers and others now recommend that severance payments be paid in instalments, to allow the company the benefit of mitigation.

There are no mandatory rules governing severance on a change in control.

Pro rata incentive payments for the termination year are not typical.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

Even if the dismissal is justifiable on one of the 'fair' grounds listed in response to question 23, the employer must follow a fair procedure. This means the employer must act reasonably, comply with the terms of the employee's employment contract, meet the required notice period and ensure there is no unlawful discrimination in the treatment of the employee. If dismissal is for misconduct or poor performance, the employer should comply with the Advisory, Conciliation and Arbitration Service (ACAS) code of practice on disciplinary and grievance procedures. As part of the fair procedure, the employee must also be given sufficient information about the reasons for his or her possible dismissal, a reasonable period of time to consider that information and the opportunity to respond at a hearing or meeting (to which the employee has a right to be accompanied) before a final decision is reached.

Limits exist on constructive dismissal

An employment tribunal cannot award more than £25,000 in damages for breach of contract or notice obligations (however, there is no such restriction in the civil courts) or £80,541 for unfair constructive dismissal.

In order to pursue a claim for constructive dismissal, it must be shown that the employer committed a serious breach of the employee's employment contract and the employee accepted the breach by resigning employment.

'Cause' is not defined in UK legislation. Constructive dismissal is defined under section 95(1)(c) of the Employment Rights Act 1996, which provides:

> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ... only if) –*
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

27 Are 'gardening leave' provisions typically used in employment terminations?

Yes. In the event the contract is to be terminated on notice, employers frequently reserve the right to put the employee on garden leave or a period of paid suspension from work. This provides the employer with an opportunity to take steps to protect the business (secure client contacts, etc) while the employee remains subject to express or implied employment obligations of loyalty and confidentiality.

There are no specific limits on its use; however, for an employer to put an employee on garden leave, it is helpful to be able to rely on an express contractual right. Without such a provision, employees can argue that to do so constitutes a breach of contract, because they have an implied right to work. However, it is worth noting that courts are generally willing to allow an employer to put an employee on gardening leave, even without an express contractual right to do so (as long as the employer continues to pay the employee and to provide continued benefits).

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

Yes. A general waiver of claims on termination of an executive's employment is permitted. To waive statutory employment rights, however, the waiver must be a valid settlement agreement or be negotiated by the government body, ACAS.

The following applies to valid settlement agreements:

- they must be in writing;
- they must relate to specific proceedings;

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- an employee must obtain independent legal advice on the agreement's effect on their ability to pursue the statutory rights in question;
- the legal adviser must have insurance for negligence;
- they must identify the adviser; and
- they must specifically state that the conditions regulating settlement agreements are satisfied.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

The most common types of post-employment restrictive covenants are:

- non-solicitation or dealing covenants, which generally restrict the solicitation of or dealings with a former employer's customers, clients or potential customers, or other employees; and
- non-compete covenants, which prevent employees working for competitors for a defined period post-employment, in order to protect confidential information and trade secrets belonging to the former employer; these are more difficult to enforce than non-solicitation or dealing provisions, since employees are already prevented as a matter of law from disclosing trade secrets (eg, a manufacturing process or unique algorithm) after termination, and are often subject to express confidentiality provisions with respect to other non-public information.

There is no maximum period for a post-termination covenant, but employee restrictions lasting longer than 12 months are unlikely to be enforceable in the UK, other than in exceptional circumstances. Even 12 months' protection will only be justified for the most senior employees or in special circumstances.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

A contractual term restricting an employee's activities after termination is void as a restraint of trade and contrary to public policy unless the employer can show that the protection sought is no more than is reasonably necessary to protect its legitimate business interests (such as a stable workforce and key client contacts). In assessing the enforceability of a particular restrictive covenant, a court will consider the degree to which it is limited by both duration and geography. For example, a post-termination covenant that lasts for six months and is confined to a particular city will have a much greater chance of success than a two-year, worldwide restriction.

A court may, in certain circumstances, be willing to sever the offending parts of a clause that are too wide in scope. However, it will not simply rewrite a covenant to make it enforceable if it is too broad, nor will it construe a wide (and void) restriction as having implied (and valid) limitations.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

Damages

The employer must show that the employee breached restrictive covenants and that it suffered a loss as a result of that breach. This will normally be loss of profits or opportunities diverted by the employee.

Injunction

The employer may also seek an injunction – an order prohibiting certain behaviour – if it believes the employee has breached a post-termination restriction, and that damages are an inadequate remedy. An application will generally be made for an injunction and request that the employee 'deliver up' or destroy confidential information that the employee has relied upon in support of his or her unlawful activity.

Legal action against the competitor

Where the employee has been induced by the employer's competitor into breaching restrictive covenants, the employer might choose to sue that competitor for the tort of inducing a breach of contract (particularly where the competitor company has greater financial resources than the former employee).

Update and trends

A notable trend in 2017 is gender pay reporting – the UK's Gender Pay Gap Reporting Regulations came into force on 6 April 2017 and require employers with 250 or more employees to publish statutory calculations every year showing how large the pay gap is between their male and female employees. The difference in mean and median hourly pay and bonus must be provided, along with proportionate bonus and quartile calculations that show the proportion of men versus women in four segments of the workforce, divided from highest to lowest pay.

An employer must comply with the regulations for any year where they have a 'headcount' of 250 or more employees on 5 April. A wider definition of who counts as an employee is used (from the Equality Act 2010). This means that workers are included, as well as some self-employed people. Agency workers are included, but counted by the agency providing them. The results must be published on the employer's website and a government website within 12 months. The results must be confirmed by an appropriate person, such as a chief executive.

Employers also have the option to provide a narrative with their calculations. This should generally explain the reasons for the results and give details about actions that are being taken to reduce or eliminate the gender pay gap.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Yes, all employers will have to provide workers with a workplace pension scheme over the next few years. This is called 'automatic enrolment'.

All employers must automatically enrol eligible jobholders (aged between 22 and the state pension age and earning a statutory minimum amount) into a qualifying workplace pension (occupational pension).

From October 2017, overall employee and employer contributions to the qualifying pension scheme will have to total 8 per cent of earnings, with a minimum 3 per cent being paid by the employer.

From October 2012 to September 2017, reduced contributions will be required. Contributions by the employer and the employee are limited to 'qualifying earnings' (earnings between two specific bands, which are currently £5,876 and £45,000).

The earnings thresholds are reviewed each tax year and the Department of Work and Pensions confirmed on 6 April 2017 that the annual earnings thresholds for the 2017–2018 tax year are £5,876 and £45,000.

The government has set up the National Employment Savings Trust, which is available for employers to use in order to comply with their auto-enrolment duties.

Employers who wish to discontinue voluntary benefits must go through a formal consultation exercise with its employees and consider what legally binding representations it might have given its employees over the years about keeping the plan open.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Typical plans for executives are defined contribution plans, either to a group personal pension plan, or to an individual plan. Provision of defined benefits is increasingly rare, except among the largest public companies. Since the tax regime has become less favourable for executive pension arrangements, it is becoming increasingly common for employers to agree terms on an individual basis to reflect that person's tax position.

The key legal concern for an executive plan is that it does not breach HMRC tax avoidance rules. Executive plans for public companies are subject to disclosure rules.

34 May executives receive supplemental retirement benefits?

In defined benefit plans, an executive's spouse (including a same-sex spouse) is usually provided with a pension if the employee dies before retirement. That benefit can, but does not have to, be extended to cover

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a member's dependent children up to a certain age, and other dependants. For both defined benefit and defined contribution plans, the death of the executive usually triggers a lump-sum death benefit paid by the trustees to the executive's nominee. These payments can be funded through separate life assurance.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

A company may not generally exempt a director from, or indemnify him or her against, liability in connection with negligence, default, or breach of duty or trust.

Where the director does not benefit from a company indemnity, a directors' and officers' (D&O) policy is essential to fund any defence. Many UK directors are now insisting that an adequate D&O policy is in place before they will commit to joining a board. D&O insurance is designed to protect directors from loss resulting from claims made against them in relation to the discharge of their duties as directors or officers respectively. D&O insurance is not compulsory but the Companies Act (CA) 2006 allows a company to purchase insurance for its directors, and those of an associated company, against any liability attaching to them in connection with any negligence, default, breach of duty or breach of trust by them in relation to the company of which they are a director (section 233 of the CA 2006).

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply: on the transfer by acquisition of a business comprising the assets (hard and soft) of an entity that retains its economic identity after the acquisition (ie, on a business of asset sale); and where activities performed by one employer (and to which employees are assigned) transfer to another employer – in an outsourcing, for example. TUPE transfers the employment of transferring business employees to the new employer automatically, with continuity of employment preserved. The new employer 'steps into the shoes' of the old employer for most purposes. Most rights and obligations (except certain pension rights) transfer to the new employer. The new employer is supposed to replicate all existing benefits. This can be difficult in relation to certain benefits such as bonus, commission and share options. Courts typically require employers to provide schemes of broad equivalence.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Yes, this is subject to individual negotiations, service agreements and the terms provided for by the relevant share plans.

An LTIP will normally have provisions allowing awards to vest and be distributed early if there is a change in control. If the change in control happens before LTIP awards have vested, awards should vest by reference to the performance achieved between the grant date and the date of the change in control.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

This is largely dependent on the rules of the applicable share option plan. In order to retain the tax benefits of most of the tax-approved plans (such as EMIs and CSOPs) it is necessary to issue shares pursuant to the exercise of options. If the awards were simply 'cashed out' the tax benefits would be lost.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

No.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

No.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There is no prohibition on tax gross-up or tax equalisation payments although these are likely to be treated as employment income and so also subject to income tax and national insurance contributions. There is a statutory prohibition on transferring employer national insurance contributions on to the employee except in specific situations (eg, on the exercise of an option).

42 Are choice-of-law provisions in executive employment contracts generally respected?

Yes, although the chosen law is subject always to UK mandatory rules and public policy.

COVINGTON

Chris Walter **cwalter@cov.com**
Guy Dingley **gdingley@cov.com**
Hannah Bradshaw **hbradshaw@cov.com**
Richard Surtees **rsurtees@cov.com**

265 Strand
London WC2R 1BH
United Kingdom

Tel: +44 20 7067 2000
Fax: +44 20 7067 2222
www.cov.com

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United States

Marc Trevino
Sullivan & Cromwell LLP

Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

In the United States, the primary sources of law governing compensation arrangements and employee benefits are divided between state and local, on the one hand, and federal, on the other.

State law generally concerns the substance of the compensation arrangements, including at-will employment, employee duties, constraints on the forfeiture or clawback of incentive awards, enforceability of post-employment restrictive covenants and interpretations. To a significantly lesser extent, these also are matters of local law.

Federal law generally concerns the structure of compensation, with the most significant sources being the Internal Revenue Code of 1986 (IRC), the Employee Retirement Income Security Act of 1974 (ERISA) and regulations promulgated by the Department of Labor (DOL), the Internal Revenue Service (IRS) and the Pension Benefit Guaranty Corporation (PBGC). The IRC governs the structure of compensation by providing tax preferences for some arrangements and by purposely making some arrangements uneconomic. ERISA governs private sector employer and union-sponsored tax-qualified pension, retirement and health and welfare benefit arrangements and pre-empts most state laws relating to these employee benefits.

Compensation and benefit arrangements that permit or provide for investment in employer securities or grant equity-based awards to employees may also be subject to registration under, or require an exemption from, federal securities laws. Equity-based awards that are exempt from federal securities laws may be subject to state securities laws requirements (referred to as 'blue sky' laws).

2 What are the primary government agencies or other entities responsible for enforcing these rules?

State and local laws are judicially enforced, although states also maintain departments of labour with varying authority. The primary federal government agencies responsible for enforcement are the IRS, DOL, PBGC and Securities and Exchange Commission (SEC). The IRS enforces IRC provisions governing compensation and employee benefit plans. The DOL is responsible for enforcing federal labour law, as well as the fiduciary aspects of ERISA-governed plans. The PBGC insures ERISA-governed defined-benefit pension plans. The SEC enforces federal securities laws.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

For listed companies, the compensation of the chief executive officer must be evaluated by a committee of independent (non-management) directors and must be approved by the committee or by the full board of directors.

The compensation paid and granted to the chief executive officer, chief financial officer and next three most highly compensated executive officers of publicly traded companies is subject to a non-binding shareholder vote every one to three years. In addition, in order to maintain the tax deductibility of certain compensation payable to these officers (other than the chief financial officer) in excess of US$1 million per year, the compensation must be performance-based and granted under a plan that is shareholder approved. In the event of a change in control of a publicly traded company, a non-binding shareholder vote is required for compensation paid or granted to proxy officers that is based on or relates to the change in control.

Employee equity-based award plans maintained by listed companies are subject to binding shareholder approval under the applicable exchange's listing rules. Certain plans granting tax-advantaged stock options and employee stock purchase rights under the IRC are also subject to shareholder approval.

ERISA-governed retirement and pension plans are also required to be submitted for IRS review and approval every five years, although the IRS has announced that it is planning to scale back the scope of its review, beginning in 2017.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Changes to compensation and benefits that are covered by a collective-bargaining agreement between a union and an employer are required to be bargained for and approved by union members. In addition, under the National Labor Relations Act, employers of union-represented employees must bargain collectively with respect to wages, hours and other terms and conditions of employment. While a unionised employer is not required to seek union approval of a sale of the company, the employer may have an 'effects bargaining' obligation, meaning that the employer may need to discuss with the union ways to ameliorate the impact of the sale on employees, including severance pay, seniority, pensions, health insurance and job security. There are no works councils in the United States.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

ERISA effectively prohibits private-sector employer and union-sponsored retirement plans (both defined benefit and defined contribution) unless they are funded and comply with strict contribution, participation, vesting, anti-discrimination, fiduciary, distribution and reporting rules. There is an exception for unfunded arrangements to select groups of management or highly compensated employees (ie, 'top-hat' plans described in question 22).

The Sarbanes-Oxley Act of 2002 prohibits publicly traded companies from extending, arranging or renewing personal loans to their directors and executive officers. Bona fide business-related advances (such as travel advances or company credit cards used primarily for business purposes, made or used in the ordinary course of business and repaid promptly in accordance with normal business practices, and traditional indemnification advances to executive officers and directors) are generally not viewed as being encompassed by the prohibition on personal loans.

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6 What rules apply to compensation of non-executive directors?

The compensation of non-executive directors is generally set by the directors themselves, and there is no specific requirement as to how a company determines the level and type of compensation paid to non-executive directors. US courts have recently revisited the standards by which the courts will evaluate the decision of directors as to compensation, because the directors are self-interested. In the context of some significant payments to directors, courts have now consistently concluded that, if challenged, the decision will be evaluated as to its 'entire fairness' to the company and without deference to the decision the directors reached. However, the compensation decision is within a range approved by shareholders the regular and more lenient 'business judgement' standard will apply. Director compensation has not been a source of significant controversy, and accordingly the law is not well-developed.

As described above for employee equity-based award plans, equity-based award plans maintained by listed companies under which non-executive directors receive awards are also subject to binding shareholder approval under the applicable exchange's listing rules. Listed companies may maintain separate equity-compensation award plans for employees and non-executive directors or may maintain one plan covering awards to both employees and non-executive directors. It is an emerging practice to include specific director compensation ranges (including both equity and cash compensation) within these plans, a practice that the courts appear to accept.

Each year, cash, equity-based and all other compensation paid and granted to the directors of a publicly traded company is subject to disclosure in the company's annual proxy statement in accordance with SEC Regulation S-K.

Because non-executive directors are not employees, they are not permitted to participate in ERISA-governed tax-qualified pension, retirement and health and welfare benefit arrangements.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

Each year, compensation paid and granted to the chief executive officer, chief financial officer and next three most highly compensated executive officers of a publicly traded company is subject to narrative and tabular disclosure in the company's annual proxy statement in accordance with SEC Regulation S-K. In connection with a change in control, compensation paid or granted to the preceding officers that is based on or relates to the change in control is required to be publicly disclosed. These two disclosures are subject to the non-binding shareholder votes described above.

A publicly traded company must disclose within four business days any material compensatory plan, contract or arrangement (regardless of whether it is written and including material modifications) in which the chief executive officer, chief financial officer or any of the next three most highly compensated executive officers participates. In addition, any management contract or any compensatory plan, contract or arrangement in which any of the preceding participates must be periodically disclosed, together with any of the preceding in which a director or any other executive officer participates (unless, in the latter case, immaterial in amount or significance).

ERISA requires consolidated annual disclosure to the IRS, DOL and PBGC (as applicable) of financial and other information regarding non-exempt retirement and welfare plans but does not require such disclosure of individual information. The DOL makes plan annual reports available to the public.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

Employment agreements with individual employees are not required under US federal or state law and are not particularly prevalent, except for top management (ie, the chief executive officer and direct reports). Typical employment agreement provisions include the term of the agreement (which may be for a set term or may include automatic renewals), base salary, annual incentive target, participation in employee benefits, severance benefits for 'without-cause' and for 'good-reason' terminations (which may increase upon a change in control), and post-employment restrictive covenants (confidentiality, non-compete and non-solicitation). More prevalent are informal 'offer letters' issued at the outset of employment that document certain employer policies.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

Annual incentive compensation is typically paid in cash either upon achievement of pre-established performance hurdles or on a discretionary basis. Long-term incentive compensation may take the form of cash or equity-based awards. In some cases, annual incentives are settled partially in cash and partially in equity awards that are subject to additional vesting conditions (effectively creating a hybrid of annual and long-term incentive programmes).

Long-term cash awards are typically payable upon achievement of pre-established performance hurdles over the performance period. Equity-based awards may be subject to time-based or performance-based vesting (or a combination of both) and include stock options, stock appreciation rights (SARs), restricted stock and restricted stock units (RSUs). Equity-based awards for partnerships are typically in the form of profits interests, which have no value on grant and entitle the holder solely to future profits.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

There are generally no limits on the amount or structure of incentive compensation in the United States. However, IRC section 162(m) limits the company's tax deduction on compensation that may be paid to a public company's chief executive officer and the next three most highly compensated executives (other than the principal financial officer) to US$1 million unless it qualifies as 'performance-based compensation'. Under IRC section 162(m)(6), the tax deductibility limit for certain health insurance providers is US$500,000. IRC sections 280G and 4999 impose a 20 per cent excise tax on the employee and loss of the company's tax deduction on certain 'excess parachute payments' to 'disqualified individuals' upon a change in control (which may include the value of accelerated vesting of equity awards).

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Deferral and vesting of incentive awards are permissible. There are generally no required minimum or maximum vesting or deferral periods, although many public company shareholder-approved equity award plans contain minimum vesting conditions (eg, one year for stock options and SARs and three years for 'full-value' awards, such as restricted stock and RSUs). Vesting may be time-based or performance-based and deferrals must comply with the deferral election and time and form of payment requirements under IRC section 409A in order for the employee to avoid an additional 20 per cent tax and interest. Certain states, such as California, have also adopted state tax laws similar to section 409A.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

Payment of recurrent discretionary incentive compensation does not cause such amounts to become a mandatory contractual entitlement. Depending on the facts and circumstances and applicable state case law, however, employees may be able to bring a common law claim that the employer had a pattern and practice of paying bonuses and the employee continued employment in reliance on the bonuses.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

The type and amount of incentive compensation awarded to an executive does not affect the compensation that must be paid to other

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executives or employees, although, in practice, companies often grant similar types and amounts of equity-based awards to similarly situated employees. Differences in compensation to similarly situated employees can sometimes be the subject of a discrimination claim.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

State law strongly protects wages for employer recovery. However, the same level of protection does not apply to incentive compensation, and it has become increasingly common for bad acts and, in the financial institution context, for adverse-risk outcomes.

For publicly traded companies, federal law requires chief executive officers and chief financial officers to disgorge incentive compensation and profits of company stock sales that they receive within the 12-month period following the public release of financial information if there is a restatement because of material non-compliance, owing to misconduct, with financial reporting requirements. The SEC has proposed rules to require public companies to adopt and enforce clawback policies applicable to excess incentive compensation received by current and former executives in the three-year period preceding the date the issuer is required to prepare an accounting restatement owing to material non-compliance with financial reporting requirements, without regard to whether misconduct occurred.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

As discussed in question 9, prevalent forms of equity compensation for corporations are stock options, SARs, restricted stock and RSUs, each of which may be subject to time-based or performance-based vesting. Partnerships and limited liability companies taxed as partnerships typically grant profits interests. The typical vesting period for stock options and SARs is in equal annual instalments over three to four years and the typical vesting period for restricted stock and RSUs is three to five years, either in instalments or cliff vesting at the end of the vesting period. Performance-based vesting conditions vary widely, although financial measures and relative total shareholder return are most common. The vesting periods and conditions for profits interests vary widely but may require the holder to remain employed until a change in control or liquidity event.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

'Incentive stock options' (ISO) that satisfy the terms and conditions of IRC section 422 and stock options granted under an employee stock purchase plan (ESPP) that satisfies the requirements of IRC section 423 are eligible for special tax treatment. Such options are not subject to tax upon grant or exercise and, provided the employee satisfies the holding requirements for the underlying stock, the holder will recognise:

- capital gain or loss upon disposition of ISO shares in an amount equal to the difference between the amount realised on disposition and the exercise price paid for the shares; and
- ordinary compensation income equal to the lesser of:
  - the excess of the consideration received upon disposition over the exercise price paid; and
  - the excess of the fair market value of the shares at the time of grant over the exercise price paid.

An ESPP permits employees to purchase stock at up to a 15 per cent discount of the fair market value of the stock (as determined under section 423). See question 18 for the general tax treatment of other equity-based awards.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

Equity-based compensation must be registered unless an exemption from registration is available. A short-form registration statement on Form S-8 is typically available for publicly traded companies and a prospectus summarising key plan terms, tax treatment, resale restrictions and federal securities filings that are incorporated into Form S-8 and prospectus by reference must be delivered to award recipients. Exemptions from registration may be available under rule 701, regulation D and section 4(a)(2) of the Securities Act of 1933 or the company may be able to rely on a 'no sale' theory if certain requirements are met. Equity-based awards granted in the US by companies that are not publicly traded may be subject to registration under applicable blue sky laws. If rule 701 is relied on, registration will generally not be required under blue sky laws (but certain notices may be).

18 Are there withholding tax requirements for equity-based awards?

The employer is generally required to withhold income and employment taxes on: (i) exercise of a stock option (except as described in question 16) or SAR; (ii) vesting of restricted stock; and (iii) payment of RSUs (although, if RSUs vest but payment is delayed, employment but not income taxes are required to be paid on vesting). In the case of (i), withholding is based on the difference between the aggregate fair market value of the stock (or cash paid) on exercise and the aggregate exercise or reference price. In the case of (ii) and (iii), withholding is based upon the value of the stock or cash on vesting or payment. In the case of restricted stock, a holder may make an election under IRC section 83(b) to pay income tax upon grant based on the then fair market value of the stock and any further increase in the value of the stock is taxed as capital gain. Because equity-based awards are typically settled in stock, the company needs to determine how it will meet its tax-withholding obligation (eg, by requiring employees to remit additional cash, net withholding shares to cover the cost of taxes, or permitting broker-assisted sales of stock to cover taxes).

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Inter-company chargeback agreements for compensation are common between a non-local parent and a local affiliate, and the form of those awards varies depending upon applicable tax and securities laws and accounting rules. Issues that should be considered include when the chargeback is made, how much is charged back, how availability of tax deductions is accounted for or whether chargeback is made in cash or equity. If no chargeback agreement is in place, a determination needs to be made as to how the value of the compensation will be treated (eg, whether it will be treated as a contribution to capital from the parent to the affiliate).

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

IRC section 423 permits employee stock-purchase plans at a discount of up to 15 per cent of fair market value of the stock (as determined under section 423). Such plans are required to be approved by the issuer's shareholders, and favourable tax treatment is available for qualifying stock purchases as described in question 16. Employee stock purchase plans that do not satisfy the section 423 requirements are rare and must comply with IRC section 409A (ie, by specifying the time of exercise in order for employee to avoid 20 per cent additional tax).

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Employers are not required to provide minimum paid leave, although employers are required to make 12 or 26 weeks (depending on the reason for the leave) of unpaid leave available to qualifying employees under the Family Medical Leave Act (FMLA). A number of states also have family medical leave statutes. There are a number of unemployment insurance programmes maintained at federal and state levels, including unemployment insurance benefits (generally paid by states and funded through state and federal payroll taxes), disaster unemployment assistance and trade readjustment allowances. There are also a number of disability benefits available through federal programmes, most significantly Social Security disability benefits and Medicare, and state disability programmes. Employers are not required to provide health coverage, but, if provided, such coverage

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is governed by ERISA and is subject to the continuation benefits provisions under the Consolidated Omnibus Budget Reconciliation Act (COBRA) (as described in question 24). There are generally no limits on discontinuing voluntary health benefits, provided the employer has not contractually committed to maintaining such benefits.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Executives typically participate in the employer-sponsored, tax-qualified retirement, health and welfare benefits maintained by an employer for its other employees. Employers may also provide executives with additional non-qualified retirement and health coverage that provides benefits above, or in addition to, those benefits provided under tax-qualified plans. In order to be exempt from most provisions of ERISA, supplemental retirement and medical benefits need to be provided only to a 'top-hat' group of employees (ie, a select group of management or highly compensated employees) and a notice of such plan must be filed with the DOL. Certain tax assessments and other penalties may apply to such additional benefits if they do not meet applicable requirements or are determined to discriminate in favour of highly-compensated employees (eg, under IRC section 105(h), section 2716 of the Public Health Service Act (regulations have not yet been promulgated under this section) or fail to satisfy ERISA top-hat requirements).

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

Employees in the United States are generally employed 'at will' and can be terminated for any reason (ie, with or without 'cause') and without notice, subject to any applicable contractual obligations and subject to laws preventing discrimination based on personal characteristics such as sex, age, race, religion and disability, or based on certain types of protected activity, such as whistle-blowing.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

There are generally no minimum severance requirements in the United States. Private-sector employers with 20 or more employees that sponsor a group health plan for their employees are required to make post-employment continuation health benefits available to employees (and their spouses and dependent children) upon termination of employment (and certain other qualifying events) under COBRA. Special COBRA rules apply in the context of a stock or asset sale. COBRA coverage is generally available for 18 months but may be available for up to 36 months under certain circumstances. In addition, certain states, such as California, have adopted state laws requiring post-employment continuation health benefits.

The federal Worker Adjustment and Retraining Notification Act (WARN) requires employers (generally those with 100 or more employees) to provide notice 60 days in advance of covered plant closings and covered mass layoffs. This notice must be provided to either affected workers or their representatives (eg, a labour union), to the state dislocated worker unit and to the appropriate unit of local government. An employer that fails to provide the appropriate notice is liable to each employee for an amount including back pay and benefits for the period of violation, up to 60 days. Federal WARN claims may be waived. A number of states (including California, New Jersey and New York) have adopted state WARN analogues that are more restrictive than federal WARN or provide additional triggers.

25 What executive severance payment level is typical?

Typical severance protection provided by publicly traded companies varies but for employers that maintain executive severance plans or agreements, severance generally ranges from 12 to 24 months of base salary or base salary plus annual incentive (based on average, target or highest incentive) and often includes a pro rata bonus for the year of termination (based on achievement of performance goals). Additional severance of up to 12 months may also be provided in the event of termination without 'cause' or for 'good reason' following a change in control.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

There are generally no statutory limits for cause or good reason terminations, though this should be confirmed under applicable state law. Cause and good reason are typically defined by contract or applicable severance plan terms.

Typical cause triggers under an executive employment agreement include failure to substantially perform duties, commission of a felony, engaging in illegal conduct or gross misconduct that causes financial or reputational harm to the company, material breach of restrictive covenants, or being disqualified or barred by any governmental or self-regulatory authority from serving in contemplated position. Cause provisions sometimes require notice and an opportunity to cure an event constituting cause.

Typical good reason triggers under an executive employment agreement include material and adverse change in position, duties and responsibilities, material and adverse change in reporting relationships, reduction in base salary and annual bonus opportunity, material breach of employment agreement by the company, and failure by the company to have a successor assume the obligations under the employment agreement. Good reason provisions typically require notice and an opportunity to rectify circumstances constituting good reason. IRC section 409A contains requirements for good reason triggers that, if satisfied, facilitate flexibility in structuring, implementing and modifying the underlying arrangement.

Broad-based severance plans covering rank and file employees typically have broader cause definitions and do not have good reason definitions.

27 Are 'gardening leave' provisions typically used in employment terminations?

Gardening leave provisions have not historically been typical in the United States, although they are increasingly being utilised for limited periods to prevent employees from engaging in competitive activity where a non-competition covenant may otherwise be more difficult to enforce under applicable state law.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

Waiver and release of claims upon an executive's termination of employment is generally permitted, provided there is adequate consideration. Waiver of age discrimination claims by employees who are 40 or older under the federal Age Discrimination in Employment Act requires a specified period to consider the release (21 or 45 days) and a seven-day revocation period. Claims under the Fair Labor Standards Act and FMLA cannot be released without approval of the DOL or a court. Many states, including California, Texas and Georgia, subject releases to additional state law requirements.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Post-employment non-compete, non-solicitation of customers and non-solicitation of employees restrictions are prevalent in executive agreements. The restriction periods vary widely and by industry, but typical periods range from one to two years for senior management and six to 12 months for lower-level executives. Restrictive covenants may also apply to non-executive employees for a shorter period (eg, three months).

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Restrictive covenants are governed by state law, and a number of states (including California) limit (or prohibit) certain restrictive covenants,

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such as non-competes and non-solicitation of customers, or require specific language to be included in such restrictive covenants. Where permitted, restrictive covenants are generally required to be limited to the scope, geographical area and duration needed to protect the employer's legitimate business interests. The willingness of courts to modify (or 'blue pencil') the term or scope of such restrictive covenants varies from state to state.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

Remedies for breach of post-employment restrictive covenants are defined by contract and may include seeking an injunction and temporary restraining order in an applicable court, damages caused by the competition, forfeiture or recoupment of severance and other benefits or payment of liquidated damages by the executive. Forfeiture of unpaid compensation or recoupment of paid compensation are generally viewed more favourably by courts and more likely to be enforceable.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Employers in the United States are not required to provide pension or retirement benefits for their employees, although to the extent such benefits are provided, they are governed by ERISA and the applicable provisions of the IRC and DOL and PBGC regulations, which establish vesting, funding, reporting and disclosure and other protections. ERISA contains anti-cutback protections, which generally prohibit cutback of accrued retirement benefits, early retirement benefits, retirement-type subsidies and other forms of optional benefits offered under tax-qualified retirement plans.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Executives generally participate in the company's tax-qualified retirement plans, which may be in the form of defined contribution or defined benefit plans, although defined benefit plans in the United States have been on the decline for many years. Executives may also participate in supplemental and excess arrangements described in question 34. Employers are permitted to take a current tax deduction for contributions to tax-qualified retirement plans (subject to applicable limits), whereas employers are not permitted to take a tax deduction for benefits under non-qualified plans until the benefits are actually paid.

34 May executives receive supplemental retirement benefits?

Executives generally are permitted to receive supplemental retirement benefits. Such benefits are typically provided in the form of non-qualified (ie, 'top-hat') supplemental or excess retirement plans. Supplemental retirement plans provide executives with specified retirement benefits (either on a defined contribution or defined benefit basis), which are typically offset by applicable tax-qualified and Social Security benefits. 'Excess' benefit plans provide for a continued accrual of benefits on a non-qualified basis to the extent such benefits are not permitted to be accrued under an employer's tax-qualified plans because of IRC limits on compensation and maximum benefit accruals. Excess plans may be in the form of defined benefit or defined contribution. Supplemental and excess plans are not permitted to be 'funded' (within the meaning of the IRC), although assets may be set aside by the plan sponsor in a 'rabbi trust', the assets of which remain subject to the company's creditors in bankruptcy or insolvency. There generally are no limits on providing discriminatory retirement benefits for executives through the use of supplemental plans.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

Executives generally may be indemnified or insured for claims related to actions taken as an executive, officer or director, subject to limits under applicable state corporate law (eg, for certain bad acts), the company's charter and by-laws and any applicable indemnification agreements and insurance policies. Federal law potentially limits indemnification for select securities law claims and for select financial institution regulatory claims.

Update and trends

The prevalence and use of clawback policies in the United States has increased substantially over the past five years. It has become expected that executives and other high-level employees will be subject to compensation recovery in the event of misconduct or adverse financial outcomes resulting from their activities or the activities of those they supervise. These clawbacks have largely been accepted voluntarily, and the law applicable is not well developed.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

An asset sale will generally not result in an automatic transfer of benefit obligations to the acquirer. Assumption of such obligations are determined by contract, except for provision of COBRA benefits in an asset sale where the buying group is a successor employer (as determined under COBRA) and the selling group ceases to maintain a group health plan following closing. Further, employees do not have 'acquired rights' protections in an asset sale.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Yes, although providing executive retention or related arrangements in connection with a change in control varies widely from transaction to transaction and depends on a number of factors, including existing severance protections, the desire to retain management, the type of business and the length of the period between signing definitive documentation and closing of the transaction. The structure of retention arrangements also varies but typically would provide for cash awards payable at closing, cash or equity-based awards (typically RSUs) that vest and become payable at a specified time (or times) following the closing date (eg, six to 24 months following closing). The transaction documentation may also provide for a retention pool to be used for retention awards, which awards are typically determined by mutual agreement of the parties.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

There are generally no limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control, or no restrictions on 'cashing out' of equity awards, except to the extent limited or prohibited under the applicable compensation plan and award agreement. Providing for acceleration or payment upon a change in control without a corresponding termination of employment (ie, 'single-trigger' benefits) is generally disfavoured by shareholder advocacy groups and certain institutional shareholders. Accordingly, such practice is generally on the decline in favour of 'double-trigger' arrangements under which acceleration of vesting, exercisability and payment only occurs upon a qualifying termination within a specified period following a change in control.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

No foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives.

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40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

Employment agreements, employee compensation or benefit plans, or award agreements are generally not required to be translated into the local language (English), although, in practice, most such plans and agreements are provided in English. In addition, ERISA includes provisions on foreign language assistance (ie, when a certain portion of plan participants are literate only in the same non-English language, the plan administrator may be required to provide a notice written in that language indicating that assistance with the plan's summary plan description is available).

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are no prohibitions on tax gross-ups and indemnities. These payments are disfavoured by shareholder advocacy groups and institutional investors (outside of the context of tax equalisation), and therefore are not prevalent, except for certain (often legacy or situation-specific) arrangements relating to the excise tax under IRC 4999 that can apply in the context of change in control.

There are no prohibitions on tax equalisation, and the practice of providing such payments for expatriate employees is prevalent, although it varies from company to company.

42 Are choice-of-law provisions in executive employment contracts generally respected?

Choice-of-law provisions in executive employment contracts are generally respected provided that the provisions have a connection to the employment relationship; however, courts in certain states generally will not respect choice-of-law provisions that conflict with state law public-policy prohibitions (such as often underlie limits on post-employment restrictive covenants).

SULLIVAN & CROMWELL LLP

Marc Trevino **trevinom@sullcrom.com**

125 Broad Street
New York
NY 10004
United States

Tel: +1 212 558 4000
Fax: +1 212 558 3588
www.sullcrom.com

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