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Law and Practice

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1. Terms of Employment

1.1 Status of Employee

In the Philippines, blue-collar and white-collar workers are not explicitly described under the law or jurisprudence. The common understanding, however, is that blue-collar workers are those who typically perform skilled or unskilled manual labour and are paid a daily wage, while white-collar workers are those who perform work in an office or administrative setting and are paid a monthly salary. Nonetheless, whether an employee is a blue-collar or white-collar worker does not substantially determine the benefits to which he or she is entitled. As long as such worker is considered an employee, he or she shall be granted such rights and entitlements under Presidential Decree No 442 or the Labour Code of the Philippines, as amended ("Labour Code"), or special labour laws, unless otherwise excluded due to his or her functions and/or position.

The classification of employees as either managerial employees, members of the managerial staff or supervisory employees, or rank-and-file employees is of relevance. Article 82 of the Labour Code on Labour Standards defines managerial employeesas those whose primary duty consists of the management of an establishment in which they are employed, or of a department or subdivisions thereof. Similarly, Article 255 of the Labour Code on Labour Relations refers to managerial employees as those who are vested with powers or prerogatives to lay down and execute management policies or to hire, transfer, suspend, layoff, recall, discharge, assign or discipline employees. Supervisory employees are those who, in the interest of the employer, effectively recommend the taking of such managerial actions, and whose duties normally involve the use of independent judgement. All others are rank-and-file employees and are entitled to the minimum requirements of the Labour Code on working conditions and rest periods. Furthermore, as managerial employees exercise management prerogatives on behalf of the employer, they are not eligible to unionise or join, assist or form any labour organisation. On the other hand, rank-and-file employees are entitled to the right to self-organisation under the law.

In the Philippine jurisdiction, the types of employment specified by law and jurisprudence are as follows:

- regular employment;
- probationary employment;
- project or seasonal employment;
- casual employment; and
- fixed-term employment.

Regular and casual employment. Article 295 of the Labour Code provides for the types of employment, depending on the nature of the work. The general rule is that the employment relationship is deemed to be regularwhere the employee has been engaged to perform activities that are usually necessary or desirable in the usual business or trade of the employer. Otherwise, such employment relationship is only casual. Thus, the primary standard for determining regular employment is the reasonable connection between the particular activity performed by the employee and the usual trade or business of the employer. The connection can be determined by considering the nature of the work performed and its relation to the scheme of the particular business or trade in its entirety. If the work performed is not necessary or desirable to the business of the employer, the employment is deemed casual. However, if such casual employee has been performing the job for at least one year, even if the performance is not continuous and merely intermittent, the law deems the repeated and continuing need for its performance as sufficient evidence of the necessity – if not indispensability – of that activity to the business. Hence, the employment is considered regular in status, but only with respect to such activity, and while such activity exists.

Probationary employment. A probationary employee is one who is engaged for regular employment but who, for a given period of time, is being observed and evaluated to determine whether or not he or she is qualified for regular

employment status. A probationary appointment affords the employer an opportunity to observe the skill, competence and attitude of an employee under such probationary status. Article 296 of the Labour Code provides that probationary employment shall not exceed six months from the date the employee started working, which has been interpreted to mean 180 days. A probationary employee who is allowed to work beyond this period shall already be considered as a regular employee by operation of law in terms of his/her status. The probationary period may be extended by mutual agreement of the parties.

Probationary employees also enjoy security of tenure in the sense that, during their probationary employment, they cannot be dismissed except for just or authorised causes under Articles 297 and 298 of the Labour Code, or failure to meet the standards for the regularisation of employment. It is important to note that the reasonable standards for the regularisation of employment should be made known by the employer to the probationary employees at the time of their engagement. Where no standards are made known to the employees at that time, they shall be deemed as regular employees (in terms of their status) from day one of their employment.

Project or seasonal employment. The principal test used to determine whether employees are project employees is whether or not they were assigned to carry out a specific project or undertaking, the duration or scope of which was specified at the time the employees were engaged for that project. Seasonal employment is akin to project employment, except that the work or services to be performed is seasonal in nature and the employment is for the duration of said season. A project employee is likewise entitled to security of tenure, such that no employee shall be dismissed prior to the completion of the project or phase thereof for which he/she was engaged, unless the dismissal is for just or authorised cause, or is brought about by the completion of the phase of the project for which the employee was engaged.

Fixed-term employment. This kind of employment is not covered in the Labour Code. A fixed-term employee is one whose tenure is set for a definite period. While the Supreme Court has recognised the validity of fixed-term employment contracts, it has consistently held that this is the exception rather than the general rule. Even if it is clear as regards the existence of a period, a fixed-term contract is invalid if it can be shown that it was executed with the intention of circumventing an employee's right to security of tenure. Jurisprudence has laid down the criteria under which fixed-term employment may be upheld:

- the fixed period of employment was knowingly and voluntarily agreed upon by the parties without any force, duress or improper pressure being brought to bear upon the employee, and in the absence of any other circumstances vitiating his or her consent; or
- it satisfactorily appears that the employer and the employee dealt with each other on more or less equal terms, with no moral dominance exercised by the former on the latter.

1.2 Contractual Relationship

The type of employment contract necessarily follows the type of employment under which an employee is classified – ie, regular, casual, probationary, project, seasonal or fixed-term. Since employees generally enjoy security of tenure, employment contracts may only be terminated for just or authorised causes under the Labour Code or, in the case of probationary employment, if the employee should fail to meet the performance standards set for the regularisation of status.

An employer-employee relationship may be established even in the absence of a physical contract. An employment relationship is determined by applying the four-fold test, under which the elements of an employment relationship are as follows:

- selection and engagement of the employee;
- payment of wages;
- power of dismissal; and
- power to control the employee with respect to the means and methods by which his or her work is to be accomplished.

Employment contracts do not generally need to be in writing, as there is no such requirement in the Philippine labour laws, nor are there any formal requirements mandated to qualify an employment contract as enforceable. As a matter of fact, the employment status of an employee does not rely solely on the stipulations in a written employment contract, as the grant and enforcement of employee rights is highly favoured.

The general rule is that the law does not prescribe particular details that must be included in employment contracts, as oral agreements may govern the same. However, for certain kinds of employment, particular details must be embodied in the employment contract in order to make them valid. Specifically, the following kinds of employment contracts must indicate the following:

- Project employment – the particular project or undertaking, or phase thereof, with which the employment is coterminous must be specified, along with the duration of the work to be performed, which means that the day of termination of the project must be certain.
- Probationary employment – in addition to a stipulation as to the length of the probationary period, which shall not exceed six months, the contract must also inform the

employee of the reasonable standards on which his or her performance will be evaluated.
- Fixed-term employment – the duration or fixed period of employment must be indicated in the employment contract.

1.3 Working Hours

The general rule is that an employee's normal hours of work shall not exceed eight hours per day, in accordance with Article 83 of the Labour Code, with any work beyond these hours entitling the employee to an additional overtime premium of at least 25% of the hourly rate. However, the regulations allow an employer to implement a Compressed Workweek (CWW) schedule and other flexible work arrangements. Under Department of Labour and Employment (DOLE) Advisory No 02-2009 (the Guidelines on the Adoption of Flexible Work Arrangements), a CWW is a flexible work arrangement where the normal work week is reduced to fewer than the usual number of work days in a week, but the total number of work-hours (ie, 40 or 48 hours per week) shall remain. Thus, the normal workday is increased to more than eight hours, but cannot exceed 12 hours without the corresponding overtime premium. The same DOLE Department Advisory also enumerates the guidelines for the other kinds of flexible work arrangements – ie, reduction of work days, rotation of workers, forced leave, broken-time schedule, and flexi-holidays.

There are no specific terms required for part-time contracts, except for the exact hours of work expected to be rendered in a day or during the work week. However, employees who render part-time work are also entitled to the benefits mandated under the law, proportionate to the duration of the services rendered vis-à-vis those granted to regular employees.

Under Article 87 of the Labour Code, work may be performed beyond eight hours a day if the employee is paid for the overtime work. Moreover, under Article 89 of the Labour Code, an employee may be required to render emergency overtime work, subject to the payment of overtime pay, in the following instances:

- when the country is at war or when any other national or local emergency has been declared by Congress or the Chief Executive;
- when overtime work is necessary to prevent loss of life or property, or in the case of imminent danger to public safety due to actual or impending emergency in the locality caused by serious accident, fire, flood, typhoon, earthquake, epidemic or other disaster or calamities;
- when there is urgent work to be performed on machines, installations or equipment, in order to avoid serious loss or damage to the employer, or due to some other causes of a similar nature;
- when the work is necessary to prevent loss or damage to perishable goods;
- when the completion or continuation of work started before the eighth hour is necessary to prevent serious obstruction or prejudice to the business or operations of the employer; and
- when overtime work is necessary to avail of favourable weather or environmental conditions where performance or quality of work is dependent thereon.

In this regard, the rates of overtime pay would vary depending on the day when the overtime work is performed, as follows:

- for overtime work on an ordinary working day, the employee shall be entitled to additional compensation equivalent to his or her regular wage plus at least 25% thereof; and
- for overtime work on a scheduled rest day, a special day or a regular holiday, the employee shall be entitled to additional compensation equivalent to the employee's rate for the first eight hours on such rest day, special day or regular holiday plus at least 30% thereof.

Memorandum Circular No 1, Series of 2004, issued by DOLE sets forth the rules to be followed by all employers in the private sector for payment of overtime premiums during a regular holiday, a special day or an employee's rest day.

1.4 Compensation

An employer is mandated to pay an employee the statutory minimum wage, which is defined as the lowest wage rate fixed by law that an employer can pay his or her workers; said rates are periodically released through wage orders promulgated by the Regional Tripartite Wages and Productivity Board (RTWPB). Employers who fail to pay the minimum wage may be subject to punishment. The minimum wage rates for agricultural and non-agricultural employees in every region of the country shall be those prescribed by the RTWPB after conducting wage studies per industry, province or locality. Per Department Order No 10, series of 1998, wage rates include cost-of-living allowances as fixed by the RTWPB, but exclude wage-related benefits such as overtime pay, bonuses, night-shift differential pay, holiday pay, premium pay, 13th month pay, premium pay and leave benefits, among others. In the capital Metro Manila area, the latest Wage Order (NCR No 21) prescribes a minimum daily wage of PHP512 per day.

In addition to the required minimum wage, another mandatory requirement that must be included as a component of a rank-and-file employee's remuneration is his or her 13th month pay.

The 13th month pay is an additional income given to employees not excluded under the law, and is equivalent to one

twelfth of the basic salary of an employee within a calendar year. In order for a rank-and-file employee to be entitled to this payment, he or she must have worked for at least one month during the calendar year. The formula for computing an employee's 13th month pay is "total basic salary earned during the year/12 months = proportionate 13th month pay".

On the other hand, bonuses are generally granted to the employee as an act of generosity on the part of the employer. Therefore, an employee cannot, as a rule, claim entitlement to certain bonuses. However, a bonus may constitute part of an employee's wage and, therefore, must be given in the following circumstances:

- when it is stipulated in the employment contract or Collective Bargaining Agreement (CBA);
- when the grant of the bonus is based on company policy or practice; or
- when the bonus is granted as an additional compensation without any condition for its grant.

If the employer would be granting bonuses under any of these instances, then the grant thereof cannot be construed as an act of generosity.

Other than through the process of setting minimum wages per region, the government allows employers and employees to agree on compensation levels and other terms and conditions of employment. Where there are unions representing employees in a specified bargaining unit, the government allows these unions to bargain collectively with the employer with respect to wages, hours of work and all other terms and conditions of employment.

1.5 Other Terms of Employment

Vacation and Vacation Pay

Article 95 of the Labour Code grants an employee who has rendered at least one year of service a Service Incentive Leave (SIL) of five days with pay. The SIL is commutable to its money equivalent if an employee does not use the leave by the end of the year. An employer is not obliged to provide any other vacation leaves, paid or unpaid, of the same import.

Required Leaves

Maternity Leave. Section 14-A of Republic Act No 8282 or the Social Security Law provides that every pregnant employee, whether married or unmarried, is entitled to a maternity leave benefit of 60 days in the case of normal delivery or miscarriage, or 78 days in the case of Caesarian section delivery, with benefits equivalent to 100% of the average daily salary credit of the employee as defined by law. Employers are required to advance this benefit subject to reimbursement from the Social Security System.

Paternity Leave. Section 2 of Republic Act No 8187 or the Paternity Leave Act of 1996 provides that all married male employees who are cohabiting with their spouses are entitled to a paternity leave of seven calendar days to enable the male employee to support the wife in the recovery period and/or in the nursing of the newly born child. The benefit shall be in addition to existing leaves granted to employees, and cannot be converted to cash if unutilised.

Parental leave. Section 18 of Republic Act No 8972 or the Solo Parents' Welfare Act of 2000 provides that a special-leave benefit of no more than seven working days is granted every year to a solo parent, as defined under the law, who should have rendered at least one year of service.

Leave for Women Victims of Violence. Section 43 of Republic Act No 9262 or the Anti-Violence Against Women and Their Children Act of 2004 provides that employers are required to grant a paid leave of up to ten days a year to a female employee who is a victim of the crime of violence against women and their children as defined under R.A. No 9262 – ie, any act or series of acts committed by any person against a woman who is his wife or former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child, whether legitimate or illegitimate, within or without the family abode, which result in or are likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty. The leave shall be in addition to all other paid leaves under the Labour Code, and extendible when the need arises.

Leave due to Gynaecological Surgery. Section 18 of Republic Act No 9710 or the Magna Carta of Women provides that a female employee who has rendered continuous aggregate employment service of at least six months for the last 12 months shall be entitled to a special leave benefit of two months with full pay based on her gross monthly compensation following surgery caused by gynaecological disorders.

Limitations on Confidentiality

There are no limitations as to the provision of confidentiality or non-disparagement clauses in an employment contract, following the principle of autonomy of wills under contract law. In fact, an employer may perpetually prohibit the employee from divulging confidential information that he or she received in the course of his or her employment. In the same vein, an employer may likewise prohibit an employee from taking any action that may have an impact on its business or reputation. Confidentiality or non-disparagement agreements or clauses typically impose penalties for violating the same, in the form of liquidated damages.

Employee Liability
An employee's liability to the employer for loss or damage may be enforced through wage deductions, albeit under very stringent standards. In fact, under Article 114 of the Labour Code, no employer shall require his or her worker to make deposits from which deductions shall be made for the reimbursement of loss or damage to tools, materials or equipment supplied by the employer, except when the employer is engaged in such trades, occupations or business where the practice of making deductions or requiring deposits is a recognised one, or is necessary or desirable as determined by the Secretary of Labour and Employment in appropriate rules and regulations. This is further limited by Article 115 of the Labour Code and Labour Advisory No 11, series of 2014, which states that no deduction from the deposits of an employee for the actual amount of the loss or damage shall be made unless the employee has been heard thereon, and his/her responsibility has been clearly shown. In no case shall the deduction exceed 20% of the employee's wages in a week.

As regards an employee's liability to third persons, under Article 2180 of the Civil Code of the Philippines, employers shall be liable for the damages caused by their employees acting within the scope of their assigned tasks, even though the former are not engaged in any business or industry. Thus, damages caused to third persons by reason of an employee's negligence in the performance of their duties or in their official capacity are assumed by the employer.

2. Restrictive Covenants

2.1 Non-Competition Clauses
Non-compete clauses may be included in Philippine employment contracts, especially if substantial investment in the employees is involved. These clauses prohibit an employee from accepting employment with a direct or indirect competitor engaging in a business similar to or in competition with the business of the previous employer. Per Philippine jurisprudence, while there is no hard and fast rule to determine the validity or enforceability of a non-compete clause, it may be stricken down when, based on the circumstances, the restriction is unreasonable so as to restrain trade unduly, when it is contrary to the public welfare, and when the restriction is not greater than is necessary to afford fair and reasonable protection to the party in whose favour it is imposed. On the other hand, the Supreme Court has upheld a non-compete clause that was limited as to time, trade and place. Thus, the reasonableness of the arrangement may be determined on the basis of said factors.

Non-compete clauses may be enforced by filing a civil case with the regular courts of competent jurisdiction within ten years of the time the right of action accrues, as stated in Article 1144 of the Civil Code. The extent of the liability depends on the stipulation in the contract and/or the damages that may be proven arising from the breach. Typically, however, non-compete clauses include the imposition of a penalty in the form of liquidated damages pegged at a fixed amount in the case of violation thereof. While the employer may stipulate any amount, courts may still temper the same upon judicial review if the amount is found to be unconscionable or iniquitous in light of the circumstances.

2.2 Non-Solicitation Clauses - Enforceability/Standards
Similar to non-compete clauses, non-solicitation clauses regarding either employees or customers may be enforced by filing a civil case with the regular courts within ten years of the time the right of action accrues. There are no set standards for the validity or enforceability of such clauses, except as to their reasonableness. The Civil Code allows the parties to a contract to agree on such terms as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy.

There are no substantial distinctions as to the enforceability or validity of non-solicitation clauses in reference to customers compared to those for employees.

3. Data Privacy Law

3.1 General Overview of Applicable Rules
Under Republic Act No 10173, otherwise known as the Data Privacy Act of 2012, and its Implementing Rules and Regulations (IRR), the collection of information from a *data subject*, including an employee, is referred to as "processing", which pertains to any operation or any set of operations performed upon personal information, including but not limited to the collection, recording, organisation, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of data.

Section 3 of the law defines three categories of information belonging to an individual, namely:

- personal information;
- privileged information; and
- sensitive personal information.

Personal information refers to any information, whether recorded in a material form or not, from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify an individual. *Privileged information* refers to any and all forms of data that, under the substantive or procedural laws, constitute privileged communication, such as those made between husband and wife, lawyer and client,

doctor and patient, religious minister and confessant, and public officer and any person with respect to confidential communication in the course of the public officer's duties. Finally, *sensitive personal information* refers to the following:

- information about an individual's race, ethnic origin, marital status, age, colour, and religious, philosophical or political affiliations;
- information about an individual's health, education, genetic or sexual life, or regarding any proceeding for any offence committed or alleged to have been committed by such person, the disposal of such proceedings, or the sentence of any court in such proceedings;
- information issued by government agencies peculiar to an individual, including but not limited to social security numbers, previous or current health records, licences or denials, suspension or revocation thereof, and tax returns; and
- information specifically established by an executive order or an act of Congress to be kept classified.

Under Section 12 of the Data Privacy Act, the processing of *personal information* shall be permitted only if it is not otherwise prohibited by law and when at least one of the following conditions exists:

- the data subject has given his or her consent;
- the processing is necessary and related to the fulfilment of a contract with the data subject or in order to take steps at the request of the data subject prior to entering into a contract;
- processing is necessary to protect vitally important interests of the data subject, including his or her life and health;
- processing is necessary in order to respond to a national emergency, or to comply with the requirements of public order and safety, or to fulfill functions of public authority; or
- processing is necessary for the purposes of the legitimate interests pursued by the Personal Information Controller or by a third party to whom the data is disclosed.

On the other hand, Section 13 of the same law provides that the processing of *sensitive personal information* and *privileged information* shall be prohibited, except in the following cases:

- when the data subject has given his or her consent, specific to the purpose prior to the processing or, in the case of privileged information, all parties to the exchange have given their consent prior to processing;
- when the processing of the same is provided for by existing laws and regulations, provided that such regulatory enactments guarantee the protection of the sensitive personal information and the privileged information, and that the consent of the data subjects is not required by law or regulation permitting the processing of the sensitive personal information or the privileged information;
- when the processing is necessary to protect the life and health of the data subject or another person, and the data subject is not legally or physically able to express his or her consent prior to the processing;
- when the processing is necessary to achieve the lawful and non-commercial objectives of public organisations and their associations, provided that such processing is confined and related to the bona fide members of these organisations or their associations, that the sensitive personal information is not transferred to third parties, and that the consent of the data subject was obtained prior to processing;
- when the processing is necessary for purposes of medical treatment and is carried out by a medical practitioner or a medical treatment institution, and an adequate level of protection of personal information is ensured; or
- when the processing concerns such personal information as is necessary for the protection of lawful rights and interests of natural or legal persons in court proceedings, or the establishment, exercise or defence of legal claims, or when provided to government or public authority.

Significantly, Section 25 of Rule VI of the IRR of the Data Privacy Act essentially requires an employer to establish three types of security measures to ensure the protection of the personal data it processes: organisational; physical; and technical.

Among other matters, the Act specifically requires the employer to establish organisational security measures to establish the position of a Compliance Officer or Data Protection Officer to ensure compliance with the Act, to protect personal information and limit the processing of such, and to devise appropriate rules regarding the engagement of employees who shall have access to personal data. The Act also requires the employer to establish physical security measures, which may include designing the office space to provide privacy to anyone processing personal data, and putting technical security measures in place, which entails the protection of computer systems used in the processing and storage of personal data through consistent monitoring and encryption.

Evidently, these measures must be comprehensive enough to protect the personal data from both natural dangers (eg, accidental loss or destruction) and human dangers (eg, unlawful access, fraudulent misuse, unlawful destruction, alteration or contamination).

Further, Section 47 of Rule XI of the IRR provides several rules when a personal information controller or processor is required to register its personal data processing systems. As a rule, all controllers or processors who employ fewer than 250 persons are not required to register their personal data

processing systems, unless the processing it carries out is likely to pose a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes sensitive personal information of at least 1,000 individuals. The registration must contain:

- the name and address of the employer and its representative, and their contact details;
- the purpose or purposes of the processing, and whether processing is being done under an outsourcing or subcontracting agreement;
- a description of the category or categories of data subjects, and of the data or categories of data relating to them;
- the recipients or categories of recipients to whom the data might be disclosed;
- proposed transfers of personal data outside the Philippines;
- a general description of privacy and security measures for data protection;
- a brief description of the data processing system;
- a copy of all policies relating to data governance, data privacy and information security;
- attestation to all certifications attained that are related to information and communications processing; and
- the name and contact details of the compliance or data protection officer, which shall immediately be updated if there are any changes.

The same goes for any wholly or partly automated processing operations carried out by a personal information controller.

Specifically, National Privacy Commission Circular 17-01 provides that sectors or industries that are subject to mandatory registration of their data processing systems include government branches, bodies or entities, banks and non-bank financial institutions, telecommunications networks, internet service providers and other entities providing similar services, business process outsourcing companies, universities, colleges and other institutions of higher learning, and all other schools and training institutions, hospitals, including primary care facilities, multi-speciality clinics, and other organisations processing genetic data, insurance providers, businesses involved in direct marketing and networking, companies providing reward cards and loyalty programmes, pharmaceutical companies engaged in research, and personal information processors processing personal data for a personal information controller included in the preceding items, and data processing systems involving automated decision-making.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers

Article 40 of the Labour Code provides that a non-resident alien may only be engaged to work in the country, or an applicant employer may only engage a non-resident alien to work in the country, if there is a determination of the non-availability of a person in the Philippines who is competent, able and willing at the time of application to perform the services for which the alien is desired.

4.2 Registration Requirements

Article 40 of the Labour Code also provides that any alien seeking admission to the Philippines for employment purposes and any domestic foreign employer who desires to engage an alien for employment in the Philippines must obtain an employment permit from the Department of Labour. Per Department Order No 186, series of 2017, the permit required is otherwise known as the Alien Employment Permit (AEP), and is valid for the position and the company for which it was issued for a period of one year, unless the employment contract or other modes of engagement provide otherwise; however, in no case shall it exceed three years.

An application for the issuance of an AEP shall be filed with the DOLE Regional Office or Field Office having jurisdiction over the intended place of work, and shall be supported by the following:

- a duly completed application form;
- a photocopy of the applicant's passport with valid visa;
- a notarised contract of employment or appointment enumerating the duties and responsibilities, annual salary and other benefits of the foreign national;
- a photocopy of the Mayor's Permit to operate a business; and
- a Business Name Registration and Application Form with the Department of Trade and Industry (DTI) or Securities and Exchange Commission (SEC) Registration and General Information Sheet.

Moreover, a foreign national who seeks to exercise a particular profession in the Philippines must also secure a Special Temporary Permit (STP) from the Professional Regulation Commission (PRC). If the employer is covered by the Anti-Dummy Law, an Authority to Employ Foreign Naitonal (ATEFN) must be obtained from the Department of Justice, or from the Department of Environment and Natural Resources (DENR) in case of mining.

On the other hand, under Bureau of Immigration (BI) Memorandum Order AFF Jr. No 05-001, a foreign national who wishes to work and stay in the Philippines for a maximum period of no more than six months may secure a Special Work Permit (SWP) from the BI instead of an AEP, which may be secured for a period of three months, and renewed for the same period thereafter.

5. Collective Relations

5.1 Status of Unions

Under the 1987 Constitution, the right of the people – including those employed in the public and private sectors – to form unions, associations or societies for purposes not contrary to law shall not be abridged. For this reason, employees have a right to self-organisation, which right is further protected under Article 253 of the Labour Code.

Specifically, such right to self-organisation shall include the right to form, join or assist labour organisations for the purpose of collective bargaining through representatives of their own choosing, and to engage in lawful aid and protection. Labour organisations are unions or associations that exist in whole or in part for the purpose of collective bargaining, or for dealing with employers concerning terms and conditions of employment.

Unions in the Philippines are active only in the particular bargaining unit, which is no larger than the employer-wide unit that elected them to be the employees' representatives for purposes of collective bargaining, but only with their employer. There is no industry-wide or craft-based bargaining unit in the Philippines.

Other than the right to bargain collectively with the employer, the rights of a legitimate labour organisation or union include the right to be furnished the employer's audited financial statements once the organisation or union is determined to be the exclusive bargaining representative of the employees, to own property, to sue and be sued in its registered name, and to undertake all other activities designed to benefit the organisation and its members.

5.2 Employee Representative Bodies - Elected or Appointed

A group of employees seeking entitlement to all the rights and privileges of a legitimate labour organisation, including recognition as a collective bargaining agent, must first register as a labour organisation. Workers may unionise either as an independent union or by affiliating as a local chapter of a recognised federation. Article 240 of the Labour Code provides that, to be able to register, an independent labour organisation must, among other things, show that all the members of the union comprise at least 20% of all the employees in the bargaining unit where it seeks to operate.

Workers may also obtain representation via a charter certificate issued by a duly registered federation or national union. This will mean that such association shall become the latter's local chapter. Notably, there is no membership requirement in the case of a local chapter, although it is vested with legal personality only for purposes of filing a petition for certification election from the date it was issued the charter certificate.

Department Order No 40-I-15, series of 2015, outlines the procedure for a request for certification in an unorganised establishment with only one legitimate labour organisation. In such a case, the requesting union must prove that it has the support of at least a majority of the number of employees in the bargaining unit. Should it qualify as such, that union may be issued a certification as the sole and exclusive bargaining agent of the covered employees in the establishment.

5.3 Collective Bargaining Agreements

If the company becomes a unionised or organised establishment, a Collective Bargaining Agreement (CBA) between the company and a union certified as the exclusive bargaining agent of a particular group of employees would also govern the terms and conditions of employment of the company's employees. Article 263 of the Labour Code provides for the CBA to be executed upon the request of either the employer or the exclusive bargaining representative of the employees, which contract shall incorporate the agreement reached after negotiations with respect to wages, hours of work and all other terms and conditions of employment, including proposals for adjusting any grievances or questions under such agreement.

6. Termination of Employment

6.1 Grounds for Termination

Instead of motivation, a just cause normally attributable to the employee's fault or negligence is required to terminate regular employment, and should be proven with substantial evidence. Unlike in other jurisdictions which adopt an "at-will employment" arrangement, Philippine labour law reinforces the importance of an employee's right to security of tenure, as guaranteed by Article XIII, Sec. 3 of the 1987 Philippine Constitution. Before a regular employee could be meted the supreme penalty of termination from employment, the employer must first comply with both substantive and procedural due process. Substantive due process means that the dismissal must be based on a just cause or an authorised cause. The just causes for dismissal are provided under Article 297 of the Labour Code, to wit:

- serious misconduct or wilful disobedience by the employee of the lawful orders of his or her employer or representative in connection with his work;
- gross and habitual neglect by the employee of his or her duties;
- fraud or wilful breach by the employee of the trust reposed in him or her by his or her employer or duly authorised representative;

- commission of a crime or offence by the employee against the person of his or her employer or any immediate member of his or her family or his or her duly authorised representative; and
- other causes analogous to the foregoing.

On the other hand, an employer may likewise terminate the employment of an employee for the following authorised causes due to the employer's business-related decisions, under Article 298 of the Labour Code:

- the installation of labour-saving devices;
- redundancy;
- retrenchment to prevent losses; or
- the closing or cessation of operation of the establishment or undertaking.

Also, Article 299 of the Labour Code allows an employer to terminate the services of an employee who has been found to be suffering from any disease and whose continued employment is prohibited by law or is prejudicial to his or her health and the health of his or her co-employees.

The foregoing considered, any ground invoked for termination of employment – whether for just or authorised cause – must be supported by evidence (an a posteriorimotivation). Further, for just causes, a dismissal on account of an employee's act or omission must be carried out after careful deliberation and investigation of the evidence presented, and after the employee is given an opportunity to be heard and defend him- or herself regarding the offence he or she was charged with. In the absence of sufficient proof of such act or omission, his or her dismissal may not be warranted by the circumstances.

The procedural requirements for just causes are different from those for authorised causes, as explained in **6.2 Notice Periods/Severance**. In a nutshell, dismissals due to just causes follow the two-notice rule (involving a notice to explain, an ensuing administrative investigation, and a notice of the employee's decision). In authorised causes, 30 days notice is required to be served to the affected employees and the Department of Labour and Employment. Procedural requirements must be complied with before an employee can be dismissed for just or separated authorised cause(s). Failure to comply with the procedural requirements will not invalidate the dismissal, if based on sufficient substantive grounds, but will entitle the employee to nominal damages.

There is no threshold for redundancies in the Philippine jurisdiction that would lead to such termination of employment being a collective redundancy. Per well-established jurisprudence, redundancy generally exists where the services of an employee are in excess of what is reasonably required by the actual requirements of the enterprise. A position is redundant where it is superfluous, and superfluity of a position may be the outcome of a number of factors, such as over-hiring of workers, decreased volume of business, and dropping of a particular product line or service activity previously manufactured or undertaken by the enterprise. Redundancy may also be validly resorted to as a cost-cutting measure and to streamline operations so as to make them more viable, because the employer has no legal obligation to keep more employees in its payroll than are necessary for the operation of its business.

In the case of redundancy, employees are entitled to be paid separation pay of at least one month's pay or one month's pay per year of service, whichever is higher. In addition, they are entitled to prior notice at least one month prior to the effective date of separation. Where there are employees similarly situated, the employer must have applied reasonable and verifiable selection criteria to determine who among them are to be separated, including but not limited to such criteria as seniority, employment status and/or efficiency rating.

6.2 Notice Periods/Severance

For the dismissal of an employee due to a just cause, procedural due process is established by jurisprudence and consists of the following:

- *Show-Cause Notice or Notice to Explain*. The employee should be given a written show-cause notice or notice to explain, which contains:
  (a) specific causes or grounds for termination, with a directive for the employee to submit his or her written explanation within a reasonable period of at least five calendar days from receipt of the notice;
  (b) a detailed narration of the facts and circumstances that will serve as a basis for the charge against the employee; and
  (c) specific company rules that were violated, if any, and/or which of the grounds under Article 297 is being charged against the employee.
- *Administrative Hearing.* The employee should be given ample opportunity to be heard and to defend him- or herself with the assistance of his or her representative or counsel, if he or she so desires, in an administrative hearing called for the purpose.
- *Notice of Termination.* Finally, if the evidence warrants the dismissal of the employee, he or she should be given a notice of termination containing the findings and the basis for their dismissal, including an enumeration of the proven acts and/or omissions and the rule/law violated.

For authorised causes, on the other hand, two separate written notices are served on both the affected employee and the DOLE at least one month prior to the intended date of termination. Separation pay must also be paid to the affected employees in an amount constituting one month's pay or at

least one month's pay for every year of service, whichever is higher, if the termination is due to the installation of labour-saving devices or redundancy, and one month's pay or at least one half of a month's pay for every year of service, whichever is higher, in cases of retrenchment to prevent losses and closures or cessation of operations not due to serious business losses or financial reverses.

The employer shall not terminate an employment contract on the grounds of disease unless there is a certification by a competent public health authority that the disease is of such nature or is at such stage that it cannot be cured within a period of six months, even with proper medical treatment. Further, a notice of termination must have been served separately to the employee and the DOLE at least one month prior to the effectivity of the termination, and the employee must have been paid separation pay in an amount equivalent to at least one month's salary or to one half of a month's salary for every year of service, whichever is greater, with a fraction of at least six months being considered as one whole year.

For authorised causes, the payment of severance pay andthe service of one month's notice are both required by the law. No payment in lieu of notice is allowed. Severance pay is not required for termination due to just causes or resignations, although the two notices mentioned above are indispensable for purposes of complying with procedural due process.

The procedure to be followed is outlined above. No other external advice or authorisation is required to carry out the dismissal, and no prior clearance is required from the DOLE before separation may be effected.

6.3 Dismissal for (Serious) Cause (Summary Dismissal)

Regardless of the seriousness of the just cause, no summary dismissal is allowed by law: the requirements of procedural due process must still be observed. However, there can be a preventive suspension for a period of no more than 30 days if the employer finds the employee to be a serious threat to the life or property of the employer or his or her representatives or co-employees.

See the discussion on procedural requirements for dismissal due to just causes outlined above.

Should an employee be summarily dismissed (ie,the requirements of procedural due process are not observed), the dismissal per semay not be invalidated if it is based on sufficient grounds. However, such a failure may entitle the separated employee to nominal damages.

6.4 Termination Agreements

While there is nothing to prohibit the employer and employee from agreeing upon the conditions of an employee's resignation, the employer must ensure that such an agreement may be proven as having been freely and voluntarily entered into by the parties. This is because an employee questioning the validity of such termination agreements before the labour courts may be construed as a forced resignation and, consequently, constructive dismissal. The burden of proof in dismissal cases is on employees. Constructive dismissal exists where there is a cessation of work because continued employment is rendered impossible, unreasonable or unlikely, through an offer involving a demotion in rank or a diminution in pay and other benefits. Aptly called a dismissal in disguise or an act amounting to dismissal but made to appear as if it were not, constructive dismissal may also exist if an act of clear discrimination, insensibility or disdain by an employer becomes so unbearable on the part of the employee that it rules out any choice other than for him or her to forego his or her continued employment. Once found to have been constructively dismissed, an employee will be adjudged to be entitled to reinstatement, back wages, and even moral or exemplary damages.

There are no statutory requirements for releases. While law and jurisprudence look with disfavour upon releases and quitclaims by employees who are merely pressured into signing them, a legitimate waiver representing a voluntary settlement of an employee's claim should be respected by the courts as an agreement between the parties. Jurisprudence provides that the requisites for a valid (release waiver and) quitclaim are as follows:

- that there was no fraud or deceit on the part of any of the parties;
- that the consideration for the quitclaim is credible and reasonable; and
- that the contract is not contrary to law, public order, public policy, morals or good customs, nor prejudicial to a third person with a right recognised by law.

6.5 Protected Employees

No particular category of employees is immune from termination from employment if, based on the circumstances, their acts warrant the imposition of the supreme penalty of dismissal. To force an employer to retain an employee when the latter does not deserve it is to violate the employer's management rights or prerogative. Parenthetically, this right allows an employer to regulate all aspects of employment freely, according to his or her own discretion and judgment, including hiring, work assignments, working methods, time, place and manner of work, tools to be used, processes to be followed, supervision of workers, working regulations, transfer of employees, work supervision, the lay-off of workers, and the discipline, dismissal and recall of workers.

7. Employment Disputes

7.1 Wrongful Dismissal Claim

A wrongful dismissal claim may be filed by an employee before the National Labour Relations Commission (NLRC) if his or her dismissal was not due to either a just or an authorised cause, or if the dismissal is contrary to law or is too harsh a penalty. If found meritorious, by virtue of Article 294 of the Labour Code, the employee may be awarded with reinstatement without loss of seniority rights and other privileges or payment of separation pay in lieu thereof, plus full back wages inclusive of allowances, and other benefits or their monetary equivalent.

7.2 Anti-Discrimination Issues

Article 3 of the Labour Code itself provides that: "The State shall afford protection to labour, promote full employment, ensure equal work opportunities regardless of sex, race or creed, and regulate the relations between workers and employers." Acts of discrimination on account of one's sex, race or creed may be in the form of lesser compensation, including wage, salary or other form of remuneration and fringe benefits, to a particular employee as against another for work of equal value. Favouring one employee over the other with respect to promotion, training opportunities, study and scholarship grants solely on account of such difference in sex, race, or creed.

Apart from Article 3 of the Labour Code, the following provisions and statutes also aim to curb discrimination in the workplace:

- Articles 133 to 135 of the Labour Code on Discrimination Against Women;
- Section 32 of Republic Act No 7277 or the Magna Carta for Disabled Persons on Discrimination Against Disabled Persons; and
- Republic Act No 10911 or the Anti-Age Discrimination in Employment Act.

There are no legal stipulations that categorically establish the burden of proof to lie with one party in a discrimination case. However, if the discrimination issue is raised in a case for illegal dismissal, it would be incumbent upon the employer to prove through substantial evidence that the dismissal was based on valid grounds. This is in line with Articles 297 and 298 of the Labour Code; otherwise, the general rule that "he who alleges must prove" should be followed.

Under Article 303 of the Labour Code, employers who are found to have wilfully discriminated against women may be penalised with a fine of PHP1,000 to PHP10,000, or imprisonment of three months to three years, or both, at the discretion of the court.

Section 46 of the Magna Carta for Disabled Persons, on the other hand, provides that "any person who violates any provision of [R.A. 7277] shall suffer the following penalties: for the first violation, a fine of not less than [PHP50,000] but not exceeding [PHP100,000] or imprisonment of not less than six months but not more than two years, or both at the discretion of the court; and for any subsequent violation, a fine of not less than [PHP100,000] but not exceeding [PHP200,000] or imprisonment for not less than two years but not more than six years, or both at the discretion of the court."

Finally, the Anti-Age Discrimination in Employment Act penalises any violation of said law with a fine of PHP50,000-500,000, imprisonment of three months to two years, or both, at the discretion of the court.

Common to the above statutes are provisions stating that any alien found guilty may be summarily deported after serving his or her sentence. Likewise, if the offence is committed by a corporation, trust, firm, partnership, association or any other entity, the penalty is imposed upon the guilty officers of such corporation and/or entity. Apart from the penal statutes, an aggrieved employee may likewise file an action for damages in a separate action before the regular courts.

8. Dispute Resolution

8.1 Judicial Procedures

DOLE Department Order No 107, series of 2010 (D.O. 107-10), provides the guidelines on the Single Entry Approach (SEnA), prescribing a 30-day mandatory conciliation-mediation service for all labour and employment cases. All requests for assistance, wherever filed, shall be made in writing, using a form called "SEAD Entry No 1", which will be filled out by the requesting party and shall indicate the reference number, the date of filing, the name and address of the requesting parties, and the nature and subject of the grievance or request, among other items.

Should the SEnA proceedings not result in the settlement of the case, the employee may elevate the case to the NLRC, by filing a complaint that sets forth his or her cause(s) of action and the names and addresses of all complainants and respondents; the complaint must be made under oath by the complainant, with a declaration of non-forum shopping.

As to forum, disputes arising between current employees and their employers involving labour standards compliance are cognisable by the DOLE Regional Offices. On the other hand, the Labour Arbiters of the NLRC shall have original and exclusive jurisdiction to appear and decide the following cases:

- unfair labour practice cases;
- termination disputes;

- cases filed by workers involving wages, rates of pay, hours of work and other terms of employment, if accompanied with a claim for reinstatement;
- claims for actual, moral, exemplary and other forms of damages arising from employer-employee relations;
- cases arising from any violation of the duty to bargain collectively; and
- all other claims arising from employer-employee relations, except claims for Employees Compensation, Social Security, Medicare and maternity benefits.

As one employment is treated differently from another despite a common cause of action, each and every employee must be considered as an individual litigant when filing claims, thus negating the possibility of a class action suit. Parenthetically, one employee may have a different set of entitlements and/or accountabilities from the other, or may have particularities in the case that would aggravate or mitigate the employer's liability to him or her, if any. Thus, the disposal of a class action suit with a blanket and identical relief for all employees of an employer is not possible in labour cases.

Section 6 of Rule III of the 2016 NLRC Rules of Procedure, as amended, provides that a lawyer appearing for a party is presumed to be properly authorised for that purpose. In every case, such lawyer shall indicate in his or her pleadings and motions his or her Attorney's Roll Number, Professional Tax Receipt Number, Integrated Bar of the Philippines Number, and Mandatory Continuing Legal Education compliance number.

A non-lawyer may also appear in any of the proceedings before the NLRC, but only under select conditions, namely:

- he or she represents him- or herself as party to the case;
- he or she represents a legitimate labour organisation, which is a party to the case;
- he or she represents a member of a legitimate labour organisation that exists within the employer's establishment, who is a party to the case;
- he or she is a duly accredited member of any legal aid office recognised by the Department of Justice or Integrated Bar of the Philippines; or
- he or she is the owner or president of a corporation or establishment which is a party to the case.

Appearances of a non-lawyer will not be recognised in any proceedings before the NLRC.

8.2 Alternative Dispute Resolution

Voluntary arbitration is possible, especially in a unionised setting, pursuant to the provisions of a collective bargaining agreement, which should provide for a grievance machinery and a voluntary arbitration procedure.

The resort to grievance machinery and voluntary arbitration is mandated in cases where the dispute involves the interpretation, implementation or enforcement of a collective bargaining agreement (CBA). Per Article 274 of the Labour Code, the parties to the CBA may resort to voluntary arbitration by DOLE-accredited arbitrators if no settlement is achieved through the grievance machinery system provided for in the CBA. These Voluntary Arbitrators have original and exclusive jurisdiction over cases relating to the interpretation or implementation of CBAs or the enforcement of an employer's personnel policies. Under Article 275, the parties may vest upon the voluntary arbitrators the jurisdiction to hear and decide all other labour disputes, including regarding unfair labour practices and bargaining deadlocks.

Pre-dispute arbitration agreements are enforceable. These agreements are usually embodied in CBAs, wherein the parties may agree to resort to voluntary arbitration if settlement through the grievance machinery process is not possible. These provisions in the CBA may be enforced.

8.3 Awarding Attorney's Fees

As a general rule, in the absence of any award granted by a court, attorney fees and the expenses of litigation cannot be recovered in termination cases; attorney fees may only be awarded if the dismissal is in bad faith. Normally, however, labour arbiters grant 10% of the monetary award to the winning employees who are compelled to litigate to enforce their rights or question their dismissal.

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