

THE
EMPLOYMENT
LAW REVIEW

TWELFTH EDITION

Editor
Erika C Collins

THE LAWREVIEWS

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PHILIPPINES

*Alejandro Alfonso E Navarro, Rashel Ann C Pomoy and Deanna Carmelli L Go*¹

I INTRODUCTION

Philippine labour law is intertwined with the principle of social justice. The Philippine Constitution itself and several statutes declare that relationships between management and the workforce are imbued with public interest such that labour contracts must yield to the common good and must be construed in favour of the safety and decent living of the worker.² Philippine case law also provides: ‘When the conflicting interest of labour and capital are weighed on the scales of social justice, the heavier influence of the latter must be counterbalanced by the sympathy and compassion the law must accord the underprivileged worker.’³

Nevertheless, the law also recognises the employer’s right to exercise management prerogative in the conduct of its business, and employers enjoy a wide latitude of discretion to regulate all aspects of employment, provided that policies, rules and regulations on work-related activities of the employees are fair and reasonable.⁴

The Supreme Court has often declined to interfere in the legitimate business decisions of employers as long as its exercise is in good faith to advance its interests and not for the purpose of defeating or circumventing the rights of employees under the law or valid agreements.⁵

i Legal framework

The Labour Code primarily governs labour standards and labour relations, and regulates:

- a* pre-employment, including the recruitment and placement of overseas workers, and the employment of non-resident foreign nationals;
- b* human resources development, including training for apprentices and learners;
- c* labour standards, including hours of work, rest periods, wages and premium pay;
- d* health and safety, and social welfare benefits;
- e* labour relations, including regulations on the organisation and activities of unions, collective bargaining, and strikes and lockouts; and
- f* post-employment, including termination of contracts and retirement.

1 Alejandro Alfonso E Navarro is a managing partner, Rashel Ann C Pomoy is a junior partner and Deanna Carmelli L Go is a junior associate at Villaraza & Angango.

2 Civil Code, Articles 1700 and 1702; Constitution, Section 18, Article II; Philippine Labour Code, Article 4.

3 *Philippine Telegraph & Telephone Corporation v. National Labor Relations Commission*, 183 SCRA 451 (1990).

4 *Gemina v. Bankwise Inc*, 708 SCRA 403 (2013).

5 *Mariano v. Martinez Memorial Colleges, Inc*, 789 SCRA 344 (2016).

There are also special laws regulating certain aspects of employment, including:

- a* laws that require mandatory employer contributions to a state fund, such as the Social Security Law,⁶ the National Health Insurance Act⁷ and the Home Mutual Development Fund Act;⁸
- b* laws that grant certain benefits to specific groups of employees, such as maternity leave for pregnant women under the Expanded Maternity Leave Law,⁹ paternity leave under the Paternity Leave Act,¹⁰ parental leave for single parents under the Solo Parents Welfare Act,¹¹ special leave for women who have undergone surgery caused by gynaecological disorders under the Magna Carta of Women,¹² and special leave for victims of violence under the Anti-Violence Against Women and their Children Act;¹³ and
- c* laws that affect specific aspects of employment, such as the Occupational Safety and Health Standards Act,¹⁴ which strengthens the compliance requirements for safe workplaces, the Safe Spaces Act,¹⁵ which defines and penalises sexual harassment in the workplace, and the Telecommuting Act, which allows an employee to work from an alternative workplace with the use of telecommunications technologies.¹⁶

The Department of Labour and Employment (DOLE) is the regulatory entity primarily charged with the administration and enforcement of the Labour Code and is empowered to issue rules and regulations on employment matters.

Case law, as decided by the Supreme Court, is the final component of the legal framework of employment law as it clarifies gaps left by statute.

ii Courts and tribunals

Proceedings on employment disputes are initiated by referral to a single-entry assistance desk officer for conciliation-mediation proceedings to aid parties in reaching an amicable settlement. Should these efforts fail, the matter is referred to the appropriate DOLE office or agency.

Labour arbiters of the National Labour Relations Commission (NLRC), the primary labour tribunal created by the Labour Code, have exclusive jurisdiction to receive evidence, and to hear and decide cases involving unfair labour practices, termination disputes, including claims for benefits, strike and lockout disputes, financial claims not arising from social security, national health insurance or employee compensation, and damages. Decisions made by the labour arbiter may be appealed to a division of the NLRC.

6 Republic [Rep.] Act No. 8282 (1997).

7 Rep. Act No. 10606 (2013).

8 Rep. Act No. 9679 (2008).

9 Rep. Act No. 11210 (2019).

10 Rep. Act No. 8187 (1996).

11 Rep. Act No. 8972 (2000).

12 Rep. Act No. 9710 (2009).

13 Rep. Act No. 9262 (2004).

14 Rep. Act No. 11058 (2018).

15 Rep. Act No. 11313 (2019).

16 Rep. Act No. 11165 (2018).

On the other hand, parties seeking alternative means for dispute resolution may mutually agree to bring their employment disputes before DOLE-accredited voluntary arbitrators, who have exclusive jurisdiction to hear and decide cases arising from the interpretation or implementation of a collective bargaining agreement (CBA) or a company personnel policy.

Decisions of the NLRC and the voluntary arbitrators may be elevated to the Court of Appeals, and decisions by the Court of Appeals may be appealed to the Supreme Court.

iii Enforcement

The enforcement of Philippine labour law primarily rests with the DOLE, which monitors the enforcement of labour laws through its regional offices and attached agencies. The DOLE Secretary, or any of his or her duly authorised representatives, is granted visitatorial and enforcement power to access any employer's premises and records, to conduct inspections to monitor compliance with the required labour standards, and to address any labour relations issues.

II YEAR IN REVIEW

The covid-19 pandemic and the strict community quarantine measures imposed by the government resulted in the closure of several business establishments in the Philippines. As early as April 2020, the Philippines faced an unemployment rate of 17.6 per cent. By October 2020, the situation had improved, with unemployment estimated at 8.7 per cent, equivalent to more than 3.8 million unemployed Filipinos.¹⁷

To curb unemployment during the covid-19 pandemic, the DOLE encouraged private establishments to adopt alternative work schemes, while maintaining measures to prevent the spread of covid-19. These alternative work arrangements include:

- a* transfer of employees to another branch or outlet of the same employer;
- b* assignment of employees to other functions or positions;
- c* reduction of normal workdays;
- d* job rotations;
- e* working from home or telecommuting work arrangements;¹⁸ and
- f* forced leave.¹⁹

As regards forced leave, the DOLE amended the Implementing Rules of the Labour Code, which allows for the suspension of employment for a period of six months, and extended the same to one year in the event of pandemics and other similar national emergencies.²⁰

Similarly, to prevent the closure of businesses and a large number of lay-offs, the DOLE allowed employers and employees to voluntarily agree to temporarily adjust or reduce employees' wages and other benefits.²¹

17 'Employment Situation in October 2020', *Philippine Statistics Authority* (3 December 2020), available at <https://psa.gov.ph/content/employment-situation-october-2020>.

18 Labour Advisory No. 17, series of 2020, Sections 3 and 4.

19 Labour Advisory No. 9, series of 2020, Section III.

20 Department Order No. 215, series of 2020.

21 Labour Advisory No. 17, series of 2020, Section 5.

III SIGNIFICANT CASE

In *Paragele, et al. v. GMA Network, Inc.*,²² the Supreme Court ruled that GMA Network, a major television and radio network in the Philippines, is the employer of the 30 cameramen and assistant cameramen whom it dismissed, as these are not independent contractors. The Supreme Court clarified that in order to be considered independent contractors, it must be shown that the individuals were hired because of their unique skills and talents and that the principal did not exercise control over the means and methods of their work. However, in this case, GMA Network provided the equipment used during recordings and assigned supervisors to monitor the petitioners' performance and guarantee their compliance with company protocols and standards.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Employment relationships in the Philippines are contractual in nature but imbued with public interest, such that labour contracts must yield to the common good.²³ An employment contract may be perfected in oral or written form because, generally, no specific form of contract is required. Nevertheless, the best practice is to have a written employment contract and for it to be signed at the beginning of the engagement.

One exception to the rule involves the contracts of employees hired by independent contractors as these must be executed in writing and must contain a specific description of the job, work or service to be performed by the employee, the place of work, the conditions of employment and a statement of the applicable rate of pay.

The Labour Code classifies employees as regular, seasonal, project or casual. Regular employees are engaged to perform activities that are necessary or desirable in the usual business or trade of the employer and those who have rendered at least one year of service, whether continuous or broken, with respect to the activity in which they are employed. Seasonal employees are those who are engaged to work or perform services that are seasonal in nature, and the employment is only for the duration of the season. Project employees are those hired for a specific project or undertaking, the completion or termination of which has been determined at the time of engagement of the employee. Casual employees are those who are not regular, project or seasonal employees and perform work that is usually not necessary or desirable as part of the usual business or trade of the employer.

Additionally, Philippine jurisprudence recognises the validity of fixed-term employment contracts that meet the following criteria: (1) the fixed period of employment must be knowingly and voluntarily agreed by the parties; or (2) it satisfactorily appears that the employer and the employee dealt with each other on more or less equal terms and neither exercised moral dominance.²⁴

22 G.R. No. 235315, 13 July 2020.

23 Civil Code, Article 1700.

24 *Convoy Marketing Corp v. Albia*, 772 SCRA 162 (2015), citing *Brent School, Inc v. Zamora*, 181 SCRA 702 (1990).

ii Probationary periods

An employee may be required to complete a probationary period of six months, provided that at the start of employment, the employee is informed of (1) his or her status as a probationary employee, and (2) the reasonable standards that must be met to qualify as a regular employee.²⁵ Failure to satisfy these requirements means that the employee is hired as a regular employee from the start of their employment. An employee who is allowed to work after the probationary period shall be considered a regular employee.

iii Establishing a presence

A foreign company may directly hire employees to carry on its business in the Philippines without being officially registered in the country. In such cases, the foreign company is considered as a foreign corporation doing business in the Philippines without a licence, and is subject to the following significant risks: it is not allowed to sue or to defend itself in any litigation before any Philippine court or tribunal;²⁶ and its directors, trustees and officers are at risk of being penalised with a fine of not less than 10,000 Philippine pesos but not more than 1 million Philippine pesos.²⁷ The direct hiring of Filipinos for work to be performed outside the Philippines must be carried out through licensed recruitment agencies.

An offshore foreign company may validly hire an independent contractor to perform a specific job in the Philippines. A valid contracting arrangement shall not establish an employer–employee relationship between the offshore foreign company and the independent contractor’s employees. Similarly, for the purposes of seeking tax treaty relief, hiring an independent contractor will generally not create a permanent establishment in the Philippines, provided that the contract does not exceed the maximum periods under the applicable tax treaties.²⁸

Hiring a Filipino employee entails payment of the following minimum statutory benefits:

- a* minimum wage (as determined by the regional tripartite wages and productivity in the region where the company operates);
- b* overtime pay for work rendered beyond eight hours a day;
- c* one 24-hour rest day for every six consecutive days of work;
- d* premium pay for work performed at night, on rest days and on holidays;
- e* 13th-month pay equivalent to one-twelfth of an employee’s annual pay;
- f* paid leave days for eligible employees, namely:
 - five days of service incentive leave after rendering one year of service;
 - seven days of paternity leave and up to 105 days of maternity leave;
 - seven days of single parent leave;
 - two months of leave for a gynaecological disorder; and
 - up to 10 days of leave for victims recognised under the Anti-Violence Against Women and their Children Act;
- g* mandatory employer’s share in the social security system, Philippine Health Insurance Corporation and Home Mutual Development funds; and
- h* retirement pay of at least half-a-month’s pay for every year of service, when the employee reaches the age of 65.

25 Labour Code, Article 291.

26 Revised Corporation Code, Section 150.

27 *id.*, at Section 170.

28 ITAD BIR Ruling No. 241-12.

Employers are also required to withhold the appropriate amount of the employee's income taxes, and to report and remit the same to the Philippine tax authority.

V RESTRICTIVE COVENANTS

Restrictive covenants such as non-compete clauses, non-disclosure agreements and confidentiality clauses are valid and may be included in employment contracts so long as they are fair, reasonable and not contrary to law, morals, good customs, public order or public policy. The determination of the reasonableness of these provisions is evaluated based on the particular facts and circumstances of each case.

The Supreme Court has used the following factors in determining the reasonableness of restrictive covenants: whether the covenant protects the legitimate business interests of the employer; whether the covenant creates an undue burden on the employee; whether the covenant is injurious to public welfare; whether the time and territorial limitations contained in the covenant are reasonable; and whether the restraint is reasonable from the standpoint of public policy.²⁹

Notably, apart from case law finding that confidentiality and non-compete clauses must be clear and unambiguous,³⁰ there is currently no case law specifically dealing with other restrictive covenants, such as non-disclosure agreements, non-solicitation contracts and confidentiality clauses.

VI WAGES

i Working time

An employee's normal hours of work must not exceed eight hours per day. In addition, a one-hour break for regular meals, not counted as compensable working time, must be provided.

Employees who work from 10pm to 6am are entitled to receive a night shift differential of not less than 10 per cent of his or her regular wage for each hour of work. There is no limitation on the maximum number of hours of night work that may be performed by an employee.

ii Overtime

An employee who works more than eight hours a day is entitled to receive overtime pay. For overtime performed on an ordinary working day, the overtime rate is the employee's regular rate plus an additional 25 per cent of the regular rate. Overtime performed on a scheduled rest day, special day or a regular holiday is the employee's regular rate plus an additional 30 per cent of the regular rate. For the purpose of determining entitlement to overtime pay, all time during which an employee is suffered or permitted to work are considered as hours worked. However, an employee may render overtime only if he or she is obliged or permitted by the employer to do so.³¹ There is no limitation on the maximum number of hours of overtime that can be worked by an employee.

29 *Rivera v. Solidbank Inc*, 487 SCRA 512 (2006).

30 *Century Properties, Inc v. Babiano*, 795 SCRA 671 (2016).

31 *San Miguel Corporation v. Layoc*, 537 SCRA 77 (2007).

VII FOREIGN WORKERS

An employer is not required to keep a register of foreign workers; however, an employer is required to secure the required permit from the DOLE and the appropriate visa from the Bureau of Immigration when employing a foreign worker.

Under the Labour Code, an alien employment permit (AEP) may be issued to a non-resident foreign national or to the applicant employer after 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 foreign national is desired. Although there is no statutory limit, the number of foreign nationals hired by an employer may be considered by the DOLE in determining whether the AEP should be granted. The AEP will be valid for one year, unless the employment contract provides for a longer term, which shall not be longer than three years. Once issued, an AEP may be used as the basis for the foreign worker to apply for a Section 9(g) working visa from the Bureau of Immigration.

Foreign workers employed in the Philippines are subject to Philippine tax regulations, and the employer has an obligation to withhold, report and remit the applicable taxes due. Local labour laws and regulations that provide benefits to, and protect the rights of, Filipino employees are also applicable to foreign workers.

VIII GLOBAL POLICIES

Disciplinary rules do not have to be filed with any government authority and do not need the approval of employees. However, changes to a disciplinary policy requires the employer to consult with the employees regarding the proposed changes before they can be implemented.³² The consultation process may be effected through the following means:

- a* by having the representative of a labour management council (see Section XI) consult employees regarding the change in the policy prior to the issuance of a memorandum declaring the change;
- b* by informing the employees of the proposed change in policy, giving them a reasonable period to register their comments or objections, prior to sending out a memorandum informing them that the policy has taken effect; or
- c* by discussing the proposed changes through a general meeting, to allow the employees to register their comments or objections, prior to sending out a memorandum informing them that the change in policy has taken effect.

There is no requirement for internal policies to be written in the local language. However, the employer should see to it that its employees are at least properly informed of their rights and obligations as employees.³³ The method of how the employees are informed of the internal policies of the company is within the exercise of the management prerogative of the employer, provided that it shall be done in a just, reasonable, humane and lawful manner.

Certain statutes, such as those involving sexual harassment in the workplace or drug testing, impose specific standards that must be complied with by the employer in crafting its internal policies.

³² id.

³³ *Philippine Airlines, Inc. v. National Labor Relations Commission*, 225 SCRA 301 (1993).

Disciplinary rules are not automatically incorporated into an employment contract. Consequently, employment contracts must contain language expressly providing that the employee agrees to abide by the company's disciplinary rules and internal policies.

IX PARENTAL LEAVE

i Maternity leave

Any female worker who has (1) made at least three monthly contributions to the social security system (SSS) in the 12 months immediately preceding the semester of childbirth, miscarriage or emergency termination of pregnancy, and (2) duly notified her employer of her pregnancy and the expected date of birth, shall be entitled to the paid maternity leave benefit,³⁴ which shall consist of:

- a* 105 days of paid leave for a live birth, regardless of the method of delivery; or
- b* 60 days of paid leave for a miscarriage or emergency termination of pregnancy.³⁵

In the case of a live birth, the mother has the option of extending her maternity leave for an additional 30 days without pay by giving the employer notice of the extension within 45 days of the end of her maternity leave.³⁶

Eligible female workers availing of the paid maternity leave benefit are entitled to receive their full pay, as advanced by the employer, within 30 days of filing a maternity leave application.³⁷ The SSS shall immediately reimburse the employer to the extent of 100 per cent of the employee's average daily salary credit for the applicable period of paid maternity leave.³⁸

A female worker entitled to maternity leave benefits may, by providing written notice to her employer and the employer of the intended carer, allocate seven days of benefits to the child's father or, in the event of the father's death, absence or incapacity, to an alternative carer, who may be a relative within the fourth degree of consanguinity or the current partner of the female worker sharing the same household.³⁹

ii Paternity leave

Any married male employee is entitled to paternity leave of seven days with full pay for the first four deliveries of the legitimate spouse with whom he is cohabiting, by notifying his employer of the pregnancy of his spouse within a reasonable period of the expected date of delivery of the pregnant spouse, or within such period that may be provided in the company's rules and regulations.⁴⁰ The paternity leave benefit is paid by the employer.

34 Rep. Act No. 11210 IRR, Rule VI, Section 1.

35 *id.*, at Rule III, Section 2, Paragraph 2.

36 *id.*, at Rule III, Section 2, Paragraph 3.

37 *id.*, at Rule VI, Section 3.

38 *id.*, at Rule VI, Section 4.

39 Rep. Act No. 11210, Section 6.

40 Rep. Act No. 8187 (1996), Section 2; Rep. Act No. 8187 IRR, Sections 3 and 4.

iii Single parent leave

A single parent who has completed at least one year of service, whether continuous or broken, shall be entitled to seven working days of parental leave for each year, provided that the employee has notified his or her employer within a reasonable period prior to availing of the leave, and has presented his or her single parent identification card to his or her employer.⁴¹

Further, in addition to the paid maternity leave benefits provided under the Expanded Maternity Leave Law, pregnant employees who qualify as single parents under the Solo Parents Welfare Act are entitled to an additional 15 days' paid leave when availing of their paid maternity leave benefit.⁴²

X TRANSLATION

English and Filipino are considered the two official languages in the Philippines.⁴³ Employment documents may be drawn up in English. However, should an employee who is having difficulty understanding a document request a translation of the same, it is advisable to provide a translation in a local language understood by the employee.

For documents that take the form of a release, waiver or quitclaim, it is advisable that its stipulations be in English and Filipino or in the language best known to the employee.⁴⁴

XI EMPLOYEE REPRESENTATION

Employees and employers are encouraged by the Labour Code to form labour management councils to facilitate the exercise of the employees' right to participate in the company's policy-making and decision-making processes. Employee representatives on labour management councils are elected by at least the majority of all employees in the establishment.⁴⁵

Employees also have a constitutionally protected right to self-organisation. Rank-and-file and supervisory employees are free to form, join or assist unions of their own choosing for the purposes of collective bargaining.

Unions are 'locally' formed within a company through specific bargaining units and are open only to employees within that company. To exercise the rights granted by law to unions, a union must be duly registered with the DOLE and must generally consist of at least 20 per cent of all the employees in the bargaining unit where it seeks to operate.⁴⁶ A bargaining unit is a group of employees sharing mutual interests within a given employer unit comprised of all or a portion of the entire body of employees in the employer unit, or any specific occupational or geographical grouping within that employer unit.⁴⁷

A union selected as the sole exclusive bargaining representative shall retain this status (1) for one year from the last certification election, (2) during the course of negotiations for a

41 Rep. Act No. 8972 (2000), Section 8; Rep. Act No. 8972 IRR, Sections 18 and 19.

42 Rep. Act No. 11210 IRR, Rule III, Section 2, Paragraph 2.a.

43 See *W Land Holding, Inc v. Starwood Hotels and Resorts Worldwide, Inc*, G.R. No. 222366, 4 December 2017; see also 1987 Constitution, Article 14, Section 7.

44 *EDI-Staffbuilders International, Inc v. National Labor Relations Commission*, 537 SCRA 409 (2007).

45 Labour Code, Article 266.

46 id., at Article 240.

47 Omnibus Rules Implementing the Philippine Labour Code, Book V, Rule I, Section 1(q).

CBA, (3) during a bargaining deadlock and (4) during the five-year validity of a CBA, except within the 60 days prior to its expiry. Once selected, the bargaining representative and the employer have a duty to bargain collectively.

XII DATA PROTECTION

i Requirements for registration

The collection and processing of personal information, including employee data, is governed by the Data Privacy Act of 2012 (DPA). Data privacy regulations are implemented by the National Privacy Commission (NPC).

An employer is a personal information controller under the DPA when it is involved in controlling the collection, holding, processing and use of information about its employees. It is required to implement ‘reasonable and appropriate organisational, physical, and technical security measures for the protection of personal data’.⁴⁸ Employers must register with the NPC if any of the following conditions are met: it employs at least 250 employees; the processing includes sensitive personal information of at least 1,000 individuals; the processing is likely to pose a risk to the rights and freedom of data subjects; or the processing is not occasional.

As a general rule, an employee’s consent must be secured prior to the collection of any personal information.⁴⁹ However, provided that sensitive personal information is not involved, an employee’s personal data may be processed even without consent when it is necessary or desirable in the context of an employer–employee relationship.⁵⁰

ii Cross-border data transfers

Cross-border data transfers are allowed under Philippine law, and are considered data sharing under the DPA. The employee’s consent is required even when the data is to be shared with an affiliated or mother company.⁵¹ In addition, the employer should execute a data sharing agreement that establishes safeguards for data privacy and security, and upholds the data privacy rights of its employees.

There is no specific requirement to register a cross-border data transfer with the NPC.

iii Sensitive data

The Implementing Rules of the DPA define sensitive personal information as personal information:

- a* about an individual’s race, ethnic origin, marital status, age, colour, and religious, philosophical or political affiliations;
- b* about an individual’s health, education, genetics or sexual life;
- c* about any proceeding for any offence committed or alleged to have been committed by the individual, the disposal of those proceedings or the sentence in those proceedings;

48 Implementing Rules and Regulations of the Data Privacy Act, Section 25.

49 *id.*, at Section 21(a).

50 *id.*, at Section 34(b)(2).

51 *id.*, at Section 20(b)(1).

- d* issued by government agencies peculiar to an individual; and
- e* that is specifically established by an executive order or an act of Congress to be kept classified.⁵²

The processing of sensitive personal information is prohibited unless the employee has given prior consent to the processing thereof for a declared, specified and legitimate purpose, or under the specific circumstances provided by the Implementing Rules of the DPA.⁵³ Higher criminal penalties are also imposed for the unlawful processing of, or data breaches relating to, sensitive personal information.

iv Background checks

Background checks are legally permissible in the Philippines and constitute a valid exercise of management prerogative.⁵⁴ Employers commonly conduct background checks to determine a potential employee's prior criminal record and credit history. The processing of information gathered through background checks may be considered as necessary or desirable in the context of an employer–employee relationship.⁵⁵ However, processing an employee's information may require the employee's express prior consent if it involves the processing of sensitive personal information.

If an employee who has attained the status of a regular employee fails a background check, he or she may be disciplined by the employer only upon compliance with the employee's rights to substantive and procedural due process.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

An employee may only be dismissed for just or authorised causes for dismissal. This policy is anchored on the principle of the security of tenure of employees, which is not only statutorily provided but is constitutionally enshrined.

Under the Labour Code, the just causes for termination are:

- a* serious misconduct or wilful disobedience;
- b* gross and habitual neglect of duties;
- c* fraud or wilful breach of trust;
- d* loss of confidence;
- e* commission of a crime or offence by the employee against his or her employer, the employer's immediate family or his or her duly authorised representatives; and
- f* other causes analogous to the foregoing.⁵⁶

The authorised causes for termination of contract are:

- a* installation of labour-saving devices;
- b* redundancy;
- c* retrenchment to prevent losses;

52 id., at Section 1(t).

53 id., at Section 22.

54 *Pili v. National Labor Relations Commission*, 217 SCRA 338 (1993).

55 Implementing Rules and Regulations of the Data Privacy Act, Section 34(b)(2).

56 Philippine Labour Code, Article 297.

- d* closure or cessation of business;⁵⁷ and
- e* a disease not curable within six months as certified by a competent public authority, and when the continued employment of the employee is prejudicial to his or her health or to the health of his or her colleagues.⁵⁸

The cause of dismissal determines which procedure must be followed prior to the dismissal. For just causes, an employer must:

- a* serve the employee with a written notice containing the specific causes or grounds of termination, and giving him or her an opportunity to provide an explanation, within at least five days of receiving notice to clarify his or her defence;
- b* conduct a hearing or conference to allow the employee to explain his or her defences, present evidence and rebut the evidence presented against him or her; and
- c* serve the employee with a written notice of termination indicating that all circumstances involving the charge against him or her have been considered as well as the grounds to justify the termination of his or her employment.⁵⁹

Severance pay is not required for just cause dismissals but may be granted in exceptional circumstances.

For authorised causes, the employer must send written notices to the employee and to the DOLE regional office at least one month before the intended date of termination of the employment contract. The employee must also be granted severance pay at the rate prescribed by the Labour Code or by the CBA.

Failure to comply with the procedural requirements shall not invalidate a dismissal where just or authorised causes exist. However, an erring employer may be held liable for nominal damages of up to 30,000 Philippine pesos for just causes or up to 50,000 pesos for authorised causes.

There is no legal requirement for notifying a union prior to a termination, but such a requirement may be provided in the CBA. Further, no employee class may be exempt from termination, subject to regulations on the termination of employment contracts for authorised causes as may be prescribed in a CBA.

An employee may question the dismissal by filing an illegal dismissal case before the NLRC. The parties may freely enter into a settlement agreement while the dispute is pending.

ii Redundancies

An employer may implement termination of contract by redundancy when the following elements are present:

- a* there must be superfluous positions or services of employees;
- b* the positions or services are in excess of what is reasonably demanded by the actual requirements of the enterprise to operate in an economical and efficient manner;
- c* there must be good faith in abolishing the positions now deemed redundant;
- d* there must be fair and reasonable criteria in selecting the employees whose contracts are to be terminated; and
- e* there must be an adequate proof of redundancy.⁶⁰

57 id., at Article 298.

58 id., at Article 299.

59 *Unilever Philippines, Inc v. Rivera*, 697 SCRA 136 (2013).

60 DOLE D.O. No. 147-15, Section 5.4(b).

An employer may also implement termination through a retrenchment programme that complies with the following requirements:

- a* the retrenchment must be reasonably necessary and likely to prevent business losses;
- b* the losses, if already incurred, are substantial, serious, actual and real or, if only expected, are reasonably imminent;
- c* the expected or actual losses must be proved by sufficient and convincing evidence;
- d* the retrenchment must be in good faith and not to defeat or circumvent the employees' right to security of tenure; and
- e* there must be fair and reasonable criteria in ascertaining the retention and dismissal of employees.⁶¹

Mass termination as a result of the closure of business may also be implemented when the following elements are present:

- a* a decision has been made by the management to close the enterprise or cease operations;
- b* the decision was made in good faith; and
- c* there is no other option available to the employer except to close or cease operations.⁶²

Further, termination as a result of the installation of labour-saving devices is allowed when the following requirements are met:

- a* there is a need to introduce machinery, equipment or other devices;
- b* the introduction must be done in good faith;
- c* the purpose of the introduction must be valid;
- d* the introduction of machinery, equipment or devices and the consequent termination of employment is the only option available to the employer; and
- e* the criteria for selecting employees whose contracts are to be terminated are fair and valid.⁶³

An employee whose contract has been terminated as a result of the above causes is entitled to a severance payment of at least one month's salary or half-a-month's salary for every year of service. However, when closure of an enterprise is the result of serious business losses, no severance payment is required.

An employee may question the dismissal by filing a case before the NLRC. Failure by the employer to prove the existence of each of the elements of a valid dismissal may lead to a finding that the dismissal was illegal. The parties may freely enter into a settlement agreement while the dispute is pending.

XIV TRANSFER OF BUSINESS

There is no specific statute that regulates the employment aspect of legitimate transfers of business through mergers, acquisitions or outsourcing transactions. However, case law clarifies that, in the event of a full merger with no express stipulation in the articles of the merger concerning the employees of the non-surviving entity, the employment contracts of

61 *id.*, at Section 5.4(c).

62 *id.*, at Section 5.4(d).

63 *id.*, at Section 5.4(a).

the non-surviving entity are automatically assumed by the surviving corporation.⁶⁴ Thus, the absorbed employees become regular employees of the surviving corporation on the day the Securities and Exchange Commission approves of the merger.⁶⁵ In this regard, the surviving company may have a valid good faith basis to establish redundancy of positions for which the functions of certain employees will be duplicated.

In transactions involving the acquisition of assets of a going concern, provided that the sale is in good faith, the transferee or buyer has no legal duty to take on the employees of the seller.⁶⁶ A transferee that acquires a business in good faith has no liability with regard to the employees of the transferor and does not have to continue employing them. However, in exercising its prerogative to select and hire employees to fill the vacancies in its facilities, the transferee may give preference to separated employees who are appropriately qualified.⁶⁷

XV OUTLOOK

Based on bills recently filed with Congress, employers can anticipate measures to institutionalise alternative or flexible work arrangements.⁶⁸ This measure is supported by DOLE provided that the hours of work shall not exceed 48 a week and shall not result in diminution of existing benefits, including payment of overtime pay and other benefits under the Labour Code.⁶⁹

Likewise, there is currently a push for eradicating abusive contractualisation practices and penalising employers and contractors who commit such practices. Senate Bill No. 1499 seeks to amend the Labour Code to address, if not wholly eradicate, short-term and abusive contractualisation practices.⁷⁰

Further, there is a pending measure to enhance the regulation on employment of foreign nationals and transfer of technology. Senate Bill No. 1778 seeks to amend the Labour Code by requiring foreign nationals with employment permits to implement an understudy or skills programme. The understudy or skills programme shall be approved by DOLE to ensure the transfer of technology or skills to Filipinos.⁷¹ The failure of the foreign national to conduct or complete the understudy or skills programme shall be penalised, without prejudice to the non-renewal of the work permit issued to the foreign national or the blacklisting of the employer of the foreign national (or both).⁷²

64 *Bank of the Philippine Islands v. BPI Employees Union-Davao Chapter-Federation of Unions in BPI Unibank*, 658 SCRA 828 (2011).

65 *id.*

66 *Barayoga v. Asset Privatization Trust*, 473 SCRA 690 (2005).

67 *id.*

68 Senate Bill No. 153.

69 See also DOLE, Legislative Update, 'DOLE Supports Bill on Alternative Work Arrangement' available at <https://www.dole.gov.ph/news/dole-supports-bill-on-alternative-work-arrangement/> (last accessed 4 December 2020).

70 Senate Bill No. 1499, Section 2.

71 Senate Bill No. 1778, Section 3.

72 *id.*

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