HANDBOOK

HIGHLIGHTS OF LEGAL REQUIREMENTS APPLICABLE TO WORKPLACE MANAGEMENT

FILIP & COMPANY

business law

This handbook is based on the Romanian legislation applicable as of June 9th, 2020.

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Why should you read this?

If your purpose is to get acquainted with high level aspects about employment law matters in Romania or if you are just looking for a better mitigation of inherent labour related issues within your company and you are not a legal expert, this handbook should be of use.

This handbook is of a legal nature but is written for non-legal professionals. Therefore, it is on purpose simplified in certain respects and tends to have a more practical approach. Its goal is not to realise an in-depth rendition of applicable legal theory, but a practical "how to" guide.

We would be happy to answer any queries you may have by reading this material.

DEFINED TERMS:	
BOD	*Board of Directors*
CLA	*Collective Labour Agreement*
ILA	*Individual Labour Agreement*

1. WHAT IS AN EMPLOYMENT RELATIONSHIP?

There are several elements that differentiate the labour relationship from other types of contractual relations, such as contracts for provision of services, intellectual property conventions or other types of agreements on the basis of which certain activities are performed.

The **employee may only be a natural person**, while the employer may be a legal person or a natural person. The employee's obligations cannot be transferred to another person. The labour relationship is defined by subordination. The employee is subordinated to the employer and the employer has a control prerogative and the power to regulate the activity of the employee. Under Romanian employment law, the **employees are the beneficiaries of a complex system of protective measures** as part of the employment relationship with the employer, some of which are explained hereafter.

The Employer has the legal obligation to ensure the conclusion of an ILA with each of its employees. The ILA must be executed in written form, in Romanian language, and observe the minimum content prescribed by the law. Authorities and courts have the power to re-qualify other types of contractual or non-contractual relationships as ILAs and sanction the employers who do not execute ILAs with their employees.

Any amendments brought to the **ILA** must also be concluded in written form and registered in due time with the Employees' General Registry (in Romanian: REVISAL).

Besides the ILAs, labour relationships are governed by the law, internal regulations and CLAs, as explained in the following sections.

2. LEGAL NORMS GOVERNING EMPLOYMENT RELATIONSHIPS

Legal norms. Any company conducting business in Romania is subject to the following main pieces of legislation and contracts regulating the relationship between the employer and its employees:

- The Romanian Labour Code (Law no. 53/2003) as republished and further amended;
- Where applicable, the CLAs, which presently can be concluded at sector level, at group of companies' level and at company's level. These are separate agreements which award employees certain rights on top of those stated by the law. These agreements are also intended to adapt the rights and obligations of the parties to the specificity of a certain company, type of activity, group of companies.

Note:

The provisions of the CLAs at sector level are mandatory for the companies acting in the sector that signed the respective CLA and can be extended to all entities in the respective sector. The CLA concluded at company level produces effects for all the employees of that company, regardless of the date of employment or their affiliation with a trade union.

Internal policies. Additional rights and obligations may be provided in the company's internal regulation or other procedures and policies. By adopting such documents, the companies usually regulate matters which were left outside the contractual framework described above or implement their own policies. The internal norms cannot depart or provide lower rights for the employees than the law, CLAs or the ILAs. Generally, such internal policies may be amended at any time by the companies, with the prior information and, if the case, consultation of employees.

3. COLLECTIVE NEGOTIATIONS AND CONTENT OF CLAs

A company having **21 employees** or more is obliged to start collective negotiations. These should be initiated with at least 45 calendar days before the expiry of its current CLA, when applicable. If there is no CLA in place, the company should invite its employees to collective negotiations on an annual basis. The collective negotiations are held with the representative trade unions (as described below) or, when there are no trade unions established in a company, with the employees' representatives.

In principle, the negotiations cannot last longer than 60 days, except as otherwise agreed between the parties.

The CLAs tend to set up the entire framework of the employment relationship referring to matters such as conclusion, execution, performance and termination of the ILAs, working and resting time, holidays, general framework for salaries, other payments and incentives, professional training of the employees, health and safety at work, rights and obligations of the trade unions, non-discrimination requirements, labour conflicts.

A CLA at company level cannot contain lower rights for the employees than the CLA at sector level, if applicable, or lower than the minimum rights granted to the employees under the law.

4. UNIONS, EMPLOYEES' REPRESENTATIVES AND EMPLOYERS ASSOCIATIONS

Unions

A number of 15 employees from the same company can set up trade unions. Trade unions can participate in collective negotiations if they fulfil certain representativeness conditions established by law, mainly having as members at least 50% plus 1 of the employees within the company.

Union leaders have their contracts suspended during their mandate. They are entitled to dedicate to union's activity an amount of days which is subject to the negotiation between parties. The employer is not obliged to pay salary rights for the time union members dedicate to union activities.

The BOD has general obligations to ensure information and consultations with the trade union on its decisions regarding professional, economic, or social matter, as well as on any other matters which could significantly impact the workforce.

Note:

An interesting aspect is that under the Romanian law, when a union does not have a sufficient number of members to be representative at company level, affiliation of such union to a union federation representative at sector level can ensure the union participation to the collective negotiation at company level through the union federation.

Employees' representatives

Usually, when there are no trade unions established within the company, the employees organize the election of their representative, who have the purpose to ensure social dialogue with the employer, defend and promote the employees' interests. The employees' representatives are elected through the vote of at least 50% plus 1 of the employees within the company.

The number of employees' representatives is established with the employer's consent. Besides this prerogative, the employer cannot interfere in any way with the process of election of employees' representatives.

Employers association

Employers may also set up employers' associations in order to represent, support and defend their interests. Similar to the unions, in order to participate to collective negotiations at higher level (i.e. activity sector level), these associations must comply with representativeness conditions (mainly reaching relevant quota of the employees working within the respective activity sector).

Note:

Collective employment relations in Romania are rather underdeveloped at this point in comparison with Western European countries. However, in the past years, both foreign companies with establishments in Romania, as well as local companies, have started to shown an interest in influencing employment relationships

5. RECRUITMENT

ILAs are usually concluded after a preliminary examination of the professional abilities of the person applying for the job. The law does not set forth a procedural framework on how the recruitment process should be conducted by the employer.

Means for performing the so-called "preliminary examination" of the professional and personal abilities of an applicant may include practical or theoretical **tests** to determine knowledge and abilities, as well as **interviews**, where the employer can assess how the candidate would adapt to the existing team.

Before signing or amending the ILA, the employer has an obligation to offer clear and complete information to the (envisaged) employee on the terms and conditions applicable to the labour relationship or the proposed change.

Pre-employment checks (background checks) are allowed under the Romanian legislation provided that they are limited to a specific scope and purpose, i.e. they are necessary for assessing the applicant's aptitudes for employment.

Thus, information can be obtained: (i) directly from the applicant employee (information aimed at assessing competences and professional abilities for the job); or (ii) from former employer(s), provided that the applicant is notified.

Some additional information can be obtained from publicly available records or other individuals or entities (though this is still subject to the personal data protection requirements).

Special categories of information can only be consulted with the candidate's consent, while others are even forbidden for employers to process.

6. INCENTIVES WHEN HIRING CERTAIN PERSONS

Companies are entitled to a monthly lump sum amounting to RON 2,250 for a period of 12 months for each employee, if the work relationship lasts for at least 18 months, for hiring special categories of employees, such as (i) persons with disabilities (for companies having at least 50 employees, the percentage of employees with disabilities must be at least 4% of the overall number of employees); (ii) unemployed individuals over 45 years; (iii) unemployed single parents; (iv) long term unemployed individuals; or (v) young individuals between 16 and 25 years who have no job, do not attend any form of education nor professional training activities.

Companies hiring unemployed individuals who are eligible for retirement within a 5 year term as of their employment are entitled to a monthly lump sum equal with RON 2,250 for each employee until the employee becomes eligible for retirement.

7. HIRING FOREIGN EMPLOYEES

Conditions and formalities for hiring foreign employees are different for EU and non-EU citizens.

The procedure for hiring **EU citizens** involves concluding an ILA, registering it with the local labour authorities and afterwards, fulfilling the formalities with the Romanian Immigration Authority for obtaining the right to stay in Romania.

EU citizens may freely work in Romania for any period of time and enjoy of all the rights and benefits acknowledged under EU directive, regulations and other acts supporting free movement of workers across EU.

Non-EU citizens are required to obtain in advance a work permit issued by the Romanian Immigration Authority and can only be hired if certain conditions are complied with (e.g. the jobs cannot be occupied by Romanian, EU or SEE citizens; the employer has paid all obligations to the state budget, etc.).

Foreign employees can also be seconded to Romania. Secondment is allowed only for limited periods of one year within a five years period. The seconded Non-EU citizens will benefit from the more favourable rights principle.

Foreign citizens usually become payers of Romanian individual income tax for income sourced in Romania, under a certain procedure. The general rule under the European norms is that workers are insured under the social security system of the state where they work. However, in certain situations and on limited periods of time, foreigners may remain subject to the social security system of their home state.

8. THE INDIVIDUAL LABOUR AGREEMENT

As a rule, ILAs are entered into for an **indefinite period** of time. Exceptionally, in special circumstances (e.g. increase in seasonal activity) and, in principle, for an initial period of no more than 36 months, employees can be hired on the basis of a **fixed-term** ILA.

Temporary workers. Companies may also use employees provided by personal leasing agencies, for carrying out specific temporary works. Under the Romanian Labour Code, using temporary employees involves the observance of certain formalities,

(i) the company (as user) enters a personnel lease agreement with a temporary labour agent, while

(ii) the temporary labour agent executes temporary ILAs with the specific employees.

In principle, the duration of the assignment cannot exceed 24 initial months and 36 months in total, after having been extended.

Note:

The employer must make sure that the salary rights of the temporary employee are not lower than the salary rights awarded to a permanent employee performing the same or a similar job within the company.

Main clauses of the ILA:

a) the work place or, in the absence of a stable work place, the possibility for the employee to work in various places;

b) the position/function in accordance with the Romanian Professional Classification or other laws and the attributions of the job;

c) the typical risks of the job;

d) the duration of the annual leave the employee is entitled to;

e) the base salary, other elements representing salary rights, as well as the timing of salary payments;

f) the normal work period expressed in hours per day and hours per week;

g) the length of the trial period, if any;

h) the criteria for the assessment of the professional performance of employees.

If the employee is to carry out his/her activity abroad, the employer shall provide the employee **additional information**, such as: the duration of the work period to be performed abroad, climate conditions, the currency in which the salary rights will be paid or the local customs the non-observance of which might endanger the employee's life, freedom, or person.

Note:

The parties may negotiate and include in the ILA specific clauses, such as non-compete, mobility and confidentiality. The non-compete and mobility provisions require extra remuneration. A non-compete clause may only be effective after the termination of the labour relationship, for a period of maximum 2 years and must be remunerated with minimum 50% of the employees' average revenues received during the last six months of work (this may increase if severance packages are paid until the contract ends).

Job description. The individual labour agreement should have attached to it a clear and comprehensive job description. Lacking job descriptions makes it difficult to sanction, demote or dismiss an employee for poor performance, on disciplinary grounds or in the event of conducting an economic restructuring.

9. AMENDMENTS TO THE INDIVIDUAL LABOUR AGREEMENT

As a rule, any provision of the ILA may be modified only with the **consent of both parties**, by signing an addendum. Exceptionally, the labour agreement may be modified unilaterally only in cases and under conditions expressly established by law.

Examples: The employer may temporarily change the employees' workplace without his/ her consent in case of delegation or secondment.

Delegation means performing the same work for the same employer, but in another location. The unilateral decision of the employer can only cover 60 days across one calendar year. After this initial period, it requires the employee's consent for consecutive periods not exceeding 60 days each.

Secondment means performing the same work but for another employer. The unilateral decision of the employer can cover one year; afterwards, extension requires the employee's consent every six months. Employees can refuse secondment for personal well-grounded reasons solely.

10. DISCIPLINARY PREROGATIVE OF THE EMPLOYER

The employer has **disciplinary control over the employee**. This means it has a **prerogative to sanction** the employee when failing to observe his/her obligations.

Disciplinary rules and procedures are regulated by the employer under the Internal Regulation of the Company. It is **essential** that the employer ensures **proper and documented communication** of the Internal Regulation to each of its employees.

Any **disciplinary sanction** (save for the written warning), including dismissal for disciplinary reasons, can only be imposed on an employee after conducting a prior disciplinary investigation. This investigation must be conducted within a six-month period from the date the misconduct is committed.

The rules for conducting disciplinary investigations are not prescribed by the law in detail, but they need to be thoroughly set by the employer under the Internal Regulation.

11. TERMINATION OF THE INDIVIDUAL LABOUR AGREEMENT

An individual labour agreement may be terminated (i) by effect of law, (ii) due to the employee's resignation, (iii) by the parties' agreement, or (iv) following dismissal.

All situations are regulated in detail by the applicable legislation. The most important aspect is that the resignation **does not have to be justified**. on the other hand, **the dismissal** of an employee can occur only **in very particular situations** and only after following a strict procedure to this end.

Resignation

A notice term in case of employee's resignation is agreed in the ILA or, as the case may be, in the applicable CLA. The maximum duration is, however, set by the law to 20 working days for employees holding executive positions and 45 days for employees holding managerial positions. The ILA shall terminate on the date of expiry of the notice term or on the date the employer waives the benefit of such term, either entirely or partially. If the individual labour agreement is suspended during the notice period, the notice term is suspended accordingly. An employee can resign without notice only if the employer has not met its obligations provided under the ILA.

Dismissal

The employer can dismiss an employee only for a limited number of reasons specified in the Labour Code. The most important reasons are:

- disciplinary reasons involving gross or repeated misconduct;
- physical or psychological inaptitude attested by a competent doctor;
- the employee is not professionally fit for the position held;
- restructuring the job for reasons unrelated to the employee (e.g. for economic reasons).

In all cases, **the employer needs to follow strict procedural rules**. Failure to observe the procedure may lead to annulment of the dismissal decision, payment of the salary rights for the entire period between dismissal and the settlement of the litigation (which usually last between 12-24 months), and, if requested by the employee, reemployment in the former job.

In some cases dismissal is temporarily prohibited, e.g. (i) pregnancy - if the employer was aware of such condition prior to the issuance of the dismissal decision, (ii) during maternity or childcare leave, (iii) during medical leave or (iv) during the annual holiday leave.

The decision to terminate an individual labour agreement **must be issued in writing**, it **must be very well grounded** and have a certain content prescribed by the law.

Dismissal as a disciplinary sanction must observe the entire process required for applying any disciplinary sanction and it is essential that the seriousness of the sanction is very well explained by the employer.

Dismissal for poor performance can only take place after the employer has verified the employee's professional competence, and provided that the employer is not able to offer another suitable job to the concerned employee.

Dismissal for economic reasons needs to be backed up by a strong economic justification of the reorganisation measures taken thereby.

Romanian labour legislation makes no provision for **severance payments** to be granted to the employees upon dismissal. Severance payments are generally provided for in the applicable CLAs or, in some cases, in the Internal Regulations.

12. WORKING AND RESTING TIME

The normal working time for full-time employees is of **8** hours per day and of **40** hours per week.

Overtime

The law sets a maximum working week of **48 hours, including overtime**. Work performed may exceed 8 hours per day and 48 hours per week, provided that the average number of working hours, as calculated for a maximum period of four months, does not exceed eight hours per day and forty-eight hours per week. Longer periods may be provided in relevant CLAs.

The general rule is that **no overtime work shall be performed without the employee's consent**. By means of exception, the employer can impose overtime work in case of force majeure and in case of urgent work necessary for the prevention or removal of the effects of accidents or catastrophes.

The employee has the legal right to refuse overtime work save for the exceptional situations mentioned above.

Overtime shall be **compensated for with paid time off in lieu** within the next 60 days after overtime has been performed. If such compensation is not possible, overtime is paid to the employee by adding an allowance which cannot be lower than 75% of the base salary. During the period of activity reduction, the employer has the possibility to grant time off in lieu compensating the overtime that will be performed by the employee in the following 12 months.

Night work

The work performed between **10 p.m. and 6 a.m**. is considered night work. The night employee represents, as the case may be: (i) the employee who performs night work at least 3 hours of his daily working time or (ii) the employee who performs night work at least 30% of his monthly working time.

A normal night work period may not exceed an average of **8 hours per day calculated for a maximum period of 3 months.** If the employee carries out his/ her work in special conditions, the normal night work cannot exceed 8 hours over any period of 24 hours. Moreover, employees under the age of 18 may not perform night work. Separately, pregnant women, women who have recently given birth and nursing women cannot be forced to perform night work. Additional interdictions may be provided in relevant CLAs.

Daily and weekly time off

Weekly time off must to be granted to employees for 48 consecutive hours after five working days, and, as a rule, on Saturday and Sunday. If the activity cannot be interrupted on weekends, granting the weekly time off may be set under the company CLA or the Internal Regulation.

13. HOLIDAYS AND PAID LEAVE

Annual leave

Unless otherwise agreed in the CLA, the law provides that the duration of the annual paid leave (holiday) must be of minimum **20 working days**.

For the duration of the holiday, employees shall benefit of **an annual holiday allowance** which shall not be lower than the base salary, additional payments and allowances for that period. The allowance is computed by multiplying the number of holiday leave days with the average value of the salaries received during the 3 months previous to the holiday.

Public holidays and other time off:

The following public holidays are provided under the Romanian Labour Code:

- 1st and 2nd of January;
- 24th January - Union Day;
- Good Friday, the last Friday before Easter;
- 1st and 2nd day of Easter;
- International Labour Day - 1st of May;
- 1st of June;
- 1st and 2nd day of Pentecost (i.e., 50 days after Easter);
- 15th of August;
- Saint Andrew's Day - 30th of November;
- Romania's National Day - 1st of December;
- 25th and 26th of December (Christmas).

Employees belonging to a Christian religious cult will benefit from the legal holidays for Good Friday, first and second day of Easter, first and second day of Pentecost, depending on the date on which these holidays are celebrated by the respective religious cult.

To the extent that employers will grant these employees days off both on the dates set for the legal Christian religious cult to which they belong and for the legal holidays (e.g. the situation of employers who interrupt their activity on these days), these employees will benefit from days off cumulatively. Until recently, the Labour Code did not provide for the obligation of these employees to recover the additional days off granted to them, however the Labour Code has been amended so that employees who benefit cumulatively from these days off will recover the additional days based on a schedule set by the employer.

The CLA concluded at company level or the Internal Regulations may also provide for days-off in case of family events such as marriage, child's marriage, child birth, death of a spouse, child, parents or in laws.

Medical leave

The employees are entitled to paid medical leave for temporary work incapacity caused by common illness or injury outside work.

As a rule, the maximum duration of paid time off for medical leave is 183 days per year and may be extended with 90 days in grounded situations. In exceptional situations, the paid time off may be increased up to 18 months in total for severe illnesses like neoplasia or AIDS.

The medical leave allowance is 75% of the average salary over the six months preceding the medical leave, going up to 100% in case of severe illnesses.

The medical leave allowance is incurred by the employer for the first five days of temporary work incapacity, while the remainder is incurred by the National Social Security Fund (although payment continues to be effected by the employer).

Childcare leave

Any of the child's parents is entitled to childcare leave up to two years (or three years in case of disabled children) after expiry of the maternity leave (126 days granted to the mother). The childcare leave can be taken for every birth, adoption, placement, custody or guardianship established.

An employee can benefit of childcare leave if he/ she worked for a minimum period of 12 uninterrupted months during the previous two years before the child's birth.

Currently, the amount paid as monthly childcare leave allowance is equal to 85% of the average net income for the last 12 months of the previous 24 months before the child’s birth. The amount of the monthly childcare leave allowance cannot be less than 2,5 ISR, i.e., RON 1,250 (approximately EUR 260), and cannot exceed an amount equal to RON 8,500 (approximately EUR 1,800). The childcare allowance is fully incurred and paid from the state budget.

14. SALARY AND OTHER SALARY RIGHTS

The **minimum gross base salary** to be paid for the normal work schedule is established by Government decision each year. Starting with 1 January 2020, the minimum gross salary is of RON 2,230 (approximately EUR 470). By means of exception, for personnel employed in functions that provide higher education level and have a working experience of at least one year in this function, the minimum gross salary is of **RON 2,350** (approximately EUR 500).

The average gross salary for 2020 is of RON 5,429 (approximately EUR 1,100).

15. SOCIAL CONTRIBUTIONS AND TAX MATTERS

Both the employer and the employee are subject to fiscal and social contributions regulated by the law and other norms. Currently, the following contributions apply:

Contributions	Payer	Amount
Social security fund	Employee	25% of the employee's monthly gross salary (normal working conditions)
	Employer	4%, 8% - additional quota from the employer's general salary fund (depending on the working conditions)
	Total	25%; 29%; 33% (employee + employer)
Public health insurance fund	Employee	10% of the employee's monthly gross salary
Work contributions insurance fund (unemployment fund; medical leave and compensation fund; work accidents insurance system; contribution to the guarantee fund for the salary payments)	Employer	2,25% from the employer's general salary fund
Contributions to the trade unions and employers' associations	Employee/ Employer	as established by the CLAs concluded at different levels

16. HEALTH AND SAFETY AT WORK

As employer, you have a substantial number of health and safety obligations to comply with, among which:

- developing a prevention and protection plan, which can be adequately applied to the specific workplace conditions;
- ensuring that all employees are informed and instructed with respect to the measures from the prevention and protection plan;
- informing the employees about the safety and health related risks;
- taking all necessary measures for first aid, firefighting and evacuation of employees;
- appointing one or more employees to carry out the prevention and protection activities.

The employer may choose to carry out health and safety activity either internally, by appointing specialized personnel, or externally, by outsourcing this activity.

Under Romanian legislation, companies that reach 50 employees are obliged to organize an internal health and safety committee. However, if the set-up of this committee is not necessary, its attributions can be fulfilled by the person responsible with labour protection within the company, appointed by the employer.

17. LABOUR INSPECTIONS

You can be surprised by a labour inspection (down-raids) at any time, without prior announcement or notification, in any of the workplaces organized by the employer.

The labour inspectors can investigate the workplaces and all the documents related to the employment relationships and even pick up documents. The employer is always entitled to be assisted by a lawyer or by other experts.

The employer has the right to request protection of its commercial secrets and to receive written confirmation from the authority about the documents which were picked up.

Any measures ordered by the labour inspectors can be challenged. The challenging procedure and applicable terms depend on the challenged measure.

18. LABOUR CONFLICTS

Under the Romanian legislation, the labour conflicts are split into two categories, namely collective conflicts and individual conflicts.

Collective conflicts

- Collective conflicts occur when: (i) the employer refuses to start the negotiation of a CLA, if the previous CLA expired or there is no CLA or (ii) if no CLA has been concluded - the employer not accepting the employees' claims or (iii) collective negotiations are unsuccessful (i.e., not followed by conclusion of a CLA).
- The means of solving collective conflicts are: conciliation, mediation and arbitration and shall be organized by the representatives of the employers and trade unions/employees' representatives.
- Both the trade unions/employees' representatives and the employers have the obligation to participate in solving the conflict by using the abovementioned means in the respective order.
- If parties use all means of solving the conflict without any results, the representative trade unions/employees' representatives can start a strike.
- The strike means collective and voluntary cease of work.
- During the strike, the employees benefit only of the health insurance rights, as their other rights like the right to receive the salary are suspended *de jure*. The employees who are on strike must not disturb non-participants to strike nor the company's management from fulfilling its duties.
- The company's management cannot employ persons to replace the employees on strike.
- During the strike, the organizers have the obligation to continue negotiations with the employer for finding a compromise and eventually stop the conflict.

Individual conflicts

The individual conflict is the conflict between the employer and the employee related to the exercise of specific rights and fulfilment of certain obligations from the ILA, from the CLA or from the applicable laws. In practice, they appear mainly in connection with non-observance of individual rights and obligations set forth by the individual or collective agreements and are solved in the courts of law. Typically, individual conflicts last between 12-24 months.

19. LABOUR JURISDICTION

Although there is substantial practice in the fields, we do not benefit of a unitary case law in the field of employment relations. This is why we always recommend consulting a rather wide range of court cases on a certain subject matter before acting in a potential conflicting situation.

We tried to extract from practice and from the law a few guidelines that related to employment litigations in Romania:

- Litigations concerning employment relationships are free of the judicial stamp, hence inexpensive to be launched by employees;
- Litigation procedures are usually judged with emergency;
- The employer has to produce evidence even for the claims made by the employees;
- Precedent is no guarantee to obtaining a similar solution in a similar litigation file;
- The trial will be held at the court where the employee works, has his/ her residence or domicile;
- In case of doubt, the courts will usually interpret a legal or contractual provision in favor of the employee.

The practice has demonstrated that, in most of the cases, the courts tend to have a protective approach on the employee. Hence prevention and good preparation of employer's position are very important for an employer that may become party in an employment litigation.

20. EMPLOYMENT MATTERS REGARDING TOP MANAGEMENT

This section refers to members of the Board of Directors (referred to as "directors" in the following paragraphs). The Romanian term for this position is "administrator".

Under Romanian law, the director(s) of a joint stock company has to enter into a management agreement with the Company. A pre-existent ILA will be suspended throughout the duration of the directorship.

In practice, the director(s) of a limited liability company may conclude individual labour agreements which would remain in force even throughout the directorship mandate.

However, for an adequate protection of the company, it is recommendable to arrange for management agreements to be concluded with the director(s) and agree that their individual labour agreement(s) are suspended for the duration of the director mandate.

Who appoints and/or revokes a director?

The director(s) is (are) typically appointed by the Company's General Meeting of Shareholders or by the Sole Shareholder.

However, the first director/s is/are appointed through the Articles of Association. The appointment as Director must be expressly accepted by the respective Director.

Usually the director(s) are appointed for a limited mandate (without exceeding 2 years for the first mandate and 4 years for subsequent mandates, in case of joint stock companies) with the possibility to be reappointed. The directors may be in principle re-appointed for an unlimited number of mandates.

The General Meeting of Shareholders may revoke the directors at any time, and they are not entitled to request the annulment of the resolution regarding their revocation in court. However, if the revocation was not justified, the directors are entitled to damages.

General obligations of the directors

As a general rule, **the directors take management decisions** as required by the company's business, except for those reserved by law or by the Articles of Association for the General Meeting of Shareholders.

Directors are not allowed to disclose any confidential information and/ or any trade secrets of the company that became accessible to them during the performance of their mandate. The confidentiality obligation is created by law and further defined by the terms of the management agreement. Directors continue to be held by the duty of confidentiality even after the termination of their directorship, pursuant to the terms of their management agreement.

The Directors must perform their duties cautiously, diligently and with loyalty. Once a person becomes a director, all his/ her actions in this capacity must be performed in the company's best interest.

Directors of joint stock companies must be covered by a professional liability insurance policy in relation to their activity as directors. The policy may be concluded (either by the company or the directors themselves) with a Romanian/ foreign insurance company.

If the Directors **breach the rules according to which they must fulfil their mandate**, they may become liable towards the company. Depending on the offence and its circumstances, the Directors may be forced to pay damages for the prejudices caused to the company or even become liable under criminal law.

Directors are liable for damages caused by their actions or inactions to the company, either directly or indirectly (e.g. for causing a loss to a third party which the company must reimburse). Directors are liable to the extent they exceed or abuse their mandate, either intentionally or by negligence. However, they are not liable to the extent that they act within their mandate, without negligence and the company does not suffer a loss. To the extent it is established by the courts of law that the Directors are liable, they have to compensate the company both for effective prejudice and loss of profit.

Common rules apply also for a certain category of executives, namely in case of a joint stock company where the daily management was delegated by the BOD to the executives.

21. TRANSFER OF EMPLOYEES

As you may already know, if transferring the business or a part thereof to another entity, all employees attached to that business are protected under the Transfer of Undertaking European Directive no. 2001/23 (TUPE), under the corresponding European Court of Justice case law and under the national applicable legislation (Law no. 67/2006), mainly in 3 ways:

i) **automatic transfer** meaning that they become employees of the transferee and cannot be dismissed by the transferor or by the transferee as a direct consequence of the transfer;

ii) **their rights are transferred to the transferee as they are.**

If within the transferor the employees had a collective agreement in force, the provisions thereof should be observed by the transferee for at least one year, when they can be renegotiated; also, employees should benefit of the more favorable rights applicable within the transferee; and

iii) **the employees impacted** by the transfer will be informed and consulted with at least 30 days before the transfer.

Elements defining a transfer of undertaking

Application of TUPE in case of transfers of undertaking is to be judged on a case-by-case basis using the criteria set forth in the TUPE directive, the national legislation, the CJEU and national case law. The main aim of this legislation is to safeguard the jobs of the personnel under an employment agreement or employment relationship with the business that is subject to transfer.

A transfer of undertaking (which leads to application of TUPE) is defined by 3 elements:

i. **existence of a transfer**. As results from the case law, this means any sort of coordination between the previous employer and the new employer following which a business is transferred and the employer changes. It can take the form of a contract, but it can be deducted also from a series of events such as closing one business by an entity and soon after opening same business or parts of the same business by a different entity, somehow benefitting of information or having a coordinated action with the entity which closed.

ii. **existence of an undertaking or part of an undertaking.**

This is typically defined as a stable economic entity organized as a grouping of resources, enabling or facilitating the exercise of an economic activity, pursuing a specific objective.

iii. **the undertaking should preserve its identity after the transfer.** This is assessed by considering factors such as: (a) the type of undertaking, (b) the degree of similarity between the activity which stopped and the new activity, (c) whether assets, tangible or intangible, are transferred or not, (d) whether employees are taken over or not, (e) whether customers are assigned or not etc.

Categories of staff entitled to transfer

Lately, the tendency of the CJEU manner when dealing with TUPE cases is characterized by going more deeply in the facts and specific aspects of each case. The outcome of this approach is that, through its case law, CJEU broadened significantly notions such as “employer” or “employee”. For example, the notion of employee includes also the employees of another company who perform their work on a permanent basis within and for the transferring business.

22. PERSONAL DATA PROTECTION

Starting with 25 May 2018, when the (EU) General Data Protection Regulation 2016/679 (the „GDPR") has become directly applicable in Romania, the companies are no longer required to notify the Personal Data Supervisory Authority when processing personal data.

Nonetheless, employers have other personal data protection obligations that they must fulfil under the GDPR.

Firstly, employers must ensure the confidentiality and security of the personal data that they process in relation to their employees and must adopt specialized internal policies and technical and organisational measures regarding the safe processing of such data.

Secondly, employers should ensure that their employees are fully informed of the processing activities that their employer performs with respect to their personal data.

Thirdly, in order to process personal data in the employment context, the employer must have a legal basis for doing so (art. 6 GDPR). Also, under the GDPR, processing of special categories of data (usually referred to as sensitive personal data, such as health data, trade union membership data etc.) is prohibited, unless one of the 10 exceptions apply (art. 9 GDPR). Even if such an exception applies, the employer should also ensure that it has a legal basis for processing the respective sensitive data (art. 6 and art. 9 GDPR).

Additionally, the GDPR and the Romanian Law no. 190/2018 for the implementation of the GDPR (the "Law no. 190/2018"), which entered into force on 31 July 2018, significantly increase employers' stakes to ensure that their employees' monitoring systems remain on the right side of the privacy line.

According to an opinion of the Article 29 Working Party (an official interpretative EU body, currently replaced by the European Data Protection Board), for the majority of processing at work, including monitoring, the legal basis cannot and should not be consent. With a few exceptions, consent is generally not valid in the employment context, as is considered to not be freely given. This is due to the subordination relationship between the employer and the employee and to the real or potential negative consequences which will usually arise from the employee not consenting.

Moreover, the Law no. 190/2018 provides for additional conditions for the employers to be able to use monitoring systems in relation to their employees (by video surveillance or by other electronic communications), based on the legal ground of their legitimate interest. The most notable one is the obligation to consult the trade union before such systems are implemented.

Employees' monitoring becomes even more relevant as work from home/ teleworking is widely used nowadays. Nonetheless, employers might encounter challenges in ensuring that their employees' productivity levels remain the same, while still ensuring compliance with the GDPR principles. It could be argued that a legal basis for processing personal data in this context could be the legitimate interest of the

company to ensure that their employees continue to work as normally and maintain the same productivity level necessary to keep the activity going.

However, a case by case assessment should be performed before such monitoring is implemented, considering the envisaged objective, the available technologies and systems, all under the GDPR principles. Moreover, prior to the implementation of any monitoring systems, the employers would have to perform a balancing test in order to assess whether their interests are overridden by the interests or fundamental rights and freedoms of the employees.

Conducting a data protection impact assessment should also be considered, depending on the type of processing, in particular in case of using new technologies, and taking into account the nature, scope, context and purposes of the processing, if the processing likely to result in a high risk to the rights and freedoms of natural persons. The specific requirements of the GDPR and the decisions/guidelines of the supervisory authority should be followed in this respect.

Several ideas could be considered when assessing the possibility to implement monitoring systems for the employees working at a distance, such as: (i) using preventive measures rather than subsequent verifications (e.g. filters preventing particular websites access), or (ii) monitoring the aggregate levels of internet usage, as opposed to individualised monitoring for each employee, or (iii) monitoring only an employee's log-in and log-out of the company's VPN application and not the website pages visited or mouse clicks. The monitoring activities for the purpose of IT security could also result in the processing of personal data, so these should be taken into consideration as well, upon assessing compliance with the personal data protection regulations.

Most importantly, in all cases, an employer must be upfront and transparent to its employees about what monitoring measures it wishes to implement. Thus, the employer shall ensure that the employees are informed that their personal data will be used for this purpose, before any actual monitoring systems are installed.

The rights of the employees regarding the personal data that is processed by their employer have also been significantly improved under the GDPR. Thus, employees can benefit of the following main rights:

- the right to be informed;
- the right to have access to their personal data;
- the right to have the personal data rectified, updated, restricted or even deleted;
- the right to object to the processing of their data, when such processing is based on the legitimate interests of their employer;
- the right not to be subjected to a decision based solely on the automated data processing;
- the right to file a complaint with the ANSPDCP.

23. INTELLECTUAL PROPERTY RIGHTS

As a general rule, if it is not otherwise stated in the ILA and the employee's work duties do not involve the creation of patents, inventions and so on, the copyright pertains to the employee.

The employee can allow a third party to use their work, but the employer must give his consent to such use and must also be rewarded for the costs incurred in creating the concerned invention/ creation.

In the absence of any other contractual provisions, the employer owns the copyright to software created by employees in performing their work or under the employer's instructions.

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This handbook is a practical and simplified instrument. The activity of a Romanian company can encompass a wide variety of situations where special derogatory rules apply or the rules presented herein must be interpreted in sensitive legal situations. When in doubt, please do not hesitate to contact Filip & Company using the contact details below for clarifications or supplementary questions.

Thank you for using this handbook!

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