

## BERMUDA LABOUR AND EMPLOYMENT LAW HANDBOOK - 2017

In this Handbook any reference to the masculine “him” is intended to include all other genders unless stated otherwise and words importing the singular include the plural and vice versa. Further, any reference to a statutory provision is intended to include a reference to any statutory modification or re-enactment of it.

Please note that all links to legislation are as of the date stated, or in the case of legislation from the Bermuda Government's website, the most recent consolidation. Legislation in its current form can be viewed at <http://www.bermudalaws.bm>.

### I. THE EMPLOYMENT CONTRACT – GENERAL

Things said and done during the hiring process may affect an employer’s ability to later fire someone lawfully. Since March of 2001 when the Employment Act 2000 (“EA 2000”) came into effect, employers in Bermuda are required to have a valid reason to terminate the contract by reason of s.18. A clause in the contract that purports to give the employer the right to terminate “at will” (i.e. without just cause) is unlawful and thus unenforceable.

#### *A1. Common Law Claims – Wrongful Dismissal*

An employee may still sue his employer in court for common law breach of the contract of employment (“wrongful dismissal”). The written terms of the contract of employment may be contained either directly in the contract/statement of employment or they may exist separately (e.g. in the offer letter, a staff memo, the Employee Handbook, on the Intranet, in a Collective Agreement, etc.).

In such cases those separate terms may be construed to be incorporated into the contract of employment by express reference or implication. To form an effective part of the contract, the employer should ensure that the employee signs a document to confirm that the provisions of the separate document have been brought to his attention and are incorporated in the contract. If the employer does not want these separate terms incorporated in the contract (e.g. a discretionary bonus scheme or the Employee Handbook because he wants to be able more easily to amend their provisions at will), he should use clear and conspicuous language that

they will be construed against the party who drafted the agreement, most likely the employer (the “*contra proferentem*” rule).

In addition, separate express oral promises or statements made by the employer during the hiring negotiations may form part of the contract. Employers should not make oral promises or representations that contradict the written contract between the parties. To help avoid this, the written contract should stipulate that it forms the “whole contract,” and supersedes and takes precedence over any prior oral representations or statements that shall have no effect.

A related area of the common law is the tort of misrepresentation arising from negligent representations or misstatements that may be made by the employer to the employee regarding the terms, conditions, or other material facts arising in the course of negotiating the employment contract. If the employee relies on such negligent statement to his detriment, he can bring an action for damages against the employer for the loss suffered. This can have particular relevance to Bermuda where an employee might be induced to sell the family home abroad and give up a job to come to Bermuda on the faith of verbal promises made by the employer (and later denied), only to find that realistically he (the employee) cannot afford to complain about the situation upon arrival in Bermuda on an immigration work permit that can be revoked if he stirs up trouble.

In rare cases, certain customary or “notorious” terms in a given industry or profession may be read/implied into the contract, but only if they are sufficiently well defined so as to be certain and universally applied in the trade or profession in question.

It is important to note that in all employment contracts, there is an implied term of mutual trust and confidence that the employer will not conduct himself in such a way as to undermine the relationship of trust and confidence that exists between him and the employee. If the employer breaches this trust, such action will give rise to the right of the employee to terminate the contract by reason of constructive dismissal. The conduct must be sufficiently serious in nature such that it is not reasonable to expect the employee to continue working for that employer any longer (see below).

#### *A2. Statutory Claims – Unfair Dismissal*

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In addition to common law claims, the employee may file a statutory complaint of unfair dismissal if the employer breaches the provisions of the EA 2000. The EA 2000 limits the circumstances under which the employer may terminate the contract. S.20 prescribes minimum periods of notice that must be given and s.18 provides that, subject to other sections of the Act (ss.26 and 27 requiring a written warning in the case of unsatisfactory performance or misconduct falling short of serious misconduct), there must be a valid reason for termination connected with:

- the ability, performance, or conduct of the employee; or
- the operational requirements of the employer's business.

S.22 of the EA 2000 provides that if the employee requests it, the employer must provide him with a "Certificate of Termination" containing the reason(s) for the termination.

In addition, s.28 of the EA 2000 ("unfair dismissal") protects employees from disciplinary action or termination on the following grounds:

- an employee's race, sex, religion, colour, ethnic origin, national extraction, social origin, political opinion, disability, or marital status;
- an employee's age, subject to any other enactment or any relevant collective agreement regarding retirement;
- any reason connected with an employee's pregnancy, unless it involves absence from work that exceeds the allocated leave entitlement;
- an employee's trade union activity;
- an employee's temporary absence from work because of sickness or injury, unless it occurs frequently and exceeds the allocated leave entitlement;
- an employee's absence from work for any of the reasons mentioned in s.13 (public duties), or due to service as a volunteer fire officer;
- an employee who removes himself from a work situation which he reasonably believes presents an imminent and serious danger to life or health;

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- an employee's participation in any industrial action that takes place in conformity with the Labour Relations Act 1975;
  - the employee has filed a complaint or participated in proceedings against an employer involving alleged violations of the EA 2000; or
  - the employee has made a protected disclosure as a whistle-blower under s.29A of the EA 2000.

### *B. Discrimination*

The Human Rights Act 1981 (as amended) (“HRA 1981”) has primacy over other laws and applies generally to persons in Bermuda (including employers and employees) and prohibits discrimination on any one of the following protected categories as defined in s.2, namely: race, place of origin, colour, ethnic or national origin, sex, pregnancy, sexual orientation, marital status, disability, family status, religion or beliefs or political opinions, or criminal record (except where there are valid reasons relevant to the nature of the offence that would justify the difference in treatment).

Discrimination occurs if:

- less favourable or deliberately different treatment is given to a person as compared with others generally because of one of the protected grounds; or
- someone refuses to enter into a contract or arrangement with a person on like terms and circumstances as in the case of other persons generally; or
- someone applies to another person a condition which he applies to others generally but which has a discriminatory effect on the person concerned which cannot be shown to be justifiable and which operates to the detriment of the person discriminated against because he cannot comply with that condition (e.g. the condition that all employees must work on Saturdays cannot be complied with by Jehovah’s Witness employees on religious grounds).

As for employers, s.6 of the HRA 1981 makes it unlawful to discriminate against a job applicant or employee in any of the above ways by:

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- refusing to refer or to recruit any person or class of persons for employment;
  - dismissing, demoting or refusing to employ or continue to employ any person;
  - paying one employee at a rate of pay less than the rate of pay paid to another employee employed by him for substantially the same work, the performance of which requires equal education, skill, experience, effort and responsibility and which is performed under the same or substantially similar working conditions, except where the payments are made pursuant to—(i) a seniority system; (ii) a merit system; or (iii) a system that measures earnings by quantity or quality of production or performance;
  - refusing to train, promote or transfer an employee;
  - subjecting an employee to probation or apprenticeship, or enlarging a period of probation or apprenticeship;
  - establishing or maintaining any employment classification or category that by its description or operation excludes any person or class of persons (as defined in s.2) from employment or continued employment;
  - maintaining separate lines of progression for advancement in employment or separate seniority lists, in either case based upon criteria specified in s.2, where the maintenance will adversely affect any employee; or
  - providing in respect of any employee any special term or condition of employment.

Certain express statutory exceptions are made in the Act including, most importantly, subsection 6(6) which provides that the provisions prohibiting discrimination, limitation, specification or preference for a position or employment based on sex, marital status, family status, religion, beliefs or political opinions, or any related advertisement or inquiry, do not apply where a particular sex or marital status, religion, belief or political opinion, or availability at any particular time, as the case may be, is a *bona fide* and material occupational qualification and a *bona fide* and reasonable employment consideration for that position or employment.

However the Act makes clear that nothing in it confers the right on any person to be given, or to be retained in, any employment for which he is not qualified or which he is not able to

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perform, or of which he is unable to fulfil a *bona fide* occupational requirement, or any right to be trained, promoted, considered or otherwise howsoever treated in or in relation to employment, if his qualifications or abilities do not warrant such training, promotion, consideration or treatment.

Disabled persons are protected in that they are not considered disqualified for employment by reason of their disability if it is possible for the employer / prospective employer to modify the circumstances of the employment so as to eliminate the effects of the disability in relation to the employment, without causing unreasonable hardship (as defined in the Act) to the employer.

Further the Act allows an exception to give preference in hiring to Bermudians and also to take into account someone's nationality *bona fide* for reasons of national security.

Other exceptions are made in the context of employment involving physical strength/stamina of the prospective employee and in hiring by religious, charitable and social non-profit organizations.

Any term of a contract of employment that contravenes the HRA 1981 is not rendered void or unenforceable by reason only of breaching the Act, but may be rectified by a Court upon application so as to secure compliance with the Act going forward if it appears to the Court that it is feasible to do so without affecting the rights of persons who are not parties to the contract.

The Act provides a regime for filing complaints about breaches of human rights with the Human Rights Commission. The Commission's Executive Officer has the power to investigate and collect evidence if he has reasonable grounds for believing that an employer has breached the Act. He also has a duty to seek to settle the causes of the complaint (through mediation or conciliation by mutual consent of the parties) or to endeavour to cause the breach to cease, as the case may be. He may dismiss the complaint at any stage of the proceedings after giving the complainant an opportunity to be heard, if in his opinion the complaint is without merit.

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Where it appears to the Executive Officer that it is unlikely in the circumstances that the causes of a complaint will be settled or he has been trying for nine (9) months to settle the causes but has been unsuccessful, and the complaint is not so serious as to warrant a prosecution, he must refer the complaint to a Tribunal appointed under the Act.

The Tribunal will hear the complaint and decide whether or not a party has breached the Act and may do any one of more of the following:

- order the party in breach to come into compliance with the Act and rectify any injury caused to the complainant by the breach and to make financial restitution (except for any loss which the complainant could have avoided had he acted reasonably);
- if an offence has been committed and it is satisfied that its order will not be complied with, refer the complaint for prosecution; and/or
- order any party to the dispute to pay any other party or the Commission costs of the proceedings before the Tribunal up to \$1000.

If the Tribunal decides after hearing a complaint that it is frivolous or vexatious and unjustified, the Tribunal may order the complainant to pay compensation to the respondent, not exceeding the reasonable costs incurred by the respondent to defend himself against the complaint.

There is a right to appeal to the Supreme Court from an order of the Tribunal on matters of fact or law or both. In addition, criminal penalties of fines or imprisonment are imposed upon conviction for offences of wilful and unlawful discrimination, or for aiding, counselling or procuring another person to discriminate against a person in breach of the Act.

As an alternative to bringing a complaint under the HRA 1981, a complainant may opt to sue in Court for breach of statutory duty under the Act in civil tort proceedings as permitted by s.20A of the Act. Damages for unlawful discrimination may include compensation for injury to feelings.

It can be seen that the EA 2000 overlaps somewhat with the HRA 1981 in rendering unlawful a dismissal based on a protected human rights ground. The aims of the Acts are different however; the termination provisions of the EA 2000 are aimed at compensating the employee

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for unfair dismissal whereas the HRA 1981 is aimed at bringing the person who has discriminated against another into compliance with the Act and compensating the complainant for injury caused to him, including to his feelings. Unlike the Human Rights Tribunal, the Employment Tribunal has no jurisdiction to order costs against a losing party.

On the issue of racial discrimination, the Human Rights Commission is charged with additional functions relating to equality in an effort to work towards the elimination of such discrimination. It has a duty to maintain a register of employers from information received from the Government's Department of Statistics which records the race of every employee in Bermuda. All employers must register with the Bermuda Government and provide information each year as required by the Statistics Act 2002 relating to the makeup of their workforce by category of race, job category, hours worked, age and gender. Employers with more than 10 employees must also record gross annual income and benefits as well as information on recruitments, promotions and departures.

In addition, the Commission has the power to issue codes of practice containing practical guidance towards eliminating racial discrimination and promoting equality of opportunity in the workplace. The code of practice must be approved by both Houses of the Legislature before it becomes enforceable. No such codes of practice are in place currently.

### *C. Employment Applications*

The HRA 1981 provides that no person shall use any employment application or make any written or oral inquiry that expresses (either directly or indirectly) any discriminatory limitation, specification or preference based on any of the protected human rights grounds (see above section I.B.), or that requires a job applicant to furnish any information concerning any of the protected grounds. The prohibition does not apply to applications used or inquiries made by the Government for the purpose of administering certain provisions of law. Another exception is made in respect of persons proposing to hire someone from abroad in which case the hirer may make inquiries regarding the applicant's gender, marital status and the number of his dependent children.

Bermuda immigration policy provides that a work permit will not be issued to a foreigner to work in Bermuda if there is a Bermudian or spouse of a Bermudian or Permanent Resident



Certificate holder who is qualified and applies for the position. Preference for jobs will be given to applicants in that order. When applying to the Department of Immigration for a work permit to hire an expatriate worker and a Bermudian (etc.) has applied for the job but was rejected, the prospective employer must include details about the Bermudian and their application along with the reason why they were deemed not suitably qualified for the position. They must also demonstrate that they have informed the Bermudian of the outcome of his application.

#### *D. Use of Employment Contracts*

Employment relationships are created by a contractual agreement. In the past, such agreements could be wholly verbal; there might not be any written contract at all such that the terms of the relationship had to be defined solely by reference to the spoken word between the parties.

Since March of 2001 when the EA 2000 took effect, s.6 mandates that not later than one week after an employee commences employment, the employer must give him a written Statement of Employment which must be signed and dated by both parties. The statement must contain particulars of:

- the names of the employer and employee;
- the date when the employment began;
- the job title and brief description of the work;
- the place(s) of work;
- the gross wage or the method of calculating it and the intervals at which it is to be paid;
- the normal days and hours of employment or shift patterns;
- holiday entitlement;
- sick leave;
- the length of notice to terminate that must be given by each party;
- the details of any pension provided;

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- the disciplinary and grievance procedures (if any);
  - where the employment is not expected to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date on which it is to end;
  - the probationary period (if any);
  - the dress code (if any); and
  - whether there is any collective agreement which directly affects the terms and conditions of employment.

Any agreed variations to the terms of employment that are contained in the Statement of Employment must be embodied in an amendment document or revised Statement that is signed and dated by the parties, and given to the employee within one month from the change having been agreed.

Employment contracts will often contain more than the above-mentioned required fundamental terms.

When drafting employment contracts, Bermuda employers should be aware that non-compete clauses will not be enforceable in Bermuda unless they are considered reasonable in protecting the employer's legitimate business interests, such as trade secrets or other highly confidential information. Non-compete clauses must be reasonable in relation to time, geographical scope and scope of the prohibited work (see below).

Arbitration clauses may be included in Bermuda employment law contracts (typically in relation to more sophisticated senior business positions). Otherwise, disputes are adjudicated via the statutory mechanism prescribed by the EA 2000 or in the Courts.

Whilst few employers do so in practice, employment agreements should be stamped with Government stamp duty in compliance with the Stamp Duties Act 1976 in order to be enforceable in Court. Currently the stamp duty payable on an employment contract is \$25. Exempt companies are exempt from paying such tax.

#### *E. Advertising/Recruitment*

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The HRA 1981 makes it unlawful for any person to publish, display, circulate or broadcast any advertisement for a position or employment for or on behalf of an employer that contains any words, symbols or other representation, or that is under a classification or heading, indicating directly or indirectly any discrimination against any person in any of the ways protected by the Act (see above section I.B.) in respect of any limitation, specification or preference for the position or employment.

Pursuant to the Government's Work Permit Policy published by the Department of Immigration effective March 1<sup>st</sup>, 2015, each advertisement for employment must include the following details:

- the name, telephone number and mailing address of the employer;
- the title of the job being filled and the minimum standards of qualification and experience;
- a brief job description of the job to be filled that is consistent with the normal functions associated with the job (an advertisement is invalid if it contains a description which seems tailor-made for an expatriate applicant); and
- notice of the deadline for application.

Before an employer in Bermuda will be granted a work permit by the Department of Immigration to hire an expatriate worker or renew their current work permit, the employer is generally required to advertise the position for a minimum of three (3) days in the local daily newspaper within an eight (8) workday period. Electronic advertisement is not considered as fulfilling part of the three (3) day requirement. The advertisement that appeared in the local newspaper must be included in the immigration application to hire the overseas worker. Effective March 1<sup>st</sup>, 2015, employers must also post a notice regarding the position to be filled on the Government Job Board at [www.bermudajobboard.bm](http://www.bermudajobboard.bm) for at least eight (8) consecutive days.

The work permit application must be submitted within three (3) months of the date on which the position was last advertised; alternatively within six (6) months where the length of the recruitment process does not permit the employer to submit an application within three (3) months of the date the position was last advertised, upon payment of an Advertisement Extension Fee.

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If a Bermudian or a spouse of a Bermudian or a Permanent Resident Certificate holder applies for the job and is qualified for the position, then permission to hire the expatriate worker will, as a matter of immigration policy, be denied.

The requirement to advertise does not apply to any job filled by a Bermudian, spouse of Bermudian, divorced parent of a Bermudian child who has obtained an Extension of Spouse's Employment Rights, or to a Permanent Resident Certificate holder.

An employer may apply to the Department of Immigration for a waiver from the advertising requirements if he believes that he has justification for doing so. A waiver from the Board/Minister may be granted in cases, for e.g., where the person is uniquely qualified for the position; or the position would not exist in Bermuda if it were not for the applicant filling the job; or the success of the business would be detrimentally affected if the person were to leave the business; or the employee is integral and key to income generation for the business by brokering deals or attracting/retaining clients or funds.

The decision of the Board/Minister may be appealed to the Minister upon payment of the requisite fee.

Automatic waivers to the requirement to advertise will be granted for:

- CEO and other Chief Officer posts;
- Resort Hotel General Manager posts (175 or more beds);
- Periodic, Occasional, New Business, Global and Global Entrepreneur Work Permits and certain other permits granted with listed restrictions.

#### *F. Employment References/Background Investigations*

There are no specific laws in Bermuda relating to employment references or background investigations of potential employees. Some contracts of employment will make the employment conditional upon passing background criminal, employment/educational and credit checks.

While consideration of a criminal background is appropriate in some circumstances, employers must obtain the job applicant's written consent to obtain information about his criminal background or the Bermuda Police Service will not release the information. An

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applicant's criminal record can be checked either through the Magistrates' Court or through the Bermuda Police Service.

The HRA 1981 provides that an employer cannot refuse to hire an applicant because of their criminal record, except where there are valid reasons relevant to the nature of the offence for which he was convicted that would justify treating him differently for consideration of that type of job (s.2.(2)).

In respect of employment background checks, the applicant's consent is not legally mandated. Prospective employers will routinely approach former employers without the job applicant's consent for employment references / background information. Conversely the job applicant is often required to provide contact details for referees in his job application thereby consenting to the prospective employer contacting such persons for background information.

When an employer provides information about a former employee to a prospective new employer, he has a legal duty to state what he knows either positively or negatively about the employee. The common law defence of qualified privilege protects employers from defamation claims when they provide a reference that contains defamatory statements. If the employer provides information to the prospective new employer honestly in good faith and without malice towards the former employee, the information will be privileged and therefore protected from a defamation claim.

The duty of honesty and good faith is continuing. Thus if the former employer discovers, after giving a positive reference, that the employee was in fact a dishonest employee, it is that employer's duty to communicate its discovery to the new employer who relied on the original reference. Even if this later communication is offered voluntarily, it is also considered privileged and protected.

In addition, employers must be careful not to make false, careless or reckless statements when giving references or they can face liability for a negligent misstatement that causes loss to the new employer (e.g., by giving a positive reference in saying the employee was wonderful, when in fact the employee performed unsatisfactorily and was terminated as a result).

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Many employers in Bermuda refuse to provide reference letters for outgoing employees, invoking an internal policy that they will only confirm in writing the formal details required by a Certificate of Termination under s.22 of the EA 2000. The Certificate must be provided if the employee requests it and must contain: (a) the name and address of the former employer; (b) the nature of the employer's business; (c) the length of the employee's period of continuous employment; (d) the capacity in which the employee was employed; (e) the most recent level of wages and other remuneration payable to the employee as at the date of termination of the contract; and (f) if the employee requests it, the reason for termination. Accordingly a prospective employer may request a copy of the employee's Certificate of Termination with his former employer (if one was provided) as a starting point.

Educational institutions from abroad will invariably require a former student's consent before they release any information about that person to a third party including employers.

An applicant's consent to screening for his credit or financial history is not legally required. Such information may be obtained by a paid up member of the Bermuda Credit Association which is the only organization in Bermuda that provides such information (traditionally covering checks in the retail, banking and utilities industries). A member has access to their data base and can therefore be provided with credit information about anyone in the data base. A job applicant may inquire of the Bermuda Credit Association if any credit checks have been made on him in which case the Bermuda Credit Association will confirm the information.

#### *G. Visas (in Bermuda known as Work Permits)*

In Bermuda an expatriate (foreign) employee requires a work permit issued by the Ministry of Home Affairs' Department of Immigration in order to work in Bermuda. The Bermuda Government's comprehensive work permit policy is set out in its published "Work Permit Policy" (effective March 1<sup>st</sup>, 2015) which is annexed to this Handbook. Standard work permits ranging from 1 year to 5 years in length, Short Term Work Permits for up to six (6) months and Periodic Work Permits (allowing multiple visits to the Island over a period of time for less than 30 days per visit) are all on offer if the requisite immigration policy conditions for hiring are met.

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A new type of work permit called the Global Entrepreneur Work Permit has been introduced which will be available to exempted companies or start-up companies in Bermuda, allowing their employees to reside and work in Bermuda for up to one year when planning and setting up their new business.

In addition, a new Business Work Permit has become available for exempted companies who are new to Bermuda to receive automatic approval of work permits without having to advertise the position for the first six (6) months of their existence; certain restrictions apply.

To help alleviate unemployment, the new policies will include a requirement that employers advertise all jobs on the Government Job Board for at least eight (8) days, and businesses may be asked to participate in certain initiatives to boost the number of Bermudians employed in job categories where there are high numbers of work permit holders in those businesses.

Further, the Department of Immigration will henceforth be issuing work permit cards (to replace the current paper-based work permit) for all work permit holders and to sponsored dependants of those work permit holders (for eg., spouses and children). The primary aim of the work permit card is to facilitate travel to/from Bermuda. Paper-based work permits will only be issued to employers and for the Department of Immigration's files.

## II. COMPENSATION AND BENEFITS

### *A. Minimum Wage*

Bermuda does not have a minimum wage and, accordingly, wages are determined by the contract between the employer and the employee who may or may not be represented by a union negotiating wages on his behalf.

In respect of certain classes of employees hired from abroad who are deemed to need protection from potential employer abuse (e.g., child caregivers), immigration policy may specify that a certain minimum wage per hour (as well as overtime pay at the rate of time and a half his normal hourly wage) must be included in the Statement of Employment as a condition for granting work permit permission to an employer to hire such a person. The

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employer must include a signed copy of the Statement of Employment in the application submitted to Immigration for the work permit.

***B. Minimum Age***

The Age of Majority Act 2001 defines a minor as a person under the age of 18 years.

The Employment of Children and Young Persons Act 1963 places restrictions on the ability to employ minors between the ages of thirteen (13) and eighteen (18) years, depending on the nature of the occupation. Children under the age of thirteen (13) are not permitted to work at all unless the work is of an agricultural or a horticultural or domestic character and the parent or guardian of the child is the employer, or the employment is in the nature of carrying and delivering light goods (e.g. a messenger or a grocery packer). Further, no child under 13 is permitted to be employed without having a weekly continuous rest period of at least thirty-six (36) hours.

Children under the age of sixteen (16) cannot be employed during school hours on school days, and may only be employed for up to 2 hours on such days outside of school hours.

Persons under the age of eighteen (18) cannot be employed at night unless they are over the age of sixteen (16) years, and then only until midnight. If such person is female, then the employer must make adequate arrangements for the employee's safe return home after work.

***C. Wage Payments***

Pursuant to s.6(e) of the EA 2000, the employer must provide the employee with a written Statement of Employment which must give particulars of the employee's gross wage or the method of calculating it, and the intervals at which it is to be paid. Under s.3 of the EA 2000, wages are defined as all sums payable to an employee under his contract of employment (by way of weekly wage, annual salary or otherwise) or otherwise directly in connection with his employment, including any commission. The definition excludes tips or bonuses and expenses or the monetary value of any benefits in kind.

In addition, s.7 of the EA 2000 states that an employer must provide each employee with a written itemized pay statement at or before the payment of any wages. The statement must



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contain details as to the period of time or the work that the wages cover; the rate of wages to which the employee is entitled; the number of hours worked if they vary from week to week; the gross amount of wages to which the employee is entitled; the amount and purpose of any deduction made from that amount; any bonus, gratuity, living allowance, or other payment to which the employee is entitled; and the net amount of money being paid to the employee.

S.8 prohibits an employer from making a deduction from an employee's wages unless the deduction is required or authorised to be made by virtue of a statute, collective agreement or a provision of the employee's contract; by order of any court or tribunal; or the employee has previously signified in writing his agreement or consent to the making of the deduction. Where the employer pays the employee less than what is owed, the amount of the deficiency is considered an unauthorized deduction.

Deductions made for the purpose of reimbursing the employer for overpayments of wages or overpayments in respect of expense reimbursements, deductions made as a result of any disciplinary proceedings, and deductions made in consequence of an employee's participation in a strike or lockout are not considered unauthorized deductions.

#### *D. Child Labour*

See Section II.B above.

#### *E. Health Insurance*

The Health Insurance Act 1970 sets out the compulsory obligation of employers to provide a health insurance plan for themselves, their employees, and their employees' non-employed spouses.

The Act provides that an employer must promptly provide a new employee with a written statement setting out the name and address of the licensed insurer with whom the employee's contract of hospital insurance has been made, the date the insurance came into effect, and the insurance number. Failure to do so constitutes an offence, and the employer can be sued for any lost benefits, with the loss being recovered as a civil debt.

The Health Insurance Act 1970 provides for the most basic mandatory level of coverage known as the Standard Hospital Benefit (“SHB”). Whilst the employer is responsible for paying the total cost of the premium, the Act allows the employer to deduct 50% of that cost from his employee’s wages. The Government subsidizes this coverage for children, seniors and the indigent. The SHB currently covers the majority of local hospital services.

The next level of coverage is the Hospital Insurance Plan (“HIP”) which is available to all individuals above eighteen (18) years of age. HIP covers local hospital services plus doctor’s home visits and various other benefits, in addition to overseas care for emergency procedures that are not offered in Bermuda, reimbursed at 60% of usual and customary costs, provided an overseas referral is obtained from a Bermuda registered physician. As HIP offers more benefits than SHP, HIP is often chosen by employers to meet the letter of the law. The employer usually pays approximately 50% of the monthly premium.

HIP benefits are markedly lower than “major medical” insurance coverage which is the highest level of coverage available. Most private health insurance plans in Bermuda provide for major medical (including visual and dental) coverage. The employee will usually pay 50% of the premium cost to obtain such benefits, depending on the terms of his contract of employment. The contractual benefit is subject to the terms of the plan that is negotiated between the insurance provider and the employer.

All employers should make their employees familiar with what is, and is not, covered by their medical insurance plan. They will usually provide their employees with a summary plan booklet highlighting the major provisions of the plan and level of benefits payable.

Following the termination of employment, employees in Bermuda are automatically covered as a matter of law for four (4) weeks at the statutory basic level of coverage at no cost to either party.

#### *F. Disability Benefits*

##### Government Disability Benefits

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Ss.12(f) and 12(g) of the Contributory Pensions Act 1970 (“CPA 1970”) as read with ss.17A and 17B provide for disability benefit payments to persons which are either contributory or non-contributory in nature. These sections benefit “insured persons”, namely persons over school leaving age (i.e. over 18) who are “incapacitated for gainful employment”.

S.4 provides that persons who are over eighteen (18) and under sixty-five (65) years of age (pension age) must pay weekly contributions at the rate set out in the Act for every contribution week or for any part thereof during which any part they are gainfully occupied. The contribution is matched by the employer. Persons gainfully occupied in Bermuda over the age of sixty-five (65) do not have to pay the employee contribution; the employer does. Self-employed persons must also pay contributions (double the amount of the normal employee contribution if they are between eighteen (18) and sixty-five (65) years of age since there is no separate employer contribution). Self-employed persons over the age of 65 must pay the normal employee contribution amount.

S.17A provides that an insured person over 18 years of age and under the age of 65 years (pension age) shall be entitled to a contributory disability benefit if that person is incapacitated from gainful employment by reason of any physical or mental disability or terminal illness and:

- he has made at least one hundred and fifty (150) contributions;
- the yearly average of contributions paid by or credited to him is not less than fifty (50);  
and
- he produces a certificate from a registered doctor certifying incapacity or terminal illness, provided that where the yearly average of contributions is twenty-five (25) or over, but less than fifty (50), the benefit is reduced pro rata.

If the disability is in the form of a terminal illness, a doctor must certify that the employee suffers from a progressive disease, and his death in consequence of that disease can reasonably be expected within twelve (12) months.

A non-contributory disability benefit is available to a person under s.17B who are incapacitated from gainful employment who have not paid any contributions only if: he is over the age of eighteen (18) years and under age sixty-five (65); he has been ordinarily

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resident in Bermuda for ten (10) years immediately preceding the application for the benefit; he produces a certificate from a registered doctor certifying that he is incapacitated from gainful employment; and the incapacity is of a permanent nature.

An applicant for a disability benefit must make a claim in writing on the prescribed form within thirteen (13) weeks after the day on which the commencement of the benefit is claimed, but the period may be extended if good cause for the delay can be shown (s.20).

#### Private Disability Benefits

Private long term and short term disability benefits are often provided by the employer as part of an employee's benefit package. Half the costs of the premiums may be deducted from the employee's pay.

After the employee's sick leave benefit is exhausted, the employer may offer a short term disability benefit in respect of illness/injury lasting up to six (6) months. The employee must be unable to perform the duties of his position and be under the care of a registered doctor during this time. The employee will most likely remain employed whilst on short term disability (either on full pay or part pay or unpaid, depending on the terms of the policy) and enjoy continued full employee benefits (health insurance, life insurance etc.).

In the event of long term illness or injury for eligible employees, the employer's long term disability benefit, if offered, will take effect after the short term benefit expires. The long term benefit is a percentage (usually 2/3) of normal monthly base salary up to a maximum monthly benefit amount. Depending on the terms of the policy, an employee on long term disability will either remain employed or will be terminated by the employer due to their long term inability to carry out their normal job functions. In such circumstances, the contract of employment may be deemed frustrated and thus terminated, and the losses will lie where they fall.

The long term benefit continues throughout the duration of the disability subject to certain exceptions in the policy (e.g., shortened if the disability is mental in nature). If the employee remains employed, then he may or may not also receive the full regular benefits (health insurance, life insurance, etc.). If terminated, then the employee loses these other regular

benefits unless exceptions are made in the policy. In such case the employee finds himself having to pay the full cost of his health insurance out of his disability pay which can be financially stressful.

#### *G. Overtime Issues*

Although the EA 2000 does not provide for a minimum wage, it does provide for mandatory overtime pay, unless the parties expressly contract out of the requirement.

Pursuant to s.9, an employee who works in excess of 40 hours a week is entitled to be paid at the overtime rate of one and a half times his normal hourly wage. Alternatively, the employee may be paid his normal hourly rate for the extra hours and further compensated by being given the same number of hours off in lieu.

These overtime provisions do not apply to the professional or managerial employee whose Statement of Employment provides that his annual salary has been calculated to reflect that his regular duties are likely to require him to work, on occasion, more than 40 hours a week.

Overtime is also not payable where the employer and the employee agree that it should not apply and therefore the parties can contract out of the overtime requirement altogether.

However, in respect of certain classes of overseas employees who require protection from abuse such as child caregivers, the Department of Immigration will not issue a work permit to an employer to employ the foreigner unless overtime pay is provided for in the contract, a signed copy of which must be filed with the Department.

Many Collective Agreements provide for overtime pay for unionised employees including double pay for hours worked on Sundays and public holidays.

The Minister of Home Affairs has the power to modify the effect of the mandatory overtime provisions by prescribing a different number of hours for certain specified jobs, taking into account various factors, including the customary work schedule in a particular industry.

#### *H. Workday/Workweek/Work hours*

Typically, employees in Bermuda put in a forty (40) hour workweek, from Monday through Friday from 9 a.m. to 5 p.m. including an hour's break for lunch (thus effectively working thirty-five (35) hours per week). Employees in professional or managerial positions inevitably work longer hours than the standard workweek.

Pursuant to s.6 of the EA 2000, the employer must provide the employee with a written Statement of Employment which must include details of the normal days and hours of employment or, where the job involves shift work, the normal pattern of shifts.

S.7 of the EA 2000 provides that the written pay statement provided to the employee must contain details as to the period of time that the wages cover, the rate of wages to which the employee is entitled, and the number of hours worked where that number varies from week to week, in addition to other details.

Under s.10, an employer must provide each employee with a rest period of at least 24 consecutive hours in each week. This requirement does not apply in the case of certain categories of employees, including police officers, prison officers, fire officers and medical practitioners and nurses employed at the Island's hospitals.

The EA 2000 does not apply to part-time employees who work less than 15 hours per week.

### **III. TIME OFF/LEAVES OF ABSENCE**

#### ***A. Paid Vacation***

S.12 of the EA 2000 provides that an employee is entitled to two (2) weeks (ie. 10 days) of annual paid vacation after he has completed the first year of continuous employment and after each subsequent year of continuous employment (such periods of vacation are not cumulative).

Where an employee is entitled to more than two (2) weeks of annual holiday by reason of any statute, contract of employment, custom or practice, the more favourable provision prevails (see s.2).

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S.12 further provides that, where practicable, an employer shall grant the employee's request to take his annual vacation at a particular time, subject to the requirements of the business and to requests for vacation by other employees.

If the employee requests it, and it is practicable to do, the employee is entitled to be paid his holiday wages in advance of the vacation.

*B. Paid Sick Leave*

S.14 of the EA 2000 provides that an employee who has completed at least one year of continuous employment, and who is unable to work due to sickness or injury, shall be entitled to be paid his normal hourly wage for up to eight (8) days per year.

An employee shall not be entitled to be paid his normal wages if he is absent from work for a period of two (2) or more consecutive days unless, upon request by the employer, the employee provides the employer with a medical certificate certifying his inability to work due to sickness or injury.

Where an employee is entitled to more than eight (8) sick days per year by reason of any statute, agreement, contract of employment, custom or practice, the more favourable provision shall apply (s.2).

*C. Paid Time Off (Public holidays, Public duties)*

S.11 of the EA 2000 provides that employees are entitled to time off from work with pay on all public holidays unless the parties agree otherwise. The Public Holidays Act 1947 provides the mechanism for Government declaring which days are public holidays.

Employees are not entitled to such pay if they do not work on the working day before and after the holiday, unless they are on vacation or sick leave. If the holiday falls on an employee's scheduled day off, then he can either take the next working day as his holiday or another day, as agreed with his employer.

If the employee is required by his employer to work on a public holiday, he must be paid at a rate equal to at least the usual overtime rate (e.g., time and a half). Alternatively, he may be

paid his regular rate and then be given an extra day of paid leave on a date agreed with the employer. Again, the parties may agree to contract out of these requirements.

There are other instances when an employer, where practicable, must permit employees who have completed at least one year of continuous employment to take paid time off during their working hours pursuant to the EA 2000. Such instances include, by way of example, an employee having to carry out responsibilities in connection with serving on a Government Board, the Bermuda Regiment, the Reserve Police, the Senate or House of Assembly, jury duty, and voting in parliamentary elections. Where the employee receives any payment in connection with such duties, the employer is entitled to deduct these earnings from the wages payable to the employee for such time off (s.13).

#### *D. Bereavement Leave*

If a member of an employee's immediate family dies (i.e., spouse, child, parent, sibling, or co-habitee), the employee is entitled to up to three (3) consecutive days of bereavement leave (up to five (5) days if the funeral is overseas). The employee must advise his employer as soon as possible of the death and the expected dates of leave. The bereavement leave is unpaid unless the contract of employment stipulates otherwise.

Where an employee is entitled to more than the above entitlement by reason of any statute, agreement, contract of employment, custom or practice, then the more favourable provision prevails (s.2).

#### *E. Medical Leave*

The EA 2000 does not provide for medical leave other than sick leave, as set out above.

#### *F. Ante-Natal and Maternity Leave*

S.15 of the EA 2000 provides that a pregnant employee who has completed over one year of continuous employment is entitled to take paid time off during working hours to attend ante-natal appointments. If her employer requests it, the employee must produce a medical certificate and appointment card verifying the pregnancy and the appointment in order to



obtain this benefit. Employees who have worked less than one year are entitled to the time off, but without pay.

Pursuant to s.16 of the EA 2000, a pregnant employee is entitled to twelve (12) weeks of maternity leave after one year of continuous employment (as of her expected due date) if she provides her employer with a medical certificate verifying the pregnancy and specifying the estimated date of birth. To receive the entitlement, the employee must submit an application for maternity leave at least four (4) weeks before she intends to commence her leave. Of the twelve (12) weeks, eight (8) weeks are paid leave and the other four (4) weeks are unpaid leave. If the employee has been employed for less than one year, her benefit is eight (8) weeks of unpaid leave. Maternity leave pay is paid directly by the employer to the employee.

If the employee intends to return to her position following her period of maternity leave without loss of seniority, she must notify her employer at least two (2) weeks in advance of the date on which she intends to resume work. If the employee's position no longer exists, the employer must provide the returning employee with a comparable position with at least the same level of wages and benefits as she was receiving before her maternity leave. If the employee fails to notify her employer at least two (2) weeks in advance of the date she intends to resume work, the employee shall be deemed to have terminated her employment.

Where an employee is entitled to more than the above statutory entitlements by reason of any statute, agreement, contract of employment, or custom or practice, then the more favourable provision prevails (s.2).

There is no law providing for paternity leave (whether paid or unpaid) in Bermuda. Some employers voluntarily provide paternity leave, generally around a week or less.

#### ***G. Workers' Compensation***

In Bermuda, the Workers' Compensation Act 1965 (as amended) provides for workers' compensation to be paid to employees who are injured on the job or who suffer occupational disease which renders them unfit for work. For further explanation of the statute, see Section IX below.

#### IV. TERMINATION ISSUES

Until the EA 2000 came into force in March of 2001, the employer was entitled to terminate an employee's employment on whatever basis the employer deemed appropriate, provided that sufficient notice of termination was given and human rights legislation was not violated. The contract would either expressly provide the period of notice that had to be given or a reasonable period of notice would be implied into the contract by the court based on all the circumstances of the case.

Thus if the employer terminated the employee summarily (without notice) for cause, the employer had to justify the summary dismissal by proving gross misconduct on a balance of probabilities standard of proof. Contractual terms agreed between the parties could also restrict the circumstances and procedures under which an employer was able to lawfully terminate an employment contract.

Today, the effect of s.18 of the EA 2000 is that, in addition to giving proper notice, the employer must have a valid reason in order to terminate the contract (see below).

##### *A. Wrongful /Constructive Dismissal Claims*

An employee is entitled to bring a common law court action for wrongful dismissal (breach of contract) if the employer has breached a term of the contract of employment that causes the employee to suffer damage. Examples of breaches include but are not limited to the following:

- the employee was engaged for a fixed period of time and was dismissed before the expiration of that fixed period;
- the employee was engaged for a period terminable by notice (e.g., 3 months) and dismissed without the proper amount of notice or payment in lieu of notice;
- the employer fired the employee summarily without sufficient cause (i.e., there was no proven gross misconduct);
- the employer failed to follow the disciplinary procedures stipulated in the contract before terminating the employee;

- the employer “constructively dismissed” the employee by substantially refusing to continue employing him on the agreed upon terms of employment (e.g., by cutting pay, demoting, changing the reporting lines, etc.) such that the employee could not be expected to work for the employer any longer.

A Supreme Court decision has rejected the assertion that the statutory framework for resolving employment disputes under the EA 2000 has deprived the courts of jurisdiction to entertain wrongful dismissal claims. Accordingly, it is open to an employee to pursue a common law claim in the courts, notwithstanding his right to pursue his statutory remedies for unfair dismissal under the EA 2000.

An employee has six (6) years from the date of the alleged breach of contract by the employer in which to institute his common law action for wrongful dismissal in the courts.

In respect of unfair dismissal claims, the EA 2000 provides employees with statutory remedies when the employer has violated a provision in the Act relating to termination. Save for cases of constructive dismissal, the burden of proof is on the employer to prove that the dismissal was fair (s.38). An employee who claims constructive dismissal has the burden of proving the reason which made continuation of the employment relationship unreasonable (s.29).

The employee must file his complaint under the EA 2000 within three (3) months of the alleged breach of duty by the employer (s.36).

S.37 provides that the complaint is made to an inspector employed by the Department of Workforce Development, who must inquire into the matter if he has reasonable grounds to believe that an employer has failed to comply with any provision of the Act. He may compel production of information and documents from either party if he requires it for the purposes of his inquiry. After making such inquiries as he considers necessary in the circumstances, the inspector must endeavour to conciliate the parties and to effect a settlement by all means at his disposal.

Where the employer has a contractual grievance procedure in place to deal with employees' complaints, the inspector must not, except with the consent of all parties, attempt to settle the

complaint or refer the complaint to the Employment Tribunal unless and until there has been a failure to obtain a settlement by means of that contractual grievance procedure.

Where the inspector has reasonable grounds to believe that an employer has failed to comply with any provision of the Act but is unable to effect a settlement, he must refer the complaint to the Employment Tribunal which will hold a hearing on the matter as soon as practicable after the referral (s.38). The Tribunal must give the parties or their representatives a full opportunity to present evidence on oath and make submissions.

If the Tribunal determines that an employer has breached the Act, it must notify the parties in writing of the reasons for its decision and has power to order various remedies, including compliance with the EA 2000 and payment to the employee of any unpaid wages or other benefits owing to the employee.

If the Tribunal upholds an employee's complaint of unfair dismissal, it shall award either reinstatement or re-engagement of the employee in comparable work, or (much more likely) a compensation order of such amount as is considered just and equitable in all the circumstances of the case, having regard to the loss sustained by the employee that is attributable to action taken by the employer, and the extent to which the employee caused or contributed to the dismissal.

The amount of compensation ordered to be paid shall not be less than two (2) weeks' wages for each completed year of continuous employment (for employees with no more than two (2) completed years of continuous employment) and four (4) weeks wages for each completed year of continuous employment for longer serving employees, up to a maximum equivalent of twenty-six (26) weeks' wages.

Examples of unfair dismissal claims under the EA 2000 include where:

- the required amount of notice to terminate was not given by the employer, or it was given during prohibited leave times. S.18 of the EA 2000 provides that an employee's contract of employment shall not be terminated by an employer unless the employer complies with the notice requirements of s.20. Pursuant to s. 6, the amount of notice that must be given to terminate must be stated in the contract (note that no notice need be given during any probationary period). The employer is not allowed to give notice of termination during an

employee's absence on annual vacation, maternity leave, bereavement leave, or sick leave (unless the period of sick leave extends beyond four (4) weeks).

- the employee was terminated for an invalid reason. S.18 of the EA 2000 states that an employee's contract of employment shall not be terminated by an employer unless there is a valid reason for termination connected with: (a) the ability, performance, or conduct of the employee; or (b) the operational requirements of the employer's business.

Further s.18 provides that no lawful termination may occur unless the provisions in s.26 (dismissal for repeated misconduct within a six (6) month period after a written warning has been issued to the employee), and s.27 (dismissal for unsatisfactory performance that has not improved within a six (6) month period after a written warning and instructions on how to improve performance have been issued to the employee) have been complied with.

If the termination is for an invalid reason, it is an unfair dismissal meriting a complaint being made under the Act.

As to disciplinary action falling short of dismissal, s.24 of the EA 2000 provides that an employer is entitled to take disciplinary action including issuing a written warning or suspending the employee when it is valid to do so. The factors an employer is entitled to take disciplinary action are as follows:

- the nature of the conduct in question;
- the employee's duties;
- the terms of the contract of employment;
- any damage caused by the employee's conduct;
- the employee's length of service and his previous conduct;
- the employee's circumstances;
- the penalty imposed by the employer;
- the procedure followed by the employer; and
- the practice of the employer in similar situations

S.22 of the EA 2000 states that the employer must provide the employee with a “Certificate of Termination” stipulating the reason for the termination if the employee makes such a request (see above Section I.F.).

In addition to listing valid reasons for termination stipulated in s.18, s.28 of the EA 2000 provides that an employee’s dismissal is unfair if it is based on any of the reasons listed in that section (see Section I.B. above). Many of the invalid reasons listed are human rights related grounds.

*A. Constructive (Unfair) Dismissal*

S.29 of the EA 2000 provides that an employee is entitled to terminate his contract of employment without notice where the employer’s conduct has made it unreasonable to expect the employee to continue working for the employer, keeping in mind the employee’s duties, length of service and circumstances. An employee who terminates his contract due to constructive dismissal is deemed to have been unfairly dismissed under the Act. The burden of proof is on the employee to prove why continuing the employment relationship would be unreasonable (s.38).

*B. Discrimination Claims*

See Section I.B. above.

*C. Severance Allowance*

Where an employee has completed at least one continuous year of employment and his employment is terminated by reason of redundancy (defined in s.30 of the EA 2000 see below), or the winding up or insolvency of the employer’s business, the death of the employer, or the death of the employee from an occupational disease or accident resulting from that employment, the employee or his estate, as the case may be, is entitled to be paid severance allowance under s.23 of the EA 2000.

The amount of severance allowance depends on the employee’s length of service, and is set out in s.23, namely two (2) weeks’ wages for each year of completed service up to ten (10)

years, and three (3) weeks' wages for each year of completed service over ten (10) years, subject to a maximum of twenty-six (26) weeks' wages.

Where an employee is entitled to more than the statutory minimum by reason of any statute, contract of employment, custom or practice, the more favourable provision prevails.

Severance allowance is not payable in certain specified circumstances, the most common scenario being where the employee unreasonably refuses to accept an offer of re-employment by the employer at the same place of work under no less favourable terms than he was employed prior to the termination.

Where severance allowance is payable, it is in addition to the employee's entitlement to notice or payment in lieu of notice arising out of termination.

#### *D. Harassment & Sexual Harassment*

S.6B of the HRA 1981 provides that no employee shall be harassed in the workplace by the employer or his agent or by another employee, based on any of the HRA 1981 protected grounds (see above Section I.B.). The Act provides that harassment occurs when a person persistently engages in comment or conduct towards another person that is vexatious and that he knows, or ought reasonably to know, is unwelcome.

S.9 of the HRA 1981 prohibits any person from abusing any position of authority which he occupies in relation to another person employed by him or by any concern which employs both such persons, for the purpose of harassing that other person sexually.

S.9 further provides that employees have a right to freedom in their workplace from sexual harassment by their employer, or by an agent of the employer, or by a fellow employee, and employers must take such action as is reasonably necessary to ensure that sexual harassment does not occur in the workplace.

The section clarifies that a person sexually harasses another person if he engages in sexual comment or conduct towards that other person that is vexatious and that he knows, or should know, is unwelcome.

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Complaints of harassment are made to the Human Rights Commission under s.15 of the HRA 1981. See above Section I.B (Discrimination) for the complaints procedure regime stipulated in the HRA 1981.

*E. Whistle-blower Protection*

Effective October 21st, 2011, s.28(1)(j) of the EA 2000 prohibits termination of employment or the imposition of disciplinary action on the ground that the employee made a “protected disclosure” as a “whistle-blower” under s.29A of the Act.

The latter section provides that a person makes a protected disclosure if, in good faith, he notifies a certain category of listed person that he has reasonable grounds to believe that: (a) his employer or any other employee has committed, is committing, or is about to commit, a criminal offence or breach of any statutory obligation related to the employer’s business; or (b) that he himself has been directed, either by his employer or by one of his supervisors, to commit such a criminal offence or breach of statutory obligation; or (c) that information tending to show any matter falling within paragraph (a) or (b) has been, is being, or is likely to be, altered, erased, destroyed or concealed by any person.

S.29(4) renders void any contractual term that seeks to preclude a person from making a protected disclosure.

Further s.3 of the Good Governance Act 2012 (effective since July 3, 2012) provides that a person commits an offence if he terminates a contract with another person because that person or any of his officers or employees has made a protected disclosure; or if he withholds any payment due under a contract to another person because that person or any of his officers or employees has made a protected disclosure. A person (including a corporate body) who commits such offence is liable on summary conviction to a fine not exceeding \$10,000, or to imprisonment for a term not exceeding twelve (12) months, or to both.

A “listed person” for the purposes of s.3 includes but is not limited to the person’s employer, manager or supervisor, a police officer and various other official Government-appointed positions.



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*F. Public Access to Information*

The Public Access to Information Act 2010 (“PATI 2010”), (which came into force on April 1<sup>st</sup>, 2015), is aimed at increasing accountability of government agencies by allowing the public to request information from publicly funded bodies.

An Information Commissioner has been appointed pursuant to s.50 to run the government agency independently and manage the implementation of the requirements of PATI 2010.

S.6 of PATI 2010 requires regular reporting by publicly funded agencies so that the request for information from the general public to the Information Commissioner is used as a last resort. The penalty for non-compliance with PATI 2010 is a fine up to \$10,000 or imprisonment for up to six months.

**V. LAYOFFS/WORKFORCE REDUCTIONS/REDUNDANCIES**

*A. Layoffs and Redundancies*

S.32 of the EA 2000 provides that an employer who lays off an employee must do so in accordance with the Act.

S.30 provides that where any of the specified conditions of redundancy exist, the employer may lay off an employee for a continuous period not exceeding four (4) months.

An employee is redundant for the purposes of this Act where his termination is, or is part of, a reduction in the employer’s workforce which is a direct result of any of the conditions of redundancy existing, namely:

- the modernisation, mechanisation or automation of all or part of the employer’s business;
- the discontinuance of all or part of the business;
- the sale or other disposal of the business;
- the reorganization of the business;

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- the reduction in business which has been necessitated by economic conditions, contraction in the volume of work or sales, reduced demand or surplus inventory; or
  - the impossibility or impracticality of carrying on the business at the usual rate or at all due to: shortage of materials; mechanical breakdown; act of God; or other circumstances beyond the control of the employer.

A lay off that exceeds a period of four (4) months amounts to a termination by reason of redundancy.

S.30 of the EA 2000 mandates that, before terminating an employee for redundancy, as soon as practicable, the employer shall inform the employee's trade union or other representative (if any) of the following information:

- the existence of the relevant condition of redundancy;
- the reason(s) for the termination contemplated;
- the number and categories of employees likely to be affected; and
- the period over which such termination is likely to occur.

In addition, the employer must consult the employee's trade union or other representative (if any) on:

- the possible measures that could be taken to avert or minimise the adverse effects of such redundancy on employment; and
- the possible measures that could be taken to mitigate the adverse effects of any termination on the employees concerned.

Often there will be a collective agreement between the employer and the relevant union that delineates the requirements to be followed and the benefits (if any) to be paid in the event of an intended layoff or redundancy.

#### ***B. Severance Pay***

S.23 of the EA 2000 provides that the amount payable if an employee is terminated by reason of redundancy is two (2) weeks' wages for each year of completed service up to ten (10)

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years, and three (3) weeks' wages for each year of completed service over ten (10) years, subject to a maximum cap of twenty-six (26) weeks' wages.

Where an employee is entitled to more than the statutory minimum payable by reason of any statute, contract of employment, custom or practice, the more favourable provision prevails (s.2 EA 2000).

### *C. Benefits*

Employers are not required to provide benefits for employees who are laid off (beyond the statutory notice and severance allowance requirements), unless they have contracted to do so.

### *D. Use of Separation Agreements*

Separation/severance agreements agreed between the parties are enforceable in Bermuda, and arise in the context of termination of employment generally; they do not arise specifically in the context of layoffs and redundancies. Separation agreements are construed and enforced in accordance with normal contract law principles. Stamp duty of \$25 should be applied to the agreement in order to be enforceable in court (unless the employer is an exempted company), pursuant to the requirements of the Stamp Duties Act 1976.

## **VI. UNFAIR COMPETITION/COVENANTS NOT TO COMPETE**

### *A. Trade Secrets*

Implied into the employment contract is a duty on the part of the employee not to misuse or disclose confidential information concerning the employer or former employer, including trade secrets. However because this implied duty is often difficult to define and enforce, employers who are concerned about their trade secrets being disclosed often insert express restrictive covenant clauses in the contract.

Trade secrets, trademarks, copyright, and other types of highly confidential information are viewed by the courts as an employer's legitimate business interests which the employer is entitled to protect by means of restrictive covenants.

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*B. Covenants in Restraint of Trade & Garden Leave clauses*

An issue that often arises for consideration is the employer's ability to enforce an express term prohibiting an employee from competing with the employer after the employee's contract has ended. Bermuda law follows English common law on this subject but, obviously, the facts and circumstances of the Bermuda labour market are different, and judges will have regard to this when construing restraint of trade clauses and analysing whether they are enforceable.

The law starts from the premise that covenants in restraint of trade are *prima facie* unlawful and accordingly are to be treated with suspicion. The court will enforce the covenant only if it goes no further than is reasonably necessary to protect the trade secrets or other legitimate interests of the employer.

It is for the employer to identify a legitimate business interest that is capable of protection and, further, to show that the covenant extends no further than is reasonably necessary to protect that interest. The legitimate interests that will justify the imposition of a covenant in restraint of trade are: (i) trade secrets or confidential information akin to a trade secret; (ii) trade connections; and (iii) workforce stability.

In order to determine whether an item of information is a trade secret or confidential information akin to a trade secret, the court will have regard to a number of factors, including the nature of the employment and the nature of the information itself.

The court will scrutinise more carefully covenants in employment contracts given the usual inequality of bargaining power between the parties as compared with normal commercial contracts. The covenant is interpreted in the context of the employment agreement as a whole so as to give effect to the intention of the parties. The court generally is vigilant in ensuring that only the minimum protection needed to serve the employer's legitimate business interests will be afforded; as such, it will often strike down clauses that are unreasonably wide in terms of time, geographic extent, and scope of restricted activity.

In addition to being reasonable, the clause must be founded on good consideration in the contract and not be too vague. The burden of establishing the validity of the term is on the

party seeking to uphold it. Therefore, covenants that restrict the employee's freedom to work must be carefully drafted, or they will not be effective in achieving their purpose.

An alternative to a post-termination non-compete clause, particularly for a key employee, is the inclusion of an express "garden leave" clause in the employment contract. This clause allows the employer to prohibit the employee from working during the notice period whilst he continues to receive his normal wages and benefits. The employee is thereby precluded from accepting employment elsewhere (and competing) until the expiry of the notice period.

Even if the contract does not contain either a restraint-of-trade or garden leave clause, the employer may try to rely on the implied duty of confidentiality as it applies after the termination of employment. As stated above, a former employee has an implied duty not to misuse or disclose the confidential information of his former employer. However, inasmuch as this implied duty is often difficult to define and enforce, employers are advised to instead use express non-competition clauses to protect their interests.

As for other forms of restrictive covenants, the courts will enforce reasonable non-solicitation clauses that prevent the employee from soliciting the business of customers or suppliers of the former employer and thus protect trade connections. A trade connection is established where it can be shown that, by virtue of his position with the employer, the employee has had contact with customers or suppliers, such that the employee is likely to acquire knowledge of, and influence over, the customers or suppliers.

Courts will also prevent the poaching of key employees in order to protect the stability of the employer's workforce. Thus a clause prohibiting a former employee from soliciting his former colleagues to join him in his new employment may well be upheld, again if it is reasonable in scope. The clause is more likely to be upheld where the prohibition is against poaching a senior employee as opposed to someone in an administrative position whose loss is not going to materially affect the stability of the workforce.

In all of these cases, the legal principles must be considered carefully in light of the facts of the particular case, and care must be taken when drafting these types of covenants to ensure that they are reasonable and therefore enforceable under Bermuda law.

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## VII. PERSONNEL ADMINISTRATION

### *A. Required Postings*

Bermuda immigration work permit policy (effective March 1<sup>st</sup>, 2015) provides that employers must post a notice regarding job positions to be filled on the Government Job Board for eight (8) days ([www.bermudajobboard.bm](http://www.bermudajobboard.bm)). Most often the issue of any required postings will be dictated by the contract of employment. Postings are more likely to be required in contracts taking the form of a union collective agreement (e.g. contractually required postings that allow for internal recruitment amongst union member employees when a position becomes available before advertising the position locally).

S.3B of the Occupational Safety & Health Act 1982 requires employers to post a copy of the Act and any Regulations made under the Act at a conspicuous place at the place of employment; or at a place that is easily, readily and conveniently accessible for use by the employer and all employees.

S.20 of the same Act requires employers with more than ten (10) employees to establish a health and safety committee and to post the names of the health and safety committee members in a prominent place at the workplace.

S.7 of the Occupational Safety and Health Regulations 2009 requires employers with five (5) or more employees to prepare a written statement of the occupational safety and health policy governing the place of employment and post a copy of the statement at a location that is accessible to every employee at the place of employment.

S.15 of the Regulations requires the health and safety committee at work to keep accurate records of all matters that come before it, as well as minutes of its meetings which must be signed by two (2) chairpersons and posted by the employer in a conspicuous place at the relevant place of employment.

The Occupational Safety and Health Regulations 2009 contain a host of detailed provisions requiring posting by the employer in respect of various health and safety at work matters in the workplace, namely:

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- The posting of a warning sign in relation to a stairway that is so close to a traffic route used by vehicles or to a machine or any other hazard as to be hazardous to the safety of an employee using the stairway (s.34);
  - A legible sign with the words "Danger-High Voltage" in letters that are not less than 5 cm (2 inches) in height on a contrasting background shall be posted in a conspicuous place at every approach to live high voltage equipment (s.73);
  - Notices that set out the details of the emergency evacuation plan and emergency procedures must be posted at locations accessible to every employee at the place of employment (s.86);
  - Signs shall be posted in conspicuous places at all entrances to a fire hazard area at a place of employment - (a) identifying the area as a fire hazard area; and (b) prohibiting the use of an open flame or other source of ignition in the area (s.92);
  - If there is a risk that an employee may be exposed to unsafe levels of sound at a place of employment, all noise hazard areas in the place of employment must have warning signs posted (s.98) which are in conspicuous locations so as to provide adequate warning that unsafe levels of sound may be encountered (s.101);
  - Where a hazardous substance is used, handled or stored in a place of employment, clearly legible signs shall be posted in conspicuous places warning every person granted access to the place of employment of the presence of the hazardous substance and of any precautions to be taken to prevent or reduce any safety or health risk (s.150);
  - Where a hazardous substance in a place of employment is hazardous waste, the employer shall disclose the generic name and hazard information in respect of the hazardous waste by applying a label to the hazardous waste or its container, or posting a sign in a conspicuous place near the hazardous waste or its container (s.154). Also warning signs must be posted at approaches to any materials handling area while materials handling operations are in progress (s.214);
  - Where an aisle, corridor or other course of travel that is a principal traffic route intersects with another route, warning signs marked with the words "DANGEROUS INTERSECTION" in letters not less than 5 cm (2 inches) in height on a contrasting background, shall be posted along the approaches to the intersection (s.225);
  - Where an employee is at risk of being struck by moving vehicles while carrying out any work, the employer must post suitable signs warning drivers of vehicles of the work (s.255);

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- Where the employer is a construction contractor, ss.265 and 351 require the posting of notices and signs containing a myriad of information about the contractor and various safety procedures and warnings.

### *B. Required Training*

S.3 of the Occupational Safety and Health Act 1982 places a duty on every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all of his employees, which duty extends to, inter alia, the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the safety and health at work of his employees.

S.7 of the Occupational Safety and Health Regulations 2009 requires employers with five (5) or more employees to prepare a written statement of the occupational safety and health policy governing the place of employment, post a copy of the statement at a location that is accessible to every employee, establish an organization for carrying out the policy and updating it annually, provide information, education and training to employees with regard to their role in the organization, and provide a copy of the statement and any revision to the health and safety committee or representative.

S.8 provides that where training is required under the Regulations, the employer must ensure that the person who provides the training or instruction prepares and signs a written record of same. The record must include the name of the employee who received the training or instruction and the date on which the training or instruction took place, and be signed by the employee.

Members of the health and safety committee at work are entitled to take time off during their regular working hours without penalty to perform their duties and to undergo training with regard to the performance of those duties (s.18).

The Regulations contain a host of requirements with respect to training in relation to various health and safety issues including training on various subjects in relation to:

- having to enter a confined space at work (s.52);



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- the use of insulated protective equipment and tools during the performance of electrical work (s.62);
  - the climbing or working on any pole or elevated structure that is used to support electrical equipment (s.64);
  - the training of emergency officers and monitors with respect to the emergency evacuation plan and the emergency procedures and location and use of fire protection equipment and emergency equipment provided by the employer (s.89);
  - where employees may be exposed to unsafe levels of sound at work (s.98);
  - where there is a risk of a work process at a place of employment causing an employee to be exposed to unsafe levels of vibration (ss.112 and 114);
  - where there is a risk of a work process at a place of employment causing an employee to develop a musculoskeletal injury (s.117);
  - where employees are likely to be exposed to a hazardous substance at work (s.147);
  - where employees operate, maintain or repair the assembly of pipes (s.148);
  - the safe and proper inspection, maintenance and operation of all machinery and tools that employees are required to use (s.160);
  - the operation of materials handling equipment in relation to inspection, fuelling (if applicable) and safe and proper use (s.201);
  - where the use of protective clothing and equipment is required (s.259);
  - where the employee operates an elevating work platform (s.321); and
  - where an employee is using an explosive actuated fastening tool (s.329).

Also on the issue of training, as a matter of Government immigration policy, employers' work permit applications to the Department of Immigration to hire non-Bermudians are more likely to be approved where a training programme for Bermudians exists in the workplace.

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Certain types of employers carrying out regulated activities as defined by Bermuda's anti-money laundering laws, require regular training of staff in anti-money laundering and anti-terrorist financing procedures.

*C. Personnel Records*

See also Section I.G below (Record-keeping).

The Public Access to Information Act 2010 ("PATI 2010") (which became effective on April 1<sup>st</sup>, 2015), is aimed at increasing accountability of government agencies by allowing the public to request information from publicly funded bodies which may include government employee-related personnel information.

Currently, as a matter of practice, employees are usually allowed to review their personnel file upon appointment with their employer's human resources department and under supervision. It is not yet known how the legislation will affect, if at all, personnel records held by government bodies.

*D. Meal and Rest Periods*

There is no Bermuda legislation governing meal periods. Contractual obligations regarding meal breaks are often included in Collective Agreements involving unionised employees.

Under s. 10 of the EA 2000, Bermuda employers must provide their employees with a rest period of at least 24 consecutive hours each week. This requirement does not apply to certain categories of employees, namely police officers, prison officers, fire officers, and medical practitioners and nurses employed at the hospitals. Collective Agreements will often provide for contractually agreed upon rest periods in various industries employing unionised employees.

*E. Payment Upon Discharge or Resignation*

The EA 2000 introduced the concept of a minimum period of notice of termination that must be given to every employee. Pursuant to s. 20, an employee is entitled to at least one week's notice if he is paid on a weekly basis, two weeks of notice if he is paid every two weeks, and

in all other cases, to one month's notice. If an employment contract stipulates a greater amount of notice, then the more favourable contractual provisions will apply (s.2).

An employer may in his discretion elect to make payment in lieu of requiring the employee to work out his notice period. In such cases, the employee is entitled to his full salary along with all other normal benefits that accrue during this time, including vacation and sick leave, housing allowance, car, pension and other benefits.

If the employee leaves without giving proper notice, the employer only has to pay salary plus any accrued but unused vacation and benefits, up to the last day worked. If the employer suffers loss as a result of the employee's breach, he may sue the employee for damages. Practically this rarely, if ever, happens.

For certain types of termination (e.g., redundancy, the closing or insolvency of the employer's business, the death of the employer or the job-related death of an employee), the employer must pay the employee (or his legal representatives) "severance allowance" in addition to giving the requisite notice (see above Section V.B).

Normal statutory deductions will be made from payments in lieu of notice, e.g., for payroll tax, health insurance coverage, government pension (social insurance) and private pension. In respect of severance payments (e.g. contractual termination payments), only payroll tax will be payable.

Payment in lieu of notice and severance allowance do not have to be paid when the employee is summarily dismissed for serious misconduct or for repeated misconduct within six (6) months after receipt of a written warning, or for continued unsatisfactory performance within six (6) months after receipt of a written warning along with instructions on how to improve performance. However, the dismissed employee is still entitled to accrued but untaken vacation and pay and benefits due to him as at the date of termination. The same applies when an employee is terminated during a probationary period.

#### *F. Employment References*

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Bermuda law does not require employers to provide employment references. See Section I.F above for the law in relation to job references.

*G. Record-keeping*

There are a host of detailed provisions requiring recordkeeping by employers in respect of various records related to their employees, pursuant to the following statutes:

S.8(5) of the Contributory Pensions Act 1970 requires employers to keep records of social insurance (government pension) contributions paid by the employer on an employee's behalf and any information as required by Director when employment comes to an end.

S.29 of the same Act allows an inspector to enter into an employee's workplace and demand production of all the relevant documentation as reasonably required, including wage and salary records, in accordance with his functions under the Act.

S.12 of the Payroll Tax Act 1995 requires an employer to make an assessment of the notional remuneration of a deemed employee which represents a fair and equitable valuation of his services to the business. In order to make this assessment, the employer must use financial records that he has retained showing the services of any deemed employee which generate revenue for the business, and allocation of benefits to that employee from the business. A deemed employee is defined in the Act as a partner, shareholder, member of a limited liability company, member of the governing body of an association, members of Senate and the House of Assembly, and a person holding government office in set out in Schedule 2 to the Ministers and Members of the Legislature (Salaries and Pensions) Act 1975.

S.14 of the Taxes Management Act 1976 requires that the employer paying payroll tax keep documents of account and other books, records or documents as are necessary to show compliance with the Taxes Acts (including the Payroll Tax Act 1995). These records must be kept for five (5) years commencing on the last day of the financial year in which any transaction took place. S. 20 of the same Act provides that an assessment (regarding the amount of tax or to further tax to which such person is chargeable) may be made at any time not later than five (5) years after the end of the tax period to which the assessment relates.

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The Tax (Accounts and Records) Regulations 1991 require that the employer keep the records specified in the Schedule and any records reasonably necessary to prove or verify any information contained in any records so specified (Regulation 4). The Schedule (to Regulation 4) provides that employers must keep:

- (1) payroll records setting out the gross salary or wage for each employee, with deductions, and the net salary or wage paid to each employee including bonuses, commissions, allowances, etc.; and
- (2) records of the amounts of all benefits conferred on each employee or deemed employee, the nature of each benefit, and details as to how each of those amounts was calculated.

Records to be kept by self-employed persons and employers of deemed employees for payroll tax are the same but also include financial records as set out in s.12 of the Payroll Tax Act 1995 as mentioned above. Self-employed persons are “deemed employees” and are required to keep records under s.12(3)(e) of that Act and s.1(a) and 1(b) of the above Regulations.

S.13 of the Electronic Transactions Act 1999 states that where certain documents, records or information are required by law to be retained, that requirement is met by the employer (or his agent) retaining electronic records if the information contained in the electronic record is accessible and is retained in the original format with the original information.

S.14 of the same Act provides that in any legal proceedings, nothing in the rules of evidence shall apply as to deny the admissibility of an electronic record in evidence, solely on the ground that it is an electronic record, or if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the ground that it is not in its original form.

Information in the form of an electronic record will be given due evidential weight and in assessing the evidential weight of an electronic record, regard shall be given to the reliability of the manner in which the electronic record was generated, stored or communicated; the reliability of the manner in which the integrity of the information was maintained; the manner in which the originator was identified; and any other relevant factor.

S.3C of the Occupational Safety and Health Act 1982 requires that every employer shall keep documents and data on work processes, material, equipment, working conditions and any

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other documents or data that affect the safety and health of persons at work as the Minister may specify and in such form as the Minister may direct.

Further the Occupational Health and Safety Regulations 2009 require that employers keep records of certain information regarding health and safety in the workplace as follows:

- Every employer is to maintain records and documents required by the Regulations and make them readily available for examination by the Safety and Health Officer and by the safety and health committee in a form prescribed by the Regulations, for a minimum of three (3) years; unless the document relates to an employee, then it shall be maintained for three (3) years or longer if their employment exceeds three years (reg.6).
- A written and signed record by the instructor shall be kept of all training sessions provided for employees which are required by the Regulations, including the name of the instructor and date of training, along with the employees' signatures (reg.8).
- Every health and safety committee (formed under reg.10) shall ensure that accurate records, which must be provided to the employer and posted by the employer, are kept of all matters that come before it, and shall keep minutes of its meetings in a conspicuous place (reg.15).
- Every employer shall keep a record of any minor injury to their employees which they are aware occurred on their premises including a detailed description of their employee, the date, location, severity, cause and treatment of the injury, and preventative or remedial action taken by the employer (reg.27). All injury reports are to be kept for a minimum of ten (10) years; or the duration of an employee's employment, whichever is longer (reg.29).
- Every employer must, no later than March 1 in each year, submit to a Safety and Health Officer a written report setting out the number of accidents, dangerous occurrences and minor injuries that were reported or recorded by an employer during the 12 month period ending on December 31 of the preceding year (reg.30).
- Every employer must keep a record of every emergency evacuation from their place of employment for a period of three (3) years from the date of the evacuation (reg.87).
- A record of all instruction and training given to emergency officers and monitors in their responsibilities in reference to emergencies must be kept in the place of employment for three (3) years from the date of instruction (reg.89).

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- The employer must keep a record of each meeting held between emergency officers and monitors and employees requiring special assistance and of any evacuation or emergency drill that is conducted for the employees for a period of three (3) years from the date of the meeting or drill (reg.91).
  - Every employer shall establish and maintain a record of all hazardous substances that are used, produced, handled or stored in a place of employment which must be readily available in the place of employment for examination by parties permitted under the Regulations (reg.143).
  - Where there is a risk that the concentration of an airborne chemical agent may exceed the allowed amount, tests shall be carried out and a record of each test conducted shall be kept by the employer for a period of three (3) years after the date of the test; these test records shall include date, location, descriptions of hazardous materials tested, the methods and results of those tests, and the name and occupation of the employee who conducted the tests (reg.151).
  - Every employer shall ensure that a record is kept of all inspections, tests, maintenance and modifications carried out on machinery and tools used at their place of employment (reg.162).
  - The employer must also ensure that every operator of materials handling equipment has been instructed and trained by a qualified person in the procedures to be followed for its inspection, fuelling (if applicable) and safe and proper use, and the employer must keep a record of any instruction or training given to an operator of materials handling equipment for as long as the operator remains in the employ of the employer (reg.201).

The Health Insurance (Inspection of Records) Regulations 1971 direct employers to maintain employment and wage records relating to all employees that contain specified information, as stipulated in the Act (reg.4). Government inspectors have the authority to enter an employer's premises to examine these records and make inquiries to ensure that the requirements of the Act are being met (reg.3).

In accordance with the National Pension Scheme (Occupational Pensions) Act 1998, employers must establish and maintain a pension plan for their Bermudian employees and spouse-of-Bermudian employees. They are further required to provide the administrator of the pension plan with any information that is needed in order to comply with the terms of the plan, the Act, or its regulations.

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S.16 of the same Act specifies that where employers are the administrator of their employee's pension plan, they must keep and maintain specified records pertaining to the plan, as prescribed by the Act and its Regulations.

Similarly, regulation 16 of the National Pension Scheme (General) Regulations 1999 requires employers who assume the responsibility of administrators to make information relating to their pensions available on request to persons for whom the information is specifically applicable.

S.14F of the HRA 1981 stipulates that the Human Rights Commission may require employers to furnish such information about employees and applicants for employment as the Commission may reasonably require in order to discharge its functions of seeking to eliminate discrimination.

#### **VIII. PRIVACY**

There is no general right to privacy under Bermuda law.

There is no Bermuda equivalent of Article 8 of the European Convention on Human Rights which provides that everyone has the right to respect for his private and family life, his home, and his correspondence. The Court of Appeal for Bermuda has noted that although the Convention was extended to Bermuda by the United Kingdom, no domestic legislation has been passed to specifically implement the Convention in Bermuda to make it directly enforceable by the Bermuda courts. Therefore, the force of law to be applied by the Bermuda courts is the Bermuda Constitution Order 1968, and not the Convention. However the courts will construe Bermuda legislation and the Constitution consistently with European Court of Human Rights case law as much as possible.

With respect to privacy, s.7 of the Bermuda Constitution Order 1968 only goes so far as to provide protection against unlawful searches and trespass. The section makes it unlawful to search persons or their property or to enter onto their premises without their consent. There



are various public interest exceptions to these protections, which are set out in s.7, and which must be shown to be reasonably justifiable in a democratic society.

The right to prevent the disclosure of information received in confidence is considered a reasonable restriction on the fundamental right of freedom of expression, save insofar as this can be shown not to be reasonably justifiable in a democratic society (s.9 of the Bermuda Constitution Order 1968).

In addition to these constitutional rights, s.61 of the Telecommunications Act 1986 provides that privacy of communication shall be inviolable except under certain circumstances (see below). S.62 of the Act allows the Governor, by warrant, to direct that telecommunication messages shall be intercepted, detained, or disclosed to the Governor, or prohibited altogether from being transmitted, where the interests of defence, public safety, public order, or public morality so require.

In addition, s.3 of the Computer Misuse Act 1996 makes it an offence for a person to take action with the intent of securing access to any program or data held in any computer under circumstances where he knows that such access is unauthorised.

See also Section VII.C on Personnel records.

#### *A. Drug Testing*

Although the possession and use of prohibited drugs in Bermuda is a criminal offence, there are no laws that allow employers to conduct involuntary drug tests on job applicants or employees. Some private employers provide for drug testing as a mandatory condition of employment and it is up to the employees whether they wish to contractually bind themselves to this condition of employment (if they refuse, then they will not be hired or may be dismissed if they fail drug tests during their employment). Employment policies that are contractually agreed to by the employee may provide for drug testing for cause or random drug testing. Usually this will be in industries where job safety is a feature of the employment position (e.g., persons operating construction machinery or medical professionals).

### *B. Personnel Records and Information*

See above Section VII.G (Record-keeping).

Effective, April 1<sup>st</sup>, 2015 Bermuda implemented for the first time data protection legislation, the Public Access to Information Act 2010 (“PATI 2010”). The Act enables the public to request production of information from publicly funded bodies. An Independent Commissioner has been appointed to hear appeals when requests are refused. The legislation is designed to “lift the veil” around government records, whilst protecting information protected by legal professional privilege and matters of national security.

### *C. Off-Duty Conduct*

Employers cannot dismiss an employee for engaging in even serious misconduct out of the workplace unless the misconduct is directly related to the employment relationship or has a detrimental effect on the employer’s business such that it would be unreasonable to expect the employer to continue the employment relationship (s.25 EA 2000).

### *D. Medical Information*

There are no specific laws currently in force requiring employers to establish procedures that would protect medical information about employees from being disclosed, although this would be expected of employers as a matter of good practice. However, the Personal Information Protection Act 2016 (“PIPA 2016”), the main part of which is expected to come into force in 2018, is aimed at protecting individuals’ personal information and controlling the way organizations may use that information.

In addition, the Public Access to Information Act 2010 (“PATI 2010”) came into force on April 1<sup>st</sup>, 2015 and allows members of the public to request information from a public authority, increasing transparency and accountability.

### *E. Searches*

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S.7 of the Bermuda Constitution Order 1968 protects persons from unlawful searches. There are, however, various public interest exceptions to this protection, which are set out in s.7 and which must be shown to be reasonably justifiable in a democratic society.

There are no specific laws addressing the employer's right to search employee property brought on to company premises. If the employer wishes to avail itself of this right (for example, as part of its drug policy) the employer should disseminate a clearly written policy allowing the employer to search such property on the work premises at his discretion and that the employee must comply with such policy as a condition of his employment.

*F. Lie Detector Test*

There are no laws that allow employers to require applicants or employees to take lie detector tests as a condition of employment or continued employment.

*G. Fingerprints*

There are no laws allowing Bermuda employers to require applicants or employees to furnish fingerprints.

*H. Social Security Numbers*

Bermuda does not have a social security system similar to the United States. Employees are assigned a social insurance (government pension) number and make contributions out of their salary during the life of their employment. Upon retirement, they receive a Bermuda government pension in certain specified circumstances. Upon becoming disabled, they may also become entitled to a Government disability benefit in certain defined circumstances.

*I. Surveillance and Monitoring*

S.61 of the Telecommunications Act 1986 makes it an offence for any person to tap any wire, cable, or optical fibre, or to use a device to secretly overhear, intercept, or record such signals. The section also prohibits persons from knowingly possessing, replaying, transcribing, or

communicating the contents of any records of such prohibited communications. Such communications are not admissible in evidence.

Exceptions are made in the case of police officers investigating telecommunications offences and also in the case of the Governor where he is satisfied that the interests of defence, public safety, public order or public morality so require.

There are no specific laws that protect an employee's right to privacy with respect to his employer. The issue often arises in the context of employees' use of the Internet or electronic mail system while at work. If the employer wishes to have the right to monitor the use and review the content of such communications in his discretion, he, should state this clearly in written policies disseminated to all employees who are made aware that they must comply with such policies as a condition of their employment.

#### **IX. EMPLOYEE INJURIES/WORKERS' COMPENSATION**

The Workers' Compensation Act 1965 provides for compensation to be paid by the employer to workers who suffer personal injuries by accident arising out of and in the course of the employment (whether partially or totally incapacitated), or who suffer fatal injuries or occupational disease which is due to the nature of their employment. The scheme is supervised by the Ministry of Home Affairs, although rights under the Act can be determined and enforced by the Supreme Court. The parties to an employment contract are not permitted to opt out of the provisions of the Act.

Compensation is not payable under the Act in respect of any injury which does not incapacitate the worker for a period of at least three (3) consecutive days from earning full wages, or if the injury is attributable to the serious and wilful misconduct of that worker, provided that where the injury results in death or serious and permanent incapacity, the court on a consideration of all the circumstances may award the compensation provided for by the Act or such part thereof as it shall think fit. The employee and employer may agree in the employment contract to a different amount of workers' compensation payable, provided it is equal to or exceeds the amount payable under the Act; such agreement may be made an order of the court.

Where temporary incapacity (whether total or partial) results from the injury, the normal compensation ordered is a weekly payment of half the difference between the weekly earnings which the worker was earning at the time of the accident and the weekly earnings which he is earning or is capable of earning in some suitable employment or business after the accident, capped at a maximum of \$170 compensation per week. Higher sums are payable in the event of permanent partial or total incapacity as set out in the act.

If the employee's injury was caused by the negligence or wilful act of the employer, the employee may bring an action in court and seek Workers' Compensation at the same time; if liability is not established in court, the court may still award Workers' Compensation and deduct costs as necessary for the other action. Given the relatively low sums that are paid out under the Workers' Compensation legislation, injured employees will fare better if they pursue regular court action, assuming they can prove the relevant breach of duty on the part of the employer and have the resources to do so.

No compensation is payable under the Act in respect of any incapacity or death resulting from a deliberate self-injury, or from personal injury, if the worker has at any time represented in writing to the employer that he was not suffering or had not previously suffered from that or a similar injury, whilst knowing that the representation was false.

If a deceased worker leaves any dependants wholly dependent on his earnings, the amount of compensation payable is the "actual earnings" of the deceased in the three (3) years prior to the incident, or the average of national per capita income over three (3) years. If the deceased worker leaves any dependants who were only partly dependent on the deceased, the amount of compensation must be proportional and reasonable to the injury, not exceeding what would be due if they were wholly dependant, as determined by the courts. If the deceased worker leaves no dependants, the reasonable expenses of the burial of the deceased worker not exceeding the sum of \$2,000 and the reasonable expenses of medical attention must be paid by the employer.

There is no specific statutory protection preventing employees against being fired for filing workers' compensation claims.

## X. UNEMPLOYMENT

Bermuda does not have an unemployment benefits system. Some years ago, the then Government of Bermuda considered establishing an Unemployment Insurance (“UI”) Scheme in order to provide financial security to workers faced with involuntary employment, but such scheme has never been implemented.

However, Bermuda does have a Department of Financial Assistance which is mandated to ensure that individuals with insufficient financial resources are assisted in order to maintain a minimum standard of living. The Director of Financial Assistance has the power to grant assistance awards under the Financial Assistance Act 2001 in accordance with the Financial Assistance Regulations 2004.

Section 6 of the Financial Assistance Act 2001 describes a person who is qualified to apply for an award as one who possesses Bermudian status, or who is the spouse of Bermudian status holder and has co-habited in Bermuda with that person for a period not less than three (3) years, or who is the guardian of a dependant who possesses Bermudian status and who is not serving a sentence of imprisonment. In order to eligible for an award, regulation 3 specifies that the allowable expenses of the household (head of the house and all those who reside with him in his home) must exceed the qualifying income of the household, and the value of the investments and assets of the household must not exceed \$500.

Regulation 4A(2) requires that if an application is made due to the termination of an applicant’s employment, payment of an award of financial assistance may not commence until three (3) months after the date of termination. “Termination” of an applicant’s employment means either termination for cause or resignation, but does not include termination due to circumstances which are the basis of a complaint brought by the applicant under the Human Rights Act 1981.

Regulation 4A(4) indicates that if an application is made due to the termination of an applicant’s employment for reasons of redundancy, and the applicant receives a redundancy payment, payment of an award of financial assistance may not commence until the end of the

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period which is determined by the Director as a reasonable period for him to meet all of his financial needs from that redundancy payment.

## **XI. HEALTH & SAFETY AND UNIONS – INDUSTRIAL RELATIONS**

### *A. Health and Safety*

The Occupational Safety and Health Act 1982 imposes a scheme of general duties on all employers to provide basic safety at work and minimum health standards for places of employment. The employer must ensure that there are safe systems of work, safe systems for handling dangerous or hazardous substances, and training and supervision for safety.

Employers also have a general duty to: (1) conduct business in such a way that third parties are not exposed to health or safety risks; (2) provide information to employees regarding the general policies on health and safety matters, and (3) carry out those policies. In turn, employees are obliged to take reasonable care to protect their own health, as well as the health of others at the workplace.

All of these duties are general in the way they are expressed and how they apply to a wide variety of business situations and work conditions. The Act provides for regulations and codes of practice to be implemented, taking into account different types of working environments (e.g. offices, factories, warehouses, hotels, and construction sites all have their own special health and safety issues).

Most working environments are covered by the Occupational Safety and Health Regulations 2009. Specifically, the workplace must provide adequate ventilation, lighting, and sanitary facilities, it must be clean, and it must ensure the safe operation of equipment and machinery, in addition to other safety duties. First aid facilities must be provided and a sufficient number of staff must be familiar with, or have had basic training in, administering first aid techniques. Fire extinguishment equipment, emergency exits, and training are to be provided by all employers, and fire drills should be a regular occurrence. All employers must establish a health and safety committee of employees and post their responsibilities on each floor or in common work areas.

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The Regulations are enforced by inspectors who have the authority to enter premises, take samples, run tests, require the production of documents, etc. If there is a contravention of the Act or Regulations, the inspector can require the employer to remedy the contravention or order the activity stopped if it appears likely to involve a risk of serious injury. The Minister has authority to close a worksite or work premises if he believes that doing otherwise poses a danger to the health and safety of employees.

If a breach of the Regulations causes damage, the person who suffers the damage can bring an action in court against the offending party.

The Regulations further mandate that employers notify the Government Safety and Health Officer of any accidents or dangerous occurrences at the worksite that result in the death of or major injury to an employee within 24 hours of its occurrence. In addition, employers must keep detailed written records of all workplace accidents for at least ten (10) years. A breach of these duties can result in criminal penalties being imposed.

### *B. Unions*

The Trade Union Act 1965 establishes the basis of the legal existence and purposes of trade unions, their registration, their power to bring and defend actions, their duty to keep accounts, and provides for their general legal capacity to act in their own right. Every trade union must be registered and must establish rules setting forth the purposes for which it was established, the appointment and removal of trustees and officers, its investment of funds, audit of accounts, and the like. The rules must also provide for a secret ballot for the election of officers and govern the issue of a strike or lockout action.

The Act gives every worker the right to belong or not to belong to a trade union and for union members to take part in trade union activities and run for union office. It is a criminal offence for an employer to seek to prevent or deter a worker from exercising these rights.

Trade union contracts are not enforceable in court with respect to the breach of certain agreements, specifically: (1) any agreement concerning the conditions on which members shall sell goods, transact business, employ, or be employed; and (2) any collective agreement between a trade union and an employer or group of employers.



Trade unions are not liable in tort except with respect to tortious acts committed by or on behalf of a union in contemplation of a labour dispute.

Employment rights may be modified where there is an agency shop in force – i.e., where the terms and conditions of employment require employees to be members of a union or pay contributions to a union in lieu of membership or, alternatively, to a charity of their choice. More specifically, an employer that is required to set up an agency shop, based on the results of a ballot, is entitled by law to discriminate against workers who refuse to comply with the agency shop agreement. The trade union has a right to apply to the court to enforce the agency shop.

The Trade Union Act 1965 was amended in 1998 to add provisions regulating the bargaining rights of trade unions and the certification and decertification of unions to act as exclusive bargaining agents on behalf of appropriate bargaining units. Previously, the employer had to voluntarily agree to formally recognize the union as the employees' bargaining agent, even where the majority of employees wished for the union to represent them. The 1998 Amendment Act has the effect of requiring employers to certify the union as the bargaining agent where the requisite number of employees votes in favour of such action (over 50% of those participating in the ballot). There are penalties stipulated for attempts by employers or unions to influence the outcome of the vote. The statutory procedure for a ballot by the members of the appropriate bargaining unit to cancel the union's certification is also prescribed by the Act.

The Labour Relations Act 1975 sets out the basic right of union members to participate in a peaceful picket or demonstration at a place of employment for the purpose of peacefully obtaining or communicating information, or for persuading any person to work or abstain from work. Picketing must be in contemplation or furtherance of a labour dispute and in accordance with the picketing rules. Intimidation and harassment are not permitted, and may result in a conviction and fine or imprisonment.

The 1975 Act aims to ensure that all labour disputes are referred to the Director of Workforce Development for conciliation and settlement. If the Director is unable to achieve settlement, he may refer the matter to the Minister of Labour. If both parties consent, the Minister may, in

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turn, refer the dispute to arbitration before the Permanent Arbitration Panel. The Minister also has the authority to appoint a board of inquiry to look into a labour dispute and to publish a report of its findings.

Actions taken in furtherance of a labour dispute that induce a breach of contract of employment or interfere with a trade or business are immune from civil action, provided they otherwise comply with the Act.

A strike is lawful when it complies with the requirements of the Labour Relations Act 1975, namely when it is conducted by members of a trade union in a manner that complies with the picketing rules, and it relates to a trade or industry in which there is a bona fide labour dispute. A strike is unlawful if it is for any purpose other than furthering a bona fide labour dispute, or is intended to coerce the government or inflict hardship upon the community.

Pursuant to the Labour Relations Act 1975 a strike/lockout that would otherwise be lawful for an ordinary trade or industry is unlawful for an “*essential service*” industry unless, a report of the labour dispute and the proper 21-day notice of the intended strike/lock-out have been given to the Director of Workforce Development. The “essential services” are listed in the First Schedule to the Act comprising 17 categories of industry. If the Minister of Labour refers the dispute to the Permanent Arbitration Panel, the strike/lockout notice is suspended pending determination of the dispute by the Panel. The decision by the Permanent Arbitration Panel is final and binding upon the parties.

The Labour Relations Act 1975 further establishes an Essential Industries Disputes Settlement Board to adjudicate labour disputes in “*essential industries*”. The only current Essential Industry as defined by the Fourth Schedule to the Act is the hotel industry. The Act also empowers the Minister of Labour (if he has been unable to achieve a settlement) to submit the dispute directly to the Board irrespective of the parties’ wishes or the procedures agreed to or set forth in a contract or collective agreement. The Board’s work is an immediate priority and, where practicable, the Board must deliver a decision within 21 days from the date of reference. The Board’s decision is conclusive and binding on the parties.

The court has statutory power to grant temporary or permanent injunctions to restrain actual or anticipated breaches of the Labour Relations Act 1975, and proceedings may be brought

immediately whenever any person has a sufficient interest in the relief sought. A sufficient interest includes any person whose property or business is or is likely to be injured by the breach of the Act or whose premises are being picketed.

Pursuant to the Labour Disputes Act 1992, which applies to labour disputes in trades or industries, the Minister of Labour may declare by public notice that such a dispute exists or is apprehended in a trade or industry and may appoint a Labour Disputes Tribunal to inquire into it and make a decision and/or award which is conclusive and binding. Once the Minister's notice is published, continuance of any relevant strike or lockout becomes unlawful.

### *C. Limitation Periods Affecting Employers*

There are various statutes of limitations that apply to employers in Bermuda.

S.4 of the Limitation Act 1984 limits the time in which actions in tort can be made to six (6) years from the date on which the cause of action accrued (e.g. the date of breach of the employer's duty at common law or his breach of statutory duty). It is recommended that employment records for employees be kept for a minimum of six (6) years to cover the prescribed time limits in which actions may be brought.

S.7 of the Limitation Act 1984 limits the time for which a breach of contract claim can be made to six (6) years from the date when the cause of action accrued (i.e. six (6) years from the breach), (for e.g. common law wrongful dismissal or breach of a term in a contract of employment). It is recommended that employment records for employees be kept for a minimum of six (6) years to cover the prescribed time limits in which actions may be brought.

S.9 of the Limitation Act 1984 limits the time to bring an action to enforce an arbitration award (where not under seal) to twenty (20) years from the date on which the cause of action accrued.

S.12 of the Limitation Act 1984 limits the time to bring a personal injury action to six (6) years from the date on which the cause of action accrued or the date of knowledge (if later) of

the person injured (e.g. asbestos claim for contaminated employer's premises can be much later). The limit can be extended in certain circumstances.

S.12 also limits the time to bring an action in the case of death (Survival of Actions Act 1949) to three (3) years from the date of death or the date of the estate representative's knowledge, whichever is later (which can also be extended in certain circumstances). It is important to note, however, that s.4 of the Survival of Actions Act 1949 specifies that an action in tort against the estate must be brought within twelve (12) months of the death assuming the cause of action arose not earlier than six (6) months before death.

S.13 of the Limitation Act 1984 limits actions brought under the Fatal Injuries (Actions for Damages) Act 1949 to three (3) years from the date of death or the date of knowledge of the person for whose benefit the action is brought. The time limit under this section can also be extended in certain circumstances.

S.26 of the Limitation Act 1984 limits the time in which one can bring an action to enforce a judgment to 20 years from the date on which the judgment became enforceable. Further to this, no arrears of interest in respect of any judgment may be recovered after the expiration of six (6) years from the date on which interest became due.

In all cases of fraud by the defendant or deliberate concealment by the defendant or mistake, time is extended and begins to run when the plaintiff has discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it.

S.36 of the Employment Act 2000 provides an employee with three (3) months (from the date of breach) to make a complaint to the inspector that the employer has failed to comply with any provision in the Act (eg. unfair dismissal under the Act, failure to pay redundancy pay, failure to grant paid leave, etc.)

S.14H of the Human Rights Act 1981 stipulates that a complaint must be made within six (6) months after an alleged contravention of the Act takes place. This time limit can be extended up to two (2) years if there are good reasons for the delay and if neither party will be prejudiced by the delay (eg. employer discriminated in hiring, demoting, firing, etc. or failed to provide workplace free of sexual harassment).

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The Workers' Compensation Act 1965 provides for compensation for an employee in the event of death or personal injury or occupational disease arising during the course of employment. Section 12 provides that notice of an accident at work must be given by the employee as soon as practicable after the accident happened, and a claim for compensation must be made within twenty-six (26) weeks from the date of the accident causing injury or from the date of death, but, can be extended in certain circumstances for up to three (3) years.

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Canterbury Law Limited is the exclusive Bermuda member of the Employment Law Alliance and can access the Handbook on employment laws of other overseas jurisdictions all around the world at your request. For further information regarding labour and employment law in Bermuda, please contact:

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