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# EMPLOYMENT LAW OVERVIEW **ROMANIA** 2019-2020

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# I. GENERAL OVERVIEW

## 1. INTRODUCTION

Romanian Employment Law is the product of constant changes made over the last years in order to establish equilibrium between the power of union organisations and the power of the employers. This has proven a hard task. As a result, Romanian legislation has both pro-employee regulations, being one of few that establishes the mandatory reinstatement of wrongfully dismissed employees, allowing the union federations to participate in collective negotiations at the company level, as well as pro-employer regulations limiting the right to strike for employees under collective agreements.

## 2. KEY POINTS

- Most disputes involve financial claims from employees that usually include overtime payment, granting of working conditions, bonuses, etc. Employers often face collective actions from employees regarding these financial claims. Unions usually start such collective actions.
- Unions must represent 50%+1 of the employees in one company in order to be representative and part of a collective agreement. In order to still make the collective negotiations accessible to unions, the law allows union federations to participate in company level collective negotiations if they represent 7% of the employees in the industry sector.
- Employers have the right to regulate working hours, but special legal provisions limit this right.
- Great importance is given to the form of the documents drafted by the employer. Court cases usually involve verifying the form of the documents, and a vast number of rulings are based exclusively on this aspect.
- Strict regulations apply to individual and collective dismissals. In case of unlawful dismissal, the employee has the right to reinstatement and is granted all financial rights for the entire period in which he was unlawfully dismissed. Dismissed employees will often sue for unlawful dismissal.

## 3. LEGAL FRAMEWORK

Employment law in Romania is mainly based on the following sources:

- The Constitution;
- European legal instruments: EU Law (including Treaties provisions, EU regulations and Directives and the Case-law of the European Court of justice) and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Regulations of the International Labour Organization;
- The Labour Code;
- Laws and Government decisions, especially Law nr. 62/2011 regarding the social dialogue, Law no. 263/2010 on public pension system, Law no. 319/2006 on health and safety at the workplace etc.;
- Case law: The provisions of the Labour Code can be interpreted through generally applicable and mandatory decisions of the Supreme Court (High Court of Cassation and Justice);
- Interpretative decisions of the Constitutional Court which are mandatory and generally applicable;
- Collective Labour Agreements;
- Individual Employment Contracts.

## 4. NEW DEVELOPMENTS

Lately there have been a number of changes in the interpretation of employment law related legal provisions as a result of decisions taken by the High Court of Cassation and Justice, which issued rulings on working conditions, physical health and psychical unfitness, limiting the potential discrimination risk of specific legal provisions, etc. The Constitutional Court, which stated that the suspension of the individual employment agreement is a violation of the constitutional guaranteed right to work, or that union leaders can be dismissed for reasons unrelated to their union activity. Also, as a result of introducing a legal definition for moral harassment, employees have started to file cases on such grounds (prior to 2015 there had been only a few cases on moral harassment), with the national courts granting moral damages to employees more often. Working hours and overtime are still important issues that are debated in courts.

# II. PRE-EMPLOYMENT CONSIDERATIONS

## 1. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

In order to hire an employee under Romanian law, the employer has to have a national legal entity. Employees of foreign companies can perform work in Romania based on their existing employment agreement, or can be dispatched to a Romanian company.

## 2. LIMITATIONS ON BACKGROUND CHECKS

For certain positions (such as technical ones) an authorisation (from a national authority), a degree or a certificate may be required. Individuals that do not hold the required authorisation, degree or certificate cannot be employed. Medical approval for the potential employee is mandatory, prior to commencing employment and the absence of such approval can lead to the annulment of the employment contract.

Individuals can be employed starting at the age of 16 (15 with parental consent and only for jobs that are appropriate for an individual development). Individuals under the age of 15 cannot be employed.

Private companies cannot conduct background checks, other than requiring information from the candidate and recommendations from previous employers. They can however, ask the candidate to present a criminal record issued by the competent authorities. The employer has to ask the candidate for a medical certificate that ascertains that the

candidate is medically fit to be employed, since his medical fitness prior to the signing of the agreement is an issue of the employment agreement's validity.

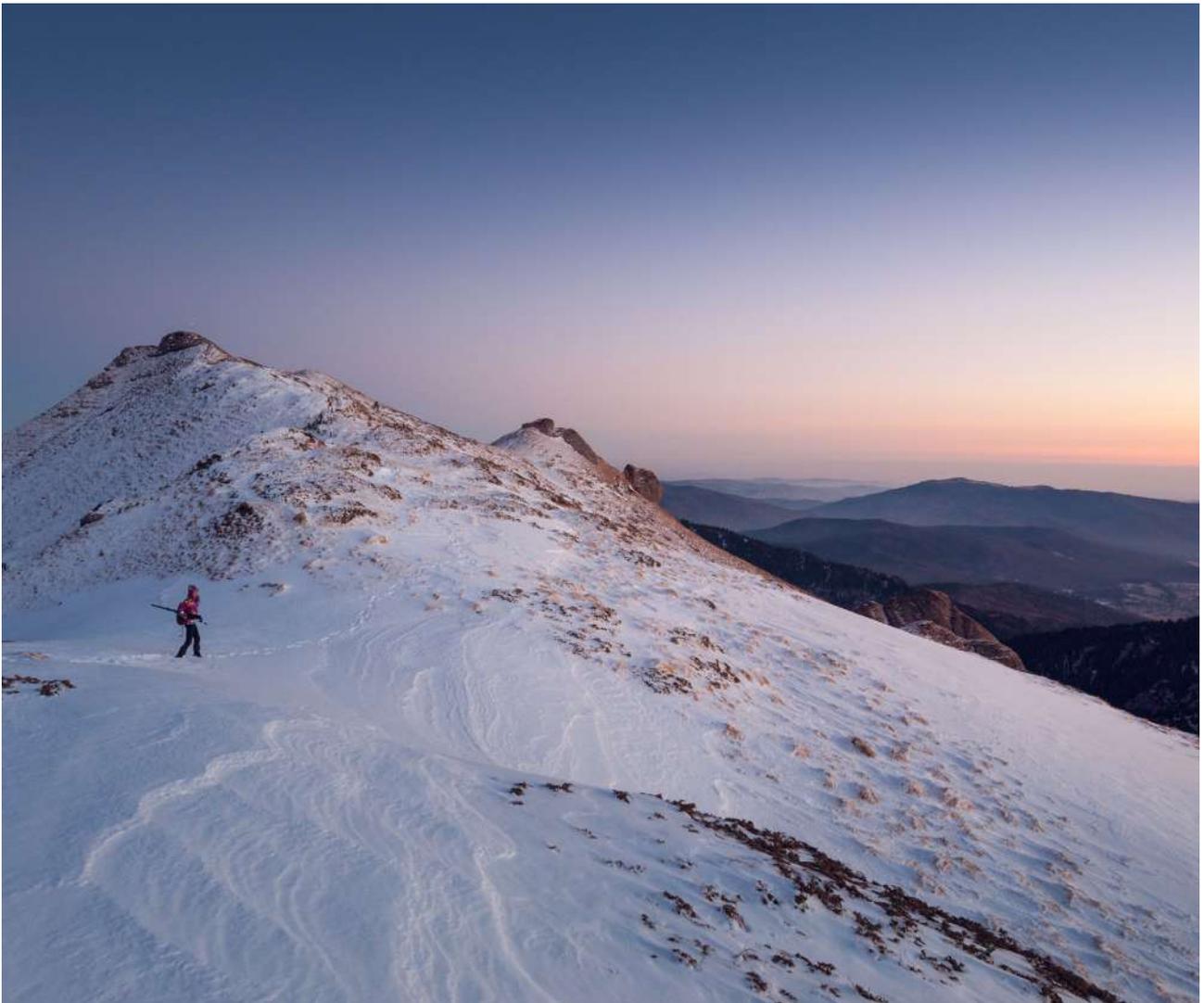
Public companies and public institutions can ask the candidate to present proof of not belonging to a political party, a proof of not being a former collaborator of the communist political police ("Securitate"), fiscal information and other specific information that is relevant to the public company or institution.

## 3. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

There are limited legal provisions on hiring practices in Romania. The Labour Code states only that the employee has to be informed on the essential clauses of the individual employment agreement during the hiring procedure. Recognised companies usually implement good practices in hiring personnel and use human resources specialists in order to select potential hires. Private companies can organise a theoretical and/or practical contest in order to select their employees. As a rule, public institutions and companies have to organise such contests in order to select the employees.

Usually vacant positions that are to be filled by hiring new personnel are advertised in media and/or on specialised on-line sites with general access. For public institutions there are specific rules on publishing the available jobs on their own website and in the Official Bulletin (local or national editions)). The employer can ask for a CV and select only some of the candidates to meet with. Job interviews are held either face-to-face, over the phone, or using live video messaging technology.

There are no rules or express limitations on what questions the employer can ask the candidate, but it is generally accepted that the questions not be too personal. Also during the hiring process the employer has to pay attention not to discriminate any category of candidates. To this end, the questions that are asked should not refer to matters that are grounds for discrimination. However these are not expressly stated rules and there is no case law regarding the hiring process other than regarding the results received at the contest organised by the employer.



# III. EMPLOYMENT CONTRACTS

## 1. MINIMUM REQUIREMENTS

As a rule, the individual employment contract is an unlimited term contract. However, the individual employment contract may also be fixed term or part time.

According to the Romanian Labour Code, any kind of individual employment contract must be concluded in writing, in the Romanian language and on the basis of both parties' consent (employer and employee). Before the beginning of the employment relationship, the employer has the obligation to conclude the individual employment contract and register it with the employees' electronic program (ReviSal).

Prior to the conclusion or amendment of the individual employment contract, the employer has the obligation to inform the person selected for employment or the employee, about the essential clauses to be introduced in the contract or to be amended.

A medical certificate upon hiring an applicant represents a mandatory requirement for concluding an individual employment contract, in order to determine whether the applicant is fit for the job. In case the medical certificate is missing, the contract is null and void.

The individual employment contract shall be concluded after the employer performs a preliminary check of the personal and professional abilities of the applicant. Information about the work performed and the duration of the work, from the former employer may be requested only after having first informed the applicant.

The individual employment contract must contain the following provisions:

- the identity of the parties;
- the place of work;
- the headquarters or domicile of the employer;
- the position/occupation according to the Romanian Classification of Occupations or other regulatory documents and the job description;
- the professional activity evaluation criteria applied by the employer;
- the job-specific risks;
- the employment start date;
- the expiration date, in the case of a limited duration or temporary employment contract;
- the annual entitlement to paid holiday leave;
- the conditions and the length of the notice period (both dismissal and resignation);
- the compensation and the payment frequency;
- the working time, expressed in hours per day and hours per week;
- the reference to the collective Labour agreement governing the working conditions of the employee;
- the length of the probationary period.

Besides the essential clauses, the parties may also negotiate and include other specific clauses in the individual employment contract, such as: a) professional training; b) non-compete clause; c) mobility clause; d) confidentiality clause.

In addition to the general requirements, part-time contracts must state the following: a) the working time and the working schedule; b) cases when the working schedule may be amended; c) overtime work prohibition, except for acts of God or other urgent works intended to prevent the accidents or to remove their consequences.

The fixed term contracts may be concluded only for the limited cases provided by the Labour Code and must contain the general imperative information plus the duration of the contract.

## 2. FIXED-TERM/OPEN-ENDED CONTRACTS

Open-ended contracts are the rule under Romanian law. The fixed term contracts may be concluded only for the limited cases provided by the Labour Code and must contain the general imperative information plus the duration of the contract.

The Labour Code states that the same two parties cannot sign more than 3 consecutive fixed-term contracts. Also the fixed-term contracts and any extensions cannot exceed a period of 36 months. After this period the contract is to be considered an open-ended contract.

## 3. TRIAL PERIOD

Employment contracts - concluded both for a fixed or open-ended term, may contain a probationary period clause.

In order to verify the skills of the employee, the parties may agree upon a probationary period, mentioned within the individual employment contract, of a maximum 90 calendar days for standard positions and a maximum 120 calendar days for managerial positions. With respect to disabled persons, the probationary period will be of a maximum 30 calendar days.

During or before the end of the probationary period, the individual employment contract may cease based on written notification, without motivation or prior notice, due to the initiative of the employer or employee.

## 4. NOTICE PERIOD

The individual employment contract may be terminated by the employer or by the employee. In case the contract terminates due to the employer's decision, with the exception of 1) dismissal for disciplinary reasons or 2) if the employee is arrested for more than 30 days, the employee is entitled to a notice period of no less than 20 working days.

In case the contract terminates due to the employee's decision to resign, he has the obligation to respect a notice period of 1) no more than 20

working days for standard positions and 2) no more than 45 working days for managerial positions. The employer has the right to waive the notice period and to agree to terminate the contract due to the employee's will, at any moment before the end of the notice period.

# IV. WORKING CONDITIONS

## 1. MINIMUM WORKING CONDITIONS

Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have certain minimum rights granted by the law and the parties' negotiation cannot stipulate conditions or rights below the legal minimum provisions. Any contractual clauses that are meant to establish rights below the minimum ones are null. The minimum working conditions and rights are set forth in the Romanian Labour Code and the Collective Agreements, if applicable (in Romania the conclusion of a collective labour agreement is not mandatory).

## 2. SALARY

As of January 1st, 2018, the minimum gross monthly wage is LEI 1900.00 (about EUR 410.00 and US \$479.00) for a 168-hour work month. Employers cannot pay a full-time employee less than the minimum gross monthly wage. Special provisions apply to public servants (there are public servants categories that are paid less than the minimum gross monthly wage).

The negotiation of the monthly wage is individual, as a rule. However, some collective agreements include a salary scale that applies to different categories of employees (as a minimum, employees being able to individually negotiate a higher wage). For public servants there are salary scales that are provided by law. Also, for public companies there are salary caps that apply usually to the management of the public company.

Employees can be granted other benefits, financial or otherwise, such as the use of company car, the

use of other company owned property (housing, telephones, laptops etc.), insurances other than the mandatory ones. Fiscal treatment of each benefit is to be determined according to the Fiscal Code (some of the benefits are exempted of all fiscal taxes, some are exempted of some of the fiscal taxes and some are considered to be part of the monthly wage).

## 3. MAXIMUM WORKING WEEK

The maximum average working time is established by the Labour Code and consists of 40 hours per week and 8 hours per day. Maximum legal working time is 48 hours per week, including overtime hours.

By exception, the maximum working legal time, including overtime may be extended over 48 hours per week, under the condition that the average working hours calculated for a 4 month period, will not exceed 48 hours per week. For certain activities, the parties (the social partners, employees' representatives and employers' representatives) may negotiate a period of more than 4 months, but not longer than 12 months.

## 4. OVERTIME

Overtime work is permitted only upon the employer's special demand and the employee's agreement, except for cases of acts of God or other urgent works intended to prevent or to eliminate the consequences of an accident.

Overtime shall be compensated by paid off hours during the next 60 days. If compensation is not possible within the 60 days mentioned above, the overtime shall be paid to the employee by adding

a bonus to the salary. The overtime addition will be established by negotiation through the collective labour agreement or individual employment contract and it cannot be lower than 75% of the base salary. Special regulations regarding working hours make the Romanian legislation stricter than the European one.

Employees who are not 18 years old are prohibited from overtime work. The employee's total working hours for one month, including overtime is recorded in writing on the pay slip.

## 5. HEALTH AND SAFETY IN THE WORKPLACE

### A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The employer has to ensure the health and safety of the employees in all work related aspects. The employer is responsible for the health and safety of the employees even when using external dedicated services. With regards to the measures to be implemented for the health and safety of their employees, employers should bear in mind that there exists a series of principles aimed at preventing health and safety issues, such as avoiding risks, evaluating the risks that cannot be avoided, adapting the work to the individual, especially when designing the workplace and when choosing the equipment, as well as work methods and training for employees. At every employer's level, a health and safety committee has to be organised. Equal numbers of members will represent the employees and the employer within this committee.

### B. COMPLAINT PROCEDURES

Employees can bring health and safety issues to the attention of the employer through their representatives in the health and safety committee, or directly to the individual responsible for the health and safety. Should the employer not take any action based on the employee's complaint, the employee can address the local Labour Inspectorate directly. The local Labour Inspectorate

will conduct periodic inspections of the ways in which the employer complies with the health and safety rules.

### C. PROTECTION FROM RETALIATION

The employer has the obligation to provide a healthy and safe workplace. If a collective agreement is negotiated, provisions on health and safety are to be included in the negotiation and in the resulting contract. General rules that apply to health and safety issues are provided by Law no. 319/2006, but special legal provisions on specific industries can also apply. As we stated, a medical certificate is necessary to conclude the individual employment agreement. Also, periodical medical check-outs are to be performed by a specialised doctor. Health or safety incidents are to be announced to specialised public authorities that can investigate the conditions of such incidents, establish any fault of the employer or the employee and also impose measures to be taken in the future in order for such incidents to be avoided.

# V. ANTI-DISCRIMINATION LAWS

## 1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

Non-discrimination is firstly a constitutional right Article 16 of the Romanian Constitution providing for equality of all citizens before the law and public authorities, without any privilege or discrimination. Anti-discrimination legal provisions are stipulated in Governmental Ordinance (GO) no. 137/2000 on preventing and sanctioning all forms of discrimination and Law no. 202/2002 on the equality of opportunity and treatment between women and men. Anti-discrimination legal provisions targeted to employees are stipulated in the Romanian Labour Code and in Law no. 188/1999 on the Statute of public servants.

## 2. EXTENT OF PROTECTION

GO no. 137/2000 sanctions any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, handicap, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life. Discrimination – being direct or indirect is sanctioned under the same rules.

In employment law related matters special attention has to be paid to discrimination on union affiliation. Also some positive discrimination treatments such as reduced pension age for women, or salary bonuses based on solely the period of service were only recently stopped.

The public authority that handles discrimination is the National Council for Combating Discrimination. An individual claiming to be discriminated against can address the National Council in an administrative procedure, or the competent courts. The NCCD issues administrative rulings that can be challenged in court. In court cases that include discrimination claims (along other claims), the National Council is asked to issue an opinion on the existence of the discrimination. Most of the time the National Council fails to provide an answer in time and judges have the liberty to establish if there is discrimination or not.

Indirect discrimination is defined as any provisions, criteria or practices apparently neutral which may disadvantage certain individuals on grounds of one of the protected groups, except where these practices, criteria and provisions have an objective justification based on a legitimate purpose and the methods used to reach that purpose are adequate and necessary.

Victimization is defined as any adverse treatment triggered by a complaint in general or by a case lodged with the courts of law regarding infringement of the principle of equal treatment and non-discrimination. Protection against victimization is not limited by Romanian law to the complainant but also extends to the witnesses. As the law does not distinguish, victimization is prohibited not only in relation to complaints filed with the NCCD but also in relation to those filed with any other public or private institution (labour inspectorate, consumer protection office etc.).

No legal definition and/or legal provisions on affirmative actions at this time.

As for the sanctions that can be applied in case of discrimination, the NCCD can issue administrative sanctions – administrative warnings and fines, the

courts being the only ones that can award moral compensation. The compensation is not capped by legal provisions, but courts usually award reduced amounts as moral compensation.

### **3. PROTECTIONS AGAINST HARASSMENT**

Harassment in general is defined and sanctioned as any behavior on grounds of race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, belonging to a disadvantaged group, age, handicap, refugee or asylum seeker status or any other criterion, which leads to establishing an intimidating, hostile, degrading or offensive environment.

Moral harassment is defined as of last year as being any improper behavior that takes place over a period, is repetitive or systematic and involves physical behavior, oral or written language, gestures or other intentional acts that could affect personality, dignity or psychological or physical integrity of a person. However few cases on harassment were registered in Romanian courts.

Sexual harassment, which is tied to a working relationship, is a criminal offence. For years this was the only type of harassment recognised by Romanian law. However, only a few cases of sexual harassment have been registered in Romanian courts, even when criminally prosecuted.

### **4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS**

The concept of reasonable accommodation for persons with disabilities is not included in the Romanian Anti-discrimination Law and it is currently defined in the special legislation on the promotion and protection of the rights of persons with disabilities but without any provision for sanctions.

There were no incidents on restriction on the employee's religious practices, such as wearing

distinctive religious objects or working hours. As we stated the Labour Code offers the opportunity to employees of all legally recognised religions to benefit of 2 paid holidays for each of the 3 major religious holidays.

### **5. REMEDIES**

In case of suspicion of discrimination, the employee can seek remedies, as stated, either of administrative nature – filing a complaint to the NCCD, or of civil nature, filing a case directly in front of the national courts. For sexual harassment claims, the employee can address the police or the public prosecutor's office. The employee can ask the NCCD or the court to establish that there is a case of discrimination. Both institutions can order the employer to stop the discriminating treatment and to take measures in order to avoid similar treatment. As stated the NCCD can apply fines to the employer if it finds that there is a case of discrimination. The courts can offer compensation if the employee asks for it and proves that there was a prejudice sustained that can be valued in money.

### **6. OTHER REQUIREMENTS**

There are no quotas legally imposed in order to enforce equal opportunity for female employees. Usually, gender inequality in terms of payment is not a prominent issue; Romania having one of the lowest pay gaps in Europe.

Each employer that employs more than 50 employees has the obligation to either employ individuals, with disabilities or to contribute to a special fund for the inclusion of individuals with disabilities in the workforce.

# VI. SOCIAL MEDIA AND DATA PRIVACY

## 1. RESTRICTIONS IN THE WORKPLACE

### A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

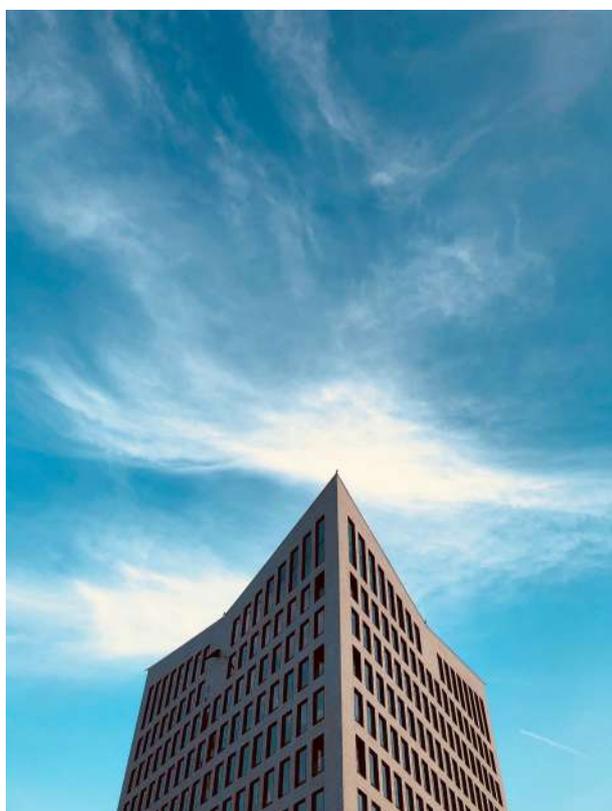
On objective grounds and with the use of clear internal procedures, the employer can restrict the employee's use of Internet and social media during working hours. This restriction applies to the use of the Internet and social media on company provided platforms, including portable devices. A relevant national case that was brought also to the attention of the European Court for Human Rights

confirmed that in the case where the employer has strict, clear and objective rules on the use of the Internet and other programs that require the use of Internet such as instant messaging programs, that the employee acknowledged, the violation of such rules can result in a disciplinary action and even in a disciplinary dismissal (*Barbulescu v. Romania*).

## 2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

If the employee has any confidential information as a result of his position within the company, he cannot divulge such secret with the use of social media. A recent ruling of a national court established that the social media is a public space, even if it has restrictions on access, meaning that any mentions on social media are to be regarded as publicly made. Also as a result of the general principle of conducting the relationship on good faith, the employee should refrain to make public affirmations that could discredit his employer.

Using social media in a manner that may affect the image or even the activity of the employer, may result in disciplinary action against the employee. Also, if the image or the activity of the employer is severely affected, the employer can also claim a financial compensation from the employee. Using confidential information and making it available on social media without authorisation can also lead to the disciplinary sanctioning of the employee, and may be grounds for a financial compensation claim.



# VII. AUTHORISATIONS FOR FOREIGN EMPLOYEES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

In Romania, citizens of the EU or the EEA do not need a work and residence permit. Foreign citizens (who are not EU or EEA citizens) must obtain a work permit in order to perform work. The work permit is issued by the Romanian Office for Immigration. As a rule, the work permit is issued for a one-year period. The number of working permits issued every year is limited and is determined by a government decision. In August 2018, the maximum number of working permits was raised due to the high demand. Non-EU and EEA citizens have the right to work in Romania under certain conditions:

- vacancies cannot be filled by Romanian citizens, citizens of UE/EEA or permanent residents of Romania;
- they fulfill special conditions regarding professional qualifications, experience and authorisation;
- they prove that their state of health complies with the activity they will perform and that they have not been convicted of crimes that are incompatible with the activity they carry out or intend to carry out in Romania;
- they are within the limits of the early contingency approved by government decision;
- the employer has regularly made contributions to the state budget;
- the employer shall effectively perform the activity used to obtain the working permit;
- the employer was never convicted for illegal work.

# VIII. TERMINATION OF EMPLOYMENT CONTRACTS

## 1. GROUNDS FOR TERMINATION

Under Romanian law, the employment contract may terminate de jure, by mutual consent or by notice given by one of the two parties. The grounds for dismissal must be real and serious and there are two types of valid grounds: Objective grounds and Economic grounds.

### A. OBJECTIVE GROUNDS

- the employee has committed a serious or repeated disciplinary offences related to the Labour discipline rules or the rules within the individual employment contract,
- applicable collective labour agreement or rules of procedure, as a disciplinary sanction;
- the employee has been taken into preventive custody for more than 30 days, under the terms of the Code of Criminal Procedure;
- by decision of the competent medical examination bodies, a physical and/or mental inability of the employee is found, not allowing him/her to fulfill the duties corresponding to the position held;
- poor performance or unsatisfactory professional skills.

### B. ECONOMIC GROUNDS

A dismissal for reasons not related to the person of the employee is the termination of the individual employment contract determined by the cancellation of the employee's position, for one or several reasons, which are not connected to the employee's person. The cancellation of the workplace must be effective and have a real and serious cause.

The dismissal for economic grounds may be individual or collective.

## 2. COLLECTIVE DISMISSALS

The collective redundancy is the dismissal, within a timeframe of 30 calendar days, on economic grounds, of:

- at least 10 employees, out of a total of between 20 and 100 employees;
- at least 10% of the employees, out of a total of between 100 and 300 employees;
- at least 30 employees, out of a total of more than 300 employees.

When the employer intends a collective redundancy, it shall initiate, in reasonable time and with a view to reaching an agreement, under the terms provided by the law, consultations with the trade union or, as the case may be, with the representatives of the employees.

During the consultations, the employer provides the trade unions or the employees' representatives with the relevant information related to the redundancy. The employer must forward a copy of the notification to the Territorial Labour Inspectorate and the local public employment office on the same date it has been forwarded to the trade union or, as the case may be, to the representatives of the employees.

The trade union or the representatives of the employees may propose the employer measures to avoid the dismissals or to reduce the number of dismissed employees, within 10 calendar days after receiving the notification. The employer must give a written and grounded answer to the proposals within five calendar days from their reception of the employee's proposals.

When, following the consultations with the trade union or the representatives of the employees, the employer decides to apply the collective redundancy measure, he notifies in writing the Territorial Labour Inspectorate and the local public employment office, at least 30 calendar days before issuing the dismissal decisions.

If, in 45 calendar days since the dismissal date, the activities whose interruption led to the collective redundancy are resumed, the employer must send the dismissed employees a written communication for this purpose and reinstate them in the same workplace as before, without any examination, contest or probationary period. The employees have a deadline of maximum 5 calendar days from the notification of the employer to express their written agreement on the proposed workplace. If the employees that are entitled to be reinstated, do not agree in writing within the deadline or refuse the workplace provided, the employer may employ new personnel for the vacant positions.

### 3. INDIVIDUAL DISMISSALS

For the objective grounds dismissal, the employer must respect the specific procedure stipulated by the Labour Code. In case of dismissal for disciplinary reasons, the employer must follow the preliminary investigation, in order to establish the breach of the employment contract's provisions or of the internal regulations. In case of dismissal for poor performance, the employer must first establish the grounds by the evaluation procedure.

In all cases, the employer must issue the dismissal decision within 30 calendar days from the date the employer acknowledged the cause of the dismissal.

#### A. IS SEVERANCE PAY REQUIRED?

Severance pay for individual dismissals is to be paid only if it is agreed as such in the individual or collective employment agreement. The only time that the Labour Code states that a severance payment (not specifying the amount) should be negotiated is for physical and/or mental unfitness to perform the activity required by the job description. The Labour Code only states that such compensation should be negotiated in the collective employment agreements, meaning that

in the absence of such an agreement, the employer cannot be made to pay the employee any amount upon his termination.

## 4. SEPARATION AGREEMENTS

### A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

A separation agreement is neither required nor considered best practice in Romania. There are no specific legal provisions on separation agreements. Usually some form of separation agreement can be found when both parties agree to terminate the working relationship and they need to make clear the conditions of the termination. However there are cases when the employee violates the terms of the separation agreement, especially when it is stated that the employee will not bring any claim in front of the courts. Such a provision included in the separation agreement will not result in the court dismissing, *ab initio*, the employee's claim.

### B. WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

Not being a usual procedure in Romania, there are no standard provisions for separation agreements. However all clauses must be in accordance with imperative legal provisions. Also they must include a moral cause, as in all civil agreements.

### C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

The age of the employee usually doesn't affect the working relationship apart from the case of reaching the age of legal pensioning when the individual employment agreement ends *de jure*. Employees under 18 years old can become part of a separation agreement under the same rules as the ones stated for entering the employment, meaning that if the employee is younger than 16 years old, parental consent is needed.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

No.

## **5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION**

The employees seeking to challenge wrongful termination can file a claim in court against the employer. The Tribunal as first instance court will analyse the cause for dismissal, the form of the dismissal decision and the correct observation of any mandatory legal procedure. If the Tribunal finds that the dismissal decision is not legal or has no grounds (this being a rarer motif for the annulment of the dismissal decision), a court ruling annulling the dismissal decision is issued. The employee will be reinstated (automatically if he/she asked to be reinstated and the dismissal was found illegal or without grounds) and is entitled to payment of all financial rights he/she would have obtained if he/she were not wrongfully dismissed. The Tribunal decision is subject to an appeal. However the decision of the Tribunal is enforceable meaning that in some cases if the employee wins in first instance and loses on appeal, the employer has to take additional measures in order to obtain the amounts already paid.

## **6. WHISTLEBLOWER LAWS**

Only whistleblowing within public institutions, and the protection of employees and public servants in public institutions, is legally regulated in Romania. The whistleblower has to act in good faith and for the general interest in order to be protected. For the private sector, customary rules have to be used when considering the protection of an employee in whistleblowing cases.

# IX. RESTRICTIVE COVENANTS

## 1. DEFINITION OF RESTRICTIVE COVENANTS

There is no legal definition given by the Romanian legislation to restrictive covenants. However some legal provisions allow the inclusion of specific clauses in the employment agreements that can offer a guarantee of good will between the parties. Also, some legal provisions sanction directly, without the existence of any contractual clauses, an inappropriate conduct of the employee with regards to his actual or former employer.

## 2. TYPES OF RESTRICTIVE COVENANTS

### A. NON-COMPETE CLAUSES

When negotiating an individual employment agreement, or during the existence of such an agreement, the parties can agree upon a non-compete clause for the employee. According to Romanian law, such clauses will be enforced only after the employment agreement is terminated (except for cases when the contract is terminated by the employer for reasons that are not related to the employee and some of the de jure termination cases). During the existence of the employment relationship it is considered that a non-compete obligation is implied, the employee having to fulfill his duties showing good will. In addition the employee has a fidelity obligation to his employer that also covers refraining from a conduct that might be considered as unfair competition.

According to the Romanian Labour Code, when agreeing upon a non-compete clause, the employee assumes the obligation not to perform any activities that could be considered as competition to his/her

former employee, in his/her own interest or in the interest of a third party.

The non-compete clause is a monthly paid clause, legal provisions stating the minimum amount that the employer has to pay in order to enforce the non-compete clause. According to the Romanian Labour Code the non-compete indemnity cannot be lower than 50% of the gross salary the employee had during the last 6 months of his employment (or of entire period of employment if the agreement was in force for less than 6 months). Parties can negotiate a higher paid non-compete clause.

The maximum period for the non-compete clause is 2 years. Also, the non-compete clause has to be clear, meaning that when negotiating such a clause the parties have to state what exact activities are prohibited, who are the third parties for which the activity is prohibited and also the geographic area of the prohibition. The employer has to keep in mind that imposing a non-compete clause that restricts the possibility for the former employee to perform any paid activity is to be considered as a disproportionate restriction of his constitutional right to work.

### B. NON-SOLICITATION OF CUSTOMERS

There are no express legal provisions that regulate the non-solicitation of customers. However the Law on combating unfair competition sanctions the diversion of the clientele by a current or former employee or his representatives by using commercial secrets that belong to the company, if the company took reasonable measures in ensuring the protection of such secrets and the revealing of such secrets might cause damage to the company. Such conduct may lead to a fine for the employee.

Some additional clauses on non-solicitation of customers might be included in the employment agreement, but not expressly prohibited; the employer has to always keep in mind that any such clauses must be reasonable, clear and enforceable. In any court case related to the enforcement of such clause the judge will take into account the proportionality of the measures that the employer wants to impose with the damage that the employee's conduct might cause to the employer's activity.

### C. NON-SOLICITATION OF EMPLOYEES

There are no legal provisions that regulate the non-solicitation of employees. However, given the general wording used by the fair competition legislation, this conduct might fall under the unfair competition conduct that can be sanctioned by the administrative bodies that monitor competition in Romania.

## 3. ENFORCEMENT OF RESTRICTIVE COVENANTS—PROCESS AND REMEDIES

The employer can choose to enforce or not the non-compete clause in the employment agreement, when the agreement is terminated. As a rule it is advisable to inform the former employee that the clause will not be enforced, in order for him to know that his conduct will not be restricted in any way. If he is not informed and the indemnity is not paid he can sue the former employer for the payment of the indemnity. However, he has to prove that he refrained from all the prohibited activities as stated in the clause.

If the employee does not respect the non-compete clause, the employer can sue for the entire amount of the indemnity paid plus any damages the former employee might have caused to the former employer.

Also, the former employee or the local labour inspectorate can ask the judge to diminish the effects of the non-compete clause.

In case of conduct that might fall under the fair competition legislation, the interested party can file a claim with the Competition Council that will analyse the conduct and establish if there is a case of unfair competition. The Council can issue administrative sanctions – fines. Also the company that suffers an imminent prejudice due to an act of unfair competition can ask the court to impose the obligation on the party that causes the prejudice (including his current or former employee) to refrain from the conduct responsible for the damage.

In case of breach of any other similar clauses included in the employment agreement the party that wants to enforce the clause has to address the court.

## 4. USE AND LIMITATIONS OF GARDEN LEAVE

Garden Leave is not regulated under Romanian law. If the employment is terminated and the employer does not require the presence of the employee during the notice period, he can ask the employee to not perform work during the notice period. In case of resignation the employer can waive his right to benefit from the notice period, meaning that he can agree for the employee to stop working immediately (and not pay the employee anymore). However, in case of dismissal the employer has to be careful in forcing the employee not to work during the notice period since the employer still preserves his constitutional right to work. Some collective employment agreements have provisions that allow the employee that was dismissed to perform work only for half of the normal working hours during the notice period in order for the employee to be able to actively seek employment (in this case it is up to the employee if he wants to benefit from this contractual clause).

# X. TRANSFER OF UNDERTAKINGS

## 1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The transfer of an undertaking, business or part of a business to a new owner by agreement is subject to the Labour Code and Law no. 67/2006. The legal provisions grant a strong protection for the employees subject to the transfer. Prior to the transfer, both the seller and the purchaser have the obligation to consult their trade unions or the employees' representatives with respect to the judicial, economic and social implications related to the transfer of undertaking. All of the seller's existing rights and obligations arising from the employment contracts and collective labour agreements will be transferred to the purchaser, except for cases when the seller is subject to restructuring or insolvency procedure. Nevertheless, the transfer of undertakings cannot be a reason for the individual or collective dismissal of the transferred employees by the seller or purchaser.

## 2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

According to Law no. 67/2006, the seller has the obligation to notify the purchaser about all the rights and obligations that are transferred between parties. The purchaser is bound by all rights and obligations resulting from the existing employment contracts at the time of the transfer and has the obligation to maintain all the rights until the contracts expire or are terminated. Beginning one year following the transfer, the purchaser has the possibility to renegotiate the collective clauses with the employees' representatives.

# XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## 1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

In Romania, employees and employers organisations are structured as private associations governed by the Law no. 62/2011 regarding the social dialogue. Every employee has the right granted by the Constitution and by the Romanian Labour Code, to constitute or to become a member of a trade union. In order to set up a trade union there must be at least 15 employees within the same company. A person cannot be part of more than one trade union organisation within an employer at the same time. Certain categories of personnel, such as public officials, members of the military and members of certain government ministries, are not allowed to establish trade unions.

Employees' and Employers' Organisations are structured by level starting from the company level, where there are unions as organisations, sector level where there are employers' organisations and union federations and the national level where there are employers' organisations and union confederations.

## 2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

The representative trade union is entitled to receive from employers any necessary information for the negotiation of the collective labour agreements and other agreements related to the employment relations. Since a union needs 50%+1 employee to be representative, and only a limited number of

unions can reach the required number of members in order to become representative, Romanian law also allows union federations that are representative at the sector's level (representing at least 7% of the employees in the sector) to participate in collective negotiations at the company level representing an affiliated union. Since the law doesn't restrict the number of unions within a company and in some sectors there are at least 3 representative union federations, a company might negotiate with more than one Union Federation.

The trade unions play a key role in collective bargaining, but they also have significant consultation and information rights. Also, based on a specific empowerment from their members, trade unions have the right to register petitions and to sustain their members' interests in front of the tribunal.

## 3. TYPES OF REPRESENTATION

If there are not any representative unions within the company and the company is one that needs to negotiate a collective employment agreement, employees have to appoint representatives for the negotiation.

### A. NUMBER OF REPRESENTATIVES

There are no rules on how many representatives are to be appointed, but Law no. 62/2011 states that the employer and the employees agree on the number of representatives taking into account the number of employees (if the company has a large number of employees that perform various types of activities in different geographical areas, the number of representative will be higher). The common practice is to appoint 3 representatives.

## B. APPOINTMENT OF REPRESENTATIVES

There are no clear rules on how the appointment should be made. However it is specified that the representatives have to have the vote of at least 50%+1 employees in the company. Also, in order to ensure the correctness of the appointing procedure the employer should reduce to a minimum the interference in the appointment process. The employees have to find a way to organise themselves in order to appoint the representatives.

## 4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

The mandate of the representatives is established during the appointment process and it is limited to a maximum of 2 years. The employees give their representatives mandate to participate in the collective negotiation of specific terms. The representatives will participate in the collective negotiations and sign the collective agreement.



## 5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

The representatives have some of the rights the representative unions have in gaining access to relevant information and being consulted in specific matters (such as when the employer wants to implement a new internal regulation).

## 6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

European legislation on works council was transposed in Romanian legislation, but few companies actually have such representative bodies. The role of works council in the employer-employee relationship is reduced. Most of the rights that the works councils have involve only receiving information from the company on important matters.

Health and safety committees have an important negotiation role. The employer's representatives and the employees' representatives discuss and agree upon health and safety measures, but also on social and economic matters within these structures.

# XII. EMPLOYEE BENEFITS

## 1. SOCIAL SECURITY

In Romania there are mandatory pensions, healthcare, unemployment common national systems that apply to all employees and employers. There are mandatory contributions made to each of these systems, by the employees. The employer pays a single contribution. The systems cover predetermined benefits for the employees. The national pension system is regulated by Law no. 263/2010. The national healthcare system is regulated by a series of specific normative acts such as the Fiscal Code and Governmental Ordinance no. 159/2005. Unemployment indemnity is regulated by Law no. 76/2002.

### A. REQUIRED CONTRIBUTIONS

For the employer, the required monthly contribution is 2.25% of the gross income for each employee. For the employee, the required monthly contributions are 25% of the employee's gross income for the pension system and 10% of the employee's gross income for the healthcare system.

## 2. HEALTHCARE AND INSURANCES

Apart from the mandatory contributions that we referred to previously there are no other mandatory insurances that the employer is required to provide. Additional health and life insurance can be provided by the employer as a benefit. The fiscal regime of such benefits takes into consideration the amount paid by the employer.

## 3. REQUIRED LEAVE

### A. HOLIDAYS AND ANNUAL LEAVE

The Romanian law establishes a minimum duration of 20 working days of annual paid leave. The social partners may negotiate a collective employment

agreement that provides more favorable conditions for the employees.

The annual paid leave period is granted in proportion to the activity performed in a calendar year and must be used for at least two consecutive weeks during the same year, if requested by the employee, and the remainder of the weeks must be used over a period of 18 months. For the duration of the annual paid leave, the employee receives a leave benefit which cannot be lower than the basic pay, the benefits and permanent extra pay due for that period, as provided for in the individual employment contract.

Except for the case of terminating the employment contract, an employer cannot replace the right of the employees to a minimum annual holiday entitlement with the payment of the indemnity for the holiday.

The employee is also entitled to take non-paid leave for solving certain personal problems. The duration of such leave is regulated by the collective agreement or the internal regulations.

There are approximately 13 public holidays in Romania and the workers are entitled to remuneration for each. Since some of the public holidays are religious there are legal provisions that state that paid holidays are to be granted to employees of other religions than the Christian Orthodox, considered majoritarian in Romania. Employees have the right to benefit from a minimum of 20 working days of paid annual leave each year. Compensation with financial benefits is only allowed in case of the termination of the employment. The employer has to ensure that employee benefits from a continuous period of 10 consecutive working days of paid annual leave.

### B. MATERNITY / PATERNITY LEAVE

Romanian legislation provides for a period of 126 mandatory maternity leave days, of which 63 days can be granted before the due date and 63 days

after the due date. The employee can receive more than 63 days for each of the periods, but has to benefit from at least 42 days of leave after the due date. The maternity leave is considered a medical leave, the employee's physician being the deciding factor in how the days are divided between the two periods.

Apart from maternity leave, parents can also benefit from a paid leave for raising the young child until the age of 1 or 2 years. During this leave period the parent receives an indemnity that is a percentage of the income the parent had prior to the leave period. Incentives are granted to parents that return to work after only 11 months. The indemnity is not paid by the employer.

### C. SICKNESS LEAVE

Medical leave is granted to the employee if the illness prevents him/her from performing his/her activity. The medical leave indemnity is paid by both employer and the state healthcare system depending on the number of days of medical leave. The first 5 days of medical indemnity are paid by the employer and the rest of the period by the state healthcare system. The indemnity is a percentage of the income of the employee.

### D. DISABILITY LEAVE

Disability leave can be a form of medical leave or a form of pension, depending on the type of disability (people with permanent disabilities that cannot work benefit from a special type of pension).

### E. ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE(S)

Employees have the right to paid or unpaid training leave. The employer has to grant paid training leave if he failed to ensure the periodic training of the employee. Unpaid training leave can be granted to employees who engage in training activities on their own initiative.

## 4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

The mandatory contribution to the pension system covers in Romania 2 Pylons of the pension system – the state provided pension (Pylon 1) and the mandatory private pension (Pylon 2). In order to fund these two pylons, the mandatory pension contribution of both the employer and the employee are divided between the state pension system administrator and private insurance companies. The percentage of the mandatory contribution that is given to private insurance companies is very low – 5% in 2018.

In addition to these 2 mandatory pylons the pension system in Romania recognises 2 more pylons. Pylon 3 or the individual facultative pension system allows the employee to contribute to a private pension system with up to 15% of his monthly income, while pylon 4 allows the employee to contribute to a private pension system without any limits to the contributions. Pylon 4 pension plans usually include life insurance. Pylons 3 and 4 are not mandatory. The employer can offer the employees the benefit of one of these facultative insurances. In addition to contributions to the national healthcare system the employer can offer the employees the benefit of private health or life insurance.

## 5. ANY OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

Any uniform of equipment necessary for health and safety reasons will be provided, free of charge, to the employee by the employer. In certain industries where there are known risks to the health of the employees (such as exposure to toxic or irritant materials) additional rights to cover what is known as a protection diet should be granted. The employer can also grant daily meal tickets to employees as an additional benefit. The meal tickets are strictly regulated, have a legally established value, and have a distinct fiscal treatment (they

are only subject to income tax). Employers can grant vacation tickets (vouchers) with distinct fiscal treatment that can only be used for traveling services within the country. Vacation tickets are more common in public companies. Other forms of benefits that can be granted by the employer are the kindergarten tickets or gift tickets, all having a distinct fiscal treatment.

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## L&E GLOBAL ROMANIA

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*This memorandum has been provided by:*

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