

EMPLOYMENT & LABOUR LAW

Summary

In Denmark, the relationship between employer and employee is regulated by statute and by agreements between the parties.

Particular attention should be paid to a number of issues, such as the rules on termination of the employment contract, non-competition and non-solicitation clauses and holiday agreements etc.

What is the overall structure of the relationship between the parties to the Danish labour market?

In Denmark, the regulation of employment law is divided into two main categories: (i) regulation on salaried employees and (ii) collective agreements.

The Danish Act on Salaried Employees contains certain minimum rights in favour of the employees. Such minimum rights include termination notices, severance payments, compensation for unfair dismissals, absence due to illness, regulation of and compensation for non-competition and non-solicitation clauses, etc. The act cannot be derogated from to the detriment of the employee.

The Danish Act on Salaried Employees covers shop assistants and office workers employed in buying and selling activities, in office work or equivalent warehouse operations, persons whose work takes the form of technical or clinical services and other assistants who carry out comparable work functions and persons whose work is wholly or mainly to manage or supervise the work of other persons on behalf of the employer. For all the above-mentioned professions, it is a requirement that they work more than eight hours per week if the Danish Act on Salaried Employees is to apply.

Collective agreements with durations of two to four years are entered into between employer organisations for the specific industry and trade unions constituting the terms of employment for many employees in Denmark. The content of the agreements vary, but normally includes minimum rights with regards to termination notice, severance payment, absence due to illness and maternity leave.

If an employee is neither a salaried employee nor covered by a collective agreement, the employment will primarily be regulated by the individual contract agreed between the parties.

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Which considerations should be made when material changes are implemented into the terms of the employment?

Pursuant to the EU Directive on Employer's Duty to Inform Employees, which has been incorporated into Danish law, employers have a duty to inform employees of all significant terms relating to the employment. If the employer fails to provide such information in writing, the employees may be entitled to compensation.

Under Danish law, any material changes in the employment terms of an employee may only take place subject to the individual termination notice of that employee. If the employee does not accept the change, the employee may consider themselves terminated by the employer. For example, any change in the salary of an employee is always considered a material change of the terms of employment. Therefore, such terms may only be changed with the notice period of the individual employee in accordance with the Danish Act on Salaried Employees and/or the individual contract.

What are the possibilities for imposing non-competition, non-solicitation and job clauses?

It is possible to impose non-competition, non-solicitation clauses and job clauses on employees. However, there are certain restrictions as to the extent and duration of such clauses.

The Danish Act on Salaried Employees contains provisions allowing the employer to impose non-competition and non-solicitation clauses on the employees. If such clauses are imposed, the employer will become obligated to pay compensation equal to at least 50% of the employee's gross salary at the time of termination. The payment obligation is only imposed during the period where the clause is enforced post-termination.

According to the act, it is only possible to impose such clauses on employees in a fiduciary position. However, the act does not apply to managing directors or general managers who presumably are most likely to be subject to non-competition and non-solicitation clauses. In these cases, there is freedom of contract, though such clauses may be set aside wholly or partly as being unfair or unreasonable.

Job clauses are regulated in the Danish Act on Job Clauses. The act requires that an agreement is made in writing both with the employees who are *comprised* by an employee clause as well as with those employees that are *affected* by such clause. Further, employees *affected* by the employee clause are entitled to compensation during the period after resignation where the clause will apply (amounting to 50% of the salary at the time of resignation). The employment contracts of these employees must include information on the employee's right to compensation, unless the employee already receives compensation according to a non-competition and/or non-solicitation clause.

Who has the right to the employee's inventions?

The Danish Act on Employee Inventions regulates the issue of title to inventions made by an employee during the course of employment. It also regulates the question of compensation for such inventions. As most of the act is not mandatory, the parties may make other agreements as to the inventions in the employment contract. Such clauses are often seen in Danish employment contracts. However, clauses on compensation or the lack of right to compensation to the employee for an invention may be set aside as void.

If an invention is made by an employee during the course of employment, the employer may require that the invention is assigned to him/her. Further, it is not necessarily relevant that the invention is made at the place of work or in the spare time of the employee. Additionally, it does not have to be relevant that the use of the invention falls within the business activities of the employer, or which party has requested the invention to be made.

If the title to the invention is assigned to the employer, the employee will be entitled to a fair compensation. The right to receive compensation for assigned employee inventions will expire after five years.

What about other IP rights of employees?

IP rights are generally transferrable in whole or in part.

Under the Danish Act on Copyright, the copyright originates with the person who created the work. As a general rule, case law provides that the copyright of a work created as part of an employment is transferred to the employer to the extent necessary for the purpose of the ordinary business of the employer - unless otherwise agreed.

Special rules apply to copyright of computer programmes, as copyright is transferred to the employer when the programme has been created by an employee in the execution of his duties or following the instructions given by the employer under the Danish Act on Copyright.

The Danish Designs Act does not govern designs created as part of an employment, although design rights generally pass on to the employer even without any explicit agreement. In accordance with EU regulation, EU designs, both registered and unregistered, pass on to the employer unless otherwise agreed.

How much holiday is an employee entitled to?

The Danish Holiday Act entitles all employees to five weeks of holiday in the period from 1 May to 30 April, i.e. the period generally referred to as a "holiday year". However, as a general rule, the act does not include managing directors.

An employee is entitled to five weeks of holiday during the holiday year regardless of whether the employee has earned the right to paid holiday or not. If the employee has not accrued the right to payment during holiday, the employee will receive holiday payment from a former employer, if any. If not, the employee pays the holiday himself.

Salaried employees paid by the month are entitled to normal salary from the employer during their holidays if the holiday is earned during the preceding calendar year. Furthermore, salaried employees are entitled to a holiday allowance corresponding to 1% of the employee's gross salary in the preceding calendar year.

Blue-collar workers or hourly paid workers often receive holiday consideration from the employer equal to 12.5% of their gross salary in the qualifying year.

Thus, there may be an economic liability related to a business as to earned, but not yet held, holiday.

Furthermore, many companies in Denmark give their employees an extra week of holiday, often referred to as "special holiday". This extra week is not mandatory.

What are the rules on employee board representation?

Under Danish law, the employees of certain companies have the right to have an influence on the management of the company, provided that the company is of a certain size.

Accordingly, employees are entitled to board representation in public and private limited liability companies if such companies have an average number of employees of at least 35 in a period covering the preceding three years. The number of employee representatives on the board may equal up to half the number of board members elected otherwise. However, if the employees are entitled to board representation, there can be no less than two representatives in any case.

The employees have the same rights and obligations as other board members, i.e. in relation to conflicts of interest, confidentiality and fees. Special rules apply to group representation.

Finally, it should be noted that although employees may be entitled to board representation, they are not obligated to execute this right. In other words, employee board representation is an employee right, not a duty.

What are the overall rules on termination of an employment contract?

The rules governing termination of employment differ depending on the relevant type of employee. As mentioned above, there are two main categories under Danish law; the collective agreements and the Danish Act on Salaried Employees.

There will be a notice period, during which the employee receives normal salary and all other agreed benefits regardless of whether the employee is party to a collective agreement or comprised by the Danish Act on Salaried Employees.

The employment contract with a salaried employee may be terminated with a notice of one to six months, depending on the employee's job seniority.

On the part of the employee, the notice of termination is one month.

A probationary period of up to three months may be agreed on, during which the employer may terminate the employment with only 14 days' notice and the salaried employee may terminate with only one day of notice, unless it is agreed that the 14 days also apply for the employee during the probationary period.

Longer termination notices may be agreed upon on the part of the employee as long as the termination notice of the employer is mutually prolonged.

The salaried employee will be entitled to a seniority severance payment after 12, 15 or 18 years of employment. This severance payment, which amounts to one, two or three months' salary, is in addition to the ordinary salary.

As the act does not apply to managing directors or general managers, there is generally freedom of contract with respect to these, provided that the manager is given a reasonable termination notice.

For blue-collar workers, the notice periods as well as the right to severance payment appear from the relevant collective or individual agreement.

What are the consequences of unfair dismissal?

A blue-collar worker may be entitled to compensation equalling a maximum of 52 weeks' salary, provided that the employment is subject to an applicable collective agreement.

Unfair dismissal of a salaried employee may be subject to compensation for unfair dismissal in the amount of up to six months' salary, provided that such an employee has more than one year of seniority. In overall terms, a dismissal has to be reasonable considering either the company's or the employee's condition. However, when deciding whether a dismissal is fair or not, it is always necessary to look at the merits of each individual case.

In addition to the above, all employees in Denmark are protected from termination of employment due to the employee's pregnancy or maternity/parental leave or other discriminatory criteria such as age, national origin, age, sexual orientation, etc. If these non-discriminatory rules are not complied with, the employee may be entitled to a large compensation.

Are there any special procedures on collective dismissals?

Collective dismissals are regulated by the Danish Act on Collective Dismissals, based on an EU directive. Further, collective dismissals are also often regulated in collective agreements.

In order to be considered a collective dismissal, certain criteria must be met within a period of 30 days.

The criteria are as follows: (i) at least 10 employees in companies with 20–100 employees are dismissed; (ii) at least 10% of the employees in companies with 100-300 employees are dismissed; or (iii) at least 30 employees in companies with a minimum of 300 employees are dismissed.

The act imposes a duty on the employer to enter into negotiations with the employees at as early a stage as possible. The purpose of the negotiations is to limit the number of dismissals and minimise the detrimental consequences thereof.

Furthermore, there is a duty to inform the Regional Local Labour Board of the dismissals and keep them up to date during the process.

Please note that breach of the act will lead to compensation for the involved employees.

How does the transfer of a business affect the employees?

The rights of the employees in case of business transfers are regulated by the Danish Act on Rights of Employees in Case of Business Transfers which incorporates the EU directive with the same name.

The purpose of the act is to ensure the rights of the employees. Subject to the act, the

purchaser of the business agrees to the rights and obligations pursuant to any collective or individual agreement that existed at the time of the transfer.

Thus, a business transfer alone does not give the purchaser access to alter the terms of employment, nor is dismissal due to business transfer considered a justifiable reason for termination.

The act also contains a duty to inform the employees of the transfer at a reasonable time before the transfer. It also contains a duty to negotiate with the employees.

Rules have been implemented in the act to ensure that the act may not be circumvented, e.g. by terminating the employees prior to the transfer followed by a re-hiring on new terms post-transfer. In addition, the employees are entitled to continue on identical terms of employment.

The act only comprises salaried employees and therefore not the management.

Are there any rules on personal data protection?

The Danish Act on Personal Data Processing places certain limitations on the retrieving and disclosing of data concerning the employees of Danish employers.

Prior to the act of processing data, the employer shall register with the Danish Data Protection Agency with the purpose of obtaining permission for the data processing. Certain exceptions apply to companies that solely process general personal data and health statements of the employees, provided that this is a requirement by law or collective agreements.

This means that the processing of data shall take place in accordance with good data processing practices. Also, the data retrieving may only take place for reasonable purposes. The future processing of retrieved data may therefore only take place if this is compatible with the purpose which formed the basis of the retrieval in the first place. The retrieved data must always be complete and correct.

A requirement of proportionality applies to the retrieving of data. This principle of proportionality applies both to the amount of the data retrieved as to the registration period.

The processing of sensitive personal data is subject to certain additional limitations.

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