Introduction[1]

Bermuda is the oldest and largest self-governing dependent territory of the United Kingdom. The fish-hook shaped, sub-tropical archipelago of 20.5 square miles in total land area is approximately 21 miles long and 1 mile wide, and its 6 main islands are connected by bridges. The Island is situated in the Atlantic Ocean, some 650 miles due east of Cape Hatteras, North Carolina and some 774 miles southeast of New York.

Bermuda is a British Overseas Territory. It is self-governing, with its own constitution and government. The resident population was 63,648 in 2021, with a decline in birth rates and increase in death rates, comprising the following demographics: 54% Black, 31% White, 8% Multiracial, 4% Asian, 3% Other. The official language is English.

Executive authority in Bermuda is vested in the King and is exercised on her behalf by the Governor of Bermuda after consulting with the appropriate Minister of the Government of Bermuda. The United Kingdom retains responsibility for the defence and foreign relations of Bermuda.

In a Research Bermuda poll taken of 219 adult residents in 2022, 83% of residents opposed independence from Great Britain.

The Government of Bermuda was reconstituted by the Bermuda Constitution Order 1968 which came into force that year. The Constitution is an overriding constitution, which means that no domestic legislation or principle of common law can derogate from it.

The Bermuda Constitution provides for a Westminster style of government with a bicameral representative government. The House of Assembly is the equivalent of the British House of Commons and the Senate is the equivalent of the British House of Lords.

There are 36 electoral constituencies in Bermuda, each of which is represented in the House of Assembly by a directly elected Member of Parliament (“MP”). The Senate consists of 11 Senators each of whom is appointed by the Governor for the life of the Parliament (which can be no more than 5 years). The person who commands the majority of the 36 MPs (in practice, the leader of one or other of the two main political parties in Bermuda) becomes the Premier and then forms a Cabinet of 12 Ministers chosen from both the Senate and the House of Assembly. Each member of Cabinet is sworn into office by the Governor.

[1]Whenever in this Handbook words are used in the masculine or neuter gender, they shall be read and construed as in the masculine, feminine or neuter gender, whenever they should so apply

The Bermuda Legislature enacts Bermuda's own legislation and its common law and equity have developed in the Bermuda courts, with much influence from other common law jurisdictions. However, certain UK Acts apply to the extent that they have been specifically extended to Bermuda or have survived since they originally became Bermuda law in 1612. The laws of Bermuda are based on the common law legal system of England and Wales, and the decisions of the English Court of Appeal and House of Lords are highly persuasive authority in the Bermuda Courts.

The Bermuda Legislature enacts and controls all Bermuda's internal affairs and laws, including those on citizenship, employment, finance, health, insurance, investments, hospitalization, immigration, taxation, trade and welfare.

Together with a number of tribunals, Bermuda's court system comprises the Magistrates' Court and the Supreme Court, headed by the Chief Justice and staffed by Puisne Judges. Each of the Puisne Judges of the Supreme Court exercises the same jurisdiction, and while a decision of co-ordinate jurisdiction is highly persuasive, no judge of the Supreme Court of Bermuda can bind another.

The main function of the Magistrates' Court is to decide on summary criminal matters. If the Magistrate determines that the offence is serious enough, the case is sent to the Supreme Court. Appeals from judgments of the Magistrates' Court are heard in the Supreme Court. The Magistrates' Court also hears certain classes of civil cases valued under $25,000. The Magistrates' Court Rules 1973 govern the procedure.

Serious criminal offences are tried in the Supreme Court and are heard by a judge and jury. Civil and criminal trials are held in open court in one of the five Supreme Court rooms. The Rules of the Supreme Court of Bermuda 1985, with some exceptions, govern civil procedure in the Supreme Court.

The Bermuda Commercial Court was established under Order 72 of the Rules of the Supreme Court as amended with effect from January 2006. Commercial court cases are heard by designated specialist commercial judges, including the Chief Justice.

The Court of Appeal for Bermuda typically sits in Bermuda for three months of the year, in March, June and November, usually for 3 weeks at a time. The Court of Appeal hears appeals from the Supreme Court.

All decisions of the Court of Appeal are binding on the Supreme Court. The Rules of the Court of Appeal for Bermuda 1965 govern the procedure in the Court of Appeal.

The Judicial Committee of the Privy Council is the final court of appeal for litigants in Bermuda. Decisions of the Lord Justices of the Privy Council on appeal from the Court of Appeal are binding on all Bermuda courts. The Privy Council is not bound by its own previous decisions.

The capital and business centre of the Island is the City of Hamilton and almost all international companies in Bermuda have their principal office there. The Bermuda dollar is tied to the United States dollar at par and both currencies are used interchangeably on the Island.

Bermuda's two largest economic sectors are offshore insurance and reinsurance, and tourism. Despite the cloud of national debt hovering at $3.12 billion, and total debt, liabilities and guarantees exceeding $7 billion, not to mention food inflation at 10.4% year-on-year, Bermuda maintains its robust reputation as a powerful financial centre and domicile of choice for the reinsurance industry, which will continue to be the main source of employment.

In 2023, international business employed 2,641 Bermudians out of 4,909 jobs and contributed over $1.92 billion to the Island's economy in 2022. Bermuda's $1.6 trillion in total assets held by 1,100 re-insurers writing gross premiums of approximately $268 billion make Bermuda the world's risk capital. Bermuda's reinsurance sector was the main driver as total dedicated reinsurance capital in 2023 jumped by 7% to $568 billion, with an even larger increase projected for 2024.

The expansion of the long-term insurance sector continued into 2023, though at a slower pace than the peak in 2022. New insurance company registrants in 2023 totalled 62. Leading the way for 2024 are the 32 new special-purpose insurers which are primarily used in the burgeoning insurance-linked security (ILS) market.

The Island has no corporation or profits taxes, withholding taxes, capital gains or capital transfer taxes, and is widely regarded as a premier offshore financial centre. It has enjoyed a long history of political, economic and social stability, and its international business sector has successfully overtaken tourism as the country's economic mainstay. Bermuda is a prominent domicile for captive insurance companies and one of the world's most important reinsurance markets.

In October 2022 good news for employers came when Bermuda was "white-listed" by the OECD and Financial Action Task Force, having successfully implemented the internationally agreed tax standard. Also said to be good for business, in November 2022 the European Court of Justice struck down an EU law that mandated public registers of corporate beneficial ownership, ruling this infringed upon fundamental rights of privacy and personal data protection. However, in November of 2023, Bermuda's premier announced that the Government was still committed to implementing the public register.
Bermuda's international business industry is said to be threatened by the impending new global minimum corporate tax (15%) that will come into effect 1 January 2025. The tax will apply to

multi-national companies that generate a revenue of €750 million annually ($810 million) and is said to affect roughly 10% of companies registered on the island.

Despite the impressive international business figures, the real Bermuda includes 10% of the population at poverty level in 2022, youth unemployment at 30%, over 2095 Bermudians on financial assistance, and at least 811 people are classified as homeless.

All companies establishing a presence in Bermuda and hiring employees must be registered with the Registrar of Companies, which is responsible for tracking, processing and administering all limited liability companies, including local companies, exempted companies, overseas companies and foreign sales corporations. A company that is not registered may not hire employees locally. If a foreign company is overseas and hires employees through an agency in Bermuda, the agency is usually deemed to be the employer for the purposes of Bermuda law.

The Employment Act 2000 (EA 2000) is the governing employment legislation in Bermuda. It applies to employees working 15 or more hours per week wholly or mainly in Bermuda for remuneration under a contract of employment, or to others performing services on terms akin to an employment relationship, subject to certain statutory exceptions. The parties may not contract out of the requirements of the Act except where the Act expressly allows it.

Employees may bring a complaint to an inspector employed by the Government's Labour Relations Department within 6 months of an employer's alleged breach the Act, including for unfair dismissal. The Tribunal comprises a chairman, a deputy chairman and from 20 to 30 members appointed by the Minister of Labour. The panel hearing a complaint will normally comprise 3 persons drawn from the Tribunal. Except where provided in the Act, the Tribunal regulates its own proceedings as it sees fit. 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 the power to order various remedies. There is a right to appeal to the Supreme Court from a decision of the Tribunal on a point of law under the Employment Act (Appeal) Rules 2014.

New case law in the Supreme Court and the Tribunal developed in 2022 following the 2021 amendments to the Act. The Government published decisions of the Tribunal for the first time (a year late), but in anonymised, redacted form. Civil penalties are now being meted out to employers, principally for failure to provide an SOE and anti-bullying/anti-sexual harassment policies. Penalties generally may be levied by the Labour Relations Department Manager up to $5,000 and by the Tribunal up to $10,000, but in fact tend to range from $1,500 to $3,000.

The Human Rights Act 1981 prohibits discrimination by employers on the basis of specified human rights protected characteristics, and sexual harassment is an offence. Discrimination and harassment on the basis of any of the human rights protected characteristics (race, gender, place of origin, etc.) are prohibited, and sexual harassment is also an offence.

Health insurance requirements for employers are stipulated in the Health Insurance Act 1970, government pension requirements in the Contributory Pensions Act 1970, private pension requirements in the National Pension Scheme (Occupational Pensions) Act 1998, and payroll tax obligations in the Payroll Tax Act 1995 and the Payroll Tax Rates Act 1995.

The Payroll Tax Amendment Act 2023, operative as of 1 January 2024, reduced payroll tax rates for persons earning under $132,000 per annum. Those earning between $48,000 and $96,000 will pay 9.2%, however, their first $48,000 of earnings will only be taxed at 0.5%. Those earning between $96,000 and $200,000 will pay 10% in payroll tax. Meanwhile, self-employed farmers and fishermen will be tax free.

Employees in Bermuda must be Bermudian, a spouse of a Bermudian, a holder of a Permanent Resident's Certificate (PRC) or must have a work permit issued by the Department of Immigration. In an effort to increase job opportunities for Bermudians and spouses, in 2022 the Government increased the number of expatriate work permit moratoriums on a sizeable number of job categories, including administrative and executive assistants, bank tellers, musicians and others.

Foreign workers are protected by the same employment laws and generally pay the same taxes as local workers, save that pension contributions under Bermuda legislation are not mandatory for foreign workers. Employers must also provide a health insurance plan, paying at least 50% of the premium.

In September 2022 the Minister of Economy and Labour announced the aim to raise the Island's working population by 25% over the next five years, to get an additional 8,400 people working through immigration reform. This goal is aimed at addressing the challenges of an ageing population and improving the solvency and sustainability of public pension funds and healthcare over the long term. Calls continue for the conventional retirement age of 65 to be raised given the ageing population and the expectation that the government pension Contributory Pension Fund will go bankrupt.

The Government's new Office of Fintech aims to promote the growth of the digital assets industry. Twenty-eight fully licensed digital asset companies are now set up on the Island, which some view as inviting reputational risk in the face of the recent collapses of crypto-related entities. The industry is estimated to have created about 50 to 80 jobs to date. The Bermuda Monetary Authority has proposed amendments to the Digital Asset Business Act 2018: Code of Practice and Digital Asset Business (Client Disclosure) Amendment Rules 2022 in order to bolster protection for customers using the services of regulated financial institutions.

There are no maximum working-hour regulations, save that employers must provide employees who work more than 5 consecutive hours with a 30-minute meal break, and must provide a rest period of at least 24 consecutive hours in each week, excluding police, prison and fire officers, medical practitioners and nurses.

Overtime pay at the rate of time and a half is mandatory for hours worked in excess of 40 hours unless the parties have contracted out of the requirement or unless the employee is a professional or managerial employee whose Statement of Employment indicates that the employee's annual salary has been calculated to reflect that his regular duties are likely to require him to work, on occasion, more than 40 hours per week.

Effective June 1, 2023, Bermuda introduced a new statutory minimum wage of $16.40 per hour, said to be the highest in the world. A worker's gross pay must add up to at least the minimum hourly wage of $16.40 for any pay reference period before an employer can begin making any deductions. A few categories of workers are excluded. For workers depending on tips and service charges such as hospitality workers, gratuities may be combined with the base wage to add up to $16.40 an hour, i.e., employers in Bermuda are allowed to include gratuities in the gross amount which count towards the minimum.

Every employee has the right to be (or not to be) a member of a trade union of their choice, or to refuse to be a member of a particular trade union. An employer who interferes with these rights commits an offence.

Employers cannot conduct involuntary drugs test on job applicants or employees. It is up to the employee or applicant as to whether they consent to submit to tests in order to become or stay employed.

Non-competition clauses are only enforceable to the extent that they are reasonable to protect the employer's legitimate business interests (e.g., trade secrets or key personnel) in terms of time, geographical scope and scope of restriction. Non-solicitation clauses (of the former employer's clients and key employees) are more readily enforceable.

A clause in the contract giving an employer the right to terminate "at will" (i.e., without just cause) is unlawful and thus unenforceable. An employee can only be dismissed for a valid reason, such as ability, performance, conduct or business operational requirements (e.g., redundancy). If the termination is for an invalid reason or for no reason or for an unlawful reason (e.g., discriminatory), it is an unfair dismissal meriting a statutory complaint to the Employment Tribunal. Statutory redundancy pay must be paid if a condition of redundancy exists (capped at 26 weeks' wages) unless the contractual terms on redundancy are more favourable. Common law allows an employee to elect to pursue a claim for breach of contract, including wrongful dismissal, in the Supreme Court for damages. The limitation period is 6 years.

In February 2023, the Government published "*A Guide to Working in Bermuda*" to heighten the awareness of employees of their employment rights. In 2023 the Government also published the *"Independent Contractor Guidance*" to help employers and employees understand whether a worker is an independent contractor or not in substance.

I. Hiring

A. Basics of Entering an Employment Relationship

For the purposes of the EA 2000, the following types of person fall within the definition of an "employee" in s.4 and therefore have the protections of the Act:

(a) a person who is employed wholly or mainly in Bermuda for remuneration under a contract of employment; and

(b) any other person who performs services wholly or mainly in Bermuda for another person for remuneration on such terms and conditions that his relationship with that person more closely resembles that of an employee than an independent contractor,

but does not include:

(a) a person who is under the age of sixteen (16) years;

(b) a casual worker;

(c) a part-time employee;

(d) a temporary employee;

(e) a student;

(f) a voluntary worker;

(g) such other class of persons as may be prescribed by regulations.

Those excepted persons are defined as follows:

> "casual worker" means a person who works from time to time for remuneration for one or more employers, but who does not seek the rights and obligations of a contract of employment;
>
> "part-time employee" means a person who is employed by an employer for less than fifteen (15) hours a week;
>
> "student" means a person who is, by virtue of s.1(3) of the Contributory Pensions Act 1970 (students employed in vacation etc), deemed not to be an employed person for the purposes of that Act;
>
> "temporary employee" means a person who is employed for no more than three (3) months in any year by an employer;

> "voluntary worker" means a person who works on a voluntary basis for a charity or other philanthropic organisation.

The TULRA 2021 provides its own definitions in s.2, including the concept of "worker" which is wider than, and includes but is not limited, to all employees falling within the EA 2000:

> "contract of employment" means any contract, whether express or implied, whether oral or in writing and whether or not in compliance with the requirements of this Act, which provides for a worker to perform specified services for an employer;
>
> "employer" means a person in Bermuda who employs workers;
>
> "terms and conditions of employment" means any terms and conditions under which one or more workers have worked, are working or will be working for their employers;
>
> "worker" includes, subject to s.3 (military etc.): (a) an employee within the meaning of s.4 of the EA 2000; (b) a person falling within s.4(2) of the EA 2000 (who is not an employee for the purposes of that Act) where such a person works or normally works wholly or mainly in Bermuda for an employer under a contract of employment; (c) an individual in employment under or for the purposes of the Crown where such employment does not fall within paragraph (a) or (b).

In determining if an individual enjoys employee status as opposed to independent contractor status (the latter of which means having to pay 100% of one's benefits), the overriding consideration will be the substance of the relationship between the parties which can often involve complex facts. There are a number of criteria, which have been developed by the English courts of common law over the years whose decisions are followed by the Bermuda courts. The four (4) stage common law test is generally:

(1) mutuality of obligations (that is, the obligation to work and to pay) – the court will consider whether the individual has the right to a minimum amount of work or pay which would indicate employment status, or whether the individual could refuse work when offered, or could be sent home if a project ended.

(2) personal service – an unqualified right to substitute for another individual would indicate independent contractor status.

(3) sufficient control by the party for whom the work is being carried out. The court will look at all the facts to determine if the employer had sufficient control over the individual for it to constitute employment status. Factors that might be considered are:

- the extent to which the individual is subordinate to the employer (for instance, are there appraisals and disciplinary procedures?);

- is the individual integrated into the business (own desk, business cards, email address)?

- does the individual provide his own tools and equipment?

- what training and supervision is provided to the individual? Is the individual permitted to take on other work?

- how senior is the individual? The more senior, the less control the employer would be expected to have.

(4) consistency of the other provisions of the contract as to whether it is a contract of employment. Control will not be enough to determine employment status on its own. Other factors that will be relevant are:

- the extent of the financial risk which is adopted by the individual, such as the risk of making a loss on the contract, termination without compensation, or an obligation to make good any defective workmanship at their own expense;

- whether the individual supplies their services through a service company primarily to limit their liability;

- whether the individual supplies their own insurance cover;

- how much the individual is invested in and manages the business;

- whether the individual is able to profit from his own performance;

- whether the individual is entitled to employee type benefits, paid a salary, or is entitled to holiday or sick pay;

- whether the individual is paid by reference to an annual salary, or a fixed hourly rate or a set fee for the entire job.

The way in which the parties describe themselves will not be decisive as to the individual's employment status. Simply drawing up a consultancy agreement and describing the relationship as a self-employed independent contractor will also not necessarily lead to a finding that no employment exists. Nevertheless, the parties' understanding about the nature

of their relationship will be taken into account by the courts, particularly if the situation is marginal.

In 2023 the Government also published *"Independent Contractor Guidance*" to help employers and employees understand whether a working relationship more closely resembles that of an employee or that of an independent contractor. The Guidance lists 12 indicators that are material to differentiate employees from independent contractors. The hope is that the Guidance will reduce the occurrence of employee benefits being compromised and lower the occurrence of disputes being brought before the Tribunal. The 12 indicators are as follows: continuity of work; tools and equipment; integration; method of payment; training; profit and loss; contract type; control over work; open market competition/number of clients; benefit responsibility; business registration; and termination.

The fundamental written terms of the contract of employment must be contained in a Statement of Employment which may constitute part or whole of the contract of employment. Other terms may exist separately (e.g. in the offer letter, a staff memo, the Employee Handbook, on the Intranet, etc., provided they are incorporated in 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 to be incorporated in the contract (e.g. a discretionary bonus scheme or the Employee Handbook because the employer wants to be able more easily to amend their provisions at his discretion), he should use clear and conspicuous language that the terms do not form part of the contract. If the terms of the written contract are ambiguous, 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 contain an "entire agreement clause" stipulating that the document forms the "whole contract," and supersedes and takes precedence over any prior oral representations or statements that shall have no effect.

Common Law Claims (Hiring Process)

The employer may be liable for the common law tort of misrepresentation (whether innocent or fraudulent) arising from misrepresentations or misstatements that have been 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 misstatement to

his detriment, he may, in principle, bring an action for damages against the employer for the loss suffered. Such claims are, in practice, rare.

Express oral promises may form part of the contract or amend the contract. Accordingly, employers should take steps to ensure that an implied contract is not created by an ill-chosen statement such as those made about trying to entice applicants to accept a position. However no contractual term will be implied to override the express terms of the contract.

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, this 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).

The employee has a duty of loyalty and fidelity to the employer during his employment (including during any period of garden leave) which implies various types of obligation on the employee's part, e.g., not to compete with his employer or make secret profits.

An employer may be estopped from asserting that a term is not a contractual term by reason of the theory of promissory estoppel where he has made a promise that reasonably induced detrimental reliance by the employee or applicant, as for example, when an accepted offer of employment has been withdrawn prior to giving the employee starting the job, and after the employee has spent money to his detriment in reliance on the promise (e.g. selling a home and moving).

Statutory Claims – Hiring

The EA 2000 provides employees who have been hired with statutory remedies when the employer has breached a provision of the EA 2000.

In addition, a civil penalty of up to $5,000 may be imposed against an employer who fails to provide a Statement of Employment to the employee (s.6(7)).

A civil penalty of up to $5000 may also be imposed against an employer who fails to provide a clear written policy statement against bullying and sexual harassment within the place of work. The employer must present this to the employee on the commencement of his employment and put procedures in place to assist every employee in understanding the policy statement, which must contain the terms set out in Schedule 1 of the EA 2000.

Statutory claims may also be brought under the HRA 1981 if the hiring process involves breaches of human rights, including principally, discrimination (see Section I.B.).

B. Discrimination (in the Hiring Process)

Protected Classes

The HRA 1981 has primacy over other laws and applies generally to persons in Bermuda (including employers and employees). It prohibits discrimination on the basis of any one of the following protected characteristics of an employee as defined in s.2(2), namely:

(i) race, place of origin, colour, or ethnic or national origins,

(ii) sex (which includes the fact that a woman is or may be pregnant) or sexual orientation,

(iii) marital status,

(iii)(A) disability (which includes any degree of physical disability (as defined) or a mental impairment and the impairment has or has had a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities);

(iv) family status

(v) [repealed]

(vi) religion or beliefs or political opinions; or

(vii) criminal record (except where there are valid reasons relevant to the nature of the offence that would justify the difference in treatment).

S.2(2) provides that a person is deemed to discriminate against another person –

(a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the light terms and the like circumstances as in the case of other persons generally, or deliberately treats him differently to other persons because of one of the protected characteristics; or

(b) If he applies to that other person a condition which he applies or would apply equally to other persons generally but–

(i) which is such that the proportion of persons of the same [protected characteristic][2] as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii) which he cannot show to be justifiable irrespective of the [protected characteristic][3]; and

(iii) which operates to the detriment of that other person because he cannot comply with it.

S.6 of the HRA 1981 makes it unlawful for an employer to discriminate against a job applicant or employee on the basis of a protected characteristic by:

(a) refusing to refer or to recruit any person or class of persons for employment;

(b) dismissing, demoting or refusing to employ or continue to employ any person;

(bb) paying one employee at a rate of pay less than the rate of pay paid to another employee 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;

(c) refusing to train, promote or transfer an employee;

(d) subjecting an employee to probation or apprenticeship, or enlarging a period of probation or apprenticeship;

(e) 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;

(f) 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

(g) providing in respect of any employee any special term or condition of employment.

[2] all protected characteristics except criminal record
[3] all protected characteristics except criminal record

Certain express statutory exceptions are made in the HRA 1981 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 HRA 1981 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 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 HRA 1981 to the employer.

Further, the HRA 1981 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 organisations.

Any term of a contract of employment that contravenes the HRA 1981 is not rendered void or unenforceable by reason only of breaching the HRA 1981 but may be rectified by a Court upon application so as to secure compliance with the HRA 1981 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.

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 characteristics or that requires a job applicant to furnish any information concerning any of the protected characteristics (see Section I.B.).

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 PRC 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 has been rejected, the prospective employer must include details about the Bermudian and their application along with the reason why he was not suitably qualified for the position. The employer must also demonstrate that he has informed the Bermudian of the outcome of his application. In an effort to increase job opportunities for Bermudians and spouses, in 2022 the Government increased the number of expatriate work permit moratoriums on a sizeable number of job categories, including administrative and executive assistants, bank tellers, musicians and others.

D. Use of Employment Contracts

The fundamental written terms of the contract of employment must be contained in a Statement of Employment which may constitute part or whole of the contract of employment.

S.6 of the EA 2000 mandates that not later than one (1) 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.

As of 1 June 2021, in addition to regular employees, all students, casual and voluntary workers, part-time and temporary employees, must have a Statement of Employment (even if they do not have the other protections of the Act). S.6(2) mandates that Statements of Employment for all employees must contain particulars of:

(a) the full names of the employer and employee;

(b) the date when the employment began;

(c) the job title and brief description of the work for which the employee is employed;

(d) the place or places of work;

(e) the gross wage or the method of calculating it, and the intervals at which it is to be paid;

(f) the normal days and hours of employment or, where the job involves shift work, the normal pattern of the shifts;

(g) the entitlement to holidays, including public holidays, and paid annual vacation;

(ga) the entitlement to rest days and meal breaks;

(gb) the entitlement to overtime pay or hours in lieu and the rate of overtime pay or the method of calculating it;

(h) the terms relating to incapacity for work due to sickness or injury, including provision for sick leave;

(i) the length of notice which the employee is obliged to give, and entitled to receive, to terminate his contract of employment;

(j) details of any pension provided, whether under the National Pension Scheme (Occupational Pensions) Act 1998 or otherwise;

(k) any disciplinary and grievance procedures applicable;

(l) 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;

(m) any probationary period;

(n) any dress code;

(o) the existence of any collective agreement which directly affects the terms and conditions of the employment;

(p) where the employment is pursuant to a work permit, the date of issue and expiry of that work permit, any employment-related conditions (including any requirement to work at more than one location) and any immigration restrictions set out in the work permit;

(q) the existence of the employer's written policy against bullying and sexual harassment in the workplace and how the policy can be accessed;

(r) such other matters as may be prescribed and may contain other details relating to the terms and conditions of employment.

Where there are no particulars to be entered under paragraphs (k) to (o), that fact must be noted in the Statement.

The Statement may refer the employee for particulars of the matters mentioned in (g) to (k) (n) and (q) to-

(a) the provisions of any collective agreement which directly affects the terms and conditions of his employment; or

(b) to any other relevant document, which is copied to the employee.

Any agreed variations to the terms of employment that are contained in the Statement of Employment must be embodied in an amended Statement that is signed and dated by the parties and given to the employee within one (1) month from the change having been agreed.

Employment contracts will often contain more than the above-mentioned required fundamental terms. Other terms may exist separately (e.g. in the offer letter, a staff memo, the Employee Handbook, on the Intranet, etc., provided they are incorporated in the contract of employment by express reference or implication. See Section I.A for further details.

In some 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.

When drafting employment contracts, Bermuda employers should be aware that restrictive covenant clauses will only be enforceable in Bermuda if they are considered reasonable in protecting the employer's legitimate business interests, such as trade secrets, clients and key staff. Non-compete clauses must be reasonable in relation to time, geographical scope (worldwide can be reasonable) and scope of the prohibited work.

As a matter of law, arbitration clauses may be included in Bermuda employment law contracts (typically in relation to more senior positions). With a well-drafted arbitration clause, an employer can obtain a stay from the Supreme Court or tribunal if an employee tries to circumvent the arbitration process by going straight to litigation.

Having said that, the Minister of Economy and Labour has stated in the press in 2022 that arbitration clauses should not be used to oust the jurisdiction of the Employment Tribunal, i.e. in cases where an employee complains that the employer has breached a provision of the EA 2000. This statement does not have the force of law.

Notably, s.2 of the EA 2000 provides that an agreement in any contract is of no effect if it seeks to contract out of the Act's "requirements", for e.g., the employer's requirement to provide maternity leave or vacation leave. Thus, arbitration cannot oust the hearing of cases relating to such requirements, but the wording of s.2 does not create a complete bar to the use of arbitration to oust other matters that might be heard before the Employment Tribunal.

Also relevant is s.37(5) of the EA 2000 which provides that where any relevant internal grievance procedure is established to deal with an employee's complaint, then "unless and until there has been a failure to obtain a settlement by means of that procedure", the Labour Relations inspector shall not attempt to settle the complaint and shall not refer the complaint to the Tribunal, except with the consent of all the parties. Thus, if arbitration is made part of the employer's established internal grievance procedure, the parties would have to exhaust that

procedure, and only if those processes were unsuccessful, could the employee then progress a complaint through the Employment Tribunal.

Assuming there is no binding arbitration clause, disputes are adjudicated via the statutory mechanism prescribed by the EA 2000 or in the Supreme Court.

Whilst few employers do so in practice, formal employment contracts 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 a simple contract is $27. Exempt companies are exempt from paying such tax.

E. Advertising/Recruitment

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 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 (updated effective March 27th, 2017), 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 will be rejected as non-compliant 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 grant a new 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 does not qualify as fulfilling part of the three (3) day requirement. Copies of the advertisement that appeared in the local newspaper must be included in the immigration application to hire the overseas worker. Employers must also

post a notice regarding the position to be filled on the Government Job Board at bermudajobboard.bm for at least eight (8) consecutive days.

The work permit application must be submitted within three (3) months of the last date on which the position was advertised; alternatively, within six (6) months where the length of the recruitment process does not permit the employer to submit an application within the three (3) month period upon payment of an Advertisement Extension Fee. If a Bermudian or a spouse of a Bermudian or a PRC holder applies 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 a PRC 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, 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 from the requirement to advertise will be granted for:

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

F. Background Checks/ Employment References

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

While consideration of a criminal background is relevant and appropriate in some circumstances, employers must obtain the job applicant's written consent to obtain a police

clearance check regarding his criminal background from the Bermuda Police Service or the police will not release the information. The employer should obtain the employee's consent in the offer letter or Statement of Employment and it will be required as a condition of a work permit for expatriate employees.

The HRA 1981 provides that an employer cannot lawfully 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)).

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 organisation in Bermuda that provides such information (traditionally covering checks in the retail, banking and utilities industries). A member has access to the database and can therefore be provided with credit information about anyone in the database. 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.

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

In respect of general employment background checks, whilst the applicant's consent is not legally mandated, the employer or prospective employer should obtain the applicant's consent to release information obtained from checks in the offer letter or contract of employment or Statement of Employment. In addition, the job applicant is often required to provide contact details for referees from his former jobs whom the prospective employer will contact for background information.

As to references, there is no obligation under Bermuda law to provide an employment reference. However, there is also nothing in Bermuda law preventing employers from giving references should they choose to do so. When an employer chooses to provide a more detailed reference, the employer has a legal duty to state what he knows, either positively or negatively, about the employee.

There are two (2) potential causes of action against employers who give references that are untrue or inaccurate, namely defamation and negligent misstatement.

An employee may allege defamation if the reference given has caused or may cause serious harm to his reputation. However, this is difficult to prove as there are several defences that protect an employer, including truth, honest opinion, and qualified privilege.

If the employer's reference is honest and factual, the employer will be conditionally protected by privilege, which means that a former employee has no claim in defamation based on an unfavourable reference unless it was made with actual malice, or intent to harm the employee. The employer is further protected by the defence of truth and/or honest opinion if the statements made were honest and true or based on an honest and reasonable opinion. The employer must be able to demonstrate the basis of this opinion.

The duty of the employer providing the reference is ongoing. If the employer subsequently uncovers facts about the employee's employment that change the reference, the employer has a duty to correct the mistake by contacting the person in receipt of the reference. This disclosure will also be protected by qualified privilege, even though it is unsolicited.

Negligent misstatement is the other (common law) potential claim an employee may make as regards a reference. Negligent misstatement can arise when an employer breaches its duty to an employee (or former employee) to take reasonable care when providing a reference. This duty encompasses the premise that the employer must provide a fair and accurate reference for the employee, and thus, when preparing a reference, he should ensure the facts are accurate and true, and that opinions expressed have a legitimate basis.

If an employer does not take care in this regard and the reference is inaccurate, unfair or untrue, either positively or negatively, the employer could be liable for damages. An employer must be able to justify and support any comments made in a reference and show that they are true or that it is honestly believed that they are true.

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 from his former employer (if one was provided) as a starting point for basic information.

II. Compensation

A. Minimum Wage

Effective June 1, 2023, Bermuda introduced a new statutory minimum wage of $16.40 per hour, said to be the highest in the world. A worker's gross pay must add up to at least the minimum hourly wage of $16.40 for any pay reference period before an employer can begin making any deductions.

The vast majority of workers (including domestic workers) must now be paid at the set level or above, although students can receive 70 per cent of the amount under the law.

A few categories are excluded, including casual workers packing groceries, people working in family businesses, apprentices, volunteers, and anyone under the age of 18.

For workers depending on tips and service charges such as hospitality workers, gratuities may be combined with a base wage to add up to $16.40 an hour, i.e., employers in Bermuda are allowed to include gratuities in the gross amount which count towards the minimum.

The Employment (Protection of Employee Tips and Other Gratuities) Amendment Act 2023, operative as of March 1, 2024 makes it mandatory for employers to ensure that all tips, gratuities and/or service charges are fairly allocated to workers and that any such payments should be made by the end of the month following the month from which the tip was made. Under the Act, workers cannot be contracted out of their rights.

Further, where a Company pays tips more than occasionally, they are required to have a tipping policy in place, and they must have records for how their tips are dealt with. Employers must also have a request process for workers who wish to receive a copy of their tipping record.

The Act also specifies that any deductions from tips, aside from those required by law (e.g., payroll tax) are prohibited, irrespective of any contractual agreements made otherwise. Where such a deduction is made, employees may file a Complaint claiming unlawful deductions from wages. A new Statutory Code of Practice for distributing tips has also been published which gives employers further details on how to meet the new statutory requirements.

B. Wage Payments & Deductions

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 and s.2 of TULRA 2021, "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 of "wages" expressly excludes tips, bonuses, expenses and the monetary value of any benefits in kind. Thus, such matters would not be included in the calculation of severance allowance for redundancy which is determined by the level of wages.

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 contain particulars of:

(a) the period of time or the work for which the wages are being paid;

(b) the rate of wages to which the employee is entitled and the number of hours worked, where the number of hours worked varies from week to week;

(c) the gross amount of wages to which the employee is entitled;

(d) the amount and purpose of any deduction made from that amount;

(e) any bonus, gratuity, living allowance or other payment to which the employee is entitled; and

(f) 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; or 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 and a complaint may be made to the Employment Tribunal.

Deductions made for the purpose of reimbursing the employer for mistaken overpayments of wages or expense reimbursements, deductions made as a result of any disciplinary proceedings which were held by virtue of the EA 2000 or any other statute, and deductions made in consequence of an employee's participation in a strike or lockout are not considered unauthorized deductions and thus may be deducted.

Normal deductions from wages include:

- payroll tax (the statutory employee portion, considerably less than the employer statutory portion);

- social insurance (government pension) (often 50% of the total cost of the premium is deducted);

- health insurance (often 50% of the total cost of the premium is deducted);

- private pension contributions for Bermudian employees or spouses of Bermudian employees only (often 50% of the total cost of 10% of pensionable earnings (so 5%) is deducted).

Of course, some employers, typically in the reinsurance industry, elect to pay 100% of payroll tax and benefit contributions.

By new payroll tax legislation enacted in 2022, tips and gratuities are not subject to payroll tax deductions, clearing up a previous grey area for employers. The Payroll Tax Amendment and Validation (No 2) Act 2022 clarifies that certain gratuities received by employees are not subject to payroll tax.

C. Minimum Age/Child Labour

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 thirteen (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) may not lawfully be employed during school hours on school days and may only be employed for up to two (2) hours on such days outside of school hours.

Persons under the age of eighteen (18) may not lawfully 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.

D. Retirement Age

There is no statutory retirement age for persons in private employment and age is not a protected characteristic under the HRA 1981.

However, a termination is deemed an unfair dismissal under the EA 2000 if the termination is by reason of an employee's age, subject to any other enactment or any relevant collective agreement regarding retirement.

Bermuda's mandatory retirement age for government (public service) workers is sixty-eight (68) years pursuant to s.22(2) of the Public Service Superannuation Act 1981.

Police officers and firefighters below a certain rank, and Bermuda Regiment staff generally have a lower retirement age of fifty-five (55) years.

Teachers are mandated to retire at the end of the school year during which they attain the age of sixty-five (65) years, with the ability to obtain extensions until the age of seventy (70) years.

In addition, the Governor may require public service officers to retire at or at any time after attaining the age of sixty (60) years.

E. Overtime Requirements

Pursuant to s.9 of the EA 2000, 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 (1½) 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. The Statement of Employment must expressly provide: "*the entitlement to overtime pay or hours in lieu and the rate of overtime pay or the method of calculating it".*

Pursuant to s.6(4A) of the EA 2000, where there is no payment of overtime or hours in lieu, that fact must be noted in the Statement of Employment.

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 forty (40) hours a week.

Overtime pay or time off in lieu is also not payable where the employer and the employee agree that it should not apply, and therefore the parties may contract out of the overtime requirement, in which case this must be stated expressly in the Statement of Employment.

In respect of certain classes of foreign employees who require protection from employer abuse such as child caregivers, the Department of Immigration will not, as a matter of policy, issue a work permit to an employer to employ the foreigner unless overtime pay is provided for in the Statement of Employment, 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 Economy and Labour 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.

F. Workday/Workweek/Work hours

The typical work week in Bermuda is forty (40) hours, 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 work week.

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 employees must receive an itemised pay statement that 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 (see Section II.B).

Under s.10, an employer must provide each employee with a rest period of at least twenty-four (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.

S.10A prohibits employers from requiring an employee to work more than five (5) hours continuously without a meal break of at least thirty (30) minutes. Employees may voluntarily opt to work during such breaks.

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

G. Benefits/Health Insurance

Government Disability Benefits

S.4 of the Contributory Pensions Act 1970 ("CPA 1970") as read with s.17 provides for disability benefit payments to certain persons which are either contributory or non-contributory in nature. These Sections benefit "insured persons", namely persons over school leaving age (i.e. over eighteen (18)) who are incapacitated from gainful employment.

S.4 provides that persons who are over school-leaving (over eighteen (18) years) age and under sixty-five (65) years of 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; only the employer does. Self-employed persons like consultants must pay contributions that are 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 sixty-five (65) must pay the normal employee contribution amount only.

S.17A provides that an insured person over eighteen (18) years of age and under the age of sixty-five (65) years 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 has 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 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/or short-term disability benefits, whilst not required, are often provided by the employer as part of an employee's benefit package, more typically provided for employees in more senior positions. Half the costs of the premiums may be deducted from the employee's pay but often these are covered 100% by the employer.

Under the terms of the relevant disability insurance policy, and typically after the employee's sick leave benefit has been exhausted, the employer may offer a short-term disability benefit in respect of illness/injury lasting typically 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 medical practitioner during this time. The employee will remain employed whilst on short term disability (either on full pay or part pay or unpaid, depending on the terms of the policy level of incapacity) 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 (if any). The long-term benefit is a percentage (usually two-thirds (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, in which case the losses will lie where they fall, but this is rarely a straightforward scenario, and it is best to cover the potential for this situation in the contract of employment at the outset.

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 his full regular benefits (health insurance, life insurance, etc.). If the employee is terminated whilst on long term disability pay, then the employee typically loses these other regular benefits unless exceptions are made in the policy. If the other benefits are lost, the employee finds himself having to pay the full cost of his health insurance out of his disability pay, which can be financially stressful.

Health Insurance

Employers are required to provide health insurance at the lowest statutory level of coverage for all employees and all non-employed spouses of employees as per s.20 of the Health Insurance Act 1970. Under s.20 employers must provide no less than the standard health benefit, but many choose to provide a higher and better level of coverage, namely either major medical comprehensive insurance or HIP insurance (mid-level). Ss.21 and 22 enable the employer to recoup up to half of the cost of premiums paid for employees and unemployed spouses of employees from the wages of the employee. Additional dependants (e.g. minor children) may be covered but the employer may insist that the employee pays 100% of these additional premium costs.

III. Time Off/Leaves of Absence

A. Paid Time Off

Vacation Pay

S.12 of the EA 2000 provides that an employee is entitled to two (2) weeks (i.e. Ten (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).

S.12 permits an employee, after completing the first six (6) months of continuous employment, to take up to five (5) days of the ten (10) days permitted annual leave but such leave is to be deducted from the permitted ten (10) days in the second year of employment.

The Statement of Employment must give particulars of the employee's entitlement to vacation leave.
The parties may not contract out of these requirements as per s.2(2) of the EA 2000.

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.

Where an employee is entitled to more than the statutory minimum period of leave by reason of any statute, agreement, contract of employment, custom or practice, the more favourable provision shall apply (s.2).

Sick Leave

S.14 of the EA 2000 provides that an employee who has completed at least one (1) 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.

The Statement of Employment must give particulars of the employee's entitlement to sick leave.

The parties may not contract out of this requirement as per s.2(2) of the EA 2000.

An employee is not entitled to be paid for sick leave if he is absent from work for a period of two (2) or more consecutive days unless, upon request by the employer, he provides the employer with a certificate from a registered medical practitioner certifying that the practitioner has examined the employee and determined that he is unable 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).

An employer is not allowed to give notice of termination during an employee's absence on sick leave unless the period of sick leave extends beyond six (6) weeks.

Holiday Pay (Public Holidays)

S.11 of the EA 2000 provides that employees are entitled to time off from work with pay on all statutory public holidays unless the parties agree otherwise in writing.

The Statement of Employment must give particulars of the employee's entitlement to holidays, including public holidays. The Public Holidays Act 1947 provides the mechanism for Government declaring which days are public holidays (normally about days ten (10) per year).

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 annual vacation leave or sick leave. If the holiday falls on an employee's scheduled day off, then he may 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 in writing in the Statement of Employment.

Other - Public Duties

Subject to the requirements of the business, an employer must, where practicable, permit an employee to take such time off during his working hours as is reasonable in the circumstances to attend any of the following bodies of which he is a member, or to do anything approved by the body for the purpose of discharging his functions-

a) any government board;

b) the Royal Bermuda Regiment;

c) the Reserve Police;

d) the Senate or House of Assembly: and

e) such other body as may be prescribed.

In addition, employers must permit an employee who has been summoned for jury service or summoned to attend court as a witness to seek such time off during his working hours as is necessary to discharge his duty.

Further employees must be permitted to take such time off during their working hours as is necessary to vote in a Parliamentary election within the meaning of the Parliamentary Election Act 1978.

B. Family and Other Medical Leaves

Bereavement leave

In the event of death of a member of an employee's immediate family as defined in s.17 of the Act, namely a spouse, child, parent, sibling, grandparent, great-grandparent, grandchild, great-grandchild or someone with whom the employee was sharing a household (other than by reason by reason of a landlord-tenant or employer-employee relationship), the employee is entitled to up to three (3) consecutive days of bereavement leave (or 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 employer is not obliged to pay the employee in respect of bereavement leave unless the contract of employment states otherwise.

Employers are not allowed to give notice of termination during an employee's absence on bereavement leave.

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

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

C. Disability Leave

Bermuda does not have any law or statue that addresses this issue. The issue is determined by contract. For disability payments, see Section II.G.

D. Pregnancy and Ante-Natal Leave/Parental Leave

S.15 of the EA 2000 provides that a pregnant employee who has completed at least one (1) year of continuous employment (as of her expected due date) 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 (1) year are entitled to time off, but without pay.

Pursuant to s.16 of the EA 2000, a pregnant employee who has completed at least one (1) year of continuous employment or will have done so by the expected date of delivery, is entitled to thirteen (13) weeks of paid maternity leave 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. If the employee has been employed for less than one (1) year, her benefit is thirteen (13) 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 and 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, she shall be deemed to have terminated her employment.

S.16A provides for paternity leave for employees who have completed at least one (1) year of continuous employment or will have done so by the expected date of birth of the child. The entitlement is for a period of five (5) consecutive days of paid leave from work for the purpose of caring for a child or supporting the child's mother. To receive this benefit, the employee must

be the father of the child and submit to his employer a certificate of a registered medical practitioner certifying that the child's mother is pregnant and the estimated date of the child's birth. He must also submit to his employer an application for paternity leave at least four (4) weeks before the day he specifies as the day on which he intends to commence his leave. If the employee has been employed for less than one (1) year, he is entitled to five (5) consecutive days of unpaid leave.

Paternity leave may only be taken once during a twelve (12) month period beginning with the date on which the child is born and must be taken within a period not exceeding fourteen (14) weeks from that date. This is intended to provide fathers with the flexibility to use their leave when they most need it, whether during the first few days following the birth, or during the first week of the mother's return to work.

Employees on maternity or paternity leave may not lawfully be given notice of termination during that leave, and their employment is deemed to be continuous during any period of absence from work on parental leave.

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

IV. Discrimination & Harassment

A. Discrimination

Protected Classes

The HRA 1981 has primacy over other laws and applies generally to persons in Bermuda (including employers and employees). It prohibits discrimination on the basis of any one of the following protected characteristics of an employee as defined in s.2(2), namely:

(i) race, place of origin, colour, or ethnic or national origins,

(ii) sex (which includes the fact that a woman is or may be pregnant) or sexual orientation,

(iii) marital status ,

(iii)(A)disability (which includes any degree of physical disability (as defined) or a mental impairment and the impairment has or has had a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities);

(iv) family status[4];
(v) [repealed]
(vi) religion or beliefs or political opinions; or

(vii) criminal record (except where there are valid reasons relevant to the nature of the offence that would justify the difference in treatment).

S.2(2) provides that a person is deemed to discriminate against another person –

(a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the light terms and the like circumstances as in the case of other persons generally, or deliberately treats him differently to other persons because of one of the protected characteristics; or

(b) If he applies to that other person a condition which he applies or would apply equally to other persons generally but–

(i) which is such that the proportion of persons of the same [protected characteristic][5] as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii) which he cannot show to be justifiable irrespective of the [protected characteristic][6]; and

(iii) which operates to the detriment of that other person because he cannot comply with it.

S.6 of the HRA 1981 makes it unlawful for an employer to discriminate against a job applicant or employee on the basis of a protected characteristic by:

(a) refusing to refer or to recruit any person or class of persons for employment;

(b) dismissing, demoting or refusing to employ or continue to employ any person;

(bb) paying one employee at a rate of pay less than the rate of pay paid to another employee for substantially the same work, the performance of which requires equal education, skill, experience, effort and responsibility and which is performed under

[4](v) repealed
[5] all protected characteristics except criminal record
[6] all protected characteristics except criminal record

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;

(c) refusing to train, promote or transfer an employee;

(d) subjecting an employee to probation or apprenticeship, or enlarging a period of probation or apprenticeship;

(e) 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;

(f) 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

(g) providing in respect of any employee any special term or condition of employment.

Certain express statutory exceptions are made in the HRA 1981 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 HRA 1981 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 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 HRA 1981 to the employer.

Further, the HRA 1981 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 organisations.

Any term of a contract of employment that contravenes the HRA 1981 is not rendered void or unenforceable by reason only of breaching the HRA 1981 but may be rectified by a Court upon application so as to secure compliance with the HRA 1981 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 HRA 1981 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 HRA 1981. 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.

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 complaint but has been unsuccessful, and the complaint is not so serious as to warrant a prosecution, he must refer the complaint to the Human Rights Tribunal appointed under the HRA 1981.

The Tribunal will hear the complaint and decide whether or not a party has breached the HRA 1981 and may do any one of more of the following:

- order the party in breach to come into compliance with the HRA 1981 and rectify any injury caused to the complainant by the breach and to make financial restitution including for injury to feelings (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 of appeal to the Supreme Court from an order of the Human Rights 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 HRA 1981.

As an alternative to bringing a complaint under the HRA 1981, a complainant may opt to issue proceedings in the Supreme Court for breach of statutory duty in civil tort proceedings as permitted by s.20A of the HRA 1981.

On the issue of race 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. If required by notice (usually annually) issued under the Statistics Act 2002 and Statistics (Disclosure of Information) Regulations 2002, employers who are carrying on an undertaking of a class or description specified in the notice must disclose information in relation to the categories as specified in the First Schedule of the main Act which include population, housing, labour, religion, race and ethnicity, etc. Historically, the notice has required employers with more than ten (10) employees to record and disclose annually the names, gross annual income and benefits as well as information on recruitments, promotions and terminations of employees.

In addition, the Commission has the power to issue codes of practice containing practical guidance towards eliminating race 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.

In respect of the EA 2000, s.28 ("Unfair Dismissal") protects employees from disciplinary action or termination on some human-rights related grounds including:

(a) an employee's race, sex, religion, colour, ethnic origin, national extraction, social origin, political opinion, disability, or marital status;

(b) an employee's age, subject to any other enactment or any relevant collective agreement regarding retirement;

(c) any reason connected with an employee's pregnancy, unless it involves absence from work that exceeds the allocated leave entitlement;

(d) an employee's trade union activity;

(e) an employee's temporary absence from work because of sickness or injury, unless it occurs frequently and exceeds the allocated leave entitlement;

(f) 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;

(g) an employee who removes himself from a work situation which he reasonably believes presents an imminent and serious danger to life or health;

(h) an employee's participation in any industrial action that takes place in conformity with the TULRA 2021;

(i) the filing of a complaint or the participation in proceedings against an employer involving alleged violations of the EA 2000;

(j) the making of a protected disclosure under s.29A of the EA 2000.

The dismissal of an employee is unfair under the EA 2000 if it is based on any of the above grounds.

B. Harassment, Sexual Harassment and Bullying

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 characteristics (see Section I.B). The Act provides that harassment occurs when a person persistently engages in comment or conduct towards another person which is vexatious and which 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 HRA 1981 provides that a person sexually harasses another person if he engages in sexual comment or sexual conduct towards that other person that is vexatious and which he knows, or should know, is unwelcome.

In contrast, s.10B of the EA 2000 defines sexual harassment to include any one or more incidences of any of the following–

(a) the use of sexually suggestive words, comments, jokes, gestures or actions that annoy, alarm or abuse a person;

(b) the initiation of uninvited physical contact with a person;

(c) the initiation of unwelcome sexual advances or the requests of sexual favours from a person;

(d) asking a person intrusive questions that are of a sexual nature pertaining to that person's private life;

(e) transmitting sexually offensive writing or material of any kind;

(f) making sexually offensive telephone or internet calls or messages to a person; or

(g) any other sexually suggestive conduct in circumstances where a reasonable person would consider the conduct to be offensive.

An employee's Statement of Employment must give particulars of the existence of the employer's written policy against bullying and sexual harassment in the workplace and how the policy can be accessed.

Bullying is defined in s.10B of the EA 2002 to mean "the habitual display of offensive behaviour intended to harm, intimidate, humiliate, undermine or coerce a person or group of employees and includes, but is not limited to, ostracising, ridiculing, shouting at, threatening, and verbally abusing a person or group of employees."

S.10B(2) mandates that an employer shall ensure—

(a) that there is a clear written policy statement against bullying and sexual harassment within the place of work for which that employer has responsibility;

(b) that the policy statement is presented to each employee on the commencement of his employment with that employer; and

(c) that procedures are put in place to assist every employee in understanding the policy statement.

S.10B provides that the policy statement must contain the terms set out in Schedule 1 to the Act and an employer may consult with employees, trade unions or other representatives (if any) in the establishment of the policy statement.

Employers who fail to comply with s.10B are liable to a civil penalty as may be imposed by the Manager of Labour or the Employment Tribunal, up to $5,000.

Human rights complaints of harassment or sexual harassment are made to the Human Rights Commission under s.15 of the HRA 1981.

V. Termination/Dismissal Issues

A. Overview

Pursuant to s.18 and s.20 of the EA 2000, employers must have a valid reason under the Act to terminate the employment relationship and must give the proper amount of contractual notice to terminate (or payment in lieu thereof).

An employer in Bermuda does not have the right to terminate an employee "at will" (i.e., without just cause) and such a clause in an employment contract is unlawful and unenforceable. An employee may only be dismissed for a valid reason such as ability, performance, conduct or operational requirements (e.g., redundancy). If the termination is for an invalid reason or for no reason or for an unlawful reason (e.g., discriminatory), it is an unfair dismissal meriting a statutory complaint to the Employment Tribunal.

B. Justification for Dismissal

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 when dismissing the employee which causes the employee to suffer damage ("wrongful dismissal"). Damages will generally equate to the value of wages and benefits that would have been payable during the contractual notice period, reduced by the amount a court considers the employee would have saved had he taken reasonable steps to mitigate his loss (e.g. by finding another job).

Examples of breaches / wrongful dismissal 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., three (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.

Constructive dismissal arises by reason of breach of the implied term of trust and confidence that is inherent in the employment relationship. Among the types of breach of contract by the employer that may support a finding of constructive dismissal (as set out in Halsbury's Laws) are:

- a failure to pay wages or unilateral decision to cut pay;
- demotion or other detrimental change in status;
- a change of job content not permitted or envisaged by the contract;
- undermining a senior employee's position;
- change of the place of work, or breach of a mobility clause (express or implied);
- unilateral change of hours;
- failure to ensure the employee's safety;
- breach of the term of trust and respect;
- failure to follow a contractually binding disciplinary procedure;
- imposition of a disciplinary measure in a disproportionate manner;
- failure to provide a reasonably suitable working environment;
- failure to deal with grievances properly and timeously.

The employee should leave in response to the breach of contract because delay in so doing may amount to waiver of the breach and affirmation of the contract, though this will depend on the facts of the case, and a realistic approach must be taken, so that it may be reasonable for the employee to work on for a period under protest, especially if trying to resolve matters without leaving or seeking other work before leaving (Halsbury's Laws).

Whether there has been a repudiatory breach by the employer entitling the employee to leave is essentially a question of fact for the Court in the circumstances of the individual case.

The Supreme Court 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. The Supreme Court has original jurisdiction to hear claims valued at Bd$25,000 or higher; breach of contract claims valued at less than Bd$25,000 are brought in the lower Magistrates' courts.

An employee has a limitation period of 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.

Unfair Dismissal Claims

As an alternative to a common law claim, the employee may file a statutory complaint of unfair dismissal if the employer has violated a provision in the EA 2000 relating to termination.

The EA 2000 limits the circumstances under which the employer may terminate the contract.

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 minimum statutory periods of notice that must be given in writing under s.20 (see below). The failure to give the requisite amount of notice will be an unfair dismissal.

An employer is not lawfully permitted 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 six (6) weeks). If notice is given during one of these periods of leave, it will be an unfair dismissal.

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.

If the termination is for an invalid reason, it is an unfair dismissal. 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.

Further s.18 provides that no lawful termination may occur unless the provisions in s.26 (employer cannot lawfully terminate for repeated misconduct unless a written warning(s) has been issued to the employee); and s.27 (employer may not dismiss for continued unsatisfactory performance unless a written warning and instructions on how to improve performance have been issued to the employee and not complied with). Thus, if no written warning was given prior to the dismissal in these scenarios, the dismissal will be unfair. Certain other timelines apply.

S.28 of the EA 2000 ("Unfair Dismissal") protects employees from disciplinary action or termination on the following grounds:

a) an employee's race, sex, religion, colour, ethnic origin, national extraction, social origin, political opinion, disability, or marital status;

b) an employee's age, subject to any other enactment or any relevant collective agreement regarding retirement;

c) any reason connected with an employee's pregnancy, unless it involves absence from work that exceeds the allocated leave entitlement;

d) an employee's trade union activity;

e) an employee's temporary absence from work because of sickness or injury, unless it occurs frequently and exceeds the allocated leave entitlement;

f) 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;

g) an employee who removes himself from a work situation which he reasonably believes presents an imminent and serious danger to life or health;

h) an employee's participation in any industrial action that takes place in conformity with the TULRA 2021;

i) the filing of a complaint or the participation in proceedings against an employer involving alleged violations of the EA 2000; or

j) the making of a protected disclosure under s.29A of the EA 2000.

A termination on any one of these grounds is an unfair dismissal.

In respect of the last-mentioned ground, the Act protects an employee “whistle-blower” who makes a protected disclosure under s.29A of the Act.

That 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) has 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.

A "listed person" includes but is not limited to the person's employer, manager or supervisor, a police officer and various other official Government-appointed positions.

Further, s.3 of the Good Governance Act 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 or to imprisonment or to both.

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; or
- the employee was terminated during the probationary period but there was no half-time probationary review;
- the employee was terminated for an invalid reason e.g. by reason of their age (where the contract did not allow such); or
- the employee was constructively dismissed.

In any claim arising out of the dismissal of an employee except for constructive dismissal, the burden of proof is on the employer to prove the reason for the dismissal, and if he fails to do so there shall be a conclusive presumption that the dismissal was unfair (s.38).

In contrast, an employee who claims constructive dismissal has the burden of proving the reason that made continuation of the employment relationship unreasonable (s.29).

The employee must file his complaint of unfair (including constructive dismissal) under the EA 2000 within six (6) months of the alleged breach by the employer (s.36).

S.37 provides that the complaint is made to an inspector employed by the Department of Labour Relations, 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 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 (s.36(5)).

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. The hearing will be in public unless the parties mutually agree otherwise.

The Tribunal comprises a chairman, a deputy chairman and a minimum of twenty (20) but no more than thirty (30) members appointed by the Minister. The panel hearing a complaint will normally comprise three (3) persons drawn from the Tribunal, which may or may not include an attorney. Except where provided in the Act, the Tribunal regulates its own proceedings as it sees fit.

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 may 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 Act provides that the amount of compensation ordered to be paid for unfair dismissal shall not be less than three (3) 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, subject to a maximum of twenty-six (26) weeks' wages.

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 reasonable to do so. The relevant factors are as follows:

(a) the nature of the conduct in question;

(b) the employee's duties;

(c) the terms of the contract of employment;

(d) any damage caused by the employee's conduct;

(e) the employee's length of service and his previous conduct;

(f) the employee's circumstances;

(g) the penalty imposed by the employer;

(h) the procedure followed by the employer; and

(i) the practice of the employer in similar situations.

There is a right to appeal to the Supreme Court from an order of the Tribunal on a point of law. The appeal process is governed by the Employment Act (Appeal) Rules 2014.

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 employer will be considered to have "constructively dismissed" the employee if he substantially refuses to continue employing him on the agreed upon terms of employment (e.g., by cutting pay, demoting, eliminating core responsibilities, etc.) such that the employee could not be expected to work for the employer any longer. Constructive dismissal arises by reason of breach of the implied term of trust and confidence that is inherent in the employment relationship.

The burden of proof is on the employee to prove why continuing the employment relationship would be unreasonable (s.38).

The employee must file his complaint under the EA 2000 within six (6) months of the alleged breach by the employer (s.36).

An employee who terminates his contract due to constructive dismissal is deemed to have been unfairly dismissed under the Act.

Discrimination Claims

See Section I.B and Section IV.A.

C. Mandatory Severance Pay

Where an employee has completed at least one (1) continuous year of employment and his employment is terminated by reason of redundancy as defined in s.30 of the EA 2000 (see below), 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. The normal employee portion of payroll tax will be deducted from the gross amount payable.

Where an employee is entitled to more than the statutory minimum of twenty-six (26) weeks' wages by reason of any statute, contract of employment, custom or practice, the more favourable provision will prevail.

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 (same) employer at the same place of work under no less favourable terms than he was employed prior to the termination.

The payment of severance allowance does not affect an employee's entitlement to payment in lieu of notice or to compensation for unfair dismissal under the EA 2000 (s.23(6)).

Severance allowance must be paid within seven (7) days of termination or on the next regular payroll date, whichever is the later.

D. Use of Severance Agreements and Releases

See Section VI.B.

E. Legal Challenges to Dismissal

See Section V.B.

F. Employment References

See Section I.F.

VI. Layoffs/Work Force Reductions/Redundancies/Collective Dismissals

A. Overview

S.32 of the EA 2000 provides that an employer who lays off an employee must do so in accordance with the Act. s.32(1A) provides that the employer must inform the employee and the employee's trade union or other representative (if any) as soon as practicable of the relevant condition of redundancy, the reasons for the layoff, and the period over which the layoff is likely to be carried out.

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:

(a) the modernisation, mechanisation or automation of all or part of the employer's business;

(b) the discontinuance of all or part of the business;

(c) the sale or other disposal of the business

(d) the reorganisation of the business;

(e) 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

(f) the impossibility or impracticality of carrying on the business at the usual rate or at all due to: (i) shortage of materials; (ii) mechanical breakdown; (iii) act of God; or (iv) 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 in which case severance allowance must be paid.

S.30 of the EA 2000 mandates that the employer shall, not less than fourteen (14) days before terminating an employee for redundancy, inform the employee and 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 and 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.

For severance allowance that is payable on redundancy see Section V.C.

B. Procedure

Mandatory Notice Periods

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.

S.20 prescribes minimum statutory periods of notice that must be given in writing. Employees are entitled to at least one (1) week's notice if they are paid weekly, two (2) weeks' notice if they are paid every two (2) weeks and, in other cases, one (1) month's notice.

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

Pursuant to s. 6, the amount of notice that must be given to terminate must be stated in the Statement of Employment.

Instead of the employee serving out his notice or being put on garden leave during all or part of his notice period, the employer may elect to make payment in lieu of notice and confer all other benefits that would have been due up to the end of the employee's 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 leave, housing allowance, car, pension and other benefits.

Payment in lieu of notice, where made, must be made within seven (7) days of termination or on the next regular payroll date, whichever is the later (s.18(5)). The employee will receive their normal net pay plus the value of all employer-paid benefits for what would have otherwise been the normal contractual notice period.

The notice period will not apply to an employee who is on a fixed-term or project-based contract or who is serving his probationary period, or whose work permit is coming to an end.

See also Section V.B.

Severance Pay

See Section V.C.

Benefits (during layoff)

There is no law mandating what benefits employers must provide during layoff. However, the most basic level of standard hospital insurance is mandatory for all employees and given that employees remain employed during periods of layoff (albeit not reporting to work), it is advised that employers should maintain health insurance during periods of layoff. Other benefits that are not mandatory in nature may be suspended during periods of layoff.

Severance Packages/Separation Agreements

Separation/severance agreements agreed between the parties are enforceable in Bermuda arise in the context of termination of employment generally; they do not arise specifically in the context of layoffs and redundancies. An employer should insist on one when he is offering the employee better pay and benefits than what the law otherwise requires.

Separation agreements are construed and enforced in accordance with normal contract law principles.

Stamp duty of $27 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.

To avoid the issue of unenforceability due to no, or no sufficient, consideration for the Separation Agreement contract, the contract should be in the form of a deed which requires stamp duty of $105 under the Stamp Duties Act 1976.

VII. Unfair Competition/Covenants Not to Compete

A. Trade Secrets

Trade secrets are a legitimate business interest that courts will be prepared to protect. 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; this duty is indefinite and survives the termination of the contract. This duty of confidentiality is part of the employee's implied duty of loyalty and fidelity during the period of employment.

However, because implied duties are often difficult to define and enforce, employers will often include express restrictive covenant clauses in the contract to protect their confidential trade secrets, to apply both during employment and post termination.

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.

B. Covenants Not to Compete

Bermuda common law regards covenants in restraint of trade as prima facie unlawful. The court will enforce the covenant only if it goes no further than is reasonably necessary to protect the legitimate interests of the employer (for example, trade secrets, trade connections and workforce stability or other legitimate interests); it will strike down clauses that are unreasonably wide in time, geographical extent and scope of the restricted activity.

Bermuda law generally 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.

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 include trade secrets or highly confidential information akin to a trade secret, workforce stability and important business trade connections.

The court will scrutinize more carefully restrictive 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.

Another way for employers to protect confidential information and trade secrets during employment is an express "garden leave" clause in the employment contract. This clause allows the employer to prohibit the employee from working in the office or accessing the employer's data during the notice period whilst the employee 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. Courts will often enforce both a garden leave clause prior to termination, as well as a post-termination restrictive covenant clause if they are reasonable in scope. The contract will often provide that the post-termination restrictive covenant period will be reduced by the amount of time that the employee spent on garden leave.

Even if the contract does not contain either a restrictive covenant or garden leave clause, the employer may try to rely on the implied duty of confidentiality as it applies after the termination of employment. 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 strongly advised to instead use express restrictive covenant clauses to protect their legitimate business interests.

C. Solicitation of Customers and Key Employees

As another form of restrictive covenant, the courts will enforce reasonable non-solicitation clauses that prevent the employee from soliciting the business of customers and known prospective 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 direct or material contact with customers or suppliers, such that the employee is likely to acquire knowledge of, and influence over, the customers or suppliers and will have had access to their confidential information. The covenant will be upheld where it is reasonable in terms of time, geographical scope and nature of scope of activity.

In addition to, and wider than, non-solicitation clauses are non-dealing clauses which can protect a legitimate business interest against competition of the business, post termination. “Non-dealing” in the legal context translates to “do business with”; these clauses are usually in relation to identified clients or known prospective clients of the former employer that were doing business with the former employer, say, in the last twelve (12) months.

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 who has influence in the industry, or has had access to highly confidential information, as opposed to someone in an administrative position whose loss is not going to materially affect the stability of the workforce. Clauses that are too wide in scope will not be enforceable.

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.

Courts or arbitrators will construe such clauses strictly with a view to not violating public policy in favour of free trade. A well-drafted severability clause should be included in the contract and will mean that the court may use its “blue pencil” to strike out invalid and unenforceable clauses and leave in place valid and enforceable ones.

D. Breach of Duty of Loyalty/Breach of Fiduciary Responsibility

During employment, employees are under an implied duty of good faith and fidelity to do their job faithfully and not compete with their employer. Thus, regardless of the express terms that exist in the contract, a court may prevent an employee from competing with his employer, or otherwise from acting outside his or her employment, if those activities are harmful to the business. Breaching this implied duty may justify summary dismissal of the employee for serious misconduct. It is easier for the employer to rely on an express restrictive covenant clause than on this implied duty.

Unlike directors of a company, employees generally do not owe a fiduciary duty to their employer unless it is stated in their contract of employment. Generally, employees in management or executive positions are more likely to be found to owe a fiduciary duty to their employer than others, as the nature of their position involving a high amount of control and decision-making power and imposes trust and confidence on them on a continuing basis.

A fiduciary duty is a serious duty, and all employees who have this duty imposed upon them by law must be careful to avoid conflict and to act with increased responsibility at all times.

If an employee breaches his duty of loyalty, he risks being summarily dismissed. In addition, the case law indicates that there are two (2) potential ways to calculate damages for breach of fiduciary duty in an employment context. One is by way of an accounting and disgorging of profits made by the party who breached the duty, while the other method (compensatory damages) focuses on the loss suffered by the party who was owed the duty.

VIII. Personnel Administration

A. Payroll Requirements

S.7 of the EA 2000 provides that an employer must give to each of his employees a written itemised pay statement, at or before the payment of any wages. Wages are usually paid directly into the employee's designated bank account. The pay statement must contain particulars of—

(a) the period of time or the work for which the wages are being paid;

(b) the rate of wages to which the employee is entitled, and the number of hours worked, where the number of hours worked varies from week to week;

(c) the gross amount of wages to which the employee is entitled;

(d) the amount and purpose of any deduction made from that amount;

(e) any bonus, gratuity, living allowance or other payment to which the employee is entitled; and

(f) the net amount of money being paid to the employee.

Mandatory payroll tax, health insurance, social insurance (Government pension), and private pension for Bermudians and spouses of Bermudians must be remitted to Government and/or the provider.

B. Required Postings

Bermuda immigration work permit policy (March 27th, 2017) 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). 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 governs health and safety laws at work and 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, post a copy of the statement at a location that is accessible to every employee at the place of employment, establish an organization to carry out the policy, provide education and training to employees with regard to their role in the organization, annually review the statement of policy and revise where necessary, and provide a copy of the statement of policy and any revision of it to the safety and health committee or the safety and health representative for 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 chairperson selected by employer members must, as soon as possible after a meeting, provide a copy of the minutes to the employer and to each member of the committee.

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:

- 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 five (5) cm (two (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 (two (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);

- 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.

C. Required Training

S.10B(2) of the EA 2000 provides that the employer must present a policy statement against bullying and sexual harassment within the place of work to an employee on the commencement of his employment and put procedures in place to assist (train) every employee in understanding the policy statement.

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. In particular, the Proceeds Of Crime (Anti-Money Laundering And Anti-Terrorist Financing) Regulations 2008 cover both AML/CFT regulated financial institutions and independent professionals and require them to establish policies and procedures in order to prevent money laundering or terrorist financing such as customer due diligence, record keeping, systems, training and wire transfers. Relevant person must take appropriate measures so that all relevant employees of his are made aware of the law relating to money laundering and terrorist financing; regularly given training in how to recognise and deal with transactions which may be related to money laundering or terrorist financing; and screened prior to hiring to ensure high standards.

An employee is a relevant employee if at any time in the course of his duties, he has, or may have, access to any information which may be relevant in determining whether any person is engaged in money laundering or terrorist financing; or at any time plays a role in implementing and monitoring compliance with anti-money laundering or anti-terrorist financing requirements. A relevant employee also includes an individual working on a temporary basis whether under a contract of employment, contract for services or otherwise.

Regarding health and safety, 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);
- 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.

D. Meal and Rest Periods

Employers are required to provide a meal break of at least thirty (30) minutes to employees who have worked at least five (5) continuous hours, per s.10A of the EA 2000. During the meal break employers cannot require employees to perform any work, but they may voluntarily opt to work if they so choose.

Under s.10 of the EA 2000, Bermuda employers must provide their employees with a rest period of at least twenty-four (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

See payment in lieu of notice, Section VI.B.

See Severance Pay, Section V.C.

If the employee resigns without giving the contractual amount of notice, the employer only has to pay accrued but unpaid salary plus any accrued but unused vacation and benefits, up to the last day worked. This must be paid within seven (7) days of termination or on the next regular payroll date, whichever is the later.

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.

Payment in lieu of notice and severance allowance do not have to be paid when the employee is summarily dismissed for serious misconduct, for repeated misconduct after a written warning, or for continued unsatisfactory performance after a written warning. 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. Personnel Records

Currently, as a matter of practice (not law), employees are usually allowed to review their personnel file upon appointment with their employer's human resources department and under supervision.

The Personal Information Protection Act 2016 ("PIPA"), the main part of which will come into force on January 1, 2025, is aimed at protecting individuals' personal information and controlling the way organizations may use and process that information. When it comes into force, personal information collected, including by employers must be:

- used fairly and lawfully;
- used for limited specified purposes;
- adequate, relevant and not excessive in relation to the purpose or purposes for which it is used;
- accurate and, where necessary, kept up to date;
- not be kept for longer than is necessary for its use;
- used in accordance with the rights of individuals;
- kept securely; and
- transferred to third parties, including international transfers, only where there is a comparable level of protection

These principles are aimed at ensuring transparency, accuracy, proportionality and security in respect of a company's use of personal information in Bermuda, while providing a level of personal autonomy and control to individuals whom the data concerns.

PIPA will become effective on January 1, 2025 and will apply to all organisations that: i) store / use personal information in Bermuda; and where (ii) that personal information is used wholly or partly by automated means (electronically in computer files); or where its use, if not by automated means, forms or is intended to form part of a structured filing system.

PIPA defines "personal information" and sets out privacy rules for institutions to follow for the collection, use, disclosure, maintenance, retention, security and disposal of personal information. "Personal information" is broadly defined as "any information about an identified or identifiable individual" - i.e., a natural person, whether they are explicitly identified by name or where their identity is identifiable from a piece of information.

PIPA prohibits an organisation from "using" personal information unless one of the conditions in s.6 is met. "Using" is defined broadly to include: "collecting, obtaining, recording, holding, storing, organising, adapting, altering, retrieving, transferring, consulting, disclosing, disseminating otherwise making available, combining, blocking, erasing or destroying it."

The lawful use of personal information under PIPA is built around the consent of the individual to whom the information relates. S.6 describes various conditions for using personal information and makes clear that the best way for an organisation to ensure compliance is to obtain an individual's consent prior to using their personal information.

S.6(1)(a) provides that an organisation must be able to "reasonably demonstrate that the individual has knowingly consented" to the use of their personal information. Consent may be deemed to have been given where it can be implied from conduct. However, in order to protect themselves, employers should have employees sign a consent form authorising the collection, storage, and use of the personal data.

Under s.7(1) of the PIPA, there is stronger legal protection for "sensitive personal information", meaning "any personal information relating to an individual's place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information".

Under s.7(2), sensitive personal information cannot be used without lawful authority for the purpose of discriminating against any person in a way that is contrary to any provision of Part II of the Human Rights Act 1981 (i.e., discrimination on the basis of a human rights protected characteristic).

Again, s.7(3)(a) of PIPA states that sensitive personal information may be used with lawful authority to the extent that it is used with the consent of the individual to whom the information relates.

Under s.9, however, in the process of recruitment or employment, an organisation can request certain types of personal information without a prospective employee's consent where the "nature of the role justifies such use".

Pursuant to PIPA, once implemented, the information being collected by the employer should be used only for the specific purpose for which it is collected and for which the individual would reasonably expect it to be used (in this case to allow the employer to undertake meaningful analysis regarding the data to enable future positive diversity and inclusion initiatives).

S.8 of PIPA states that an organisation must use personal data in a lawful and fair manner. Every organization must keep its employees' personal data secure, up to date and confidential, and make all reasonable efforts to prevent the inadvertent and unauthorised disclosure of, or access to, the personal information relating to its employees. No personal data should be kept any longer than is necessary. The employee must be told what records are kept and how they are being used. If an employee asks to find out what data is kept on them, the organisation must provide a copy of the requested information within thirty (30) days.

S.10 allows an organization to use personal information with lawful authority only for the specific purposes stated in the Privacy Notice, save where it is used with the consent of the individual concerned (s.10(2)(a)). S.10(2)(e) also allows the use of personal information about an individual for the purpose of scientific, historical or statistical research, subject to the appropriate safeguards for the rights of the individual.

Ss. 11-13 impose on organisations a duty to ensure that personal information is adequate, relevant and accurate, and that it is not kept for longer than is necessary for that use. It must also be protected against loss, unauthorised access and misuse. The appropriate safeguards must be proportionate to the severity of the harm caused, the sensitivity and the context in which the information is held.

Under s.14, in case of a breach of security, an organisation must notify without delay the individual affected and the Privacy Commissioner (he has now appointed), who will determine the next steps.

Part 3 of PIPA will also give new rights to individuals to access their personal information, and request details of the information that is being held and the purpose for which it is held. The statute also provides individuals with the right to apply to have their personal information corrected if there are any inaccuracies.

Organisations must also ensure that, when transferring personal data to a third party or using the services of a third party, such third party is contractually bound to process personal information in compliance with the legislation. Similarly, when in need to transfer personal information to an overseas third party, they remain responsible for compliance with PIPA. Organisations must therefore have sufficient security safeguards in place to ensure the safe handling of all information collected and follow PIPA's provisions when transmitting the data, whether locally or overseas.

Under s.47, PIPA creates offences for certain cases of non-compliance punishable by fines or imprisonment.

In addition, the Public Access to Information Act 2010 ("PATI 2010") 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.

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.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.

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 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 (3) 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);

- 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); and

- 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 spouses of Bermudian employees who are over the age of 23 and under the normal retirement age which is defined as not later than one year after a member of the pension plan has attained the age of 65 years unless the pension plan specifies an earlier normal retirement date. Employers are additionally 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.

An employee's pension is transferable on termination including the employee's vested contributions, which vest one (1) year after the employee joined the pension plan.

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.

IX. 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 was 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 have construed Bermuda legislation and the Constitution consistently with European Court of Human Rights case law as much as possible. In light of the United Kingdom's exit from the European Union, this is subject to change.

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. It 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.

The preliminary provisions of PIPA were introduced in 2016 but the substantive provisions have not yet come into force. PIPA will regulate the use of personal information by organisations in Bermuda by protecting both the rights of individuals and the need for organisations to retain and use personal data for proper purposes. Every employer will be required to appoint a privacy officer. The operation of the PIPA will be overseen by a Privacy Commissioner, responsible for handling data breach complaints. The complaint process will start with mediation, followed by an inquiry, followed by possible criminal sanctions. See also Section VII.C. on Personnel Records.

A. Drug and Alcohol 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. It is a matter of contract as to whether an employee consents to test in order to become or stay employed.

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. Off-Duty Conduct

Employers may not lawfully 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). Off-duty conduct may or may not meet this statutory test for summary dismissal.

C. 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, PIPA, the main part of which

is expected to come into force on January 1, 2025, 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") allows members of the public to request information (including medical information) from a publicly funded body to no records, thereby increasing transparency and accountability. Criminal penalties apply in the event of non-compliance by public bodies.

D. Searches

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.

E. Lie Detector Tests

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.

F. Fingerprints

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

G. Social Security Numbers

Bermuda does not have a social security system. Rather, 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.

H. 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.

I. Cannabis (medical and recreational use)

Under the Misuse of Drugs Act 1972, it is a criminal offence to have cannabis or cannabis resin in one's possession and a police officer of any rank has authority to seize any amount of cannabis in the possession of any person. However, in 2017 the Bermuda Government enacted the Decriminalisation of Cannabis Amendment Act, which decriminalised possession of up to 7 grams of cannabis. Anyone possessing 20 grams or more of cannabis shall be deemed to have intent to supply. It is also a criminal offence to cultivate cannabis.

In November, 2016, the Supreme Court ruled in favour of allowing the medical use of cannabis to be prescribed by registered medical practitioners. The Ministry of Legal Affairs has since issued a license for medicinal cannabis to be prescribed by them.

The Bermuda Government has twice tabled the Cannabis Licensing Bill in the House of Assembly that is said to be the "combination of a comprehensive social justice reform project to liberalise our cannabis laws in line with global contemporary thought, scientific evidence and overwhelming public support". The bill proposes to permit lawful uses of cannabis for personal adult use, and by doing so it prescribes uses beyond medical and scientific use. However, in September 2022, the British Governor of Bermuda officially and formally blocked the legislation as it is said to violate UK treaties to which Bermuda is a party. As of today, Bermuda's government has budgeted $100,000 toward amending the Bill to be in compliance with international regulations.

J. Social Media

Bermuda does not have any laws or statues that address this issue specifically, but employers are strongly encouraged to have policies in place that address issues arising from employees' use of and postings on social media. Laws of defamation may come into play. For more information, please reach out to us at mail@canterburylaw.bm

K. Weapons/Workplace Violence Policy

There are no specific laws addressing weapons in the workplace or workplace violence. Under the Criminal Code Act 1907 it is an offence for any person to have in his possession, import, carry, manufacture, supply or offer to supply to another, or be concerned in the supplying to another of a prohibited weapon. Prohibited weapons are such as declared by the Governor and include guns and bullets. In addition, it is an offence to have an article with a blade or point in a public place or a school, including a folding pocket-knife, without lawful authority.

The police have powers of stop and search and powers of entry in certain defined circumstances.

X. Employee Injuries and Workers' Compensation

A. Work Related Injuries

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 Economy and Labour, 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 compensation shall be the periodical payments as specified in the Act at such intervals as may be agreed upon or as the court may order, or a lump sum calculated having regard to the probable duration, and probable changes in the degree, of the incapacity.

Since 2020 when the 2011 Amendment Act was brought into force, the periodical payments for temporary incapacity amount to a weekly payment of two-thirds (2/3) of the weekly earnings which the worker was earning at the time of the accident, subject to certain provisos. In fixing the sums payable, the court may deduct the value of any payments which the worker might receive from the employer during the period of incapacity. Higher sums are payable in the event of permanent partial or total incapacity as set out in the statute.

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 dependent, 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.

B. Non-work related injuries

Sick pay or disability pay may be payable for non-work related injuries.

XI. Unemployment Compensation

A. Eligibility

There is no unemployment insurance in Bermuda, but the Department of Financial Assistance 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.

B. Procedure

S.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 of the Financial Assistance Regulations 2004 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 the statutory prescribed amount.

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

XII. Health and Safety

A. Overview

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 in 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.

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 twenty-four (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. Regulatory Requirements

See Section XII.A.

XIII. Trade Unions – Industrial Relations

A. Overview

See Section XIII.C.

B. Right to Organize/Process of Unionization

See Section XIII.C.

C. Managing a Unionized Workforce

The TULRA 2021 came into force on 1 June, 2021, consolidating the Trade Union Act 1965, the Labour Relations Act 1975 and the Labour Disputes Act 1992. It also amended the EA 2000.The purpose of the Act is to establish a comprehensive Employment and Labour legislative code in respect of trade union, labour relations and employment related matters and to provide for general reforms in respect of such matters. It is seen as a significant advancement for the rights of workers and significantly strengthens the rights of Unions in the workplace to hear matters in dispute that are referenced.

Among other changes, it establishes a single Employment and Labour Relations Tribunal for all employment, trade union and labour matters, with hearings and decisions now available to the public. Further, it establishes civil penalties of up to $5,000 for offences that previously required court appearances.

The Act 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.

Employers must respond to an application for certification within ten (10) days. The Act requires 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). The Manager may also automatically certify the union where there is agreement that more than 60% of workers wish to have the union as their exclusive bargaining agent. 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. A civil penalty may be imposed by the Employment Tribunal for interfering with the conduct of a ballot, and the Tribunal may declare that a ballot is null and void or give the Manager appropriate direction.

The TULRA 2021 provides when a union gains certification, there shall be an automatic agency shop in place in respect of that bargaining unit. In that case, employment rights may be modified i.e., where the terms and conditions of employment will require employees to be members of a union or pay contributions to a union in lieu of membership or, alternatively, to pay up to half their contributions to a charity of their choice instead.

An employer who is required to set up an agency shop, 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 court to enforce the agency shop.

The Act ensures that those who can trigger a decertification ballot or make an application for decertification are only those persons who are current members of the union or persons that once supported the union. The whole of the bargaining unit may vote for or against decertification.

The unions now have successor rights under the Act. Where an employer sells or otherwise transfers and undertaking, the union that is the bargaining agent for the workers employed in the undertaking continues to be the bargaining agent, and the new employer is bound by any collective bargaining agreement that applies to the workers employed in the undertaking.

The TULRA 2021 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 statute aims to ensure that all labour disputes are referred to the Manager of Labour Relations for conciliation and settlement. If the Manager is unable to achieve settlement, he may refer the matter to the Minister of Economy and Labour. If both parties consent, the

Minister may, in turn, refer the dispute to the Tribunal. 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 TULRA 2021, 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 TULRA 2021 a strike/lockout that would otherwise be lawful for an ordinary trade or industry is unlawful for an "*essential industry" or* "*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 Manager of Labour Relations. The "essential services" are listed in Schedule 3 of the Act comprising various categories of industry. The hotel industry is the only essential industry listed in Schedule 2 of the Act. If the Manager refers the dispute to the Tribunal, the strike/lockout notice is suspended pending determination of the dispute by the Tribunal. The decision by the Tribunal is final and binding upon the parties.

Any employer or worker in an essential service or any person who influences, incites or encourages said worker or employer to take place in any unlawful lock-out or irregular industrial action that deprives members of the public of that service, is liable to a civil penalty of not more than $5,000 for employers and trade unions and not more than two (2) weeks' wages for workers.

The court has statutory power to grant temporary or permanent injunctions to restrain actual or anticipated breaches of the TULRA 2021, 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 TULRA 2021 which applies to labour disputes in trades or industries, the Minister of Economy and Labour may declare by public notice that such a dispute exists or is apprehended in a trade or industry, and may refer the matter to the 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.

XIV.Immigration / Labor Migration

A. Overview Business Immigration Policy

In Bermuda an expatriate (foreign) employee requires a work permit issued by the Ministry of Economy and Labour's 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 27th, 2017, as amended).

Standard work permits ranging from one (1) year to five (5) years in length, and Short Term Work Permits for up to six (6) months may be obtained if the requisite immigration policy conditions for hiring are met.

Periodic Work Permits are also granted from one (1) year to five (5) years in length and allow multiple visits to the Island during the period of its validity, up to thirty (30) days per visit. An extension of a further thirty (30) days can be granted if there is a requirement to stay longer.

Companies may also apply for a 'Representative' (Blanket) work permit, for a period ranging from one (1) year to five (5) years, which enables a representative from their overseas jurisdiction or a service provider to enter Bermuda for up to thirty (30) days per visit.

The Department of Immigration issues work permits to work permit holders and entry permits to sponsored dependants of those work permit holders (for e.g., spouses and children). The primary aim of the work permit is to facilitate travel to/from Bermuda.

To help alleviate unemployment, Government Immigration policies include a requirement that employers advertise for the position prior to applying for a Standard or Short Term Work Permit. The position must be advertised in the local newspaper for at least three (3) days over a period of eight (8) days, and also on the Government Job Board for at least eight (8) consecutive days. 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.

B. Protocol for business visitors to obtain temporary entry for non-employment purposes

There is no requirement for employers to obtain the permission of the Department of Immigration for a Business Visitor to enter Bermuda, provided that the business visitor is in possession of a return airline ticket, valid passport, and multi-entry visa (if the person is a visa-controlled national) and provided the total length of stay does not exceed twenty-one (21) days unless an extension is granted in accordance with the Policy. An extension may be granted for up to another twenty-one (21) days which requires a letter of support from the employer on letterhead.

In March of 2014 the Bermuda Department of Immigration removed the requirement for Bermuda Entry Visas and Visa Waivers for Business Visitors, in addition to work permit holders. This change in policy allows all nationals to travel to Bermuda without a Bermuda Entry Visa or visa waiver. In association with the change in policy is the requirement that all travellers who require a multi re-entry visa to present such visa upon arrival in Bermuda. The multi re-entry visa must be valid for at least forty-five (45) days after the expiration of the work permit or specified period of travel.

C. Work Permit options for the temporary employment of professional/management foreign nationals

A Short-Term Work Permit can be used by employers to allow an employee to work in Bermuda for periods up to six (6) months. Additionally, a Periodic Work Permit may be used by employers seeking to hire non-resident individuals who will make multiple visits to Bermuda over time, staying no longer than thirty (30) days for each visit. A Letter of Permission may be granted to not-for-profit organisations, registered charities, and religious institutions to employ a person to work, whether they are being remunerated or not.

D. Work Permit options for the temporary employment of non-professional employees

See XIV.C.

E. Work Permit options for foreign entrepreneurs and/or business investors

The Global Entrepreneur Work Permit is available to persons for a period of up to one (1) year to reside and work in Bermuda in respect of work activities involving business planning, seeking the appropriate Government or regulatory approvals, establishing compliance or financial requirements, and raising capital in relation to exempted or start-up companies setting up their new business Bermuda.

In addition, a New Business Work Permit is 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 obtaining their first new Business Work Permit. Certain restrictions apply.

A Global Work Permit allows an employer that is a global company in another jurisdiction to transfer an employee to the Bermuda office without the requirement to advertise the position. This is only applicable if the employee is not filling a pre-existing position in Bermuda. Applications are automatically approved for persons who have been employed more than one (1) year and who earn a gross salary of not less than $125,000. Persons who have been

employed less than one (1) year and earn less than $125,000 will be considered on a case by case basis.

A Fintech Business Work Permit allows a Fintech company that is new to Bermuda to receive automatic approval of up to five (5) Fintech Business Work Permits within six (6) months after obtaining the first Fintech Business Work Permit. There is no requirement to advertise for the relevant positions.

F. Permanent residency based on employment

Under s.3B(2) of the Economic Development Act 1968 the Minister of Economy and Labour may designate a company as a company whose senior executives can apply for exemption from work permit control. There are certain criteria that companies must meet to obtain the concession for work permit exemptions, including that the company has at least ten (10) Bermudian employees employed at all levels in the company, and provides entry-level positions and development programmes for Bermudians. The Minister, in acknowledging that some companies may not have at least ten (10) Bermudian employees, may, in his discretion, allow smaller companies and newly incorporated companies to apply for the concession. Senior executives of a designated company may apply for the exemption, leading to the Permanent Resident's Certificate ("PRC") being granted under s.31A of the Bermuda Immigration and Protection Act 1956 if they have been employed in a senior executive role for ten (10) years and have been ordinarily resident in Bermuda for at least ten (10) years, including at least the preceding two (2) years prior to making the application.

G. Citizenship (Bermudian Status) for foreign nationals

Generally, to qualify for Bermudian status, one must possess a qualifying Bermudian connection, be a spouse or widow of a Bermudian for ten (10) continuous years with ordinary residency for seven (7) years, be the child of a Bermudian, or have certain other qualifying Bermuda connections, which change from time to time as set out in various sections in the Bermuda Immigration and Protection Act 1956. Length of residency in Bermuda is not a singular qualification for Bermudian Status.

H. Residence in Bermuda for persons not seeking to be employed

Persons who wish to reside in Bermuda only, and not take up employment, may file an application with the Department of Immigration for Permission to Reside in Bermuda on an Annual Basis. Such permission may be obtained for a period of one (1) year or for a period of five (5) years. The applicant must demonstrate that he has sufficient financial means to sustain their stay.

I. Work From Bermuda One Year Residential Certificate ("Digital Nomads")

Government introduced the popular Work From Bermuda Certificate ("Digital Nomad Certificate") in August 2020, inviting individuals to work remotely from Bermuda, namely students and employees working remotely for non-Bermuda employers.

Only businesses outside the Island may employ certificate holders so as to protect local jobs. Applicants must show that they possess the means to support themselves financially while working in a non-Bermudian-based or a non-Bermudian-registered legal entity or partnership. Holders may also complete their post-secondary studies from Bermuda. Certificate holders do not have the right to seek employment in Bermuda with Bermuda companies.

J. Economic Investment Certificate

The Economic Investment Certificate and Residential Certificate Policy ("EIC") was introduced effective 1 March 2021, replacing the previous Residential Certificate Policy. To be eligible for the EIC, a person must make a "Qualifying Investment" of at least $2.5 million. If the EIC is granted, the applicant has the right to reside and seek employment in Bermuda and receive automatic approval to work in any business in which he invested. His spouse and dependent children have the right to reside in Bermuda. In 2023 the Government announced changes to the EIC policy to encourage further investment in Bermuda, whereby EIC applicants will now be able to obtain a Residential Certificate when they make their initial investment. The initial policy onerously prescribed a 5-year wait, upon which time the discretionary Residential Certificate could be obtained. This obstacle has now been removed.

K. Compliance concerns for employers of foreign nationals

Employers should be aware that the issuance of a work permit is not automatic; they are required to give hiring preference to suitably qualified Bermudians, spouses of Bermudians and PRC holders who apply for advertised positions. See Section I.E. for more details.

L. Regional, Federal, or state/providence specific immigration or compliance issues

There are no such issues.

XV. Additional Information

A. Probationary Periods

Section 19 of the EA 2000 provides that subject to that section, a new employee may be required to serve a probationary period of not more than six (6) months commencing from the date of his employment. An employee who is serving a probationary period shall be entitled to

receive from his employer a review of the employee's performance on or before the completion of one half of the probationary period.

The employer may, before the expiration of the probationary period and after conducting a review, extend an employee's probationary period for a period not exceeding three (3) months.

During the probationary period (including any period of extension), the contract of employment may be terminated without notice: (a) by the employer for any reason relating to the employee's performance review, performance, conduct, or operational requirements of the employer's business; or (b) by the employee for any reason.

Certain excepted categories of public officer employees apply.

B. Translation

English is the written and spoken language in Bermuda. There is no law requiring that contracts of employment be translated into the employee's native language. However, if the employer is aware that the employee does not understand the contractual terms, the contract may not be enforceable under common law unconscionable bargain or undue influence principles.

Foreign nationals coming to work in Bermuda under the Portuguese Accord and those employed in construction are required to have a working knowledge of English to ensure that work duties are carried out safely. If an individual's English language skills are questionable, he or she will be landed (i.e., legally admitted) for seven days and may be required to undergo testing by the Department of Immigration as a condition of residence.

C. Transfer of Business and Outsourcing

There is no specific protection for employees whose employment is threatened by a transfer of business or undertaking. The EA 2000 provides that when a business is sold, transferred or otherwise disposed of, the period of employment with the former employer shall be deemed to be continuous and constitute a single period of employment with the successor employer, if the employment was not terminated and severance pay was not paid under the Act. Acceptance of severance pay by an employee has the effect of terminating employment.

There is no legal prohibition to outsourcing work, and this is an increasing trend given the high cost of local labour. However, where this leads to job losses for Bermudians, unionised workplaces may engage in protests, including work stoppages.

XVI.Contact Information

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 Director and Barrister and Attorney, Ms. Juliana Snelling. Contact information below.

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