GETTING THE DEAL THROUGH

Labour & Employment

in 39 jurisdictions worldwide

2014

Contributing editors: Matthew Howse, Walter Ahrens, Sabine Smith-Vidal and Mark Zelek

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Getting the Deal Through is delighted to publish the fully revised and updated ninth edition of *Labour & Employment*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 39 jurisdictions featured. New jurisdictions this year include Belgium, Ireland, Peru, Slovakia and Turkey. By consulting this book, employers and their counsel can quickly familiarise themselves with the essentials to guide them through all stages of the work relationship, from application, through to hiring, termination and disputes, in multiple jurisdictions.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

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Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Rachel Nurse
subscriptions@gettingthedealthrough.com

Business development managers
George Ingledew
george.ingledew@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com

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Romania

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Romania is a civil law jurisdiction and the core employment regulation is the Labour Code. Besides the Labour Code, specific tailored legal enactments regulate other employment-related aspects, such as employment safety and health, insurance for work accidents and professional diseases and social dialogue. Collective bargaining agreements also provide binding rules and obligations to be complied with by the employers.

Finally, considering Romania's accession to the European Union, which took place on 1 January 2007, EU legislation and ECJ decisions are also relevant.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

General provisions on harassment and discrimination are applicable to all citizens in Romania. In addition, special provisions in respect of employees are regulated under the Labour Code. Thus, all direct or indirect discrimination towards an employee, based on criteria such as sex, sexual orientation, genetic characteristics, age, national origin, race, skin colour, ethnic origin, religion, political options, social origin, disability, family conditions or responsibilities or trade union membership or activity shall be prohibited. Similar provisions exist in respect of harassment that is sanctioned as a civil misdemeanour.

In addition to the general prohibition on discrimination, an employer may not discriminate on the grounds of gender. Gender discrimination occurs if an employee is harassed or sexually harassed and there is a negative effect on the employee's remuneration if they refuse to accept the unwanted sexual conduct.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The main responsible body for the application of the employment legislation is the Ministry of Labour, Family and Social Protection and its subordinated entities. Aside from the above, there are also other agencies responsible for the application of certain elements of employment law, such as the Romanian Immigration Office responsible for integration of foreign citizens in the labour sector.

Worker representation

4 Is there any legislation mandating or allowing the establishment of a works council or workers' committee in the workplace?

The rights to establish trade union organisations and become a member of such organisations are guaranteed under Romanian law. For such purpose, employers cannot ban employees from accessing trade unions. At least 15 people working in the same unit are required to set up a trade union. A person may only belong to one trade union organisation within an employer at any one time and there are certain people, such as public officials, members of the military and members of certain government ministries, who may not establish a trade union.

In defending the rights of their members, trade unions have the right to undertake any action provided for by the law. This includes the ability to bring a court action on behalf of their members based on an express mandate from the persons concerned (the action cannot be brought to court or continued if the person concerned opposes or renounces the trial).

The representative trade union is entitled to receive from employers any necessary information for the negotiation of collective bargaining agreements and other agreements relating to employment relations.

Employees who are elected to the management body of a trade union are protected against all forms of constraint or the limiting of the exercise of their functions.

As regards works councils, the European Directive on the Establishment of European Works Councils has been implemented within Romanian law. The main provisions regulate the creation of a European works council (or an alternative procedure) for informing and consulting employees at the European level.

Background information on applicants

5 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Under Romanian law, the individual employment agreement is to be concluded after the preliminary check of the professional and personal abilities of the applicant. The means of checking are provided under the applicable collective bargaining agreement, the personnel statute and the internal regulations. Information on the applicant from former employers as regards the activities performed and the length of the employment may only be requested after having first informed the applicant.

The law is silent as regards preliminary checks performed by a third party for the benefit of the employer, but these should be allowed within the same limits provided for the employer.

6 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

A medical certificate upon hiring an applicant represents a mandatory prerequisite for concluding an individual employment agreement, in order to determine whether he or she is fit for the job position offered by the employer. The lack of such certificate shall trigger the nullity of the agreement. No pregnancy tests may be required, however, as a condition of employment.

7 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no specific provisions on drug and alcohol testing upon hiring under Romanian law. As a matter of principle, the employer could ask an applicant to submit only the medical exam provided by law upon hiring. Nevertheless, in practice, there are employers that use alcohol testing, but it is arguable whether the testing could be imposed on employees and whether the test results could be used against them (for example, for dismissing the employees).

Hiring of employees

8 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Romanian law provides for certain incentives upon hiring in relation to certain categories of persons, such as disabled, unemployed or young persons. Furthermore, in respect of disabled persons, the law imposes on the employer an obligation to employ such persons to make up at least 4 per cent of the total number of employees if the employer has concluded individual employment agreements for more than 50 persons. Failure of the employer to observe such obligation shall amount to:

- a monthly payment to the state budget of a sum equal to 50 per cent of the minimum national salary for each job position that was not filled by disabled persons; or
- the acquisition of products or services manufactured or performed by the disabled persons employed within specific units protected by law, to an amount equal to the sum that otherwise would be owed to the state budget.

9 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

The individual employment agreement must be concluded in writing, based on the parties' consent. The written form represents a prerequisite for the validity of the agreement. Prior to concluding the employment agreement, the employer is required to inform each employee of the general clauses to be included in such agreement.

The compulsory terms to be included in the individual employment agreements are the following:

- the identity of the parties;
- the place of work or, if the work place is not stable, the provision that the employee may work at various places;
- the position or occupation of the employee according to the specifications of the classification of occupations in Romania or other regulatory acts, as well as the job description;
- the evaluation criteria of the professional activities performed by the employee applicable within the employer;
- the specific risks of the job position;
- the effective date when the agreement enters into force;
- the length of the employment agreement;
- the length of rest leave the employee is entitled to;
- the length and the specific conditions of the notice term (both for dismissal and for resignation);
- the wage, other elements of the wage, as well as the payment terms;
- the working time, expressed in hours per day and hours per week;
- provisions on the applicable collective bargaining agreement; and
- the length of the trial period (if applicable).

Aside from these compulsory terms, the parties may also agree in relation to any other terms, provided that these terms are no less favourable then certain statutory rights. Such non-compulsory terms may refer to aspects such as confidentiality, non-competition and intellectual property rights.

10 To what extent are fixed-term employment contracts permissible?

As a general rule, individual employment agreements are concluded for an undetermined period. By means of exception, the parties may conclude employment agreements for a determined period, subject to certain conditions. The maximum period of employment agreements concluded for a determined period is 36 months. In certain cases, the above term may be extended if the employment agreement was concluded to substitute a certain employee whose employment agreement was suspended for more than 36 months.

11 What is the maximum probationary period permitted by law?

The trial period cannot exceed 90 days for employees holding a non-management position and 120 days for employees holding a management position. Other trial periods are provided by the Labour Code for specific situations. The employer cannot, however, extend the trial period at his or her sole discretion beyond the limits set up by the law.

12 What are the primary factors that distinguish an independent contractor from an employee?

An employee is firstly and primarily subordinated to his or her employer while an independent contractor is not subordinated to the party with whom he or she has established a contractual relationship. Also, the employee is performing work based on an individual employment agreement, while an independent contractor is performing specific work or activities based on a service agreement or other type of agreement, different to employment. Different legal frameworks apply in the two cases.

Foreign workers

13 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

For this specific issue, it is important to distinguish between EU, EEA and Swiss nationals and non-EU, non-EEA and non-Swiss nationals. EU, EEA and Swiss nationals have the right (subject to certain exceptions) to enter and work freely in the Romanian territory without the need to obtain a visa. For non-EU, non-EEA and non-Swiss nationals, working in Romania is permitted only for those who obtain a visa and a working permit. The number of working permits issued every year is limited and is determined by a government decision. The employees working for a corporate entity with its seat in one jurisdiction may work for the same corporation with a second seat in the Romanian territory based on secondment provisions.

14 Are spouses of authorised workers entitled to work?

Members of the families of EU, EEA and Swiss citizens have the right to work and live in the Romanian territory under the same conditions as those recognised for Romanian nationals. Spouses of non-EU, non-EEA and non-Swiss nationals, however, do not enjoy the right to work in Romania unless they obtain a working permit in their own name.

15 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The following conditions must be fulfilled in order for non-EU, non-EEA and non-Swiss nationals to be employed in Romania:

- vacancies cannot be filled by Romanian citizens or citizens of other EU member states or EEA countries, or permanent residents of Romania;

- they fulfil special conditions regarding professional qualifications, experience and authorisation required by the employer according to the legal provisions;
- they prove that their state of health is such as to enable them to carry out the activity under reference, and that they have not been convicted for crimes that are incompatible with the activity they carry out or intend to carry out in Romania;
- they are within the limits of the yearly contingency approved by government decision;
- the employer has regularly made contributions to the state budget in the last quarter;
- the employer must effectively perform the activity used to obtain the work permit; and
- the employer should have not been previously sanctioned for undeclared work or illegal employment.

There are no similar conditions provided for EU, EEA or Swiss citizens.

As regards the sanctions imposed on an employer who hires a non-EU, non-EEA or non-Swiss national without holding a working permit, such act represents a misdemeanour and will result in a fine.

16 Is a labour market test required as a precursor to a short or long-term visa?

As previously mentioned, the employer must provide evidence that the job positions to be filled by foreign nationals cannot be occupied by Romanian or EU or EEA nationals. There are, however, no express provisions requiring a market test.

Terms of employment

17 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Regular work time is eight hours a day and 40 hours a week. Employees' consent is required for overtime work. The maximum work time is 48 hours a week, including overtime. Additional overtime is exceptionally accepted, provided that the average work time computed on a four-month basis does not exceed 48 hours per week. The employee or the employer cannot set up different working hours outside the legal framework provided in this respect.

18 What categories of workers are entitled to overtime pay and how is it calculated?

All categories of workers who perform overtime work are entitled to receive free paid days within the next 60 days after performing such work. If the compensation of overtime work with free paid days is not possible, the employees are entitled to receive an allowance in an amount of a minimum of 75 per cent of the base salary for the work performed.

19 Is there any legislation establishing the right to annual vacation and holidays?

The minimum paid leave provided under Romanian law is 20 working days. A longer period for paid leave may be provided under collective bargaining agreements concluded at different levels of industry or at the companies' level. Also, the Labour Code provides for a number of days off that must be observed by the employers. The following days are declared holidays under the law: 1 and 2 January, first and second days of Easter, 1 May, first and second days of Pentecost, 15 August, 30 November, 1 December, and first and second days of Christmas.

20 Is there any legislation establishing the right to sick leave or sick pay?

Sick leave and the allowance for temporary incapacity for work is regulated under Romanian law. According to the legal provisions, the allowance for temporary incapacity for work is granted for no more than 183 days per calendar year running from the first sick day.

A longer period of paid leave is available in the event of certain diseases, such as heart disease, tuberculosis and AIDS.

21 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Under Romanian law, the employee is entitled to take non-paid leave for solving certain personal problems. The law does not provide a maximum duration of such leave, but it provides that the exact duration shall be determined within the applicable collective bargaining agreement or the internal regulations. During the non-paid leave, the employee is not entitled to receive any remuneration or compensation.

22 What employee benefits are prescribed by law?

Aside from the monthly remuneration received by employees in exchange for their work, there are also other benefits provided by the law such as mandatory bonuses; paid health insurance; childcare leave; disability leave; food, gift, nursery or holiday vouchers and holiday entitlement.

23 Are there any special rules relating to part-time or fixed-term employees?

Under the Labour Code part-time and fixed-term employees enjoy all the rights of full-time or regular employees, which are stipulated by the law and the applicable collective bargaining agreements, although some rights will be adjusted to reflect the hours worked (eg, wages and holiday entitlement will be pro rata).

Post-employment restrictive covenants

24 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Under Romanian law, clauses restricting the future activities of employees are permitted with certain express limitations. Such clauses may refer to a non-competition obligation of the employees for a determined period after the termination of the employment relationship with the employer.

Based on the provisions of the Labour Code, employees have a general obligation of loyalty towards their employers preventing them from performing similar activities for other employers throughout the duration of the individual employment agreement. In addition, the parties may agree to turn this into a non-competition obligation applicable after the termination of the individual employment agreement for a maximum of two years. In such a case, a monthly indemnification should be granted by the employer to the employee for the entire non-competition period following the termination of the employment, which cannot be less than 50 per cent of the employee's average gross salary for the previous six months.

25 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Yes. As mentioned above, if a non-competition obligation is agreed between the employee and the employer, the latter shall pay to the former a monthly indemnification for the entire non-competition period following the termination of the employment, which cannot

be less than 50 per cent of the employee's average gross salary for the previous six months.

Liability for acts of employees

26 In which circumstances may an employer be held liable for the acts or conduct of its employees?

According to the general rules of civil law, employers are responsible for the damages caused by their employees in the exercise of their work duties. Therefore, the employer is liable to pay any compensations resulting from an employee's actions. However, the employer may request the employee to reimburse the employer for compensation paid as a result of the employee's action.

Taxation of employees

27 What employment-related taxes are prescribed by law?

The contractual payments made by the employer in consideration of the employment agreement are subject to income tax. Under Romanian law, the level of income tax is 16 per cent, which is applicable to gross wage and related rights.

The employer must also pay social security contributions in relation to the employment agreement. The social security contributions (ie, contributions to the social security system, contributions to the health system, contributions to the unemployment system) are owed both by the employee and the employer. The payment of such contribution is made solely by the employer, however. The aforementioned contributions are related to the salary granted by the employer to the employee in exchange for his or her work. The level of the social security contributions is mainly regulated by the Law on State Social Security Budget, updated annually.

Employee-created IP

28 Is there any legislation addressing the parties' rights with respect to employee inventions?

In the absence of any contractual terms agreed by the parties within the employment agreement, there are statutory provisions that will apply to determine the ownership of IP rights. Although not mandatory, provisions on IP rights are commonly included within the individual employment agreements.

Data protection

29 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The general protection of privacy and personal data provided by the law for all citizens is equally applicable to employees. Therefore, all personal data of employees is protected against any unlawful disclosure. Under these circumstances, the employer is under a legal obligation not to use or disclose any personal information relating to the employee, except for those cases where such use or disclosure is permitted by the law or the employee's consent has been obtained.

Business transfers

30 Is there any legislation to protect employees in the event of a business transfer?

The main enactments regulating the 'transfer of an under-taking, business or part of an undertaking or business' are the Labour Code and Law No. 67/2006 on safeguarding of employees' rights in cases of the transfer of undertakings, businesses or parts of undertakings or businesses. The latter has transposed Council Directive No. 2001/23/EC of 12 March 2001 on the approximation of laws of the member states relating to the safeguarding of employees' rights in the event of the transfer of undertakings, businesses or parts of undertakings or businesses. The above legislation provides for several protection rules in the event an undertaking or business or parts thereof are transferred from one employer to another.

In this respect, the transferee is liable to observe the rights that the transferred employees had with the transferor under their individual employment agreements and the applicable collective bargaining agreement. Both the transferor and the transferee shall be under the obligation to consult their employees about the transfer and to inform them on specific issues.

For the purpose of the transfer, no consent from the employees is required. However, the transfer of undertakings, businesses or parts of undertakings or businesses shall not be used as grounds for the transferor or the transferee to perform individual or collective dismissal of employees. If a transfer involves a substantial change of work conditions to the detriment of the employee, the employer is liable for the termination of the individual employment agreement.

Termination of employment

31 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

The employment agreement can only be terminated in specific and limited cases as provided by the Labour Code, and the procedural requirements must be met. The main categories of dismissals regulated under Romanian law are dismissal for cause (restructuring) and dismissal without cause. Dismissal for cause can be done if economic or operational reasons prevent employers from maintaining the number of jobs. Dismissals for bad performance and for disciplinary reasons are among the most common types of dismissal for cause. In both cases, specific procedures must be followed. Employers' failure to comply with such procedures may trigger the annulment of the dismissal decisions in court. The same sanction shall apply if the employers cannot prove that the dismissal reasons are real and fall within the categories recognised by the Labour Code as entitling employers to perform dismissals.

32 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

If the employment agreement is terminated by the employer, the employee is entitled to prior notice. Therefore, employers are obliged to observe a 20-day notice term for all categories of dismissal, except when the dismissal is done for disciplinary reasons or when the employee is arrested for more than 30 days.

33 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

The employer may dismiss an employee without any notice in the event of a dismissal for disciplinary reasons or when the employee is arrested for more than 30 days. Payment in lieu of notice is not expressly regulated by Romanian law.

34 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Employees whose individual employment agreements are terminated without cause (for reasons not related to their person) are entitled to receive severance payments according to the provisions of the applicable collective bargaining agreements (if any). Such compensation is mainly computed based on the length of service.

35 Are there any procedural requirements for dismissing an employee?

There are specific procedures provided by law in the event of dismissal for cause and dismissal without cause. In addition, if the number of redundancies throughout a period of 30 calendar days exceeds certain thresholds, the collective dismissal procedure shall be activated. Specific steps shall have to be observed and consultations with trade unions need to be conducted.

Mention should be made that no approval from a government agency is necessary in order to perform a dismissal. However, in certain cases the law imposes on the employer the obligation to inform the labour authorities before performing dismissals.

36 In what circumstances are employees protected from dismissal?

Employees are protected against unlawful dismissals in any circumstances where a dismissal was made by the employer without the observance of the legal provisions set up in this respect. Under Romanian law, employers cannot terminate an employment agreement by means of instant dismissal for any reason whatsoever. If employers want to terminate an employment agreement, they have to observe the procedures laid down by the Labour Code for such purpose. Also, the labour legislation provides for special protection against dismissals in certain cases such as:

- throughout the duration of a temporary disability of an employee, ascertained by a medical certificate, according to law;
- throughout the period when a female employee is pregnant, to the extent that the employer had knowledge about the pregnancy before issuing the dismissal decision;
- throughout the duration of the maternity leave of the employee;
- throughout the duration of the leave of an employee for raising a child up to the age of two and, in the case of a disabled child, up to the age of three;
- throughout the duration of the leave of an employee for taking care of a sick child up to the age of seven or, in the case of a disabled child, for intercurrent diseases, up to the age of 18; and
- throughout the duration of the rest leave of an employee.

37 Are there special rules for mass terminations or collective dismissals?

Special rules on collective dismissals are provided by the Labour Code. Thus, the legal provisions regulating collective dismissals apply if, within a period of 30 days, the number of redundancies is:

- at least 10 employees, if the employer that performs the dismissals has more than 20 and less than 100 employees;
- at least 10 per cent of the employees, if the employer that performs the dismissals has at least 100 but less than 300 employees; or
- at least 30 employees, if the employer that performs the dismissals has at least 300 employees.

With regards to collective dismissals, the Labour Code provides for certain mandatory stages to be followed:

Stage 1

If the employer is contemplating collective dismissals, it has to initiate a consultation with the trade unions or, as the case may be, with the employees' representatives. The consultation agenda shall cover at least any means of avoiding collective dismissals and the appropriate means for mitigating the consequences of the collective dismissals, such as support for requalification and professional retraining.

As the Labour Code requires employers to provide the employees with the opportunity to make constructive proposals, employers must provide the employees' representatives, in writing, with all relevant information regarding the procedure.

Stage 2

The employees' representatives have 10 days from receipt of the notice sent by the employer to analyse the information and the technical and economic substantiation of the dismissals, and to produce any appropriate proposals to avoid or reduce the collective dismissals.

The employer is obliged to respond to the proposals, in writing, within five days.

Stage 3

Following the consultation process, if the employer decides to proceed with the collective dismissal, it must issue a second notice. This must reiterate all the elements included in the first notice, as well as the outcome of the consultations. This second notice must be submitted to the territorial labour authorities and to the employees' representatives at least 30 days prior to the issue of the individual dismissal decisions.

Stage 4

The employers will issue a dismissal decision for each of the affected employees 30 days after the second notice. Each decision must include:

- the reasons for dismissals;
- the notice period (20 days);
- the criteria for the establishment of the dismissal sequence; and
- a list of all vacant positions, if applicable, and the time within which the employees should express their intention to occupy a vacant position (if there are no vacant positions, this should be specified).

The dismissal decision is effective as of the date of acknowledged communication.

Stage 5

The dismissed employee is entitled to a notice period of 20 days. Upon expiry of the notice period, the employment relationship shall cease.

38 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Collective actions may be carried out on employees' behalf by the trade unions. Such actions can only be performed based on an express mandate granted to the trade union from the employees concerned. In any case, the action cannot be brought to the court or continued if the employees concerned oppose or renounce the trial.

39 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

The retirement age is regulated under the pension legislation and cannot be imposed at employers' discretion. The retirement age is 65 for men and 63 for women. The individual employment agreement of the employees shall be automatically terminated at the time the employees reach the retirement age and fulfil the minimum contribution standard within the social security system.

Dispute resolution

40 May the parties agree to private arbitration of employment disputes?

Parties may agree on arbitration before the Mediation and Arbitration Office organised within the Ministry of Labour, Family and Social Protection as regards collective labour conflicts, according to the terms set forth under the law.

Arbitration may be used at any time during a collective labour conflict. The arbitration decisions issued by the Mediation and Arbitration Office are enforceable against the parties. Mediation and arbitration are compulsory in the event that the parties, upon their consent, have decided to use such process prior to or during a strike.

Disputes between an employer and an employee are usually resolved at work either informally or in a formal context by using the company's grievance or disciplinary procedure, or in court. In such cases, the parties do not have the possibility of using arbitration.

41 May an employee agree to waive statutory and contractual rights to potential employment claims?

Under Romanian law, employees may not waive the statutory rights provided in their favour by the labour enactments. Any transaction that aims to waive those rights recognised by law to employees, or to limit such rights, shall be null. However, the law does not prohibit an employee from waiving the contractual rights provided to him or her following a negotiation held between the employee and the employers.

42 What are the limitation periods for bringing employment claims?

The law provides for several time limits, considering the specific object of the claim. Therefore, the claims referring to:

- the execution, suspension or termination of the individual employment agreement may be brought before the court within 45 days from the date when the employee became aware of the disposed measure;
- the payment of any compensation may be challenged within three years from the date the employee was entitled to ask for that compensation; and
- the declaration of the nullity of an individual employment or collective bargaining agreement may be requested during the entire duration of the agreement.

TUCA ZBARCEA
ASOCIATII

Şerban Pâslaru **serban.paslaru@tuca.ro**

Victoriei Square
4–8 Nicolae Titulescu Ave
America House, West Wing, 8th floor
Sector 1
Bucharest 011141
Romania

Tel: +40 21 204 88 90
Fax: +40 21 204 88 99
office@tuca.ro
www.tuca.ro

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