COUNTRY COMPARATIVE GUIDES 2022

The Legal 500 Country Comparative Guides

Denmark

EMPLOYMENT & LABOUR LAW

Contributing firm

Skau Reipurth

Bo Uhrenfeldt

Attorney (High Courts), Partner | beu@skaureipurth.com

Thomas Christian Thune

Attorney, Partner | tct@skaureipurth.com

This country-specific Q&A provides an overview of employment & labour law laws and regulations applicable in Denmark.

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DENMARK
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1. What measures have been put in place to protect employees or avoid redundancies during the coronavirus pandemic?

At this very moment, there are only a few measures in place in relation to Covid-19, as the virus is no longer categorized as a social critical disease.

Division of labour

Until the 31st of Marts, it is possible to make a division of labour. This measure entails that an employer can make the employees "divide" the job positions, as a result of low demand on their products. The employer can unilaterally reduce the worktime for the employees by for example 50%, and thereby only pay the employees 50 % of the salary. The rest of the time the employee will receive supplement payments from their unemployment insurance fund. This is a usual measure in collective agreements, however, the division of labour have been extended to the whole private labour market with some minor changes.

Employees who are subject to division of labour cannot be terminated for the reasons that led to the establishment of division of labour.

2. Following the covid-19 pandemic, have new employee rights or protections been introduced in respect of flexible or remote working arrangements?

A political agreement has been reached to change the rules regarding remote working.

The new rules make it possible for both employers and employees to use remote working more flexible.

It is expected that the rules will enter into force at the end of April 2022

3. Does an employer need a reason in order to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

In Denmark, if an employee is not subject to the Danish Salaried Employees Act or a collective bargaining agreement (collective agreement) under which the employees are protected against unfair dismissals, employers are generally free to terminate the employment (barring reasons of discrimination).

Under the Danish Salaried Employees Act, if the employee has been employed for at least one year, when notice is given, the termination must be based on fair reasons.

If the employee is subject to a collective agreement, the same, usually, applies, however, the seniority requirements in the collective agreement (before the protection applies) is, usually, less than a year (6 – 9 months).

Under the Danish Salaried Employees Act and collective agreements, a lawful termination must be based on fair reasons such as the employer's circumstances or the employee's behaviour.

Examples of the employer's circumstances are shortage of work, financial difficulties, restructuring, etc. In these situations, the employer is generally entitled to terminate the employee.

Examples of the employee's behaviour are poor performance, lack of co-operation, dis-loyalty etc. As a main rule, the employer is obligated to give the employee a warning prior to terminating the employee due to the employee's behaviour. Such warning must contain a description of the unwanted behaviour and the consequences if the employee does not change the unwanted behaviour. If the employee continues with the unwanted behaviour after the employee has received a warning, the employer is a main rule entitled to terminate the employee.

In case of gross negligence (assessed on a case-by-case basis), the employment may be terminated without the employer giving the employee a warning prior to the termination.

If the employer cannot document that a termination is based on the employer's circumstances or that the employee – if necessary – has received a warning prior to the termination, the termination will be considered as unlawful.

Some collective agreements also regulate, which reasons are considered as fair and unfair and, therefore, affects whether a termination is lawful or not.

Further, if a termination directly or indirectly is based on the employee's gender, age, nationality, race, parental leave, disability, skin-colour, sexual orientation, political orientation, religious orientation, fixed-term- and part-time employment, etc., it is unlawful under the Danish Non-Discriminations- or Equal Opportunities Acts.

4. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

The Danish Mass Redundancies Act contains additional procedural requirements, if the employer within any 30 day-period contemplates to:

- terminate 10 employees or more, when the company employs between 20 and 99 employees,
- terminate 10 % of the employees or more, when the company employs between 100 and 299 employees or
- terminate 30 employees or more, when the company employs 300 or more employees.

(the "Conditions")

If the Conditions are fulfilled, the employer is obligated to initiate negotiations with the employees or the employees' representatives to mitigate the number of terminations and/or the terms of the terminations.

Prior to commencing negotiations, the employer is obligated to inform the employees or the employees' representatives of:

- the cause of the mass redundancy,
- the number of the employees that may be terminated due to the mass redundancy, which category of employees might be terminated and when the mass redundancy is expected to occur,
- the overall number of the employees employed by the employer and the categories of employees within the company,
- the criteria that the employer will use to decide, which employees will be terminated under the mass redundancy and
- if any of the affected employees are entitled to a severance payment under legislation, a collective agreement or an individual agreement.

When the employer informs the employees or the employees' representatives of the above-mentioned, the employer is also obligated to forward the above-mentioned information to the Danish Regional Labour Market Council (the "Council") (the "First Letter").

If the employer after completing the negotiations still contemplates terminating employees and fulfil the Conditions, the employer is obligated to inform the Council hereof in a letter (the "Second Letter"). If the employer contemplates to terminate 50 % or more of the workforce, the Second Letter cannot be forwarded to the Council prior to 21 days after the negotiations commenced.

The Second Letter must contain information of relevance to the contemplated terminations, including the reason for the termination, the overall number of the employees employed by the employer and when the terminations are expected to take place.

When the employer has forwarded the Second Letter, the employer is obligated to as soon as possible and within 10 days from the Second Letter to inform the Council by a new letter, which employees that will be terminated (the "Third Letter"). At the same time, these employees must be informed of the terminations.

Lastly, the employer is obligated to inform the Council of the result of the terminations in a fourth letter as soon as possible after finalizing the terminations (the "Fourth Letter"). The Third and the Fourth Letter may be sent as one letter.

If the employer does not comply with the above-mentioned Conditions, the employees are entitled to a minimum notice of at least 30 – 56 days. However, for salaried employees, the normal notice periods set out in the Danish Salaried Employees Act still applies.

The employer may also be subject to a fine for any breach of the Act.

5. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

If a business is transferred as a result of a share transfer, no additional considerations apply.

If a business is transferred as a result of an asset purchase, the Danish Business Transfer Act regulates the employees' terms and conditions in connection with the transfer.

An asset transfer does not – in itself – constitute a fair reason for termination. However, if the termination is based on economical, technical or structural issues caused by the asset transfer, the termination will, generally, be considered as lawful

6. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

There are no general requirements under Danish legislation regarding minimum notice periods.

The notice periods are regulated in the Danish Salaried Employees Act, collective agreements and individual agreements.

If an employee is subject to the Danish Salaried Employees Act, the parties to the employment agreement may enter into an employment agreement with a trial period under which the parties may separately terminate the employment agreement with a 14 days' notice period during the first three months of the employment.

When the employee has been employed for more than three months or if the parties have not agreed on a trial period, the employee may terminate the employment agreement with one month's notice. The employer may terminate the employment agreement in accordance with the overview below:

Seniority when giving notice of the termination	Notice
Up to 5 months	1 month
Up to 2 years and 9 months	3 months
Up to 5 years and 8 months	4 months
Up to 8 years and 7 months	5 months
More than 8 years and 7 months	6 months

Collective agreements also regulate notice periods. The notice periods in collective agreements differ from collective agreement to collective agreement depending on the applicable work and area of practice.

If an employee is not subject to the Danish Salaried Employees Act or a collective agreement, the parties may agree on an individual agreement regulating the notice period. However, Danish case law has determined that such notice periods must be reasonable under the specific circumstances of the employment such as the employee's seniority, area of practice and the circumstances of the termination.

7. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

Payment in lieu of notice is, generally, accepted under Danish law, unless the employment is subject to a collective agreement or an individual agreement that stipulates otherwise.

However, payment in lieu of notice requires that the employee consents to it, as employees are otherwise entitled to maintain payment of the salary on the same terms as set out in the individual employment contract.

8. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

Yes, unless the employment is subject to a collective agreement or an individual agreement that stipulates otherwise.

9. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

There are no general procedural requirements under Danish legislation when terminating employees.

However, see question 4 concerning mass redundancies.

Some collective agreements also contain procedural requirements when terminating an employee such as having joint meetings, meetings in front an appointed board, etc. before the employer proceeds to terminate the employee.

Further, individual agreements can also contain procedural requirements when terminating an employee.

The consequences of breaching such procedural requirements are determined in the specific collective or the individual agreement. Usually, a breach of procedural requirements entails that the employee is entitled to a compensation.

10. If the employer does not follow any prescribed procedure as described in response to question 8, what are the consequences for the employer?

If employers do not comply with the procedural requirements in collective agreements or individual agreements, the consequences depend on the terms stipulated in the collective agreement or the individual agreement. Normally, an employee will be entitled to a compensation for unfair termination.

11. How, if at all, are collective agreements relevant to the termination of employment?

As a main rule, collective agreements contain regulation regarding termination of employees. The regulation depends of the terms in the specific collective agreement, which differ from collective agreement to collective agreement. Further, see question 6, 7, 8, 9 and 10.

12. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

There are no such requirements in Denmark.

However, certain collective agreements may contain procedural requirements prior to terminating an employee, see question 9. In addition, reference is also made to question 4 on large redundancies.

13. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

See question 3 concerning the Danish Non-Discriminations- or Equal Opportunities Act.

14. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

If a termination is in breach of the Danish Non-Discriminations- or Equal Opportunities Acts, the employee may be entitled to a compensation for unfair termination, which usually amounts to between 6 – 12 months' salary.

15. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

An employee, who has been elected as a shop steward under a collective agreement, is, normally, subject to specific protection.

Firstly, the shop steward may be entitled to an extended notice period compared to employees, who are subject to the same collective agreement.

Secondly, a termination of the shop steward is unlawful;

- if the termination is based on the shop steward's duties as a shop steward, or
- if the employer does not choose the shop steward as the last employee to be terminated among peers in connection with a reduction of the staff.

If a termination of a shop steward is unlawful, the shop steward will be entitled to a compensation as stipulated in the specific collective agreement, which differ from collective agreement to collective agreement.

Safety representatives are subject to the above-mentioned on the same basis as a shop stewards within the same area of practice. This entails that a safety representative – which performs work within an area of practice where shop stewards are not subject to any special protection – is also not subject any special protection and vice versa.

Under the Danish Part Time Act and the Danish Time-Limited Employment Act, any employees who are either employed on part time or in a time-limited employment must enjoy the same general employment terms and

conditions as any employees with the employer that are employed on full-time or time-unlimited employment.

16. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

Employees, who have made disclosures in the public interest (whistleblowers) are protected under the Danish whistleblower act.

The act provides protection against retaliation, threats in regard to termination in situations where an employee makes disclosures in the interest of the public.

It should be stressed that whistleblowers only enjoy protection under the Danish Whistleblower Act if specific conditions and procedures are met. The Act sets out specific requirements that must be met before an employee is within the scope of the Act.

17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

Employees are entitled to their normal salary during the notice period.

Further, under the Danish Salaried Employees Act employees, who have been employed for more than 12 and 17 years, respectively, are entitled to a compensation in the amount of 1 and 3 months' gross salary, respectively. Collective agreements, usually, contain similar regulation and the same can also be agreed in individual agreements.

If a termination is unlawful, employees, who are subject to:

- the Danish Salaried Employees Act, may be entitled to a compensation for unfair termination of between 1 and 5 months' salary depending on the employees' seniority and the circumstances of the termination,
- collective bargaining agreements and individual agreements are entitled to a compensation, if this is stipulated in the collective agreement or individual agreement.

Further, see question 14 concerning terminations that may be a breach of the Danish Non-Discriminations- or Equal Opportunities Acts.

If an employee is entitled to a compensation under both the Danish Salaried Employees Act and the Danish Non-Discriminations- or Equal Opportunities Acts, the employee will only be entitled to one (the highest) of the compensations.

18. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

The parties can freely enter into a severance agreement under which the consequences of the termination are regulated. In practice, such severance agreements, normally, contain additional compensation to the employee under the condition that the employee waives the right to commence a case against the employer concerning an unlawful termination.

Severance agreements must, however, be reasonable and can be held invalid, if the terms are not sufficiently reasonable for the employee.

Also, see question 7.

19. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Under the Danish Employment Covenant Act, the parties may enter into restrictive covenants such as non-competition- and non-solicitation of customers clauses. Such clauses restrict employees from performing competing work or working for the employer's customers after the employment has expired.

The use of non-competition and non-solicitation of customers clauses are subject to a number of requirements.

A non-compete clause is only valid and enforceable, if:

1. the employee holds a position of significant trust or has signed an agreement with the employer about an invention invented by the employee,
2. the employer has informed the employee of

the circumstances, which makes it necessary for the employee to be subject to a non-compete clause,
3. the employee has been employed on a continuous base for at least 6 months, when the employment lapses,
4. the employee receives a compensation during the duration of when the employee is restricted from carrying out competing work (at least 40 % of the employee' salary, if the clause is applicable for less than 6 months, or at least 60 % of the employee's salary, if the clause is applicable between 6 months and 12 months),
5. the duration of the clause is a period of maximum 12 months and
6. the employee has received information of the above-mentioned conditions in writing.

A non-solicitation of customers clause is only valid and enforceable, if:

1. the clause concerns customers and business partners, which the employee has been in commercial contact with the last 12 months of the employment,
2. the employee has been employed on a continuous base for at least 6 months, when the employment lapses,
3. The employee receives a list of the customers and business partners that the employee has had contact with within the last 12 months.
4. the employee receives a compensation during the duration of when the employee is restricted from carrying out work for customers (at least 40 % of the employee's salary, if the clause is applicable for less than 6 months, or at least 60 % of the employee's salary, if the clause is applicable between 6 months and 12 months),
5. the duration of the clause is a period of maximum 12 months and
6. the employee has received information of the above-mentioned conditions in writing.

Further, the parties may also enter into a combined non-competition- and non-solicitation of customers clause, which is valid, if the above-mentioned conditions are met with the following adjustments:

1. the employee receives a compensation of 60 % of the employee's salary during the duration of when the employee is restricted from carrying out competing work and work for customers and
2. the duration of the clause may not exceed 6 months.

If any of the above-mentioned conditions are not fulfilled, the clauses will invalid and the clauses will, therefore, lapse automatically in their entirety.

As of 1 January 2021, the use non-solicitation of employees clauses are no longer valid in Denmark, unless the clauses are entered into as part of a business transfer where the parties (transferor and transferee) may under specific conditions agree on a non-solicitation of employees clause with duration of up to 6 months.

20. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Employees are subject to the Danish Trade Secrets Act under which employees are obligated to keep the employer's trade secrets confidential after the employment lapses.

If an employee breaches the Danish Trade Secrets Act, the employer can commence injunction proceedings against the employee. The employee can also be liable for the employer's loss as a consequence of the employee's breach of the Danish Trade Secrets Act.

21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

No.

22. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

In practice, it is difficult for employers to bear the burden of proof concerning whether an employee has breached the confidential obligation under the Danish Trade Secrets Act.

To mitigate the risk of the employer suffering a loss as a consequence of the employee disclosing trade secrets, the employer can consider to restrict the employee from – during the employment – having knowledge of trade secrets, which are not necessary for the employee's work tasks.

In practice, employers also enter into restrictive covenants to ensure that the employee is not disclosing trade secrets to competitors and customers during the duration for the restrictive covenants.

23. Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

There are currently no plans of such legal changes.

Contributors

Bo Uhrenfeldt
Attorney (High Courts), Partner
beu@skaureipurth.com

Thomas Christian Thune
Attorney, Partner
tct@skaureipurth.com