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Employment law overview: Malta

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The right of all citizens to work and the state's role in promoting the conditions to make this right effective is enshrined in Malta's 1974 Republican Constitution. Indeed the Constitution's first clause states that "Malta is a democratic republic founded on work and on respect for the fundamental rights and freedoms of the individual". The Constitution also upholds the basic principles of workers' rights, including inter alia the maximum number of daily working hours, a weekly rest day, holidays without pay, the establishment of a minimum working age, gender equality, professional and vocational training for workers, contributory social insurance and the provision of the means of subsistence for those unable to work. The Constitution, however, leaves it to statutory acts to add flesh to these basic principles.

The Employment and Industrial Relations Act (EIRA) (Chap 452 of the Laws of Malta) represents Malta's primary source of employment law, including conditions of employment, protection against discrimination and industrial relations. This statute was enacted in 2002 with a view towards consolidating the previous primary sources of employment law namely the Conditions of Employment (Regulation) Act (Chap.135 of the Laws of Malta) and the Industrial Relations Act (Chap. 266 of the Laws of Malta). This consolidation exercise also served to bring Malta's employment law in line with European employment law.

Sources of Labour Law

The hierarchy of legal sources of Maltese labour law can be generally broken down as follows:

- **Primary Legislation** - The most notable of these primary legislative sources include the Constitution of Malta, the Employment and Industrial Relations Act (EIRA), the Employment Commission Act, the Employment and Training Services Act, the European Union Act, the Immigration Act and EU Regulations and Directives which apply in virtue of the doctrine of direct effect
- **Secondary Legislation** - Regulations made under the EIRA, the majority of which serve to implement EU regulations and directives, fleshing out the basic legal framework provided by the EIRA. These include Wage Regulation Orders which represent administrative regulations which regulate certain conditions of employment for specific sectors. At present, there are 31 different WROs in force. The conditions specified in these Orders include inter alia maximum hours of work, minimum wages, overtime rates, sick leave and special leave.
- **Public Service Management Code** - Members of the public service have their conditions of employment regulated by means of the Public Service Management Code or "PSMC" which was introduced in 2002 to replace the EstaCode. The PSMC brings together all the standing regulations, circulars, policies on HR Management, in the fields of Employee Relations and Resourcing in the Public Service. This code falls within the competence of the Management and Personnel Office (the former Establishments Division) within the Office of the Prime Minister.



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- **Collective agreements** - these are enterprise-specific agreements which regulate the conditions of employment of around a third of the total gainful employment in the private sector.
- **Judicial Decisions**
- **Arbitration awards**
- **Custom and practice** - These serve as a source of law in circumstances where the law is silent.

The Employment contract

Maltese Labour Law is essentially based on the contractual agreement entered into between employer and employee, provided that the statutory conditions of employment are respected. Thus, whereas certain conditions of employment are strictly regulated as a matter of law, other conditions are left entirely up to the parties to agree upon, as long as these are also considered to be objectively reasonable. Where the minimum conditions of employment are established by law or regulation, only those provisions that are more favourable to the employee are considered as being legally valid and enforceable. Collective agreements work in the same way, binding the employer party to the agreement and the members of the trade union negotiating on the employees' behalf. Individuals not belonging to the trade union in question may also agree to be governed by the terms of the collective agreement.

If the period of employment exceeds one month and the employee's working hours exceed eight hours per week, the employer is bound to give the employee within 8 working days from the commencement of employment, either (i) a written contract of employment, or (ii) a written statement of minimum conditions, which must be furnished to the employee. Such information is expected to include such basic things as the normal rates of pay, overtime rates, hours of work, place of work and leave entitlement. Wages should be paid at regular intervals not exceeding 4 weeks in arrears. Different periods of pay can be agreed in a collective agreement.

Contracts of employment may be entered into for a fixed term or for an indefinite term. A fixed term contract can be successively renewed up to a maximum period of 4 years after which the employee shall be considered to be under a contract of indefinite duration. The exception occurs when the employer has justifiable reasons for retaining the employee on a fixed term contract. An employee whose fixed term contract has expired and is retained in employment will also be considered to be under an indefinite contract if the employer does not produce a new contract of service within 12 days following the expiry of the previous contract.

A caveat worth making in the context of contracts of employment for a fixed term is that if the parties would like to terminate the contract prior to the expiry of the established term, the terminating party has to pay to the other a penalty which is established by law which is a sum equal to half the wages that the employee would have earned in the remaining period of employment.



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The first 6 months of each employment contract constitutes probation, unless the parties agree to a shorter term. By way of exception to this rule, in the case of contracts of service, or collective agreements in respect of employees holding technical, executive, administrative or managerial posts whose wages are at least double the applicable minimum wage, such probation period is of 1 year unless a shorter period is agreed upon in the contract of service or in the collective agreement. During the probation period employment can be terminated by either party without assigning any reason, provided that at least 1 week's notice of termination is given by the terminating party to the other party where the employment relationship has exceeded 1 month.

Dismissal

Dismissal and the rights and obligations of the respective parties are matters which are subject to very strict regulation under Maltese law. The Employer may only terminate a contract of employment on the basis of:

- (i) a good and sufficient cause- a term which has no statutory definition and which constitutes the interpretational basis for each case of unfair dismissal brought before the Industrial Tribunal.
- (ii) redundancy, or
- (iii) the employee reaching retirement age.

Where an employer intends to terminate the employment of an employee on grounds of redundancy, he is required to terminate the employment of that person who was engaged last in the class of employment affected by such redundancy ("Last In First Out"), provided that, where the employer and the last employed employee are related by consanguinity or affinity up to the third degree, the employer may, instead of terminating the employment of such person, terminate that of the person next in turn.

The employee, on the other hand, is free to terminate employment of employment of an indefinite term without assigning any reason.

Where the employer or employee are terminating a contract of employment of an indefinite term, the advance notice to be given by the terminating party to the other party is calculated according to the period for which the employee has been in the employment of the same employer continuously, which can be set out in the following table:

>1 month	< 6 months	1 week;
>6 months	< 2 years	2 weeks;
>2 years	< 4 years	4 weeks;
>4 years	< 7 years	8 weeks;
> 7 years		...	add 1 week for each subsequent year up to a maximum of 12 weeks



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Longer notice periods may be agreed upon in the case of technical, administrative, executive or managerial posts due to the nature or responsibilities involved in such roles and the hand-over usually required in such cases.

By way of exception to what is set out above, in cases where employment is terminated for good and sufficient cause, the employer is not required to give advance notice of termination and/or pay the employee for any wages relating to such notice period or the unexpired period of a definite term agreed upon. Typically, the employer would be expected to provide a very compelling reason for the dismissal of any employee on this ground, particularly more so when the dismissal is not preceded by any verbal or written disciplinary warnings given by the employer to the employee over a period before the dismissal. Two written warnings given by the employer over a reasonable period of time prior to the final warning and contemporaneous dismissal should serve to demonstrate a degree of prudence on the part of the employer if such dismissal is challenged by the employee as unfair.

If both parties agree to the termination, it is possible to terminate the employment contract by mutual consent. The terms and conditions of the termination may be, and usually are, incorporated in a settlement agreement signed by both parties.

Special Treatment

Maltese law affords additional protection from termination of employment to:

- employees suffering from any personal injury by accident in the course of their employment or any occupational disease occurring in the service of that employer, unless termination is agreed to by the employee;
- full-time female employees during the period of maternity leave for the period of 5 weeks following the end of such maternity leave, during which she may be incapable of working owing to a post-natal pathological condition. The law, however, also introduces a measure to reward the employer for supporting such full-time female employees during their pregnancy by providing that if the employee does not resume work after the birth of her child or, having resumed work, terminates her employment without good and sufficient cause within 6 months of the resumption of work, she would be liable to refund the wages received during the maternity leave availed of.

The employer is also prohibited from using the following circumstances as a “good and sufficient cause” for terminating the employment of any employee/s:

- the employee is a member of a trade union or has acted or is to act as the employees’ representative;
- the employee has filed a complaint or participated in proceedings against the employer involving any alleged violation of laws or regulations by such employer;



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- the employee discloses information, whether confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by the employer or by persons acting in the employer's name;
- the employee has contracted marriage;
- the business in which the employee is engaged has undergone a transfer of ownership, unless such termination is shown to be necessary for economic, technical or organisational reasons entailing changes in the workforce.

The Industrial Tribunal

The Industrial Tribunal has competence to settle trade disputes and to consider and decide all cases of alleged unfair dismissals, discriminatory treatment, breach of the principle of equal pay for work of equal value, victimization and harassment. Cases before the Tribunal must be presented within four months from the effective date of the alleged breach.

Collective Redundancies

The provisions of EU Council Directive 98/59/EC apply in the case of collective redundancies, that is the dismissal of:

- 10 or more employees in establishments normally employing more than 20 employees but less than 100 employees;
- 10% or more of the number of employees in establishments employing 100 or more but less than 300 employees; and
- 30 employees or more in establishments employing 300 employees or more

In any such circumstances, the employer is expected to comply with the procedure of consulting with the employee's representative covering ways and means of avoiding the collective redundancies or reducing the number of employees affected by such redundancies. The employer must also provide the employees' representative and the Director of Labour with a written statement providing information about the reasons for the redundancies, the number of employees he intends to make redundant, the number of employees normally employed by him, the criteria proposed for the selection of the employees to be made redundant, details regarding any redundancy payments which are due and the period over which redundancies are to be effected.

The collective redundancies may only become effective within 30 days from the date when the employees' representative and the Director of Labour are notified about the intended redundancies, unless this 30 day period is shortened or extended by the Director of Labour. If no resolution to the redundancies is attained, the employer would be bound to lay off the persons engaged last in the class/es of employment affected by such redundancies.



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Data Protection

Maltese Data Protection laws are fully compliant with applicable EU laws and these privacy matters affect various aspects of the employer-employee relationship. Thus, when processing employees' data, the employer must ensure that such data is:

- collected and recorded for specific, explicit and legitimate purposes
- accurate and, if necessary, updated
- pertinent, complete and not exceeding the purposes for which it was collected or subsequently processed
- strictly related to the purposes for which the data was collected or subsequently processed

It is also important that employers, in their capacity as data controllers, take measures to ensure that employees who will be involved in processing other employees' or customers' personal data are contractually bound to process such data acting only on the instructions of the employer and taking all those security measures available to the employer to protect the personal data against accidental, destruction or loss or unlawful forms or processing.

It is also good practice for employers to include in the contract of employment a clause to the effect that the employer's communication systems are made available to the employee with the understanding that these are used by solely and exclusively in furtherance of the employer's business and that all communications made through the employer's communication systems are subject to interception, surveillance and monitoring. This avoids potentially uncomfortable privacy-related situations for the employer by making things clear to all employees from the outset.

The Employment of Foreign Workers in Malta

A. Union citizens

Since Malta's accession in the European Union (EU) and the implementation of the Free Movement of European Nationals and their Family Members Order (the "Order") – in terms of the European Union Act (Chap. 460 of the Laws of Malta) - which Order implements inter alia the provisions of Council Directive 2004/38/EC of the European Parliament, a Union citizen may enter, remain and reside in Malta, seek and take up employment or self-employment in Malta and shall enjoy equal treatment with Maltese nationals and such right shall, subject to certain requirements, be applicable to family members accompanying or joining the Union citizen, including those family members who are not nationals of a Member State.

A Union citizen and his family members accompanying or joining him may reside and move freely within Malta on the same conditions as Maltese nationals for a period of three months without conditions or any formalities, which period is extendable to a six-month period in the case of a person who provides evidence that he is genuinely seeking employment and has a genuine prospect of securing employment by the end of the said six month period.



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Where a Union Citizen wishes to taken up employment in Malta no such employment can be undertaken by a Union citizen unless a licence has been issued, which licence however shall not be withheld. It is interesting to note that in terms of the Order a “Union citizen” includes a citizen of the European Economic Area and therefore the requirements for the issuance of an employment licence in favour of an EU citizen and an EEA citizen are not differentiated in any manner.

The procedure for the issuance of an employment licence for a Union citizen is relatively straightforward. Applications for an employment licence may be made directly buy the applicant and must be countersigned by a Director or a person holding a senior managerial position in the establishment where the Union citizen or the spouse or dependant of such citizen is to be employed, and submitted to the Employment and Training Corporation (ETC) which is the public agency in Malta on employment service set up in terms of the Employment and Training Services Act (Chap. 343 of the Laws of Malta). A photocopy of a valid travel document such as a passport or an Identity Card is to be provided with the said application together with payment of the relevant fee. If the employee is the spouse or dependant of a Union citizen he/she has to provide documentary evidence to this effect.

On submitting the application, the applicant will be provided with a provisional employment licence which entitles the employee to start work immediately. Such a provisional employment licence is valid for thirty (30) days from the date of submission of the application and until such time as another licence is issued in respect of the same employee in terms of the Order following verification by the ETC of the information provided by the applicant. It is noteworthy to mention that the thirty (30) day time-frame has been established by the ETC merely as an internal deadline within the agency in order to ensure that the licence is issued within the said period, meaning that if another licence is not issued by the ETC within thirty (30) days, the provisional employment licence remains valid until such time as another licence is issued. The employment licence is valid for a maximum period of one year and must be renewed if employment continues after the expiration date.

Once a Union citizen obtains an employment licence in Malta he/she acquires the right to reside in Malta which right extends to his/her family members even if they are third country nationals. Moreover if a Union citizen has resided legally in Malta for a continuous period of five years¹ and his family members who are not nationals of a Member State and who have resided with him in Malta for a continuous period of five years, may reside permanently in Malta and obtain a permanent residence certificate to this effect provided that relevant documentary evidence is produced to the Director of Citizenship and Expatriate Affairs in Malta.

¹ Continuity of residence shall not be affected by (a) temporary absences not exceeding a total of six months each year (ii) absences of a longer duration for compulsory military service or (iii) one absence of a maximum twelve consecutive months for reasons such as pregnancy and childbirth, serious illness, study or vocational training or a posting in another Member State or a third country.



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It is worth mentioning that in spite of the right of free movement granted to EU nationals in terms of the Order, Malta has retained the work permit system as described above to, amongst other things, provide a safeguard on the right of any foreign national to work in Malta. Consequently Malta may be able to withhold work permits in the case of a threat or a disruption in its labour market which is of an urgent and exceptional nature. To date the only restrictions imposed were on Bulgarian and Romanian nationals whose application must go through a screening process. These safeguards however can only be applied up to the year 2011 and after this period, in the event of a disproportionate influx of EU workers, Malta may still seek a remedy, this time acting through EU institutions, rather than unilaterally.² This arrangement once reached will apply indefinitely and will cover Malta's position at any time in the future in the event of possible difficulties relating to the movement of workers to Malta.

B. Third Country Nationals

The entry into Malta and the employment of third country nationals – who are not spouses or family members of a Union Citizen - is regulated by the Immigration Act (Chap. 217 of the Laws of Malta). A third country national may be permitted to enter Malta for a visit the duration of which must not exceed three months provided that he/she, amongst other things (i) holds a valid passport (ii) holds a valid visa and (iii) submits before entry into Malta, documents substantiating the purpose of the planned visit.

As in the case of a Union citizen, a third country national may not exercise any profession or occupation or hold any appointment without the appropriate employment licence. However, in respect of third country nationals, a high degree of discretion is granted to the Principal Immigration Officer in Malta to determine whether or not to grant an employment licence . Moreover, the application must necessarily be submitted to the ETC at least three months before the third country national is due to start work by the prospective employer and not by the proposed employee, and it must be signed by a Director or a person holding a senior management position in the establishment concerned.

The application for an employment licence - together with payment of the relevant fee - must be supported by the following documents:

- Detailed Curriculum Vitae , clearly indicating education, work experience and previous employers in;
- Copies of any employment references, certificates and/or any other qualifications that the applicant may have;
- Authenticated copy of the applicant's passport;
- 1 passport-type photograph;

² <http://www.eures.com.mt> – Living & Working in Malta – p.4



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- If the proposed employee is in Malta, a copy of his/her entry visa;
- A certificate of good conduct issued by the authorities in the applicant's country of residence certifying that applicant has had no criminal convictions in that country;
- The completion of a job description information document by the prospective employer pertaining to the following:
 - the company's activities;
 - the nature of the position to be occupied by the employee;
 - the employee's duties;
 - working conditions;
- Evidence of the efforts made by the company to employ Maltese or EEA/Swiss Citizens.

The employment licence in respect of a third country national is valid for a period of one year and if the proposed employee's services are required beyond the said period an application for the extension of his/her employment licence must be submitted three months before it is due to expire.

A third country national in possession of an employment licence shall also acquire a Maltese residence permit for the period in respect of which the employment licence is issued, which permit must therefore also be renewed on an annual basis. The residence permit is in the form of a sticker affixed in the holder's passport.

A third country national who has resided legally and continuously in Malta for a period of five years³ shall be granted a long-term resident status by the Director of Citizenship and Expatriate Affairs subject to the provision of the required documentation and provided the prescribed conditions are met.⁴ The long-term resident status shall be evidenced by a residence permit with the words "long-term resident – EC" entered thereon by the Director of Citizenship and Expatriate Affairs.

³ In calculating the period of five years a temporary absence from Malta shall not interrupt such period and shall be taken into account in the compilation of the period when the periods of absence are shorter than six consecutive months and do not exceed the total of ten months within the five year period.

⁴ The Director of Citizenship and Expatriate Affairs may refuse to grant an application for long-term resident status made by a third country national on grounds of public policy or public security.



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Employment & Social Security Schemes for Crew on Board Vessels Registered under the Malta Flag

Persons employed on Maltese-flagged vessels are not afforded the protection of many of the provisions of Maltese law dealing with minimum conditions of employment. In fact, the form, period and conditions of agreements with a crew member of a Maltese-flagged vessel fall outside the scope of the Employment and Industrial Relations Act but are on the other hand governed by the Merchant Shipping Act (Chap. 234 of the Laws of Malta) to the extent that, any terms or conditions adopted by the parties to an employment agreement with a crew member are contrary to the provisions of the Merchant Shipping Act in matters relating to wages and conditions of employment of seamen and masters on board ships, the said terms and conditions shall have no effect and the relevant provisions of the Merchant Shipping Act shall apply.

In its constant efforts towards providing a level of protection to seafaring professions, and to improve the social security of workers in seagoing professions, Malta emphasizes the fact that the underlying principle of international maritime law - including EU legislation - when determining the insurability of mariners employed on a vessel flying the flag of a member State should be insured by that State. Council Regulation (EC) 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving with the EU Community outlines the insurability provisions of mariners employed on board vessels flying the flag of an EU Member State and the resultant entitlement to all benefits paid under all the branches of social security covered by this same Regulation.

Prior to Malta's accession in the EU, the Merchant Shipping Act and the Social Security Act (Chap. 318 of the Laws of Malta) exempted foreign mariners employed on board Maltese flagged ships from the payment of social security contributions in Malta. Following accession, these same provisions of national legislation have remained in force only for third country nationals employed on board Maltese-flagged ships and residing in a third country. Mariners residing in an EU Member State – including third country nationals - are now liable to be insured under the Maltese social security system.⁵

With the ever improving shipping facilities in Malta and the resultant expansion of the shipping register, the impact of such a legislation may increase in the future, since this not only means that these mariners would be entitled to social security benefits in terms of the contributions they pay in Malta but also to family benefits and health care costs of the mariners themselves and their family members.

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⁵ Council Regulation 859/03 extends the rights enjoyed under Regulation 1408/71 to third-country nationals residing in the EU and members of their families.



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Zammit & Associates - Advocates is a legal practice based in Malta focusing on business law, with a predominantly international outlook. Its client-base is largely composed of foreign-owned Maltese companies, high net-worth individuals and financial institutions. The firm also provides external consultancy on corporate and financial law issues to other law firms and legal practitioners in Malta.

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