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The Global Employer: Showcasing New Developments for Multinational Employers

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The Global Employer: Showcasing New Developments for Multinational Employers

Abstract

Baker & McKenzie's Global Employment Practice Group is pleased to present its 54th issue of *The Global Employer*[™] entitled "Showcasing New Developments for Multinational Employers."

This issue contains a collection of articles on legal developments from nine jurisdictions that examine changes to employment and labour laws and practices and explore developments in compensation and benefits.

Included, you will find information pertaining to a new collective redundancy procedure in France aimed at providing for a more secure labor market; new measures in Spain intended to promote employment among young people under 30; the codification of requirements for the negotiation of social plans in Switzerland; effects on UK redundancy laws in light of being found in breach of EU directives; emboldened labor agency agendas in the US; a discussion from Argentina on the rights of employees and employers when it comes to monitoring in the workplace; new developments for stock option plans in Brazil; changes to the calculation of payroll taxes in Colombia; and the promotion and protection of labor rights in Peru.

Keywords

Baker & McKenzie, labor law, employment law, labor rights, labor market

Comments

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The Global Employer™

Showcasing New Developments for
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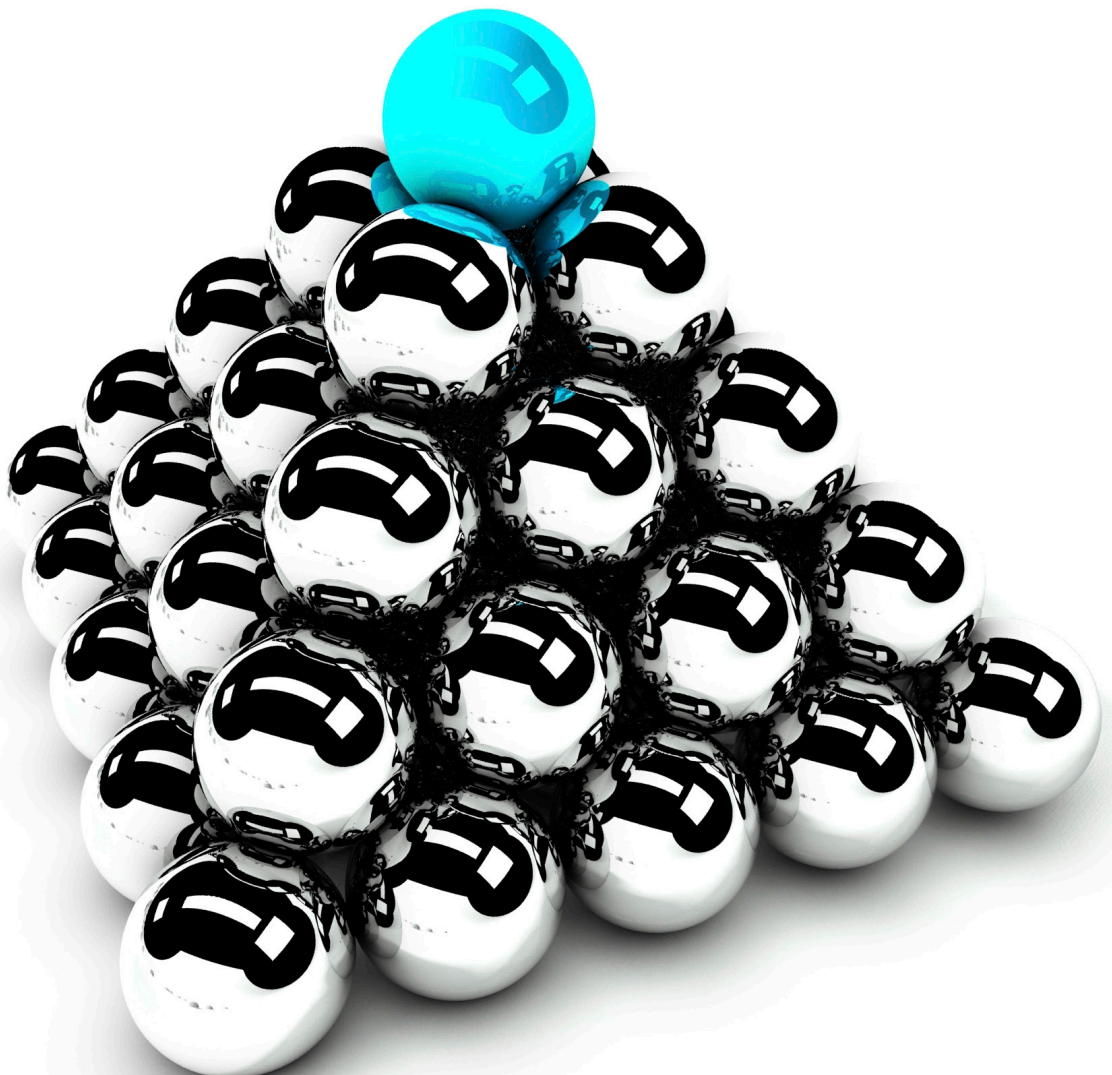


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The Global Employer

Showcasing New Developments for Multinational Employers

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Argentina



Monitoring Employees: Rights of Employers and Employees

In Argentina, new technologies and the installation of security cameras in the work place have fueled a debate on how to balance the right of employers to organize and guarantee the safety of their businesses with employee privacy rights.

Section 19 of the Argentine Constitution and Section 12 of the Universal Declaration of Human Rights guarantees the right to privacy. Numerous Argentine court decisions hold that the right to privacy is a value to be protected. In *Ponzetti de Balbín, Indalia vs. Editorial Atlántida SA*, the Supreme Court held that in certain circumstances, the right to privacy is superior even to the right of information.

The general principle regarding camera monitoring is that the cameras must be used in order to protect property and the overall business.

Legal and public discussion continues over the limits of employers in monitoring the work of their employees. The issue became public recently due to force measures taken by the Train Drivers' Union, opposing to the installation of cameras in the drivers' cabins. The transportation authority decided the installation due to a recent train accident in which there were doubts about the performance of the driver.

Recent Jurisprudence

A recent ruling demonstrates how the issue affects the interests of employers and employees. A decision by the Court of Appeals in the matter held that the installation of cameras at the worksite in order to monitor the work of the employees is a violation of privacy.

The case was initiated by the union for employees of commercial activities and services, who filed an injunctive measure against *Autopista Urbana S.A. (Autopista)* in the Courts of the City of Buenos Aires. The complaint claimed that the placement of security cameras inside toll booths undermined the right to intimacy and privacy of employees in violation of the Constitution and several laws. The secretary of the union asked the Court to prevent the installation of devices capable of capturing and transmitting images, audio and video within the toll booths. The Lower Court judge granted the injunctive measure.

The ruling of the Lower Court was subsequently appealed by *Autopista*.

Autopista claimed in its appeal that the decision affected the economic interests of the company because of the costs involved with purchasing and installing the equipment. The Court of Appeal upheld the ruling of the Lower Court.

In its appeal, *Autopista* expressed no reason to justify the installation of the monitoring equipment. Instead, the company simply stated that the installation of cameras in the toll booths preserved the physical integrity of employees, the property of the company, and did not infringe on the rights of employees. *Autopista* did not explain the system that it intended to implement, nor did it identify the people who would have access to the recordings. Most importantly, the company did not state whether the employees were informed of, or given an explanation of the measures beforehand.

Guidelines

As technology continues to advance, claims of right to privacy violations are expected to become more commonplace.

It should be noted that although there are no specific local regulations, like other legislations governing the implementation of surveillance procedures to monitor the activity of the employees', if they are done in good faith and with respect for the dignity of employees, such means of control could be justified to the extent that they are necessary for the employer's productivity and security.

The practical recommendations of the International Labor Organization on the protection of the personal data of employees states that employees who are subject to

surveillance measures should be informed beforehand of: (i) the reason behind such measures, (ii) the hours in which such measures will be applied, (iii) the methods and techniques used, and (iv) the data that will be collected. Employers should note that in light of recent court rulings concerning the right to privacy, data collection measures should only be used if safety and the protection of property warrant them.

Conclusion

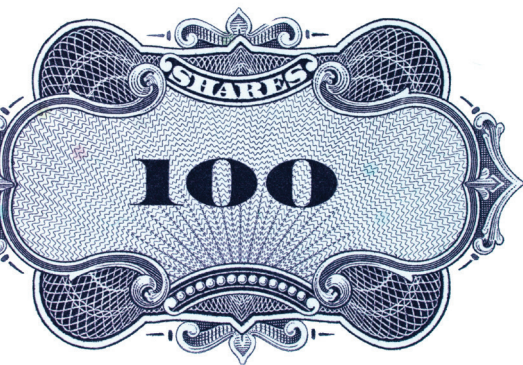
Although the right of the employer to exercise reasonable surveillance

and control of the employees' activities by the means it deems most appropriate is not under discussion, the use of cameras whose principal objective is to control the quantity and quality of the work performed is not, in principle, an acceptable practice.

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Brazil



However, companies still face difficulties implementing stock option plans. There are no laws in Brazil specifically governing the labor and social security impacts of granting stock options, nor how these plans should be treated for the purpose of calculating labor rights and applicable taxes. Also, Brazilian Labor Courts, which in general are very protective of employees, have not consolidated their understanding of the legal nature of equity plans provided to employees.

Recent Developments on Stock Option Plans in Brazil

The offering of stock options to employees in Brazil is increasing.

Notwithstanding, the general understanding of legal scholars, and a significant portion of existing Labor Courts' decisions is the sense that stock option plans should not be deemed part of the employee's overall compensation as long as some conditions are fulfilled - more importantly, the plan not being granted to reward employee performance.

However, very recently an administrative tax authority in

Brazil ("CARF") ruled, for the first time, on two significant cases. These rulings signaled that stock option plans granted to employees should be subject to social security contributions on any employee capital gains. In both cases ruled by the administrative tax authorities, the position was that stock options should be treated as part of the employees' overall compensation and, for this reason, be subject to social security taxes.

These two decisions, however, were not unanimous, as some of the individuals on the Tax Panel held that there should be no social security on capital gains. This position should be applicable only for the two specific cases analyzed. , This leaves room for the interpretation that the actual purpose of the plan was to remunerate the employees. In essence, the position of the winning votes was that “to avoid the salary nature of the stock option, there must be uncertainties, common risk on the financial operations.”

This position adopted by the administrative tax authorities will also have an impact on the labor and employment analysis of the same matter. Thus, companies must be even more careful when granting stock options in Brazil.

Conceptually, in Brazil, “compensation” encompasses the employee’s base salary, bonuses, fringe benefits and any other form of compensation or advantage

which the employee receives for his or her work, especially if the compensation is linked to the employee’s performance.

Labor laws and labor courts in Brazil are utterly protective of the employment relationship. Therefore, if the granting of stock options is linked to the employee’s performance, and the options are granted as a form of additional compensation to the employee, especially in light of the CARF precedents, an employee may be successful in asserting before a labor court that the options granted constitute a part of his or her compensation. For this reason, stock option plans, which are already very sensitive in Brazil, have to be treated even more carefully by employers.

It is important to be extremely careful when drafting stock option plans in order to minimize potential labor exposure and to give basis for additional defense arguments if they become necessary. As there

is no specific labor legislation addressing stock option plans, , the terms of the plan are essential to determine its nature.

There are actions that a company can take to mitigate the risks associated with stock option plans:

- (i) the employee should pay for stock. In other words, the plan should be onerous. The obligation of the employee to pay for the stock increases its business nature. The grant of options to the employees should always be qualified as

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Colombia



Tax Reform Brings Changes to the Payment of Payroll Taxes

The Payroll Taxes regime in Colombia requires a payment from employers based on the number of workers employed. Payroll taxes can often times be viewed as a disincentive for employment by employers. Simply put, the more employees a company has, the more payroll taxes to be paid. With the recent Tax Reform in Colombia (Law 1607 of 2012), the paradigm shifted.



With the most recent tax reform, a new income tax for equity ("CREE" for its acronym in Spanish) was created for employers in Colombia. The principal purpose of CREE is to replace the payment structure of payroll taxes and contributions to the social security system in health with a new payment structure. The tax will be paid on an annual basis, at an initial rate of nine percent calculated upon the gross profits of the company (for years 2013, 2014 and 2015) and eight percent (after 2015).

Employers in Colombia are no longer subject to the payment of payroll taxes for employees earning a salary less than ten (10) monthly minimum legal salaries (one minimum statutory salary is equivalent to approximately USD328). For employees earning a salary equivalent to, or greater than, ten monthly minimum legal salaries, the obligation of paying payroll taxes still remains.

Employers in Colombia will have to pay contributions to the Social Security System in Health, Colombian Family Welfare Institute ("ICBF" for its acronym in Spanish)

and to the National Apprenticeship Service ("SENA" for its acronym in Spanish) based both on their annual utilities, and on the employed personnel whose salaries exceed ten minimum statutory salaries. These last payroll taxes have not varied, and should continue being paid in an amount equal to five percent over the payroll of employees who earn more than ten (10) minimum legal monthly salaries (COL5.895.000 or approximately USD3.107.4). Of the five percent paid, three percent must be destined to the ICBF and two percent must be destined to SENA.

The Colombian Government created a withholding system in order to generate the correct payment of the CREE. Withholding rates are 0.3 percent, 0.6 percent and 1.5 percent on the net respective income, depending on the economic activity the employer performs. This tax is aimed at partially substituting some payroll taxes, and the healthcare contributions due from the employer. One of its principal legislative goals is to spur the creation of employment, and reduce the taxable charges in payroll considerations.

The taxable basis for CREE is similar to an income tax, but it does not include capital gains. It is determined from the gross income of the fiscal period minus the following items: Discounts and devolutions; Income classified as non taxable income; Costs; (-) Only deductions expressly mentioned in the law ; and Only exempt income expressly mentioned in the law.

The minimum taxable basis for CREE shall not be lower than three percent of the taxpayer's net equity as of the last day of the previous year. However, the net equity value of assets in an unproductive period may be excluded from the CREE minimum taxable basis.

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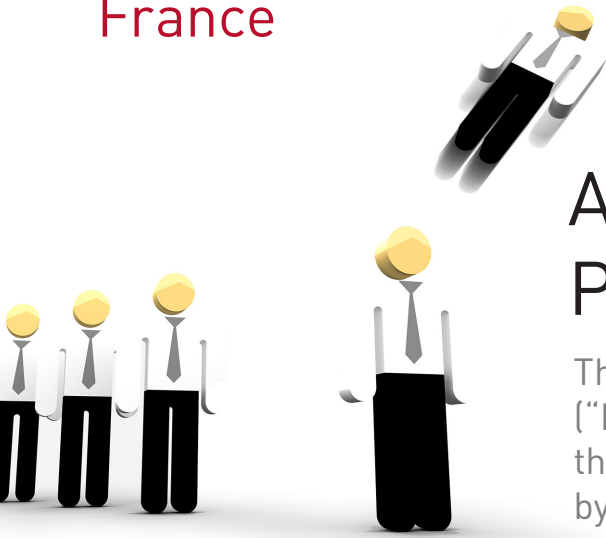
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1 Some non deductible expenses from CREE are: (i) donations; (ii) tax losses; (iii) technological research & development investments; (iv) investments for the enhancement of the environment; investments on fixed assets; (v) amortization in the agricultural sector; (vi) reforestation plantations.
2 The following exempt income cannot be subtracted from the taxable basis: income from editorial companies, cattle rancher funds, hotel services, etc.



France



A New Collective Redundancy Procedure Since July 1, 2013

The new law for a more secure employment market (“Loi relative à la sécurisation de l’emploi”), adopted by the French parliament on May 14, 2013, was validated by the French Constitutional court on June 13, 2013.

This new law provides that when the employer contemplates to make 10 employees or more redundant over a 30-day period in companies with 50 employees or more, and is therefore required to implement an employment protection plan (previously known as “Social Plan”), two scenarios are now available.

The employer can normally freely choose either scenario, i.e., the law does not impose on the employer an obligation to first initiate negotiations with the unions. However, from a practical standpoint, when there are one or several unions within a company, the employer will most certainly need to first attempt to negotiate a company agreement with these unions. In this respect, the French Ministry of employment has issued a Ministerial Guideline which provides that the Labor authorities must strongly encourage the conclusion of a company agreement to the extent possible.

1. First scenario: negotiation of a company collective agreement with the unions

The employer can decide to initiate negotiations on the redundancy process and the content of the employment protection plan (i.e., the social measures in order to facilitate the employees’

redeployment) with the unions, which would take the form of a company collective agreement.

The company collective agreement covers the following issues:

- modalities of information and consultation of the works council;
- modalities of application of the selection criteria (weighting and scope of application);
- timeframe for the dismissals;
- number of positions eliminated and professional categories concerned;
- modalities of implementation of the training, adaptation and redeployment measures.

In order to be valid, such company agreement must be signed by at least one or several representative unions within the company, i.e., those unions which received, alone or together, at least 50% of the votes cast in the first round of voting of the last election of the works council (or, in the absence of a works council, the election of the employee delegates).

In addition, in order to be applicable, the company collective agreement must be validated by the French

Labor authorities (“DIRECCTE”). The latter has a 15-day period from receipt of the company collective agreement in order to render its decision. In the absence of a written response at the expiration of the 15-day period, the agreement is considered as having been validated.

Once the agreement is validated, the employer is allowed to implement the employment protection plan and therefore to notify the dismissals, as the case may be.

Such procedure does not deprive the works council from its information and consultation rights on the collective dismissal project. Indeed, the employer must consult with the works council on the draft company agreement and carry out the information and consultation procedure of the works council (as potentially determined by the company collective agreement) and the hygiene and safety committee (cf. §3).

2. Second scenario: the employer unilaterally prepares and issues a document which includes the employment protection plan

In the event the employer has not entered into a company agreement, either because negotiations failed or there is no union within the company (or the employer simply decided to

take this route), the employer can issue a “unilateral document” which includes the employment protection plan.

This unilateral document can only be issued once the information and consultation process, in particular on the content of this document (cf. §3 below) with the works council has been completed.

The unilateral document covers the same matters as the company agreement as listed above (cf. §1).

The employer must submit the unilateral document to the French Labor authorities (“DIRECCTE”) for ratification before being allowed to implement the employment protection plan and notify the dismissals. The DIRECCTE has a 21-day period in order to render its decision. In the absence of a written response within this period, the document is considered as having been approved.

3. The information and consultation process with the employee representatives

3.1. Works Council

Whichever scenario is finally chosen by the employer, the works council must necessarily be informed and consulted and render its opinion on the two following matters:

- the reorganization project; and
- the ensuing redundancies (including the measures of the employment protection plan).

The works council must hold at least two meetings with a 15-day minimum period between the meetings.

When the employer negotiates a company collective agreement with the unions, the information and consultation process can be carried out simultaneously. However, the final draft company collective agreement must be submitted to the works council to obtain its opinion.

One of the main contributions of the new law is to provide for a maximum duration of the information and consultation process as follows:

Number of contemplated dismissals	Maximum duration
< 100	2 months
between 100 and 250	3 months
> 250	4 months

However, a company agreement concluded with the unions (cf. § 1) can provide for longer or shorter maximum periods.

In any event, in the absence of the works council’s opinion within the maximum timeframe (as provided by law or by a company agreement), the works council will be deemed to have rendered its opinion.

The works council can appoint a chartered accountant during the first meeting. The chartered accountant’s report must be communicated to the works council at least 15 days before the end of the maximum period granted to the works council to render its opinion.

3.2. Hygiene and Safety Committee (“CHSCT”)

If the contemplated restructuration might impact the employees’ health and/or safety (e.g., increase of workload), the employer must also consult the CHSCT.

This consultation process can be carried out simultaneously with the consultation process with the works council. However, since French case law generally considers that the CHSCT must be consulted before the works council renders its opinion, the employer must generally obtain the CHSCT’s opinion before the last meeting of the works council during which the latter renders its opinions.

The new law provides that when several CHSCTs need to be consulted (when several sites are concerned), the employer can decide to have designated a “coordination CHSCT”. The members of such coordination CHSCT are chosen by the members of the various sites CHSCTs.

The coordination CHSCT can also appoint a chartered accountant during the first meeting. The chartered accountant’s report must be communicated to the employer at least 15 days before the end of the maximum period granted to the works council to render its opinion. The coordination CHSCT then has a 7-day maximum period to render its opinion on the restructuration project.

The Labor administration should issue a circular in the coming months which should clarify the manner in which the new procedure should be carried out.

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New Laws Aim to Bring More Promotion and Protection of Labor Rights

Continuing with the trend of aiming for a higher promotion and protection level of labor rights, in the past months several employment and labor procedural developments had a significant impact on Peruvian employers. The application of the New Labor Procedural Law in Lima as well as in other cities of the country, the creation of a new Labor Authority [SUNAFIL] with national competency for supervising labors issues, the Rulings approved by the Labor Ministry of the Peruvian New Work Health and Safety Law and the New Disabled Individuals Law are the main examples of this.

At the end of last year the New Labor Procedural Law [Law N° 29497] was in force not only in many cities of the country but also in Lima, the capital of Peru, where most of the lawsuits are filed.

Take into consideration that this law establishes a more simple scheme and structure of labor trials based on an oral system, among other issues.

The provisions included in the new procedural law envisage faster trials in comparison with the previous system. Therefore, it sets as a pending task for all employers to identify and solve their employment contingencies before they confront claims of their employees or the filing of lawsuits.

The application of this law is evidencing a real difference with the previous procedural system, as trials conducted with the new law have really ended in a shorter term. In addition, take into consideration that the conciliation

settlement within the new procedure is working as an effective alternative for concluding the trial during its first stage.

A second significant change is the creation of SUNAFIL [Law N° 29981] that aims to strengthen the mechanisms for monitoring and supervising employer's compliance of employment dispositions and health and safety standards nationwide.

SUNAFIL is created as a specialized technical entity [inside the Ministry of Labor] with functional, administrative and budgetary autonomy.

In addition, the SUNAFIL may also provide technical assistance, conduct researches and propose the issuance of regulations on labor matters.

The main changes set in Peruvian Labor Inspection System as a consequence of the creation of the SUNAFIL are:

- The creation of the Labor Inspection Tribunal with nationwide jurisdiction. The Tribunal will rule the appeals of sanctioned employers. It is important to note that this Tribunal may issue binding precedents.
- Significant increase of the fines that can be imposed to employers who breach labor and health and safety obligations.
- Increase of the number of labor inspectors. SUNAFIL will hire new officials in order to cover its staff needs.

A third significant topic is the issuance by the Ministry of Labor of the Rulings of the Work Health and Safety Law [Supreme Decree N° 005-2012-TR].

The Work Health and Safety Law as well as its Rulings aim to establish a culture of prevention of risks [work accidents and occupational diseases] among employers.

Pursuant to said regulations employers must implement Work Health and Safety Management System considering the risks to which the employees are exposed during the rendering of their services. The main obligations within the Work Health and Safety Management System are (i) the adoption of a Work Health and Safety Management System policy; (ii) to implement Health and Safety Internal Regulations [this obligation applies only for employers with 20 or more employees]; (iii) to establish a Health and Safety Committee, or to appoint an employee as the Health and Safety Supervisor [the obligation to establish the committee applies to employers with 20 or more employees. If the employer has less than 20 employees a Health and Safety Supervisor shall be appointed]; (iv) to train all the employees in Health and Safety matters, before holding a position, during the employment and whenever a modification of functions, job position or technology takes place; (v) to conduct medical examinations before, during and at the end of the employees' employment relationship; among others.

The last significant change is the Disable Individuals Law [Law N° 29973] that was enacted with the purpose of establishing the legal framework applicable to the promotion, protection and development [on an equal basis] of the disabled individuals' rights as well as to promote their inclusion into society.

Regarding to employment matters, said law includes the following important provisions that must be taken into consideration:

- Quota of disabled employees: private companies with more than 50 employees must maintain a ratio of not less than 3% of disabled employees in its payroll.
- Additional tax deduction: Employers [public and private] will have an additional deduction when calculating their income tax due to the remuneration paid to disabled employees.
- Adjustments in the workplace: Disabled employees are entitled to reasonable adjustments in the workplace. Such adjustments include the adaptation of tools, machinery and work place, as well as modifications in the organization of work and working hours or shifts. The costs for such adjustments will also generate an additional deduction for the employer when calculating the income tax.
- Retention of employment / Position transfer: An employee who becomes disabled is entitled to keep his/her position if after implementing reasonable adjustments his/her disability is not decisive for the performance of his/her tasks and duties. Otherwise, the employee

is entitled to be transferred to a position consistent with his/her abilities and skills, provided that such position exists and that said position does not present risks to the employee's or others health or safety.

- Amendments to labor legislation: The law also amends articles 23°, 29° and 30° of Refunded Text of the Labor Productivity and Competitiveness Law, approved by Supreme Decree N° 003-97-TR. In this regard, it introduces as a legal cause for dismissing an employee [related to the employee's performance or ability] the physical, intellectual, mental or sensory deficiencies which affect the performance or the rendering of services [after reasonable adjustments has been taken and only if there is not other position where the disabled employee can be transferred]. In addition, the law has confirmed that the dismissal based on a disability is considered as a void dismissal. Also such discrimination can be deemed as an act of hostility [constructive dismissal].

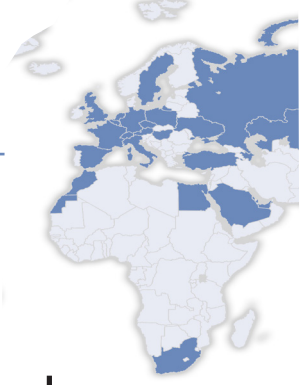
Finally, take into consideration that the non-compliance of the employment quota established for private employers, will be sanctioned, two years after the enforcement of the law [i.e. December 2016].

Issue	What has changed?	What should employers do? What have employers done?
New Labor Procedural Law	<ul style="list-style-type: none"> • Faster and more simple trials. • Oral system. • Judge powers during the trial and hearings. • Parties tasks and duties [i.e. gathering of evidence]. • Use of technology within the trail [i.e. recorded hearings]. 	<ul style="list-style-type: none"> • Train their representatives in connection to their participation in Labor trials. • Conduct internal labor audits [identify and control risks]. • Settlement of claims as an alternative of solution.
Creation of SUNAFIL	<ul style="list-style-type: none"> • Nationwide inspection authority. • More control and supervision of labor obligations. • Increase of fines. • Labor Inspection Tribunal with nationwide jurisdiction. 	Conduct internal labor audits [identify and control risks].
Work Health and Safety rules	<ul style="list-style-type: none"> • Work Health and Safety Management System documents. • Individuals under the scope of the Work Health and Safety Management System [not only company's employees - also trainees, suppliers and personnel of third parties displaced in the company's premises. • More participation and rights of unions and employees within health and safety actions. • Company Representatives criminal liability [in case of work accidents or occupational diseases]. 	Immediate action should be implemented to review compliance of Work Health and Safety obligations.
Disable Individuals Law	<ul style="list-style-type: none"> • Quota of disabled employees. • Obligation to introduce reasonable adjustments in the workplace. • Retention of employment / Position transfer. • Amendment of termination causes in connection to disabilities. 	Review compliance of obligations.

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Spain



New Measures to Promote Employment and Business Initiatives Among Young People Under 30

With on-going economic uncertainty, and an unsustainable unemployment rate of more than 26 percent, particularly prevalent among young people (56.5 percent), the Spanish government implemented several measures in February 2013 to promote employment and business initiatives among young people under the age of 30. These initiatives were validated by Act 11/2013, dated July 27, 2013, and are intended to support entrepreneurs and stimulate the growth and creation of employment.

In order to encourage hiring of young people, the Government is offering compelling social security rebates until the unemployment rate is reduced to below 15 percent. The rebates are as follows:

- **New temporary "first job" contract:** Companies / independent contractors may employ unemployed persons under 30 years without any work experience or with work experience not exceeding three months for a period ranging from three to six months, extendable to 12 months. Also, reduction of the employers' social security contribution payments are offered for converting the contract into an indefinite term agreement of EUR500/year during three years or EUR700/year for hiring women.
- **Part-time agreements for training purposes:** Companies that hire unemployed persons under 30 without any work experience or with work experience not exceeding three months under

such contract may benefit from a reduction in the employers' social security contribution rates during 12 months, extendable by 12 months (75 percent for companies employing more than 250 workers and 100 percent for all other companies)

- **On-the-job-training agreement for first-job:** companies that hire persons under 30 years under such contract will benefit from a reduction in the employers' social security contribution rates (50 percent during the entire term of the contract and 75 percent if the employee was an intern when he or she is hired).
- **Hiring by small companies / independent contractors:** independent contractors and companies with a maximum of nine employees may benefit from a 100 percent reduction in the employer's social security contributions during the first year of employment with an unemployed person under 30.

This reduction only applies for one contract.

- **Hiring of long-term unemployed individuals over 45 years:** independent contractors under the age of 30, that do not have any employees and hire a long-term unemployed individual over 45 years of age for at least 18 months will benefit from a 100 percent reduction in all employer's social security contribution payments during 12 months.

The Government also adopted the following measures to promote business initiatives and self-employment of young people:

- **Reductions and discounts in Social Security contributions:** independent contractors under 30, or under 35 for women, that start a business will be entitled to a number of social security contribution reductions and discounts.

- **Compatibility of unemployment benefits:** persons under 30 that start a business will continue to receive unemployment benefits for a maximum period of nine months.
- **Capitalization of unemployment:** persons under 30 who start a business will be entitled to capitalize 100 percent of unemployment benefits as a contribution to the share capital

of a company, which may be used to pay incorporation expenses, fees and costs of professional counseling required for the new business, etc.

- **Suspension of unemployment benefits:** the period to suspend unemployment benefits is extended from two to five years for people under 30 starting business activities.

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Switzerland



New Obligation to Negotiate Social Plan

On June 21, 2013 the Swiss Federal Parliament adopted an amendment of the Swiss Code of Obligations which, for the first time, provides for a statutory obligation to negotiate a social plan. So far, such an obligation only existed if a collective bargaining agreement so provided as was the case, for example, in the collective bargaining agreement which covers the members of the Employers' Association of the Banks in Switzerland.

According to the new law a social plan is an agreement in which the employer and the employees provide for measures which can avoid dismissals, can reduce the number of dismissals or can mitigate their consequences.

Dismissal triggering a Social Plan

The obligation to negotiate a social plan with the employees only exists for employers which ordinarily employ at least 250 employees and which envisage to dismiss at least 30 employees within a 30 day

period due to reasons which have no connection with the employees. This means that notices given due to disciplinary reasons or a long-term sickness do not count. Arguably a termination for poor performance does not count either but if such

employee's position is made redundant the courts will likely take the view that the employee's poor performance was not triggering the termination. Even if dismissals are spread over time they are counted together if they are based on the identical decision. An employer can, therefore, not avoid the negotiations on a social plan by simply delaying certain notices.

No social plan has to be adopted in case of a bankruptcy proceeding.

In the likely case that no referendum will be requested by at least 50,000 Swiss citizens the new law is supposed to enter into force on January 1, 2014. Notices which are given on or after such day would then trigger an obligation to negotiate a social plan provided all other conditions are met even if the bulk of notices have already been given in 2013. The social plan would then, however, just cover the notices given after January 1, 2014 but the social plan could provide differently.

Negotiating Body

If the employer is a party to a collective bargaining agreement, the employer has to negotiate on the social plan with the unions that are members to this collective bargaining agreement. Unless the collective bargaining agreement would so provide the employer will, however, not have to negotiate with the unions if an employer's association of which the employer is a party rather than the employer itself entered into the collective bargaining agreement. If the employer is not itself a party to a collective bargaining agreement it has to negotiate with the employee representative body or, in the absence of such a body, directly with the employees. The unions, employee representative bodies and employees can be assisted by experts during such negotiations. They have a secrecy obligation vis-à-vis all persons who do not belong to the enterprise concerned.

Content of Social Plan

The new law is silent as to the exact content of the social plan and merely states that such plan must not jeopardize the continued existence of the undertaking. If the parties cannot agree on a social plan, an arbitral tribunal has to be established. Such arbitral tribunal will then set up a social plan through a binding arbitral award.

Mere Consultation if Thresholds for Social Plan Negotiation not met

If neither the conditions set forth by the new law for the negotiation of a social plan are met nor a collective bargaining agreement exists which would require a social plan, the employer will still have to consult with the employees on any measures by which the dismissals could be avoided, their number reduced or their financial consequences mitigated provided that the dismissal qualifies as a mass dismissal. This is the case if the employer, within a 30-day period, terminates at least (i) 10 employees in enterprises ordinarily employing more than 20 but less than 100 employees, (ii) 10% of the employees in enterprises ordinarily employing at least 100 but less than 300 employees and (iii) at least 30 employees in enterprises employing at least 300 employees.

However, the employer only has to take into consideration the proposals made by the employees when making a final decision and has no obligation at all to set up a social plan. In practice, employers often adopt a social plan voluntarily and on their own initiative by unilateral decision because this facilitates communication and a smooth implementation of the dismissals. The employee representative body or the employees would in such a case just be consulted and no agreement would have to be reached.

Potential Measures to avoid Social Plan

An employer who wants to avoid the negotiation of a social plan should make sure from the outset that its employees are employed by different legal entities. The Swiss Federal Supreme Court already decided with respect to the collective dismissal process that each legal entity has to be assessed separately. A social plan would, however, still have to be negotiated if it could be shown that the mere purpose of employing employees in different legal entities was avoiding the setting up a social plan.

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UK Law on Collective Redundancy Consultation in Breach of EU Directive

In a judgment with significant ramifications for employers in the UK, the Employment Appeal Tribunal has held that UK legislation on collective redundancy consultation does not comply with EU law. In the conjoined appeals of *Usdaw -v- Woolworths* and *Ethel Austin*, the EAT has found that it is not lawful for UK legislation to restrict an employer's collective consultation obligations to those redundancy programmes which involve 20 or more employees "at one establishment". The effect of the judgment is that an employer will need to collectively consult whenever it proposes to dismiss as redundant 20 or more employees within a 90 day period, irrespective of where those employees are located.

Legal Background

S188 of the Trade Union and Labour Relations Consolidation Act 1992 requires an employer to consult collectively where an employer proposes to dismiss by reason of redundancy 20 or more employees "at one establishment" within a 90 day period.

Consultation must begin "in good time" and is subject in any event to the following timescales before the dismissals take effect:

- at least 30 days where between 20 and 99 employees are to be dismissed; and
- at least 45 days where 100 or more employees are to be dismissed.

The concept of "establishment" is key when deciding whether the

collective consultation obligations have been triggered. There is, however, no definition, and the UK government said clearly in its response to consultation on changes to the collective redundancy regime earlier this year that it was not going to introduce one.

S188 purportedly implements the requirements of the Collective Redundancies Directive. The Directive gives Member States the option of choosing 1 of 2 definitions of "collective redundancy" for consultation purposes. The first option is linked to the numbers or percentage of the workforce to be dismissed over the relevant period within an establishment of a particular size. The second option, chosen by the UK and subsequently transposed into the language of S188, is:

- "the dismissal, over a period of 90 days, of at least 20 workers, **whatever the number of workers normally employed in the establishments in question**", [Article 1(1)(a)(ii)].

S188 does not replicate this wording. This discrepancy was the key issue in the Woolworths case.

Facts

In 2008 and 2010 the retail chains of Woolworths plc and Ethel Austin went into liquidation. Several thousand employees lost their jobs as a result. The union representatives brought claims for a failure by the administrators to inform and consult collectively on the redundancies. The Employment Tribunal upheld the claims and made maximum protective awards of 90 days' pay in respect of the Austin

employees, and 60 days' pay for the Woolworths employees. As both employers were in administration, the payments were made from the National Insurance Fund.

When assessing who was entitled to those payments, the Tribunal took the view that each individual store constituted an "establishment", and that therefore the administrators had not been required to inform or consult at those "establishments" where fewer than 20 employees were based. The effect of the Tribunal's judgment was to exclude a total of some 4,400 workers from entitlement to a protective award. The union appealed.

Employment Appeal Tribunal

Neither the administrators nor the Insolvency Service for the government appeared at the EAT. The result was that legal arguments were put forward only on behalf of the union/employees. This may account, at least in part, for the bold decision in the case.

The EAT agreed with the union that the wording of S188 differed in significant respects to the wording of the Directive. In particular, the second option in the Directive simply required employers to collectively consult as soon as 20 employees were to be made redundant within the relevant period in "whatever" establishment they worked. This was consistent with the policy objective of ensuring that the obligation to consult is as wide as possible. The limitation in S188 to dismissals "at one establishment" was therefore more restrictive than the Directive.

The issue then was whether the EAT could give S188 a purposive interpretation, so as to be compliant with the EU Directive. In *MSF -v- Refuge Assurance*, 2002, an earlier EAT had held that S188 was so different to the Directive as to be "irremediable by construction," such that all the EAT felt it could do was to apply a "straightforward construction of the language".

Similarly, in the recent case of *Renfrewshire Council -v- Educational Institute of Scotland*, 2013, the EAT expressed the view that there was "force" in the argument that S188 was not compatible with the Directive but felt bound to follow the approach in *MSF*.

In *Woolworths*, the EAT did not feel so constrained. The EAT relied on *Ghaidan -v- Godin - Mendoza*, 2004, where the House of Lords held that words could be added or taken away from domestic legislation where this was to "comply with higher purposes".

Furthermore, a review of *Hansard* revealed that the limitation of collective consultation obligations to "one establishment" had not featured in the government debates upon implementation of the current S188. By contrast, the clear intention of Parliament had been to "implement the Directive correctly." The EAT was satisfied that the government had not been entitled, and indeed had not intended, to dilute the protection offered to employees by the Directive.

The EAT held that the authorities had "moved on" since *MSF*, and that it was entitled to interpret S188 so as to be compliant with the Directive.

The EAT went on to find that deletion of the words "at one establishment" from S188 achieved the necessary result "clearly and simply".

Has the law been changed?

Given the lack of participation at the EAT by either the administrators or the government, the judgment is unlikely to be appealed. The result is that there are therefore currently conflicting EAT decisions on how S188 is to be interpreted, and this may remain the position for some time. Arguably, the *Woolworths* judgment is the most authoritative, being not just the most recent judgment, but because the EAT expressly considered, and rejected, the approach taken in earlier cases.

It is possible that a future EAT may find that the earlier cases were correct, particularly with the benefit of full and reasoned arguments on behalf of an employer. The *Woolworths* judgment could be attacked either on the basis that the EAT went beyond its powers in re-writing S188 and/or that the wide interpretation given by the EAT to the meaning of the 2nd option in the Directive is wrong. There has been no ruling to date on what the wording in option 2 actually means. However, in *Lyttle -v- Bluebird UK Bidco 2 Ltd*, an industrial tribunal in Northern Ireland has recently referred a number of questions on the correct interpretation of "establishment" to the ECJ, including how the term as it appears in option 2 should be interpreted. The ECJ ruling should therefore provide welcome clarity.

Where does this leave employers?

In what will amount to a significant change to current practice for many employers in the UK, the EAT's judgment requires employers, at least for the time being, to consult collectively where 20 or more employees are to be made redundant within a 90 day period across the business, irrespective of where the employees work. The lack of any argument on "establishment" may of course mean that the collective consultation obligations are triggered in circumstances where they would not previously have been triggered at all and/or that the minimum 45 day period, (as opposed to 30 days), is triggered more frequently. Employers can take some comfort, at least, that it is no longer a 90 day period which would be triggered for larger redundancy programmes, although the maximum protective award for a failure to inform and consult remains at 90 days' pay.

The judgment will impact not just present and future collective redundancy programmes, but also those recently completed. Employers who did not consult with employees across all establishments in reliance

on S188, can probably do little at this stage other than wait to see whether claims are submitted. Protective award claims must be submitted within 3 months of the last dismissal taking effect, (subject to a Tribunal's discretion to admit late claims). It is unlikely to be a defence for employers to argue that the lack of consultation

flowed from a legitimate approach to the "establishment" issue which was in line with case law and/or government guidance.

The EAT's judgment in Woolworths represents a significant shift in the law in the UK on collective redundancy consultation.

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United States



The Emboldened Labor Agency Agendas

For the first time in a decade, the National Labor Relations Board ("NLRB") is staffed at full strength - with all five board member positions occupied. With the Senate's confirmation of the NLRB's full panel, the NLRB has more power to tackle difficult issues, set policy and pursue a rulemaking agenda. President Obama has nominated Richard Griffin, a former union lawyer and NLRB board member, as General Counsel of the NLRB. The Senate Labor Committee, voting largely along party lines, advanced his nomination in September. While Mr. Griffin won the support of only one of the committee's 10 Republicans, Senator Lamar Alexander, the committee's top Republican, said he had "no doubt" Mr. Griffin will be confirmed by the full Senate. At the same time, the Department of Labor has recently appointed a new Labor Secretary, Thomas Perez, who wasted no time in establishing an aggressive agenda. Both agencies are poised to implement significant rule changes and to pursue new enforcement initiatives which will impact companies operating in the US.

The NLRB's Focus on Non-Union Employers

Historically, the NLRB has focused on the rights of employees working in a unionized setting. As union membership has declined, so has the volume of activity before the NLRB. For the past few years, the NLRB has positioned itself to enforce the National Labor Relations Act ("NLRA") against non-union employers as well. The General Counsel has initiated a number of ground-breaking complaints alleging unfair labor practices against employees to further expand the NLRB's regulation of non-union workforces. With the full complement of Board members, it appears that enforcement activity against non-union employers will continue to be a primary focus.

Section 7 of the NLRA protects the rights of all employees covered by the act to engage in "other concerted activities for mutual aid and protection," which has generally been interpreted as a right to discuss wages, terms and conditions of employment, and working conditions. The law, however, applies to union and nonunion employers alike. A few particular topics are likely to be the focus of NLRB enforcement in the coming months and years:

- Social Media

Over the past few years, the NLRB has created for itself a new area of enforcement by entering the realm of social media. The frequency of decisions and advice memoranda in the area has continued to increase. The NLRB has looked primarily at two types of cases in relation to social media: (1) discipline or termination for an employee's protected comments via social media; and (2) overbreadth of the social media policy itself.

- Discipline for Protected Speech

Protection of Section 7 speech is nothing new, even when posted on social media. The NLRB has actively pursued Facebook-based

discipline. The typical fact pattern involves a disgruntled worker complaining on Facebook about a supervisor or the employer itself, with other employees commenting on the statement. Recently, an Administrative Law Judge even held that an employee's clicking the "Like" button may itself be protected activity. Among the cases that have reached the NLRB for decision in the past few years, approximately half have been decided in favor of the employee engaging in protected speech. The general guideline that has emerged from a review of these cases is that an employee's comments on social media are generally not protected (i.e., the employee can be disciplined) if they are mere personal gripes not made in relation to group activity among employees

- Overbroad Policies

Even where an employee has not been disciplined under a social media policy, the NLRB may issue an unfair labor practice charge when investigating an unrelated matter if it obtains a copy of the employee handbook and determines the social media policy is overbroad on its face. The NLRB's General Counsel has issued several reports on employee handbook compliance, each of which sets forth sample provisions that are likely not overly broad. As a general rule, however, employer policies should not be so sweeping (in the text of the policy or the enforcement) that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.

- Confidentiality in Investigations

The NLRB has also held that employer policies requiring "blanket" confidentiality during investigations interferes with employees' Section 7 rights in violation of the National Labor Relations Act. In *Banner Health System*, the NLRB held that a policy requiring employee-witnesses to keep confidential all workplace investigations was overbroad and

could impact an employee's ability to engage in protected speech relating to workplace issues. The Division of Advice has since released an Advice Memorandum, dated January 29, 2013, more fully setting forth the General Counsel's viewpoint:

An employer may prohibit employees' discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs the Section 7 right. In *Banner Health*, the Board held that an employer must show more than a generalized concern with protecting the integrity of its investigations. Rather, an employer must "determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, and there [was] a need to prevent a cover up." Thus, a blanket rule prohibiting employee discussions of ongoing investigations is invalid because it does not take into account the employer's burden to demonstrate a particularized need for confidentiality in any given situation.

Fortunately, a need for confidentiality may be relatively easily articulated in most investigations. Based on the NLRB's decision in *Banner Health* and the Advice Memorandum, employers should identify particular confidentiality interests on a case-by-case basis to preserve the integrity of the investigation and include the reasoning for confidentiality when speaking to employees.

- At-Will Employment Clauses

The NLRB shocked the employment-law community in 2012 when an Administrative Law Judge held that common at-will language violated the NLRA. Since then, however, Advice Memoranda issued by the General Counsel have clarified the route for employers to avoid violating the NLRA with at-will clauses. In *Fresh & Easy*

Neighborhood Market, the Division of Advice recommended that the following language did not violate the NLRA:

Nothing in this [Handbook] changes this at-will relationship, guarantees you a benefit, creates a contract of continued employment or employment for a specified term, or any contractual obligation that conflicts with the [Employer's] policy that the employment relationship with its employees is at-will.

No representative of the [Employer] other than a[n Employer] executive has the authority to enter into any agreement for employment for a specified duration or to make any agreement for employment other than at-will. Any such agreement that changes your at-will employment status must be explicit, in writing, and signed by both a[n Employer] executive and you.

Similarly, in Windsor Care Centers, the Division of Advice approved the following policy:

Only the Company President is authorized to modify the Company's at-will employment policy or enter into any agreement contrary to this policy. Any such modification must be in writing and signed by the employee and the President.

Essentially, the NLRB has drawn a bright line that policies that state that at-will status cannot be changed will violate the NLRA. Those, however, that allow for amendment, but only upon approval of a high-level employer representative or with other conditions, such as a signed, written agreement, are lawful.

The DOL's Focus on Misclassification and Wage & Hour Law Enforcement

In July, 2013, Thomas Perez was confirmed as the head of the Department of Labor. As the former Maryland Secretary of Labor and federal Justice Department attorney in the Civil Rights Division, Perez has a track record of aggressive pursuit of enforcement of workplace rights.

It is likely that Perez will begin immediately with implementation of new regulations that have languished over the past few years and will follow with enhanced enforcement. Among the likely areas of increased regulation and enforcement are the following:

- Persuader Activity

The Labor Management Reporting and Disclosure Act ("LMRDA") generally requires financial reporting and disclosures by unions and employers for certain activities. Among those, the LMRDA requires employers to disclose any agreement or arrangement with outside labor relations consultants where the consultant undertakes activities to persuade employees to exercise or not exercise their right to organize a union and bargain collectively. Disclosure includes the amount of fees paid to the consultant. The consultant must disclose all of its labor relations clients and the amount of fees received. Traditionally, employers were able to avoid reporting attorney advice under an "advice exception." Under the DOL's previous enforcement practice, the advice exception covered virtually all outside attorney activity that did not involve actual contact with employees.

Under new regulations, initially proposed in July 2011, the "advice exception" will be dramatically pared down, and will only include very limited legal advice. The consequence is that the assistance employers previously received from attorneys will no longer be exempted and the fees for such services must be publically disclosed. The DOL has announced that it intends to implement the regulations in November 2013.

- Affirmative Action

On August 27, 2013, the DOL's Office of Federal Contract Compliance Programs ("OFCCP") published its final rules revising the regulations setting forth the affirmative action obligations of federal contractors and subcontractors with regard to

disabled individuals and veterans. The final rules will become effective 180 days after the regulations are published, which is expected to occur in late September or early October, 2013.

- o Individuals With Disabilities

The new rules impose significant new obligations on employers with federal contracts for disability-related hiring and recordkeeping, including:

1. Quota of seven percent of workforce utilization for individuals with disabilities
2. Changes to applicant self-identification invitation requirements
3. Changes to employee self-identification requirements
4. Data collection and analysis obligations
5. Annual self-evaluation of the effectiveness of outreach efforts
6. Documentation of audit and reporting systems
7. Revised subcontract clause inclusion
8. Amended definition of "disability" to include ADA Amendments Act changes

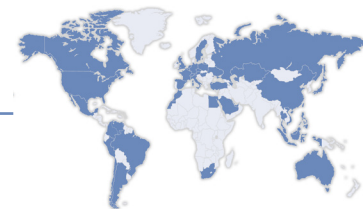
The most difficult part of complying with the final rules will be achieving the seven percent hiring quota. Many employers have a significant portion of their existing workforce who may qualify as "disabled" for the purpose of the quota and reporting obligations. A data collection initiative from current employees may prove to be very valuable when evaluating the employer's progress towards the quota.

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