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The Global Employer: The Employment Law Review and Reform Issue

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The Global Employer: The Employment Law Review and Reform Issue

Abstract

[Excerpt] Although the economies of many jurisdictions are improving, there is still some lingering global economic uncertainty. It is no surprise that governments the world over continue to revisit their employment laws to see what else, if anything, can be done to further stimulate their economies. 2013 was another busy year for employment law reform.

Baker & McKenzie's Global Employment Practice Group is pleased to present its 55th issue of The Global Employer™ entitled "The Employment Law Review and Reform Issue." In this issue, we review changes to the law in 2013 and a look at pending changes for 2014.

Included, you will find information pertaining to the leasing of employees in Germany; new measures in Spain intended to promote employment among young people under 30 and employee privacy rights over employers' controls; challenges to the applicable interest rate to worker's claims in Argentina; how employment law reforms will significantly impact employers in Mexico and in some specific cases, may considerably elevate increase the cost of formal employment; and controversy around making the Colombian Social Security System more progressive.

We also review several significant legal developments in China during 2013 that impact employers operating there; legislative changes that were expected in Hong Kong in 2013 that may be implemented in 2014 including a focus on discrimination in the coming years; and welcome changes to TUPE and automatic pension plan enrollment in the United Kingdom.

Keywords

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

Comments

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The Global Employer™

The Employment Law Review and Reform Issue



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The Global Employer

The Employment Law Review and Reform Issue

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Argentina



Changes in Jurisprudence in 2013 that have had, or will have, an Impact on Global Employers

Different rates applied to calculate interests:

The Act on Labor Procedures ("Act") of the Province of Buenos Aires was amended, establishing the applicable interest rate to worker's claims to be "the average lending rate" set by the Bank of the Province of Buenos Aires ("Bank"). So far, almost all the courts in the Province of Buenos Aires have been applying the borrowing rate set by the Bank, which is lower than the lending rate. Despite the differences between both rates, the amendment has been challenged by many labor courts alleging that it is in conflict with the Constitution, by stating that the law must be pronounced by the National Congress, as opposed to the Congress of the Province of Buenos Aires. Recently, the Supreme Court of Justice of the Province of Buenos Aires decided that the Act violates the Constitution, and the interest rate imposed in such Act is not enforceable. Consequently, most of the courts in the Province of Buenos Aires are deciding to apply the borrowing rate.

Burden of the proof in trial - Discriminatory acts:

Notwithstanding the general procedural rule under which whoever alleges an act needs to prove it, Argentine courts are now more inclined to place a *dynamic burden*, which means that evidence needs to be brought by the party that is in a better position to do so, regardless of who brings the act to the attention of the court. Moreover, labor law provides that if there is doubt about the evidence, the court should rule in favor of the employee. This means that employers are now required to pay more attention to the evidence during litigation. In order to avoid claims of arbitrary or discriminatory behavior, employers should take proper measures to document their decisions. During 2013, many cases were brought to the courts, alleging different types of discrimination. In a recent case, employees claimed retaliatory discharge based on a claim that salary differences existed, the court held that the employees who to be victims of discriminatory

acts should render reasonable evidence to prove the existence of the act that caused an injury. The court also held that once discrimination has been proved, the employer has the burden of proof that the act was not discriminatory. Since there was evidence that the employees had been claiming salary differences before their termination, the court understood that the termination was retaliatory. In another ruling the court not only decided that the termination was discriminatory, but also ordered the employer to reinstate the employees and pay them back wages.

Employers' right to monitoring employees:

A recent ruling granted an injunctive measure requested by a trade union regarding the placement of security cameras inside toll booths, by claiming that it undermined the right to intimacy and privacy of employees in violation of the Constitution and several laws. With the advance of new technologies and the desire of

employers to control employees' work, this type of claim in which the right to privacy and the new measures of surveillance collide, are becoming more regular. It should be noted that although there are no specific local regulations, like other legislations, governing the implementation of visual procedures to control the activity of employees', is in base of good faith and respect for their dignity that such means of control could be justified to the extent that they are necessary for the organization and the production of the company or its security. The practical recommendations of the International Labor Organization on protection of employees' personal data state that employees who object 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. Furthermore, such control should only be allowed if safety and the protection of property require it. In conclusion, although the right of the employer to exercise a reasonable surveillance and control of the employees' activities by the means it deems most appropriate is not under discussion, the use of cameras which principal objective is to control the quantity and quality of the work performed is not, in principle, an acceptable practice.

Joint liability in cases of subsidiaries and affiliates:

According to the law, separate legal entities that are under the direction, control or administration of others, or that are related in such manner that they constitute a permanent economic unit, are jointly and severally liable to their workers and the social security authorities, in the event of *actions to defraud or malicious conduct*. In other

words, to have a related company jointly and severally liable, related companies should (i) be related in such manner that they constitute a permanent economic unit; and (ii) have performed an act that is contrary to the law, in any manner whatsoever. A recent ruling attracted attention because it changed this concept of joint liability by accepting it in a case where a permanent economic unit existed, but not an act against the law. Following this reasoning, any claim against a related company could prevail, even when the lack of fraudulent activities are demonstrated.

Creation of Courts of cassation -

Another judicial instance: Referring to the need to democratize justice in Argentina, a new law was enacted. It creates several Courts for Civil, Commercial, Administrative and Labor issues, similar to the one that already exists for criminal cases. Consequently, there are now four judicial instances in Argentina: (i) the courts of first instance, (ii) the chamber of appeals, (iii) the cassation court, and (iv) the Supreme Court. These new Courts of cassation, therefore, provide for a new judicial stage. As of the date of this article, these courts have not been integrated yet. It is likely that the organization process for these courts may require a considerable amount of time.

Worker's associations: A ruling issued by the Supreme Court decided that section 31 of Law 23,551 (*Labor Organizations Law*) was unconstitutional. This section establishes that workers' associations with exclusive recognition have exclusive rights that cannot be exercised by other associations. Unions with exclusive recognition have higher political power because they are empowered to negotiate in the name of the

activity they represent. Further, only unions with exclusive recognition can exercise the right to strike. Hence, by this decision, the Supreme Court made the unions with exclusive recognition made equal to the ones with mere registration. In one example, the Union of State Workers filed a motion alleging the unconstitutionality of a decree issued by the intendent of the Province of Salta, by which municipal agents' salaries were reduced due to the emergency situation. The Justice Court in Salta rejected such action arguing that as of the date the motion was filed, the Union was not a recognized union and did not have legal standing to act on behalf of the collective interests of the municipal workers of Salta. The Union filed an extraordinary appeal against this decision. The Supreme Court held that section 31 violates the Constitutional right of freedom of choice and affiliation, and also violates Convention 87 of the International Labor Organization (which under the Argentine legal systems supersedes local laws) on freedom of election of the Union.

Conclusion

Due to recent changes in the trend of the courts and amendments to the laws, employers in Argentina face many uncertainties. Employers should monitor the trend and status of ongoing changes so that they stay current with the new developments and are able to adapt as needed.

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China



Significant Legal Developments in China – 2013

There were several significant legal developments in China during 2013 impacting global employers operating in China. The key developments were as follows :

- (I) Amendments to the PRC Civil Procedure Law - these allow employers to seek injunctive relief from the courts when facing employee theft of confidential information;
- (II) Labor dispatch changes - amendments to the Employment Contract Law under which companies will no longer be allowed to hire staff through staffing agencies except in very narrow circumstances; and
- (III) The introduction of the implementing regulations to the Law of the People's Republic of China on Entry and Exit Control. These regulations took effect on September 1, 2013 and introduced new visa categories, provided guidance on audits by the local public

security bureaus, and addressed employer obligations when hiring foreign workers.

We examine each development in further detail below.

(I) Amendments to the PRC Civil Procedure Law

The amendments to the PRC Civil Procedure Law took effect on January 1, 2013. The amended Civil Procedure Law specifically allows for preliminary injunctions and asset preservation relief in all civil cases. In the past, such remedies were only specifically allowed in patent, trademark, and copyright infringement cases. Trade secrets were therefore not well protected under the previous judicial practice, since companies would have to wait until they actually suffered harm before they even had a basis for bringing a claim, and then would have to wait for final judgment (which could be up to one year or more later if all appeals are exhausted) before obtaining any relief.

A Chinese subsidiary of a U.S.-based pharmaceutical company was successful in obtaining the first ever preliminary injunction in a trade secrets case under the amended law on July 31, 2013. The Shanghai No. 1 Intermediate People's Court, issued a preliminary injunction order against a former employee of the Chinese subsidiary before a trial on the merits of the case. The injunction order restrained him from disclosing, using, or allowing others to use certain documents containing trade secrets that he downloaded from the company's database without authorization. In addition, the court also issued an asset preservation order to freeze the ex-employee's real property and bank account pending the trial.

This case set a milestone for trade secrets protection (or breach of confidentiality) cases. It remains to be seen whether the court would enforce the same measures in a non-compete case, which is another type of employer-employee dispute

in which preliminary injunctive relief would help the employer prevent further damage resulting from the employee's alleged breach of duties.

In light of the amended legislation, employers are advised to focus attention on their company policies and agreements related to the protection of confidential information, as robust company policies and agreements may help the company seek injunctive relief even before the trial on the merits commences.

(II) Labor Dispatch

On December 28, 2012, the Standing Committee of the National People's Congress passed an amendment to the Employment Contract Law ("ECL"), under which companies are no longer allowed to hire staff through staffing agencies (such as FESCO, CIIC, China Start, etc.) except in very narrow circumstances. The amendments took effect on July 1, 2013.

Under the newly amended ECL, the following important changes were made:

- (i) Companies should hire most employees directly, and may use labor dispatch "only" for temporary, auxiliary, and substitute job positions. The original ECL only stated that labor dispatch should "generally" be used for such job positions.

The amended ECL provides definitions of the three crucial terms:

- A "temporary" job position is defined as a position in which the person is hired for a consecutive period of no more than six months.
- An "auxiliary" position is defined as one in which staff engaging in a company's non-

core business provide services to those involved in the core business.

- A "substitute" position is defined as one in which staff are hired to temporarily replace employees who leave work for a fixed period of time for study, leave or other reasons.
- (ii) Host companies will be limited to only hiring a certain number or percentage of their workforce through labor dispatch.
 - (iii) Legally hired dispatch staff must be paid the same compensation as directly-hired employees in the same position.
 - (iv) If host companies violate the provisions on labor dispatch, they can be fined up to RMB 10,000 (double the previous fine) for each staff member hired through labor dispatch. Under the amended ECL, hiring dispatched staff outside the allowable scope would now more clearly be subject to this fine.
 - (v) Companies wishing to engage in labor dispatch must obtain a special license from the local labor bureau, and the capital requirements have been increased four-fold to RMB 2 million. If a company engages in labor dispatch services without such a license, it risks fines up to five times the amount of illegally generated income or RMB 50,000 if no such illegal income has been generated. Previously, potential fines had been much lower.

New Measures on Labor Dispatch Licensing Issued in June 2013

On June 20, 2013, the Ministry of Human Resources and Social Security ("MOHRSS") issued the Implementation Measures on

Administrative Licensing for Labor Dispatch ("Labor Dispatch Licensing Measures"), which took effect on July 1, 2013. The Labor Dispatch Licensing Measures reiterated the preconditions for entities to engage in the labor dispatch business (e.g. RMB 2 million as the minimum registered capital), as well as specifying the procedures and documents necessary for the application of a labor dispatch license.

The Labor Dispatch Licensing Measures provide some more clarity regarding the transitional and grandfathering rules contained in the amended Employment Contract Law. Since July 1, 2013, staffing agencies established before July 1, 2013, may only engage in new labor dispatch business after obtaining the required license. It is unclear how this fits in with the amended Employment Contract Law, which allows existing staffing agencies to obtain the license by June 30, 2014, in order to engage in new labor dispatch business, since this grace period provision is missing from the Labor Dispatch Licensing Measures.

An exception to the above requirement would be that employment contracts and labor dispatch service agreements signed before July 1, 2013 can still be performed until their expiration date. However, from July 1, 2013, the employment contracts and labor dispatch service agreements signed between December 28, 2012, (the date when the amended Employment Contract law was originally issued) and June 30, 2013, must be performed in compliance with the amended Employment Contract Law (i.e. dispatched employees may be used only for temporary / auxiliary / substitute positions, equal pay for equal work, etc.).

Host companies should carefully check whether the staffing agency it uses has applied for the license and the outcome of its application, as well as subsequent annual inspections. Otherwise, the hiring of staff through an agency without a license may be deemed unlawful and the host company may potentially be subject to fines or even deemed as establishing direct employment relationships with the dispatched staff.

The Labor Dispatch Licensing Measures are mainly relevant to companies wishing to engage in the labor dispatch business, rather than host companies that use dispatched workers. The government has still not yet issued the other set of implementing regulations that it had promised to issue regarding restrictions and requirements for host entities' use of dispatched workers.

Draft Labor Dispatch Regulations Issued for Public Comment in August 2013

MOHRSS issued the draft Labor Dispatch Regulations in August 2013 for public comment. The draft Labor Dispatch Regulations include some significant provisions that would help clarify certain matters left unclear in the amended Employment Contract Law ("ECL"). For example, some guidance is provided regarding how to distinguish a true outsourcing arrangement from a disguised labor dispatch arrangement. The draft also provides guidance on how to handle the termination of dispatched workers in the event that the host entity goes through a restructuring. In addition, the draft regulations more clearly provide dispatched workers with a right to sue their host entity for de facto employment if the host entity uses labor dispatch arrangements outside the allowable scope.

Most significantly, the draft regulations set the maximum percentage of employees that may be hired through labor dispatch. Under the draft, dispatched workers used in auxiliary positions may not exceed 10 percent of the total workforce of the company (including both the directly hired employees and the dispatched workers used in auxiliary positions). There are no numerical or percentage limitations for dispatched workers hired for temporary and substitute job positions.

There is still no indication when the Labor Dispatch Regulations will finally be passed, or whether the government will make any further significant changes to the draft.

(III) Entry and Exit Control Law

The Entry and Exit Control Law was passed last summer, one year ahead of its effective date of July 1, 2013. This piece of legislation was widely viewed as an overhaul of China's immigration laws, with significant provisions governing the employment of foreign workers. The final regulations became effective on September 1, 2013.

Key Provisions

The key employment-related provisions that will be relevant to multinational employers doing business in China are highlighted below:

- **Business Visa.** Under the previous law, the F visa category was used for business travelers to visit China, including for the purpose of short-term training. Under the new regulations, an F visa is now defined as the category for exchanges and similar visits, while the newly created M visa is to be used for commercial trade activities and is expected to be the appropriate visa category for business

visitors. Neither visa category makes reference to training or training-type activities. The PRC embassies and consulates in charge of visa issuance overseas are expected to provide guidance on F and M visa application requirements.

- **Talent Visa.** The R visa has been created for high-level talent and specialists whose skills are in short supply in China. The requirements for high-level talent classification are expected to be defined by relevant PRC ministries. R visa holders will be permitted to apply for Residence Permits for employment purposes.
- **Work Visa.** The Z visa continues to apply to foreign nationals who will work in China. While the draft regulations created Z sub-categories for short-term versus long-term stays, this language does not appear in the final regulations.
- **PSB Audits.** The local public security bureaus ("PSB") responsible for processing Residence Permit applications may conduct verification through various methods including interviews and onsite visits. Employers sponsoring foreign workers must plan for such audits during Residence Permit processing. Such audits have already been in practice for some months in cities like Beijing and Suzhou, where the PSBs have telephoned employers to confirm employment details such as job position and duties and visited worksites to confirm job location.
- **Student Interns.** Employers now have guidance on hiring interns who are studying in China. Under the new regulations, foreign students holding Residence Permits for study purposes

may participate in work-study programs and off-campus internships by obtaining school approval and applying for PSB approval to be granted via an endorsement in the Residence Permit. The PSB endorsement will be specific, identifying the internship location and period, at a minimum. This is important guidance for employers because the Entry and Exit Control Law's definition of illegal employment includes a foreign student who performs work that exceeds the specified scope or duration of the work-study position.

In contrast, the regulations are silent on the issue of foreign interns who are studying overseas (rather than in China) and what

visa type would apply for these foreign students to engage in internships and similar training-type activities.

- **Employer Obligations.** Employers continue to have a duty to report on material changes to a foreign worker's employment such as termination or job location change. Employers also have the affirmative obligation to report on a foreign employee's violation of these regulations.

What to Expect Next

Since the final regulations became effective, the PRC authorities who administer the travel and activities of foreign nationals in China rolled out new or different practices and

procedures. Additional guidance, whether from the overseas embassies and consulates or the local labor bureaus and PSBs across China, was also provided in addition to extended processing times and new documentation requirements such as legalized police clearance certificates (in cities that previously did not impose such requirements on work permit applicants). Employers are advised to build in additional lead time for any foreign worker hire or transfer to accommodate these changes.

Please note that the Labor Dispatch Regulations were issued on 24 January 2014. For further details please access our client alert [here](#).

Hong Kong

Legislative changes were expected in Hong Kong in 2013, however ultimately these did not materialize. We saw detailed proposals in relation to paid statutory paternity leave and proposed amendments to empower the Labour Tribunal to order compulsory reinstatement and re-engagement of employees who have been unlawfully dismissed without a valid reason. It seems likely that these proposals will be introduced in Q1 of 2014.

On the horizon

The introduction of standard working hours in Hong Kong should be on employers' radar for 2014/15 as studies were commissioned, and committees set up, to review the regulation of working hours in 2013.

There may be an increased focus on discrimination over the next few years as the Equal Opportunities Commission has an ambitious agenda for 2014 and beyond. This includes (i) a comprehensive review

of the four anti-discrimination ordinances; (ii) conducting a public consultation on legislating against discrimination on the grounds of sexual orientation; (iii) lobbying the government to legislate against discrimination on the grounds of age; (iv) reviewing the Code of Practice on Employment under the Sex Discrimination Ordinance; and (v) establishing a Human Rights Commission.

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Colombia



Colombian Social Security System in 2014

One of the most controversial constitutional principles regarding the Colombian Social Security System has been the continuing efforts of the Colombian Government to make its practical application more progressive. A good example of this is Decree 2616 of 2013 ("Decree"), which regulated affiliation to the Social Security System in Pensions, Labor Risks and Family Compensation Bureaus of employee working for days and/or part-time who for less than thirty days a month.

With the main purpose of assuring affiliation and coverage to part-time employees, Article 171, Law 1450 of 2011, disposed that affiliation to the Social Security System of employees who worked part-time for under 30 days a month, and receive incomes for a monthly amount less than one (1) minimum monthly statutory salary, will be affiliated and contribute to the Social Security System according to the worked days and over a base of not less than one daily minimum statutory salary according to the established limits and conditions.

Such limits and conditions were specifically regulated by the Decree. According to this regulation, any person who is employed through an employment agreement for a period

of under 30 days within a month and whose remuneration is less than one monthly statutory salary, should be affiliated to the Integral Social Security System by the respective employer. The minimum contribution should be greater than one-quarter of a minimum statutory salary and the base should vary depending on the working days as follows:

- For employees who work between one and seven days a month, contributions should exceed one-quarter of a minimum statutory salary.¹
- For employees who work between eight and 14 days within a month, contributions should be made over half a minimum statutory salary.

- For employees who work between 15 and 21 days a month, contributions should exceed three-quarters of a minimum statutory salary.
- For employees who work more than 21 days per month, contributions should be based on the minimum statutory salary.

Nevertheless, the regulation is still pending on the adoption of the Contributions Liquidation Spreadsheet by the Colombian Social Security Entities. The Government is allowing two months from November 20, 2013 (publication date of the Decree), for the entities to regulate this aspect themselves or the Ministry of Health and Social Protection will perform such regulation ex officio.

¹ For year 2013, COL 147.375 or approximately USD 76.14.

The employee decides where contributions to the Pensions Administrator Fund should be made, while the employer decides over the Labor Risks Administrator and the Family Compensation Bureau where contributions should be made.

Whenever multiple employers exist, as may happen with many domestic employees, each employer should perform individually and independently its respective contribution to the Social Security System. Nevertheless, such affiliation must be made to one

single Pensions Administrator Fund. The Decree does not mention multiple affiliation to Labor Risks and Family Compensation Bureaus, but considering the general prohibition of multi-affiliation as well as a former decree that stated so, it can be concluded that the first affiliation made regarding Labor Risks Administrators and Family Compensation Bureau, will be the one to which employers must make contributions.

Special measures will be taken by the Ministry of Work in order to assure compliance to the new regulation and in order to avoid contributions evasion to the Integral Social Security System.

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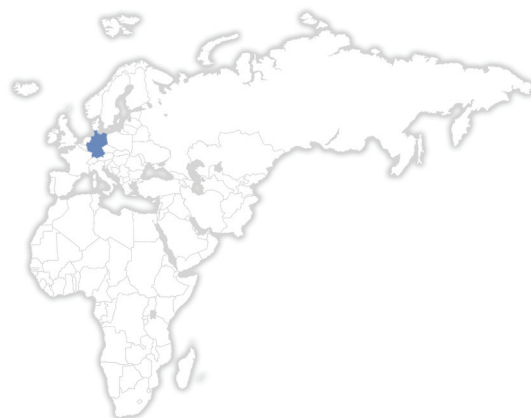
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Germany



Development of German Employment Law, in Particular as Regards Leasing of Employees - Looking to the Past and the Future

In contrast to the previous years, when there were more noticeable developments and changes in German employment law and the related jurisdiction, 2013 was a relatively “quiet” year. This is based, certainly not only, but in particular,

on the election of the new Federal Government which took place in September of this year.

In 2013 the Federal Labor Court had to decide on various cases, whereby, retrospectively, the topic “leasing of employees” has been

one of the main and recurring subjects. Consideration of temporary workers for (i) the calculation of the company’s size as regards the applicability of the statutory termination protection, and (ii) the size of the company’s works council, the works council’s right to refuse

its consent to the deployment of temporary workers are just a few of the cases with which the Federal Labour Court had to deal during the past twelve months. The following does not describe the full extent of the rulings, however, it outlines the most important and practice-oriented ones.

Leasing of employees of temporary nature only

The most recent decision of the Federal Labour Court is dated December 10, 2013, and was eagerly awaited both by German employers and the legal community. It deals with the question whether an employment relationship between the temporary worker and the lessee comes into existence if the leasing of the employee is not only temporary. According to the German Law concerning the Leasing of Employees ("*Arbeitnehmerüberlassungsgesetz/ AÜG*"), the leasing of employees by the lending company to a third party (the lessee) must be of a temporary nature. The Federal Labour Court has now decided that an employment relationship between the employee and the lessee does not exist if the statutory precondition "of temporary nature" is not met. However, at present, it is still unclear, and does not have to be decided by the Court yet, what maximum duration can be agreed on in order to qualify the leasing of employees as "temporary" and what exact penalties apply in case the leasing cannot be considered as "of temporary nature." However, and this is the good news, an employment relationship with the lessee is not assumed according to the Federal Labour Court's recent ruling.

Works council's right to refuse its consent to the employment of temporary workers

In July of this year, the Federal Labour Court decided that the works council

of the lessee may refuse its consent to the employment of temporary workers, if they shall be deployed not only "of temporary nature."

According to Section 14 of the AÜG, the lessee's works council must be involved pursuant to the German Works Constitution Act ("*Betriebsverfassungsgesetz/ BetrVG*") prior to the leasing of a temporary worker. The works council may refuse its consent in case the deployment of the temporary worker violates a law. As said, the AÜG provides for a statutory regulation according to which the leasing of employees by the lending company to a third party (the lessee) must be of a temporary nature. The lessee's works council may therefore refuse its consent to the deployment of the temporary workers, if they shall be employed at the lessee not only temporarily but rather without any time limitation. Based on this reason, and contrary to the lower courts' decisions, the application of an employer before the Federal Labour Court with which the employer wanted to replace the consent refused by the works council to the permanent employment of a temporary worker had no success.

Considering temporary workers when calculating the termination protection threshold

According to the German Termination Protection Act ("*Kündigungsschutzgesetz/ KSchG*"), the statutory termination protection applies to workers hired after December 31, 2003, only in companies where usually more than 10 employees are employed. When calculating the relevant size of the company in this regard, temporary workers employed at this company also have to be considered when their use is based on an existing "usual" staffing. According to the Federal Labour Court, this is

required by a sense and purpose-oriented interpretation of the statutory provision. The question whether the temporary workers have to be considered when calculating the threshold in the individual case, has to be decided on a case-by-case basis according to the standards set by the Court.

Considering temporary workers when calculating the size of the company's works council

Basically, temporary workers have to be taken into account for the number of staff relevant for the size of the company's works council. According to the BetrVG the number of members of the company's works council depends on the number of workers normally employed in the company. In case of five to 100 employees, additionally the employee's right to vote is decisive. From 101 workers on, the law no longer mentions this statutory condition. In March 2013, the Federal Labour Court decided, contrary to its previous jurisdiction, that temporary workers must be considered when calculating the thresholds for the size of the company's works council. Again, the Federal Labour Court argues that this is required by a sense and purpose-oriented interpretation of the statutory provision. At least in companies with more than 100 employees, the temporary worker's right to vote no longer needs to be taken into account. Contrary to the lower courts' decisions, the appeal of a works council election, therefore, was successful at the Federal Labour Court. In the present case, the selection board had not considered temporary workers when choosing the correct number of the works council's members.

Prospects

After the election of the new Federal Government, the coalition agreement has not been approved and the new Government has not been formed yet, so the implementation of new, respectively the amendment of current employment law regulations, if and where required, will not take place before the beginning

of 2014. It remains to be seen on which employment law-related topics the new Government will have a focus in the next four years and whether the German legislator will clarify still unanswered questions as regards the leasing of employees, in particular define by law the requirements of the required "temporary nature."

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Mexico



Legal Reforms Affecting Employment in Mexico

Major law reforms have been already approved while others are still under discussion at the Mexican Congress. These reforms will significantly impact employers in Mexico and in some specific cases, will considerably increase the cost of formal employment.

Relevant provisions were already modified in the Income Tax Law and amendments are expected in the Social Security Law as well. In particular, the modification to the "base quotation salary" for the payment of social security contributions and an increase on the quotas for the illness and maternity branch of insurance. In addition, new legislation is under discussion at the Congress, establishing for

the first time in Mexico the creation of an Unemployment Insurance and a Universal Pension, tending to grant minimum financial benefits to individuals over 65 years old, who do not have a pension or social security system benefit.

1. Income Tax Law.

On October 31, 2013, the Mexican Congress approved a major Income Tax Law reform, entering into force

on January 1, 2014. Three specific provisions of this reform will affect employers:

- The first establishes that exempt payments for workers and employees such as fringe benefits (food coupons, savings funds, overtime, Christmas Bonuses and others) will only be deductible up to 47 percent. The amended Income Tax Law provides however that if the

fringe benefits paid in a given year are not reduced from the payments made in the immediately previous tax year, they will be tax deductible at 53 percent. It also establishes that the non-deductible portion of such payments shall be further deductible for the purposes of determining the base of the mandatory profit sharing payouts .

- With respect to the contributions made by employers to create or increase the reserves for supplementary pension funds to those established under the Social Security Law, and seniority bonus, such contributions will be deductible up to 47 percent. However, if the benefit paid in a given year does not decrease from the one paid in the previous fiscal year, such deductions up to 53 percent will be allowed.
- In addition, the deductible amount for investments in automobiles was reduced from MXN 175,000 to MXN 130,000 pesos per unit. It also establishes a new limit of MXN 200 pesos per day for car leasing. Cars are usually granted as working tools in Mexico by employers to Managerial and Director level positions to facilitate the execution of work-related activities. This particular provision will impact the type of automobiles granted to employees or increase the cost of this working tool .

2. Social Reform.

In the framework of the tax reform, the Federal Executive Power submitted to the Congress an Initiative of the Decree to issue the Universal Pension Law and the Unemployment Insurance Law, in order to establish universal social security mechanisms.

In general terms, this reform proposes the following, regarding social security matters:

The Universal Pension Law

The purpose is to create a Universal Pension to cover those individuals who cannot obtain a tax-related pension, in order to grant basic wellbeing, protecting senior citizens from circumstantial events that may increase transient poverty or deepen poverty levels, providing economic support to these citizens through a monthly amount of MXN 1,092 pesos.

The requirements set for having access to such pension are:

- To reach the age of 65 years as of 2014 and not being a retiree;
- Residence in national territory;
- Be registered before the National Population Registry; and
- Have a monthly income equal to or less than fifteen minimum daily wages (\$971.40).

In order to receive this pension, the Mexican Social Security Institute (the "IMSS," per its Spanish acronym) will verify that the Universal Pension applicant meets the requirements indicated above and will issue the corresponding resolution. If the resolution is favorable, then it shall notify the Ministry of Finance and Public Credit (Hacienda), which will be in charge of processing the corresponding payment.

These pensions will be paid through the public budget.

Unemployment Insurance

The legislation proposes the creation of a new branch for a mandatory social security regime for unemployment. This insurance will cover employees who are registered before the IMSS in the mandatory regime of the Social Security Law.

In order to gain access to unemployment benefits, the following requirements must be met:

- Having paid social security contributions for at least 24 months within a period no longer than 36 months, following affiliation to IMSS, as of the date when the last monthly payment for such benefit was made;
- Having been unemployed for at least 45 calendar days;
- Not receiving any other monetary income for retirement, pension, unemployment support, or any other similar reasons; and
- Proof of meeting some requirements set in the promotion, placement, and training programs under the care of the Ministry of Labor and Social Welfare, basically tending to facilitate the reemployment.

This benefit and its corresponding administrative expenses will be funded through resources obtained from the employer's mandatory contributions to the National Workers' Housing Fund Institute (INFONAVIT), with a two to five percent increase in the amount of the dues paid to the INFONAVIT.

An unemployed individual will be entitled to receive the benefit in up to six monthly payments, using first the resources accrued in the Mixed Sub-Account of his Individual Retirement Account and in accordance with the following percentages of the base salary for purposes of computing social security dues and benefits for the latest 24 monthly payments:

First Payment	60%
Second Payment	50%
Third to Sixth Payments	40%

In case the balance in the Individual Sub-Account proves insufficient to cover the amount of the payments, then the benefit will be paid out of resources from a Federal Government Fund, in order to cover the difference, for an amount of up to a sum equal to a minimum wage per each remaining month until covering the full benefit. Should this fund prove insufficient, then the

Federal Government will cover the payment of any remaining difference through a sum equal to one month of minimum wages per each remaining month until the benefit is covered.

The payment of the benefit will be completed upon the unemployed individual's receipt of all six monthly payments, entering an employment relationship, receipt of monetary

income due to retirement, pension, or unemployment support of a similar or another kind, or upon the unemployed individual's failure to perform the obligations set forth in the promotion, placement, and training programs under the care of the Ministry of Labor and Social Welfare.

Modification of Social Security Dues

The reform proposes the following modifications to social security dues:

Item	Current Rate	Proposed Rate
Dues for in-kind benefits from the Illness and Maternity Insurance for retirees and their beneficiaries	Employer 1.05% SBC* Employees 0.375% Government 0.75%	Employer 2.8% of the SBC Employees 0.375% Government 0.75%
Dues for in-kind benefits from the Illness and Maternity Insurance	Employer 20.4% of the SMVG**	Employer 10% of the SMVG**
Dues for monetary benefits from the Illness and Maternity Insurance	Employer 0.70% SBC Employees 0.25% Government 0.05%	Employer 1.8% SBC Employees 0.25% Government 0.05%

*SBC Base salary for purposes of payment of social security contributions.

**SMVG General Minimum Wage in force.

The reform will trigger the following financial effects for employers:

COMPARATIVE CHART OF SOCIAL SECURITY CONTRIBUTIONS

Times the SMVG	Days of the month	SBC	Current cost	Cost according to the reform	Difference	%
2	30	129.5	985	893.69	-91.31	-9.27%
3	30	194.28	1,279.33	1,243.39	-35.94	-2.81%
4	30	259.04	1,595.04	1,614.47	19.43	1.22%
5	30	323.8	1,910.74	1,985.54	74.8	3.91%
6	30	388.56	2,226.45	2,356.62	130.17	5.85%
7	30	453.32	2,542.15	2,727.69	185.54	7.30%
8	30	518.08	2,857.86	3,098.77	240.91	8.43%
9	30	582.84	3,171.61	3,467.55	295.94	9.33%
10	30	647.6	3,489.27	3,840.92	351.65	10.08%
25	30	1,619.00	8,224.84	9,407.04	1,182.19	14.37%

3. Social Security Law - Base Quotation Salary

On April 25, 2013, the Chamber of Representatives approved a bill amending the Social Security Law which is currently under discussion in the Senate.

According to the Social Security Law in effect, the salary for the payment of Social Security Contributions is integrated with all in-cash and in-kind benefits paid by the employer to the employee as a compensation for his or her work. Some concepts, because of their specific nature are excluded, such as working tools, savings funds, additional contributions granted by employers to the retirement insurance for employees, Christmas Bonuses, Housing Agency contributions and profit sharing, food and housing, food coupons, assistance and punctuality bonuses, contributions performed by employers to pension funds, and overtime. All of the above will be subject to specific limits and conditions.

The Reforms cancel or exclude some items (i.e. punctuality and assistance bonuses) and/or reduce the amounts not to be part of the integrated salary (i.e. savings funds, overtime, Christmas bonuses, profit sharing) and restrict the exclusion of others such as working tools, food and housing, to very specific conditions.

The financial impact of this reform, if approved, will raise the cost of social security contributions depending on the specific compensation package granted by each company and therefore, the cost of the impact cannot be calculated.

Conclusions

- i) The new provisions of the Income Tax Law that came into effect on January 1, 2014, will increase the tax on the fringe

benefits employers grant to their employees, and companies are currently analyzing their financial impact and evaluating different alternatives. Among those, the possibility to monetize nonmandatory benefits (i.e. food coupons, savings fund, etc.), some others are considering absorbing the full cost of the reform, a modification of the compensation package, and some employers are analyzing on a per benefit basis a combination of these options.

Employers, employees, and unions are also evaluating whether to file a Constitutional Claim (Amparo Claim or Habeas Corpus), considering the reform does violate constitutional principles and human rights embodied in the International Agreements ratified by Mexico.

It is advisable for each employer to calculate the impact of the reform and carefully analyze the options that can be implemented.

ii) Universal Pension and Unemployment Insurance

Initiatives mentioned in section 2 are still under discussion in Congress.

The Universal Pension and Unemployment Insurance, in our view are positive because they will provide a minimum level of protection to individuals affected by being unable to earn income, in the event that the Universal Pension is implemented on a permanent basis, and on unemployment insurance on a temporary basis.

iii) Modification of Social Security Dues and the Base quotation Salary

If the reform to the Social Security Law modifying the Social Security dues and the base quotation salary were to pass, it will also trigger a substantial financial impact

for employers, and it is highly advisable to analyze its cost on a case-by-case basis. In addition to the financial impact, companies will need to significantly restructure payroll systems and anticipate the need to take action to review actions that may be implemented for the specific case.

iv) General comments

Provisions modified in the Income Tax Law, and those modified in the Income Tax Law and those submitted for modification in the Social Security Law will increase the cost of formal employment in Mexico.

As in other countries, Mexico is struggling with a very active underground economy (where taxes are underpaid or not paid at all, and where individuals are not protected by the Mexican Federal Labor Law nor the Social Security System) and in our opinion, the reform should address in a very specific manner the particular issue of increasing the costs for those employers who are in compliance with their labor and social security obligations.

A significant amount of litigation is anticipated since the legal community is considering that some of the specific provisions may be in violation of Constitutional principles and human rights. Major difficulties are also foreseen with respect to Collective Bargaining Agreements.

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Spain



Review of the Year in Spain

In 2012, due to the particularly serious labour market situation and an unemployment rate of 25 percent, the Spanish Government passed emergency legislation that included the most significant amendments to Spanish Employment Law in decades.

The amendments were numerous and they substantially modified different areas of employment law including collective bargaining agreements ("CBAs"). For example, the severance costs for unfair dismissals were significantly reduced to 33 days' salary per year worked, as opposed to the traditional 45 days' salary; redundancies and company's ability to unilaterally change work conditions (including salary), location and duties were facilitated and changes were introduced to create less binding industry CBAs (company level CBAs prevailing over industry CBAs in a significant list of matters). In sum, the Spanish employment law was notably changed in many respects with the aim of favoring employer flexibility, facilitating the hiring of employees, decreasing company costs, and reducing CBA restrictions.

In 2013, with on-going economic uncertainty and an unsustainable unemployment rate of more than 26 percent, particularly dramatic among young people (56,5 percent), employment and social security law reforms have continued to be introduced, the most notable of which are the following:

- (i) New Measures to promote Employment and Business initiatives among young people under 30:

In order to encourage the hiring of young people, the Government is offering compelling social security rebates until the unemployment rate is reduced to below 15 percent, which includes (i) **new temporary "first job" contract**: companies / independent contractors may employ, for a period ranging from three to six months, extendable to 12 months, unemployed persons under 30 years

without any work experience or with work experience not exceeding three months; (ii) **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 another 12 months and (iii) **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.

- (ii) Changes to retirement regulations:
 - a. Ordinary Retirement:
As of January 1, 2013, the ordinary retirement age will be gradually increased from 65 to 67 by 2027.



However, employees who have contributed to the Social Security system for a certain period of time will retain their right to retire at age 65 (35 years and three months in 2013, to be gradually increased to 38 years and six months by 2027). The reference periods for calculating the pension entitlement will also change gradually from 15 to 25 years by 2022. Lastly, the contribution period required for full pension entitlement will gradually be increased from 35 to 37 years by 2027.

- b. **Partial and Early Retirement:** Significant changes have been introduced with regard to these two types of retirement, aimed at raising the early retirement age and increasing the number of hours to be worked by partially retired employees, among other changes.
- c. **Compatibility between pension and work:** the Government facilitates compatibility between receiving a public retirement pension and receiving remuneration from employment (whether as an employee or as a self-employed individual), a possibility that has been traditionally very restricted under Spanish Legislation.

The objective behind such reforms is to postpone full retirement age and maximize the level of contributions to the Spanish Public Pension System.

- (iii) Other amendments include:
 - (i) the Social Security General Treasury Office has clarified the social security regime for university students working as trainees in companies, authorizing extended terms for registration and de-registration and payment of contributions;
 - (ii) new social security regulations have been passed to protect part-time workers in order to improve social security coverage; and
 - (iii) collective dismissal regulations have been amended to clarify the rules for constituting a negotiating committee to act on behalf of the workers during the consultation period, a controversial issue that many companies have faced when implementing collective dismissal procedures, often resulting in the whole collective procedure being invalidated.

The above changes have continued the trend started by the major 2012 labour reform to make labour regulations more flexible and able to adapt to the changing market demands. Despite these changes having modified very substantial aspects of the previous regulations, the unemployment rate is still far from acceptable levels, and hence we anticipate more new reforms to follow.

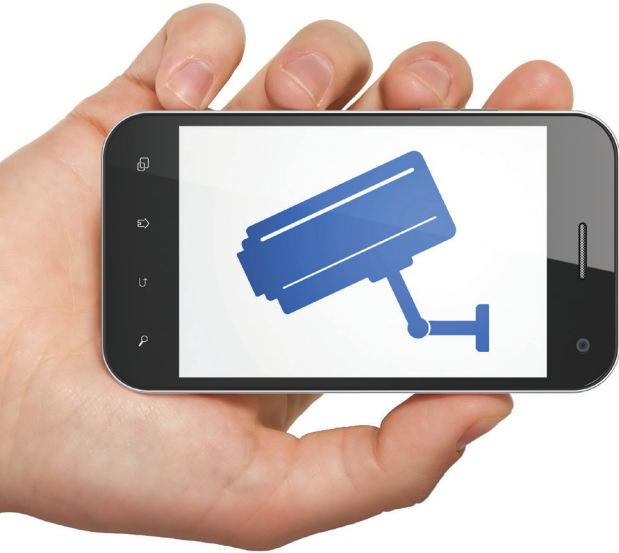
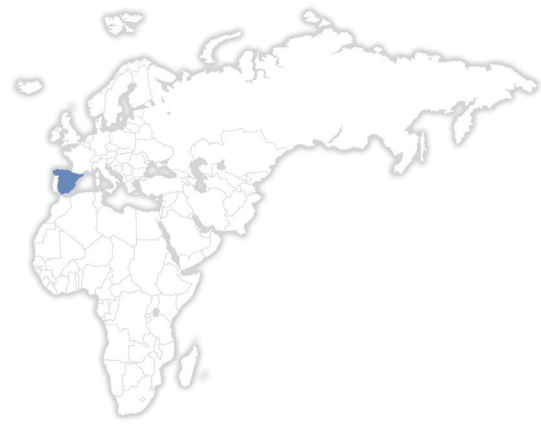
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Spain



Employees' Privacy vs Employer's Control

Companies have for years been providing their employees with the latest technologies with the aim of improving their efficiency. Nowadays, the number employees who are provided with smart phones, tablets, laptops, etc. has increased significantly.

What happens when companies suspect that the device provided is not being correctly used? Can an employer monitor its employees' laptops and correspondence without their authorization? Do employees need to be previously notified that their laptops and electronic correspondence will be monitored?

Taking into consideration the time that has elapsed since technologies took off, Spanish legislation has not kept pace with technology developments and does not address all of these questions. While we are waiting for a legal solution to all the unsolved queries, our courts have been obliged to resolve claims filed by employees whose correspondence has been monitored by their

employers. Moreover, taking into account that no specific rules have entered into force regarding this matter, the courts have been obliged to base their judgements on general principles of law.

According to the aforementioned, during the past years the Supreme Court interpreted that the employees' privacy was a fundamental right that needed to be protected. Consequently, in general terms, the employer could not freely control the employees' device, as some strict requirements were needed. In compliance with the uncontroversial case law published as of October 2013, the necessary requirements for the employer to control the employees'

device were to previously inform the employees on the following: *(i)* the use they should give to the referred company's device, *(ii)* that their correspondence could be monitored, and *(iii)* the way the employer would control the use of a device. If one of these requirements was not met, the employer was not entitled to access its employees' electronic correspondence and device. Moreover, the employer was not entitled to use the evidence obtained by accessing to the employees' electronic correspondence in a judicial procedure, without fulfilling the aforementioned requirements.

However, the employer's right to exercise its control over the employees' seems to have been

reinforced against the employees' right to privacy. In this sense, a recent judgment of the Spanish Constitutional Court from October 2013, totally changed the interpretation previously adopted by the case law, ruling in favor of the company's control and leaving the employees' privacy at a lower level. In accordance with this new interpretation, the employer is allowed to control the employees' electronic correspondence and device regardless of whether or not they have been previously informed on the use they should give to them, or have been informed on the control and the means the employer will effectively use to control the company's means in their possession.

In this latest case ruled by the Constitutional Court, the employer had access to its employee's electronic correspondence because it suspected that the employee was providing confidential information to a third person. After reviewing the employee's electronic correspondence, the employer verified that the employee was effectively sharing confidential information with a person outside the company, and therefore decided to dismiss him. The employee filed a claim indicating that the evidence obtained by the employer when controlling his correspondence was null and void and could not be used as it was obtained without meeting the requirements required by the case law.

However, despite the interpretation of the previous case law, the Constitutional Court has completely changed its interpretation and has recently held that the referred evidence could be taken into consideration as it was obtained correctly (even though the employee was never informed by his employer beforehand on the use he should give to the company's device, nor on the fact that the employer was able to control use, or the ways the employer could exercise its control).

The justification of this new interpretation is that the applicable collective bargaining agreement expressly prohibited the personal use of the company's device, and the company had reasons to suspect the employee's conduct.

Does this mean that if the applicable collective bargaining agreement prohibits the personal use of the company's means, the employer will automatically be entitled to monitor the employees' electronic correspondence and the means it has provided? Has the court forgotten that besides the employees' acknowledging the prohibition of the personal use of the company's device, the previous case law also required that the employee had to be informed on the control, and the way the employer would apply its control over the electronic correspondence and device provided?

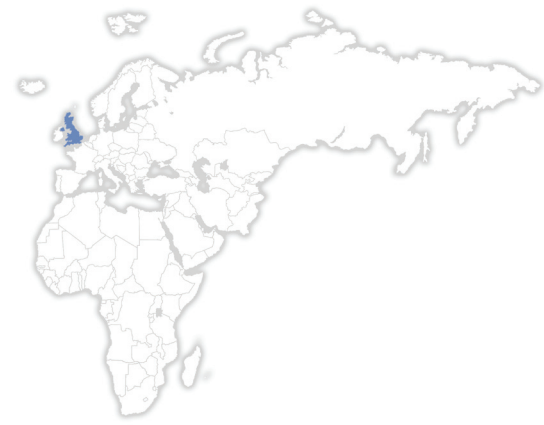
We will have to wait and see if the legislation is reviewed and modified in accordance with the current necessities. In the meantime, it seems that the employees' privacy rights will remain second behind the employers' right to control the employees' device. However, considering that the case law is continuously being modified, it is highly advisable for companies to continue to be cautious and follow the steps required by the uncontroversial case law published as of October 2013.

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United Kingdom



Reforms to TUPE

Significant changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), which implement the Acquired Rights Directive ("ARD") in the UK, will come into force on 31 January 2014, although some provisions will not take effect immediately. The changes follow the UK Government's review of TUPE, which was part of its wider review of employment laws to ensure that they provide sufficient flexibility for employers. On the whole, the changes are likely to be beneficial to employers, providing greater certainty on some practices which were already fairly commonplace, such as pre-transfer consultation on collective redundancies, and the approach to a change of location following a transfer. However, the changes do give rise to some uncertainty, particularly as to when changes to terms and conditions will be permitted, and some aspects of the pre-transfer consultation process. The changes are introduced by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (the "Regulations"). The changes are accompanied by updated guidance from the Government ("TUPE Guidance").

The key changes are:

1. Service provision change test will stay but will apply where activities post transfer are "fundamentally the same" as those pre transfer.

The Government has confirmed that, contrary to earlier indications, the Service Provision Change ("SPC") test (which typically applies in outsourcing situations) will not be repealed. However, a new qualification to the SPC test has been

introduced, which provides that a transfer will only be an SPC where the activities carried on post transfer are "*fundamentally the same*" as the activities carried out by the person who has ceased to carry them out.

This new qualification in fact reflects the existing case law and will not therefore require employers to approach the SPC test any differently in practice. However, the new provision and the TUPE Guidance implicitly endorses the

more restrictive approach to the SPC test that the courts have taken in recent years. While the existing case law gives some guidance on whether a SPC applies, each case will turn on its specific facts. With that in mind, parties entering into an outsourcing agreement should be aware of the possibility that there may not be a SPC at the end of the agreement, meaning that any employees assigned to providing the service will not transfer to the new service provider on exit and will

remain with the incumbent provider. It is therefore prudent to address this possibility in the outsourcing agreement.

2. Changes to employees' terms and conditions

Currently, any changes to employees' terms are void if the sole or principal reason for the changes are the transfer itself, or a reason connected with the transfer. Where the reason is a reason connected with the transfer, there is an exception to permit changes to terms where the reason is an "economic, technical or organisational reason entailing changes in the workforce" ("ETO reason").

The Regulations have deleted the reference to "a reason connected with the transfer" so that TUPE (as amended) now provides that changes to terms will only be void if the sole or principal reason for the changes is "the transfer". There are three exceptions:

- Where the reason for the change is an ETO reason and the employer and employee agrees to the changes;
- Where the changes are effected pursuant to an existing contractual clause e.g. a mobility clause; and
- Where the terms have been incorporated from a collective agreement, provided that the changes take effect, at the earliest, one year after the TUPE transfer, and provided that the changes are "no less favourable" to the employee overall.

The new provisions will only apply where both changes to the terms and the TUPE transfer takes place after the Regulations come into force on 31 January 2014.

The removal of the reference to a reason "connected with" the transfer is helpful, but in practice it may not be easy to distinguish between a change that is by reason of the transfer, and therefore in principle void, and one which is merely "connected with" the transfer, and so now permitted. The TUPE Guidance gives little assistance on this point although it does state that this is a new test therefore a reason that might have been considered to be connected with the transfer pre-31 January 2014, may be considered to be a transfer reason from 31 January. Most of the existing UK case law has focused on reasons "connected with" the transfer and so will be of limited guidance in finding this distinction. It is likely to be more instructive to look to the EU case law, as the UK provisions will have to be interpreted in accordance with that. It is clear from the TUPE Guidance however that harmonisation for harmonisation's sake will be void.

The express provision allowing changes which are permitted by the contract is helpful to employers. Some legal commentators have suggested that the new wording is in breach of the ARD. In *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S*, the ECJ (as it then was) stated that the relationship between an employee and a transferee could be altered to the same extent as when the transferor was the employer but not where the reason for the change is the transfer itself. On this basis, it has been suggested that an employer cannot rely on flexibility wording to make changes to terms if those changes are purely because of the transfer. However, the specific question referred to the ECJ in *Daddy's Dance Hall* was whether an employee could waive his/her rights under the ARD

by entering into an agreement with the purchaser of a business, and the ECJ decided that it could not where the reason for the change was the transfer itself. Where changes are permitted by an existing contract, the transferee is merely exercising contractual rights which it inherited from the transferor, which is not the same as asking an employee to waive his/her rights under the ARD. The TUPE Guidance does not take us any further on this point. However, in our view, employers should be able to rely on this new right, but some caution should be exercised given the risk of a future challenge based on extending the principles established in *Daddy's Dance Hall*.

The provisions allowing changes to terms incorporated from collective agreements mirror the wording of the ARD and gives transferees greater flexibility to amend contractual terms that are incorporated from collective agreements. However, employers should remember that where terms under a collective agreement have been incorporated into an individual's contract of employment, they can only be varied with the individual employee's consent. There is at least an argument that since the new right permits changes to individual terms through the back door, it is a breach of the *Daddy's Dance Hall* principle. However, our view is that such a challenge should not succeed given the express provisions of the ARD. In addition, the terms need to be no less favourable overall.

3. Dismissals

Dismissals are currently automatically unfair where the sole or principal reason for the dismissal is the transfer itself, or a reason connected with the transfer that is not an ETO reason.

Similar to the changes made to the provisions on changing employee terms, the Regulations have deleted the reference to dismissals that are "connected with the transfer" so that dismissals will only be automatically unfair if the sole or principal reason for the dismissal is "the transfer". The changes will apply to TUPE transfers which take place on or after 31 January 2014 and where notice of termination is given on or after that date.

The removal of the reference to a reason connected with the transfer is likely to have a limited impact in practice as most transferees have been able to find an ETO reason to rely on in the past, with the exception of relocations (see below).

4. ETO reason to include changes to work location

Current case law provides that an ETO reason must entail a change in the numbers or functions in the workforce. The Regulations now expressly provide that a change to a workplace location will constitute an ETO reason. The changes will apply to TUPE transfers which take place on or after 31 January 2014, and in relation to dismissals, where notice of termination is given on or after that date.

The clarification that a change to a place of work can amount to an ETO reason is very helpful given how common relocations are in the context of TUPE transfers, particularly outsourcings. Employers should remember that they must comply with the usual fair procedures before effecting any changes to terms and conditions and/or dismissals.

5. Pre-transfer consultation may be relied on by a transferee

The Regulations make a number of changes to the provisions relating to collective redundancy consultation in the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). The effect is that where the transferor and transferee agree, the transferee may begin collective consultation on potential redundancies pre-transfer, and this will count for the purposes of complying with the rules on collective consultation in the context of redundancy. The new provisions apply where:

1. There is, or is likely to be, a TUPE transfer;
2. The transferee is proposing to dismiss as redundant 20 or more employees within 90 days or less at one establishment; and
3. One or more of the individuals who are to be (or are likely to be) transferred to the transferee may be affected by the proposed dismissals or by measures taken in connection with the proposed dismissals.

Where these conditions are satisfied, the transferee may elect, by written notice to the transferor, to start redundancy consultation with representatives of the affected employees before the transfer. Note however that the transferor must agree to accept the election - if it does not, the transferee cannot undertake pre-transfer consultation.

Where the transferor agrees to pre-transfer consultation and the other conditions above are met, the existing collective consultation rules apply (subject to certain modifications) as if the transferee

was already the transferring individuals' employer and as if any transferring individuals who may be affected by the proposed dismissals were already employed at the transferee's establishment. However, there is no obligation on the transferor to provide any assistance or information to the transferee to help it comply with its obligations. This results in some practical issues for the parties to consider:

- **Co-operation:** in order to meet its obligations, (for example the obligation to ensure that the employee representatives are allowed access to the affected transferring individuals), the transferee is reliant on the transferor's co-operation. If the transferor refuses to assist, the transferee could find itself in breach of its consultation obligations. If this happens, the transferee may exercise its option of serving a cancellation notice. However, having begun the process, it is obviously unattractive from an employee relations perspective to pull out. Alternatively, the transferee could continue consultation after the transfer correcting any earlier defects. However, it could - in theory at least - still be liable for some failures e.g. a failure to provide appropriate facilities to employee representatives.
- **Who to consult?** The Regulations state that where an independent trade union is recognised by the transferor in respect of the transferring individuals who will be affected by the proposed dismissals, the transferee should consult with representatives of the transferor's recognised trade union; and where the transferee

recognises an independent trade union in respect of its own existing employees who may be affected by the proposed dismissals, it should consult with its own recognised trade union in relation to those employees. However, the Regulations do not expressly state with whom the transferee must consult in respect of the affected transferring employees outside of these circumstances i.e. where there is no recognised trade union.

The answer appears to be that the transferee has the choice to either use existing representatives of the affected employees who are authorised to take part in such information and consultation process, or to specifically elect representatives of the affected employees for these purposes. In practice, there are risks in consulting with an existing body (of either the transferor or transferee) in relation to employees of the transferor. The transferee also needs to consider, at the outset, the practicalities of being able to continue consultation, if necessary, after the transfer date if it is possible that it will not be completed before the transfer.

- **Issuing notice pre-transfer?**
One practical question is when notice of termination can be given. Currently, case law holds that the transferor cannot rely on the transferee's reason for dismissal. This means that if the transferor dismisses before the transfer, the dismissal is likely to be unfair, unless the reason for the dismissal was the transferor's reason. The

Government has confirmed that there will be no change to this point and therefore at the time of dismissal, the transferring employees must be employed by the transferee. However, an unanswered question is whether notice of termination can be given before the transfer but expire afterwards? The Regulations do not address this point. There is some doubt as to whether current case law is correct, but the safest approach is for the transferee to issue notice of termination post transfer.

- **Pooling:** Where transferring employees would, following the transfer, need to be pooled with employees in the transferee's workforce for redundancy selection purposes, the transferee will have obligations to consult with the transferring employees as well as with its existing employees who are affected. That is a strategic question that needs to be considered by the transferee. One option would be to carry out joint consultation, but this may not always be practicable or preferable, for example, where different severance terms apply, or where the employees are represented by different unions.
- **Time off and detriment:**
The obligation to provide reasonable time off for employee representatives and not to subject them to a detriment appear to fall on the transferor up to the point of transfer. The transferor has no right to decide the timing or frequency of consultation or to attend the consultation meetings

In principle, the ability to carry out pre-transfer consultation is welcome news for employers. However, as set out above, there are some uncertainties and complexities with this process, which transferees and transferors will have to carefully consider when deciding whether to elect to carry out pre-transfer consultation / accept the election to do so. It would therefore be advisable for the parties to document their agreement to any pre-transfer consultation in writing (in any event, the transferee's election to start pre-transfer consultation must be in writing).

6. Employee Liability Information

The Regulations have extended the deadline by which transferors must provide the Employee Liability Information ("ELI") to transferees from 14 days to 28 days prior to the transfer. This change reflects the majority view of the respondents to the TUPE consultation, which considered that the current time frame of 14 days is inadequate. No changes have been made however to the categories / detail of the ELI which includes matters such as the identity and age of the employees who will transfer; information contained in those employees' written particulars of employment; certain information on collective agreements; certain information regarding any disciplinary proceedings taken against an employee or grievance brought by an employee; and certain information regarding any legal action taken by those employees against the transferor. This change does not have immediate effect and will only apply to transfers which take place on or after 1 May 2014.

7. Collective agreements to be given a "static" interpretation

The Regulations clarify the effect of TUPE on collective agreements to confirm that the "static" approach will apply i.e. that a transferee will only be bound by the terms of the collective agreement agreed before the transfer date and will not be bound by any changes agreed by the transferor after the transfer date. This reflects the position taken by the ECJ in *Alemo-Herron v Parkwood Leisure*. In *Alemo-Herron*, the employees had argued that the transferee continued to be bound by changes to the collective agreement that were agreed with the transferor after the transfer, and in which the transferee had no involvement in the negotiating process (the "dynamic" approach). The ECJ held that this dynamic approach was not permitted, as the transferee was not able to participate in the negotiation of the collective agreement, it was not bound by the new terms.

In light of the decision in *Alemo-Herron*, this change is unlikely to have a significant effect in practice. However, it does appear to go slightly further than the decision in *Alemo-Herron*, which only precluded a "dynamic" approach where the transferee did not have the opportunity to participate in collective bargaining. The changes to TUPE appear to apply however even where the transferee has the opportunity to participate but chooses not to.

8. Businesses with 10 or fewer employees can inform and consult directly

The Regulations now provide an exemption for micro-businesses, defined as employers with 9 or fewer employees, from the requirement to elect and consult with employee representatives. Instead, the employer can discharge its obligations by informing and consulting with the employees directly. The exemption will only apply where there are no appropriate representatives already in place and the employer has not invited any of the affected employees to elect employee representatives. This change does not have immediate effect and will only apply to transfers which take place on or after 31 July 2014.

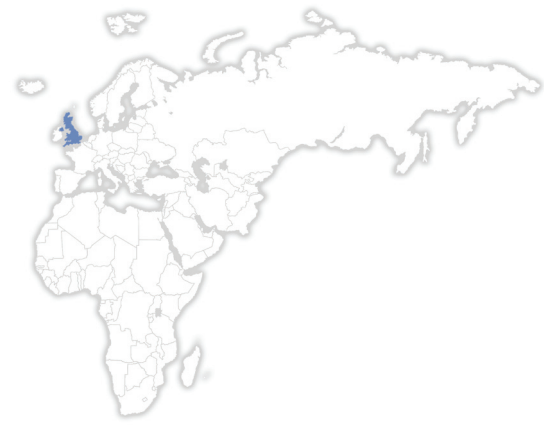
This is a welcome relaxation of the requirements of TUPE and reflects the existing practice of many employers on smaller transfers. However, its application is limited as it only applies to employers with 9 or fewer employees - it would not apply in a situation where the employer has more than 9 employees but the transfer itself is small. In this situation, technically, consultation should take place with employee representatives, but in practice, we anticipate that some employers will choose to inform and consult with the affected employees directly. To reduce the legal risk of challenge, employers should offer the affected employees the opportunity to elect employee representatives if they prefer.

Conclusion

Overall, the changes to TUPE will be welcome news for employers. However, as explained above, the Regulations do give rise to some uncertainty, particularly in relation to the pre-transfer consultation obligations, which can only be resolved by judicial guidance from the Courts and Tribunals.

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United Kingdom

Auto-Enrollment: Preparing for Crunch Time

Since October 1, 2012, starting with the largest employers, the UK has been implementing a major workplace pension reform known as "automatic enrollment" or "auto-enrollment." Under the reform workers are being enrolled without their consent into pension schemes, into which employers must make statutory contributions, although the workers may subsequently opt out. According to official statistics, up to the end of October 2013, more than 1.9 million workers have been automatically enrolled across nearly 3,000 employers. The reform will continue to be rolled out until February 2018, but 2014 is predicted to be the "crunch" year, as medium-sized employers of fewer than 250 employees will be implementing auto-enrollment beginning on April 1, 2014. Approximately 29,000 employers are expected to implement auto-enrollment during January to July 2014. Some of these employers will be international businesses who have a branch, purchase a business unit, or send workers to the UK. These businesses will need to assess the extent to which they will need to comply with auto-enrollment legislation.

In this article, updating the survey provided in the September 2011 edition of *Global Employer*, we will outline the duties placed upon employers, explain two of the outstanding problem areas of which international employers who conduct business in the UK will need to be aware, and then look at the key ways in which the UK government has modified the auto-enrollment regime in the course of its implementation.

An outline of auto-enrollment

The purpose of auto-enrollment is to address the UK Government's concern that many workers in the UK are not saving enough money for their retirement. Auto-enrollment seeks to redress this by making pension saving the default option for workers, who then have an onus upon them if they wish to opt out of saving. For the first time in the UK, auto-enrollment also requires by law certain levels of employer contributions, although increasing amounts are being phased in up to 2018.

Workers who must be auto-enrolled into a "qualifying" pension scheme (one that satisfies one of a number of quality requirements depending on the type of scheme) are those who at the relevant date:

- work or ordinarily work in the UK under the worker's contract;
- have reached age 22 but not their State Pensionable Age; and
- have earnings of at least GBP9,440 (in 2013/14 terms, and proposed by the UK Government to rise to GBP10,000 on April 6, 2014) (the "earnings trigger").

Other workers who do not meet the earnings trigger or age requirements may have rights to opt into a qualifying scheme.

Employers have duties to assess workers from the date on which the requirements first apply to them (their "staging date"), and subsequently to monitor whether any new or existing workers meet

the criteria for auto-enrollment or become entitled to opt in. Employers may postpone the assessment from their staging date for up to three months. Workers may opt out and receive a refund of deductions from their pay only if they provide the employer with the correct form within a one-month window, and employers must be careful not to encourage or "induce" this or they may face regulatory intervention.

Alongside these requirements there are a significant number of additional safeguards and administrative requirements, including information, communication and record-keeping requirements. Also, if workers do opt out then they must be automatically re-enrolled every three years.



Mostly good news so far

Given that the purpose of auto-enrollment has been to address low levels of workplace saving, the data showing that only approximately 9 percent of automatically enrolled workers have subsequently opted out has been received positively. This figure has been described as "really very encouraging" by the UK's Pensions Minister, Steve Webb.

Furthermore, the UK's Pensions Regulator - tasked with enforcing compliance - has not needed to be heavy-handed in monitoring compliance with the larger employers who have already implemented auto-enrollment. There has been just one reported case of a "compliance notice" being issued against an unnamed company, and the Regulator has disclosed that it has issued 38 informal warning letters prior to 12 August 2013. Most instances of non-compliance have been resolved without the Regulator taking the punitive steps available to it. A spokesman for the Regulator has revealed that the majority of these interventions were triggered by companies who had not left themselves enough time to implement auto-enrollment according to the statutory schedule.

However, UK businesses have reported that putting auto-enrollment in place involves a heavy commitment in terms of human resources and cost. In part this has been a result of the technical complexity of the legislation and difficulties in synchronising auto-enrollment with existing payroll systems. As we outline below (under "Simplification") some of these concerns have been addressed.

There do, though, remain outstanding areas where employers are faced with some legal uncertainty and may require legal assistance. We consider in this article two of

these areas: the location of workers who must be auto-enrolled and inducement.

Location of workers in scope

The assessment of which employees will be in scope will be particularly relevant for non-UK employers who conduct some of their economic activities in the UK. The UK legal requirement is for an employer to auto-enroll a worker who (in addition to meeting the age and earnings requirements set out above) ordinarily works in the UK under their contract. This definition contains two levels of uncertainty in individual circumstances. Firstly, under UK law a "worker" is a wider category than an "employee", and may include individuals who appear to be self-employed. Secondly, "ordinarily working in the UK" is likely to admit some workers who actually perform many of their duties outside the UK, such as "ex-pat" oil workers who work in the Middle East but have a close connection with the UK, whom are paid into a UK bank account and who pay UK tax (as the UK Supreme Court held in *Ravat v Halliburton* [2012] in connection with eligibility for the UK's employment tribunals). Alternatively, "in-pat" workers who perform some of their duties in the UK, but have a closer simultaneous working relationship with another country, may fall outside the scope of auto-enrollment. For international businesses the point is this: the employer itself does not need to be based in the UK - the crucial factor is having a worker sufficiently based in the UK.

The Regulator has issued guidance that the key question is whether the worker is "based" in the UK, as defined by their contract of employment and how it operates in practice. The Regulator has also provided a list of factors which

should be considered when a worker works partly outside the UK, for example, or is employed by a non-UK entity:

- where the worker begins and ends their work;
- where their private residence is, or is intended to be;
- where the worker's headquarters are located;
- whether they pay National Insurance contributions in the UK; and
- what currency they are paid in.

The Regulator's guidance provides a number of helpful examples of these principles in action.² For example, in dealing with workers on secondment to the UK, the crucial question is whether the worker is expected to return to their position outside of the UK. In addition there are special rules in respect of offshore workers and seafarers. In practice, employers will need to document a reasoned assessment on a case-by-case basis, recording why a worker is or is not in scope for auto-enrollment, taking account of the guidance and seeking advice where appropriate.

Inducement

One of the crucial safeguards of the auto-enrollment regime is the rule that an employer must not do anything that might induce a worker to opt out of auto-enrollment, fail to opt in, or cease active membership of a qualifying scheme. Breach of this rule may lead to a fine being imposed by the Regulator and criminal conviction for the senior officers of a company that are personally implicated in that breach. However, the Regulator has introduced a test whereby only acts that have as their "sole or main purpose" the inducement of opting-out should be proscribed.

It is recognized that there are a few areas where the application of the sole or main purpose test is not clear-cut. One instance is flexible benefits packages (arrangements which allow employees to select the benefits packages which suit them from a range offered by the employer) which include options to opt-out of auto-enrollment, particularly where there is a link to receiving benefits for doing so. Employers should carefully review the structure of flexible benefits (e.g. extra cash) packages offered to ascertain the risk that they may be deemed to induce opting-out.

Another area of uncertainty is whether employers may advise employees who have large pension pots, and stand to lose certain tax protections from the "lifetime allowance tax charge" that we have in the UK if they remain auto-enrolled into a scheme, that it is in their interest to opt out. Although appropriately worded cautions should be capable of addressing this, the UK government is likely to use a new power that will be available under the Pensions Bill currently going through Parliament (expected to be enacted early in 2014) to exempt employers from the duty to enroll workers who have such protection.

Simplification

In March 2013 the UK government launched a consultation proposing ways to simplify the auto-enrollment process ahead of the 2014 crunch. Most of those proposals were passed into law in October 2013, with some coming into force at that time and the rest on 1 April 2014. These reforms will certainly reduce some of the teething problems faced by employers who have already gone through the auto-enrollment process.

The crucial change was to introduce new definitions of "pay reference periods" as an alternative to existing definitions, which employers may continue to use if they wish. Pay reference periods are the periods over which employers must measure a worker's earnings to determine whether they exceed the earnings trigger at which that worker must be auto-enrolled. The old definition corresponded with the period by reference to which a worker is paid, and did not align with the tax periods which are built into payroll software. The consequence was that the measurement of earnings could not be easily reconciled with payroll, leading to administrative difficulties and missed deadlines. To resolve this issue the new pay reference period definition is aligned with tax periods, meaning that employers can integrate auto-enrollment with payroll.

Other easements introduced at the same time include:

- the "joining window" (the period in which a worker who must be enrolled must become an active member of a qualifying scheme) will be extended from one month to six weeks, to give employers sufficient time to assess workers with widely fluctuating earnings before enrollment. There will also be an extension to six weeks for the period for registering details with the Regulator and/or issuing a notice that auto-enrollment is being postponed for up to three months;
- an optional extension to the contribution payment deadline to the 19th day of the fourth month (or the 22nd day if the payment is transferred electronically) after the worker's automatic enrollment date, which will allow companies to hold contributions until the period during which the

worker may opt out and receive a refund of his deductions from pay has passed;

- more flexibility in the prescribed contents of the opt-out form that must be provided to automatically enrolled workers (usually by the pension scheme).

Cracking down on charges

The UK government has resolved to ensure that pension schemes used for auto-enrollment purposes ("qualifying schemes") will offer workers value for money. On 14 September 2013 a ban came into force to prevent employers passing consultancy charges from third parties, such as financial advisers brought in to talk to the workforce about the impact of auto-enrollment, onto the members of qualifying schemes. The ban does not currently cover agreements with third parties entered into before 10 May 2013 when the ban was announced.

Subsequently in October 2013, the UK government published an all encompassing consultation which, as well as proposing the extension of the consultancy charges cap to all auto-enrollment schemes, proposed that:

- there would be a cap on investment charges for all members (active and deferred) in the default fund of a qualifying DC scheme (this may be one of three options, the lowest of which is 0.75 percent, and the highest 1 percent, of funds under management);
- there would be a ban on differential charges (such as active member discounts) between active and deferred members of qualifying DC schemes; and
- there would be further requirements relating to disclosure of charges.

The consultation envisages that a charges cap will be introduced for all employers implementing auto-

enrollment from April 1, 2014, and then be extended to all employers by April 2015. Because the market rate for DC charges in the UK is typically 0.5 percent of funds under management, it is notable that the cap largely targets legacy schemes being used for auto-enrollment which may have higher charges built in.

As a result of these actions, employers may need to review the charges built into their schemes, and ensure that if used for auto-enrollment they comply with whatever cap emerges from the consultation.

Conclusion

Although the UK's pensions auto-enrollment reform has been seen as a success so far, whether it continues to be so depends largely on the coming year and the degree to which small- and medium- sized employers, including international employers who have a presence in the UK, can understand and manage the duties placed upon them. This partly means that employers need to give adequate time and resources in advance to ensure that

implementation runs smoothly, is communicated effectively to the workforce, and problem areas are addressed in good time. It is also to be hoped that the UK government and the Regulator continue to constructively engage with ways to lighten administrative burdens.

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United States



Top Developments that will Impact Your US Operations in 2014

The Affordable Health Care Act Overhauls the US Healthcare System

The rollout of the Patient Protection and Affordable Care Act (ACA) dominated the news in 2013. ACA requires large employers in the United States to provide specific health coverage to full-time

employees or pay a penalty. While the U.S. Department of the Treasury delayed ACA's employer pay-or-play mandate and reporting requirements until 2015, other provisions became effective as scheduled on January 1, 2014, including the individual mandate that requires US residents

to obtain health insurance coverage if they are not already covered by an employer plan or a government sponsored program. Among other changes for 2014, employers, to the extent they have not previously done so, must establish a maximum waiting period of 90 days before

employees are eligible to participate in the employer's group health plan, eliminate pre-existing condition exclusions, remove or modify annual or lifetime limits on essential health benefits, limit out-of-pocket maximums, and ensure that the plan offers coverage for adult children up to age 26. Employers should review their sponsored plans to ensure ACA-compliance.

The U.S. Departments of Labor, Health and Human Services and Treasury provided additional guidance related to ACA in 2013. The U.S. Department of the Treasury issued proposed regulations related to determining when employees are treated as full-time employees for purposes of calculating the total number of employees to determine if an employer is a large employer covered by ACA and to determine if at least 95 percent of the full-time equivalent employee population is covered by the large employer's group health plan. The federal agencies also released joint final regulations implementing expanded wellness rules under ACA. Employers should continue to track guidance related to the law in 2014. Final regulations on the play-or-pay rules may differ significantly from the proposed rules and impact the employer's decision-making calculus.

Federal Agency Regulations and Enforcement Initiatives Expand Worker Protections

While the US Congress remains gridlocked, with its 2013 session one of the most unproductive in recent times, federal agencies stayed busy in 2013. Various agencies, including the Department of Labor (DOL), Equal Employment Opportunity Commission (EEOC), Occupational Safety and Health Administration (OSHA), and Office of Federal Contract Compliance Programs

(OFCCP), issued new regulations, rules and guidance, significantly altering the compliance landscape for employers operating in the US. Employers also continued to witness aggressive enforcement initiatives by federal agencies. Based on agency pronouncements and increased budget proposals, US employers can expect more of the same in 2014.

DOL Targets Misclassification and Expands Family Care Leave Coverage

The DOL remained focused on combatting contractor misclassification and other wage and hour violations. In fiscal year 2013, the DOL's Wage and Hour Division recovered nearly a quarter of a billion dollars in back wages for more than 250,000 workers. The agency also continued to enter into memoranda of understanding with state agencies to allow for increased cooperation, enhancing the state and federal DOL's efforts to crack down on contractor misclassification.

Misclassification audits will likely stay front and center in 2014. The DOL recently submitted its proposed Worker Classification Survey to the Office of Management and Budget (OMB) for review and approval. According to the DOL, the survey is intended to collect information to better understand the scope of worker misclassification in the US. This survey likely is the first step toward a renewed "Right to Know" rule that could require employers to inform workers of their employment classification status and whether they are entitled to the protections of the Fair Labor Standards Act (FLSA). With increased enforcement and potential new rules on the horizon, employers should review all independent contractor classifications to minimize employment, benefit, and tax liabilities.

Following the Supreme Court's historic decision in *United States v. Windsor* providing protections to same-sex spouses under the US Constitution, the DOL also issued guidance clarifying that spousal care leave under the Family and Medical Leave Act (FMLA) must now be made available for same-sex couples. Because the FMLA defines a "spouse" according to the law of the state where the employee resides, same-sex couples now are protected in those states that recognize same-sex marriages. Employers should update their FMLA policies and procedures accordingly, and review employment and benefit coverage for lesbian, gay, bisexual, and transgender individuals.

EEOC Expands Worker Protections and Uses Aggressive Enforcement Strategies

Consistent with its Strategic Plan for 2012-2016, the EEOC maintained its focus on targeting discriminatory hiring practices, protecting migrant and vulnerable workers, preserving access to the legal system, enforcing equal pay laws, and preventing harassment. The EEOC obtained a record amount in monetary relief – \$372.1 million – for victims of workplace discrimination. It also utilized aggressive enforcement tools, including directed investigations under the Equal Pay Act, Commissioners' charges, and systemic lawsuits. Even charges arising out of individual allegations of discrimination or harassment can trigger class-wide workforce investigations.

The EEOC also continued to push for more expansive interpretations and protections of individuals under federal anti-discrimination laws. For example, in May 2013, the EEOC issued guidance addressing how the Americans with Disabilities Act (ADA) applies to applicants and

employees with cancer, diabetes, epilepsy, and intellectual disabilities. Employers should review their recruitment, screening and hiring policies and processes to ensure they do not exclude or unduly restrict individuals with these types of disabilities. Employers also should review their ADA policies related to reasonable accommodation (including pregnancy-related limitations), qualification standards, job descriptions, and leave policies.

Federal Contractors Face Expanded Obligations

The OFCCP significantly expanded obligations for federal contractors and subcontractors in 2013. In February, the OFCCP issued new investigation standards and procedures and a new internal directive for reviewing compensation systems for federal contractors. The directive provides for broad investigation of potential pay disparities using a wide range of investigative and analytical tools. Consistent with current regulations, federal contractors should conduct an annual, privileged audit of their compensation systems to determine whether there are gender, race, or ethnicity-based disparities. In addition, contractors should ensure that policies affecting the compensation of employees (i.e., initial pay, increases, promotions, assignments, overtime) reflect current market and diversity trends and are consistently implemented and that pay decisions are well-documented.

In August 2013, the OFCCP issued two final rules updating requirements under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 and Section 503 of the Rehabilitation Act of 1973. The rules, which largely take effect on March 24, 2014, require certain federal contractors and subcontractors

to implement record-keeping and job posting requirements and conduct a quantitative analysis of the number of applicants and hires who are veterans or individuals with disabilities, and impose controversial new hiring benchmarks and utilization goals. Contractors should consult with counsel to establish an action plan and timeline for compliance.

The OFCCP also issued a directive on the use of criminal background checks adopting the EEOC's 2012 guidance and recommending contractors follow the EEOC's "best practices" to avoid liability for discrimination. Accordingly, contractors should examine their criminal background check practices to ensure they are satisfying EEOC and OFCCP directives.

On the legislative front, the 2013 National Defense Authorization Act (NDAA) extended whistleblower protections to employees of federal government contractors and subcontractors. The NDAA forbids retaliation against an employee of a contractor who raises information that is evidence of gross mismanagement of a federal contract, a gross waste of federal funds, or a violation of a law, rule, or regulation related to a federal contract. Additionally, the NDAA expands what constitutes an act of whistleblowing by including disclosure to internal sources as well as outside sources. The expansion of whistleblower protections by the NDAA highlights the need for contractors and subcontractors to review their compliance programs to ensure adequate reporting channels are in place. The NDAA made these changes permanently for employees of DOD and NASA contractors and authorized a four-year "pilot program" that offers

the same protections to employees of contractors working with other agencies.

Federal contractors and subcontractors can expect additional compliance challenges in 2014. In September 2013, the Federal Acquisition Regulatory Council published a proposed rule that would impose requirements on contractors related to combating human trafficking. In early 2014, the OFCCP plans to publish a proposed rule for a new compensation data collection tool which would require federal contractors to provide the total compensation paid to men and women by race and ethnicity in each of the EEO-1 job categories and subcategories. The OFCCP also is considering revisions to its 30-year-old gender discrimination guidelines. And the DOL's Veterans Employment and Training Service plans to propose a rule to require federal contractors to report the number of their employees and new hires who are veterans.

Late in 2013, a report by Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Tom Harkin recommended more disclosure of violations of wage and hour, health and safety and other labor and employment laws and changes to make compliance with labor laws a meaningful part of federal contracting decisions. The committee's investigation into the federal contracting process revealed widespread labor law violations among major government contractors. Compliance with the changing landscape will be critical, particularly if so-called "blacklisting" rules initially proposed by the Clinton administration are re-introduced to address these perceived widespread violations by federal contractors and subcontractors.

Employers Prepare for Mandatory Injury and Illness Prevention Programs

OSHA continued to prioritize regulations for mandatory injury and illness prevention programs. The agency is developing a rule that would require employers to develop and implement an injury and illness prevention program. Elements currently include working with employees to develop the program, identifying and assessing hazards, creating a plan to control hazards, training employees on how to report and recognize hazards, and conducting periodic reviews and necessary modifications to improve the program and correct deficiencies. Companies should continue to monitor the agency's efforts and understand the requirements of an injury and illness prevention program – which many US states already require – before OSHA finalizes a federal standard.

OSHA also issued a new proposed rule in November 2013 which would require employers to submit injury and illness reports electronically. Under the proposed rule, OSHA would make the company-specific injury and illness information available on the Internet in a searchable database. According to OSHA, the proposed online posting will encourage employers to improve and/or maintain workplace safety/health to support their reputations as good employers and corporate citizens.

Significantly, the proposed electronic reporting and online posting requirements could lead to increased corporate campaigns by unions and work centers. In this regard, a recent OSHA interpretation letter allows employees at worksites without collective bargaining agreements to designate a person affiliated with a union or a community organization to act as a “personal representative”

and file complaints, request workplace inspections, act as a “walk around” representative during agency inspections, and participate in informal conferences and contest employer-filed proceedings. With the electronic reporting rules looming, it is more important than ever that employers stay proactive and develop injury and illness prevention programs so that they can minimize and prevent any unwanted corporate campaigns.

Immigration Noncompliance Poses Significant Risks

Congress failed to enact immigration reform legislation in 2013, and the prospect for an overhaul of the system in 2014 is dim. Employers could see “step by step” changes to US immigration laws as both parties head into an election year. Such changes could include separate bills providing for a pathway for legalization for agricultural workers and young immigrants who came to the country illegally as children, and increased visas for high-tech workers.

In the meantime, the U.S. Immigration and Customs Enforcement is continuing its audits of employers to detect those who knowingly hire workers that are not authorized to work in the US. Form I-9 and E-Verify compliance is critical to minimize legal risks, including substantial fines. In October of 2013, the U.S. Department of Justice reached a \$34 million settlement with Infosys as a result of an investigation into claims that Infosys violated U.S. immigration law by inappropriately using the B-1 visa status to bring foreign employees to perform productive work in the United States. Employers should ensure that their business travellers are obtaining the appropriate visa status to perform the desired activities in the United States.

NLRB Targets Non-Unionized Employers and Expands Worker Rights

The National Labor Relations Board (NLRB) continued its pro-labor agenda in 2013, issuing decisions generally viewed as highly favorable to organized labor on a wide variety of topics, including confidentiality policies, workplace access rules, social media, and bargaining units. For a review of the NLRB's most significant decisions of 2013, see our [2013 Labor Year in Review](#).

At the same time, the NLRB remained mired in constitutional challenges to its authority. In January 2013, in *Noel Canning v. NLRB*, the D.C. Circuit Court of Appeals invalidated President Obama's recess appointments of three members to the NLRB a year earlier. The court held that the Constitution only authorizes presidential appointments during intersession recesses, and that the president can only exercise his recess-appointment power to fill vacancies that arise during a recess. The Fourth and Third Circuits similarly held that the President's appointments did not comport with the Constitution's Recess Appointments Clause. On January 13, 2014, the Supreme Court heard oral argument in *Noel Canning*. If the decision stands, it could undo a year of NLRB decisions, as well as earlier decisions made by other recess appointees.

While the NLRB's agenda was frustrated to some degree by the Courts of Appeals in 2013, the NLRB is now positioned to pursue an aggressive rule-making and case agenda in 2014. The NLRB now has a fully confirmed five-member Board for the first time in a decade and a strong labor advocate as the General Counsel. Going forward, employers can expect new compliance challenges and heightened enforcement as the NLRB continues

to target non-unionized employer policies. Employers who have not updated their employee handbooks in recent years should do so now. It is clear from the NLRB's decisions, as well as statements by NLRB members about the Board's agenda, that the NLRB will continue to aggressively attack what it perceives as overly broad employer handbook policies.

In addition, employers can expect the NLRB to take up so-called "quickie" election rules. These rules, coupled with recent NLRB decisions on bargaining units, have the potential to significantly alter the organizing landscape. Accordingly, employers should prepare for the possibility of quicker elections and develop an effective communications plan to respond to union organizing in advance. And while the NLRB recently announced that it will not seek Supreme Court review of two appellate court decisions striking down its rule requiring businesses to post a notice informing workers of their rights under the NLRA, the NLRB no doubt will continue with its aggressive efforts to inform workers and labor organizations of their rights. For now, the battleground has shifted to the DOL. On December 18, 2013, the National Association of Manufacturers filed a federal lawsuit against the DOL challenging its rule requiring federal government contractors and subcontractors to post a notice informing employees of their labor rights. Employers should continue to monitor developments in this area.

In early 2014, the Office of Labor-Management Standards (OLMS) is expected to issue its final "persuader" rule expanding the reporting requirements for employers who use outside consultants and counsel to develop certain communications to their employees. OLMS also plans to propose a rule requiring labor

relations consultants to provide greater detail on the revenue they receive from employers. Employers should assess their labor relations policies and practices and consider whether to conduct additional training or planning related to union organizing activity before the DOL publishes its final rule.

For more information regarding federal developments, see our [2013 US Employer Update](#).

US Supreme Court Decisions Approve Employer Strategies to Minimize Employment Litigation

Over the last few years, the US Supreme Court has issued a series of landmark decisions addressing class action litigation, with many commentators predicting the demise of wage and hour class and collective actions in the US as a result. While class action litigation remains a significant threat, the Court's 2013 decisions provide employers with more options to avoid class-wide litigation. The Supreme Court's decisions also affirmed other strategies to reduce the risk horizon for employment litigation and to minimize litigation in far-flung (and frequently plaintiff-friendly) jurisdictions. For more information on how courts are applying recent Supreme Court cases to wage and hour class actions, see our special edition [Wage and Hour Quarterly: Recent US Supreme Court Decisions Mark a Sea Change for Wage and Hour Class Actions](#).

Class Action Waivers in Arbitration Agreements

In June 2013, in *American Express Company v. Italian Colors Restaurant*, the U.S. Supreme Court reaffirmed its pro-arbitration stance in a decision holding that a waiver of the right to proceed as a class is enforceable against federal statutory claims. A review of district

court decisions highlights the new reality—arbitration agreements with employees that include class action waivers are a viable option for employers seeking to avoid class action threats. Federal appellate and district courts uniformly rejected the NLRB agency decision in *D.R. Horton* holding class action waivers in arbitration agreements violated the NLRA. Employers now must decide whether arbitration is a preferred dispute resolution method based on their culture and experience, and how to structure arbitration agreements to achieve the maximum benefits for their workforce. Those companies already using arbitration agreements should review those agreements to see if they address class-wide arbitration or waive such rights. For more information on the use of class action waivers in ERISA plans, click [here](#).

Heightened Class Certification Standards

The litigation landscape has improved in the wake of the Supreme Court's decisions in *Dukes v. Wal-Mart* and *Comcast v. Behrend*. In its 2011 historic decision in *Dukes*, the Court unanimously held that the lack of an allegedly discriminatory company-wide pay or promotion policy, and the necessity of individualized monetary damages, made class certification inappropriate. Similarly, in March 2013 in *Comcast*, the Court reversed class certification in a consumer anti-trust case where "[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class." The Court noted that damages must be "capable of measurement on a classwide basis" for class issues to predominate in order to make class treatment appropriate under Federal Rule of Civil Procedure 23(b)(3). Employers facing class allegations should consider whether to attack the pleadings early if there is no

alleged unlawful company-wide policy or where individual damages will predominate.

Mooting Strategy

In April 2013, in *Genesis Healthcare Corp. v. Symczyk*, the Supreme Court considered whether an FLSA collective action may proceed when the lone plaintiff's claim is mooted by a full offer by the employer to pay all the damages that the plaintiff is seeking individually. In a narrowly tailored decision, the Court held that it could not. Significantly, the Court's decision left the divided judicial landscape intact, with mooted an accepted strategy to defeat wage and hour claims in some, but not all, circuits. Employers facing class or collective wage and hour litigation should consider how the appellate and district courts in the relevant jurisdiction are applying *Genesis* and assess whether mooted the claim is an effective early strategy.

Contractual Statutes of Limitation

In December 2013, in *Heimeshoff v. Hartford Life & Accident Insurance Co.*, the Supreme Court held that the time period stated in an ERISA plan for beneficiaries or employees to contest benefit decisions must be enforced, unless the time period specified is "unreasonably short or [where] a controlling statute prevents the limitations provision from taking effect." Accordingly, ERISA plan sponsors should consider adopting plan-based statutes of limitations. See our [Client Alert](#) for more information.

A number of courts have applied a similar rule to non-ERISA governed employment relationships and held that limitations periods for certain employment claims are

enforceable if the limitations period is reasonable and the applicable statute does not prohibit the contractual limitation. Accordingly, an employer can consider adopting a contractual statute of limitations in its employment contracts, application and/or handbook to reduce its risk horizon.

Forum Selection Clauses

In December 2013, in *Atlantic Marine*, the Supreme Court strengthened the enforceability of contractual forum selection clauses. According to the Court, district courts must grant a motion to transfer when the contractual forum is another federal court, unless "extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer." The Court's decision makes it clear that the plaintiff's choice of forum and private interests are irrelevant. This decision is a welcome change for employers, who are often faced with claims in far-flung states where an employee chooses to move and later bring a claim. Employers should consider the use of forum selection clauses in employment agreements, as well as ERISA and other benefit and compensation plans, to strength the predictability of the jurisdictional law that will apply. For more information, see our article, "[Employer Takeaways From *Atlantic Marine*](#)."

Increased State Laws and Regulations Complicates the Compliance Landscape

At the state and local level, new laws and regulations expanded worker protections in 2013. Employers must contend with new laws increasing the minimum wage, expanding family leave benefits, preventing employers from asking for employees' or

candidates' social-media passwords, and restricting criminal and credit background checks. For example, employers in San Francisco must consider employee requests for "flexible work arrangements" due to caregiver requirements. Effective July 1, 2014, California law will prohibit employers from asking applicants about expunged, sealed or dismissed criminal records. Various states also expanded discrimination laws to cover immigrant workers, victims of domestic violence or sexual assault, and veterans or servicepersons.

On the wage and hour front, minimum wage increases take effect in various states and cities in 2014. And employers continue to navigate new state legislation imposing wage and hour notice and recordkeeping requirements and creating significant civil penalties for employee misclassification.

US employers should ensure their policies and practices are updated to comply with new laws and regulations at both the federal and state level to minimize litigation and compliance risks.

For more information on state law developments, see our [2013 California Employer Update](#).

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