Global Employment Lawyer

Volume 2, Issue 2 - Fall 2016

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What Happens If You Really "Break A Leg!?"

According to the *Cambridge International Dictionary of Idioms*, "Break a leg!" is something you say to wish someone good luck, especially before they perform in the theatre. Although there are many theories, the derivation of this term is unclear. The expression reflects a theatrical superstition that wishing a person "good luck" is actually considered bad luck. But is it really bad luck if you "break a leg?" Recently, I broke a bone in my right foot while playing basketball (not work-related) and was unable to walk or drive a car for about seven weeks. Even though I "broke a foot," and was definitely upset about the pain and physical limitations, I considered myself lucky that I had the support of family members, lived in a place (a suburb of New York City) that enabled me to use car services and/or mass transportation to get around, and had a job that permitted me to continue working on an extremely flexible schedule--both in terms of when and where the work could be performed. But what happens to the majority of people throughout the world who "break a leg" (or foot) of the job that makes it impossible for them to continue working for a period of weeks or months? Will their medical bills be paid for? If so, who will "foot" the bill? Will they have a right to take a medical leave from their job while they recuperate? If so, will they not draw a salary during their medical leave? Will their employment be protected so that they can return to their position when they are physically able. And will they be required to present their employer with a medical certification or other clearance before they will be permitted to return to work? As the chart below indicates, while workers' experiences certainly differ from country to country, the differences may not be as dramatic as one might think.

In this issue...

	Medical Bills	Medical Leave	Job Protection	Medical certification to return to work
Austrailia	Private matter and 55% of people have medical insurance	10 days paid leave per year which accrues year to year; otherwise upaid unless private salary protection insurance	Yes, for 3 months after paid leave is exhausted	Medical clearance usually required
Canada	Most are paid by the public health care system	Most companies have standard insurance plan which pays either 100% or 66.67%. If no insurance can apply for up to 15 weeks of sickness benefits through government plan	Yes	Employer can require medical certification
China (Shanghai)	Paid by employer health insurance required by law	Paid at minimum 42% to maximum 70% of salary based on years of service	Yes, for minimum 3 months and maximum 24 months based on years	Employer can ask for medical records
Egypt	Yes, either through the General Authority for Health Insurance or Employer Insurance	Paid 75% salary for first 90 days then 85% for up to 180 days (but not less than minimum wage)	Yes, until sick and annual leave periods are exhausted	Employer can require medical certification
France	Paid by social security and Employer health insurance	Paid by social security and potentially with an obligation for the employer to maintain the salary	Yes	May be required to pass medical exam
Germany	Paid 100% by statutory social security system	First 6 weeks paid at 100% salary, then up to an additional 52 weeks at 66.67% Salary	Yes	No
Italy	Paid 100% either by employer insurance or by health public assistance system	Salary paid in full or partially (depending on National Collective Bargaining Agrement (NCBA)) by employer and then reimbursed by social security usually for upto 6 months (depending on NCBA)	Yes, for at least 6 months, depending on NCBA	Medical clearance required if more than 60 days

	Medical Bills	Medical Leave	Job Protection	Medical certification to return to work
Mexico	Paid by social security institute	Social security institute determines duration of leave and pays 100% salary	Yes	No
Poland	Paid by statutory sickness social insurance	Paid at 80% salary	Yes	Medical clearance required if more than 30 days
South Africa	If the employee has medical aid insurance, the insurance company will pay	Yes, up to 6 weeks per 36 month cycle	Yes	Generally, No. However, certain job categories may require
United Kingdom	Mainly paid by public healthcare system or, if private healthcare, by the individual or private medical insurance company	Up to 28 weeks of statutory sick pay available at prescribed rate. Employers often have enhanced policies for certain period of sickness absence.	Yes	Employer can require medical certification
United States	Most employees have group medical Insurance plans	Unpaid leave for up to 12 weeks; most employes have short term disability insurance to pay percentage of salary	Yes, for 12 weeks for most positions	Employer can require medical certification

In this month's edition, we feature articles from eight different countries—Australia, Canada, China, France, Germany, Israel, UK and US. Please let us know what you think of the articles and if you have suggestions for how we can improve our content. As always, we thank you for your readership and look forward to your comments and suggestions.

Brian Cousin, Editor in Chief

Australia

Enough is enough- stopping bullying in the workplace in Australia

By Claire Don, Solicitor, Sydney and Stephanie Nicol, Partner, Sydney

Bullying at work has long been recognized as a problem. The potential negative consequences are endless, including risks to health and safety, adverse impacts on culture and morale, increased absenteeism and turnover, damage to business reputation, increased costs, and increased exposure to legal claims.

As a result, it was not a surprise when, in January 2014, the Australian Government took steps toward eradicating the problem by introducing into one of its principal pieces of employment legislation, the Fair Work Act 2009 (Cth) (FW Act), a stop-bullying jurisdiction. That jurisdiction enables a "worker" who reasonably believes that he or she has been "bullied at work" to apply to the Fair Work Commission (FWC) for a stop-bullying order.

Importantly, the concept of a "worker" is widely defined and has the potential to include not only employees, but also contractors, subcontractors, labor hire workers, work experience students, trainees, apprentices and some volunteers. This means that many persons performing work in or for a business may be eligible to seek a stop-bullying order if they are "bullied at work."

What orders can the FWC make?

The FWC can only make an order to stop bullying if it is satisfied that the worker has been "bullied at work" and there is a risk that the bullying will continue. The orders it can make are far-reaching; the FWC may do anything it considers appropriate to prevent the worker from being bullied at work short of requiring the payment of money.

When determining an appropriate order, the FWC must take into account the findings of any investigation that may have been conducted into the alleged bullying, including whether there were procedures available to the bullied worker to resolve his or her grievance and, if such procedures were followed, the outcome of that process. It may also take into account any other facts and circumstances it considers to be relevant.

When is a worker "bullied at work"?

A worker is "bullied at work" if the following three elements are present:

- The worker is at work in a "constitutionally-covered business," defined as a constitutional corporation (such as a trading, financial or foreign corporation), the Commonwealth or a Commonwealth authority, a body corporate incorporated in a Territory, and a business or undertaking principally conducted in a Territory or Commonwealth place;
- An individual or a group of individuals repeatedly behaves unreasonably towards the worker or a group of workers to which he or she belongs; and
- The unreasonable behavior creates a risk to the worker's health and safety.

It is important to note here that being subjected to a reasonable management action carried out in a reasonable manner does not constitute being bullied at work.

Lessons from decisions

While the stop-bullying jurisdiction has not had the traction that the Australian Government had originally anticipated, the decisions that have been handed down by the FWC have shed some much needed light on the scope of the jurisdiction.

We discuss below some of the issues that have been clarified by these decisions.

- The applicant must be a "worker."

  While the statutory definition of a "worker" is broad, the FWC has held that an individual will only be a worker for the purposes of the stop-bullying jurisdiction if that individual carries out work and does so for a person conducting a business or undertaking. This means that there must be a connection between the work being carried out by the individual and the undertaking of the employer/principal. For example, the FWC has indicated that work being carried out by a student for a teacher, domestic work by a family member or any relationship outside the commonly understood sense of work for hire (paid or unpaid) is unlikely to fall within the scope of the stop-bullying jurisdiction.

- There must be a temporal connection between the bullying conduct and the worker being at work.

  Before a stop-bullying order can be made, there must be a temporal connection between the bullying conduct and the worker being "at work."

  While each matter will turn on its facts, bullying conduct will likely be regarded as being "at work" if it occurs while the worker is performing work (regardless of the worker's location or the time of day) or is engaged in some other activity that is authorized or permitted by the employer (or in the case of a contractor, by the principal), such as being on a meal break or accessing social media while performing work.

- The concept of "bullying" can be wide.

  The FWC has observed that bullying can take many forms, including humiliating, intimidating or threatening behavior. In one decision, it found that the manager of a real estate business had engaged in repeated unreasonable bullying behavior toward two employees by swearing at them, undermining their work, belittling them, physically intimidating them, slamming objects on their desks, using threats of violence and inciting them to victimize other staff members.

  Other cases have held that spreading misinformation or ill will against a worker could constitute bullying and as can criticizing or gossiping about a worker, or swearing at a worker in circumstances where the language "departs from normal social interaction in the workplace."

  Importantly, the worker's perception of the alleged bullying conduct will not necessarily be determinative. The FWC will look at the alleged conduct objectively and decide whether it constitutes bullying. For example, in one case, a worker honestly believed that he was being bullied by his senior manager's allegedly unrestrained and "malevolently motivated" micromanagement. However, the FWC determined that the manager's behavior constituted reasonable performance management—an "ordinary exercise of management prerogative"—and, hence, was not bullying.

- There must be a continued risk of bullying.

  The FWC has had cause to consider stop-bullying applications where the worker has ceased to be employed because, for example, the worker was terminated or his or her contract term expired. In these cases, the FWC determined that it could not be satisfied that there was a risk of the bullying continuing and so the applications were dismissed.

  This should not be taken to mean that termination of a worker is an appropriate response to a stop-bullying application. Such conduct would likely result in an employer or principal facing a different type of complaint, namely a general protections claim under the FW Act, on the grounds that it took an adverse action to prevent the worker from exercising his or her workplace right to bring a stop-bullying claim. We therefore recommend consulting with counsel before terminating a worker who has brought a stop-bullying claim.

- Person doing the bullying does not have to be a co-worker.

  To be bullied at work, a worker must be subjected to repeated unreasonable behavior by an individual or group of individuals. Importantly, the bullying individual or individuals do not have to be the victim's co-worker(s). For example, the FWC recently refused to decline on jurisdictional grounds an application for a stop-bullying order made by a director or shareholder of a company with whom the company had contracted to provide caretaking and letting services to a Queensland resort, where that application was made against residents or owners of properties that were part of that resort. Further, the FWC had previously observed, in another matter, that "[t] he individuals engaging in the unreasonable behaviour need not be workers, for example, they could be customers of the business or undertaking in which the applicant works."

- Risk to health and safety.

  There must be a causal link between the behaviour and the risk to the worker's health and safety. Proof of actual harm to health and safety is not necessary. What is key is that the worker be able to demonstrate that the bullying behaviour creates a risk to his or her health and safety. While the bullying behavior must be a substantial cause of the risk, it need not be the only cause.

- Leeway on orders.

  The FWC has broad powers to make any order that it considers appropriate to prevent a worker from being bullied (other than an order for the payment of money). Orders must be directed at preventing the worker from being bullied, and so far have largely been aimed at:

  - Managing interactions between a worker and certain individuals (such as, in one instance, requiring an individual to finish exercise at the workplace by 8:00 a.m. and preventing another worker from arriving at work before 8:15 a.m.); and

  - Requiring employers to implement appropriate-workplace-behavior policies. (In one matter, an employer was able to successfully avoid having a stop-bullying order made against it—after a worker was found to have been bullied at work—because of the positive measures it had taken to address the bullying culture in its workplace).

Recommended steps

Given the adverse consequences of workplace bullying and the FWC's readiness to take into account positive steps taken by employers to actively address workplace bullying, there is significant incentive for employers to take a proactive approach to eradicate or minimize bullying. We therefore recommend the following:

1. **Ensure that policies requiring appropriate workplace behavior are in place.**

   Make sure your workplace has up-to-date written policies on appropriate workplace behavior, including bullying. These written policies should explain what bullying is and is not, and also lay out the business's expectations of its workers. The policies should also include a complaint process for bringing to the employer's attention any facts or allegations of inappropriate behavior in the workplace.

2. **Educate staff about appropriate workplace behavior.**

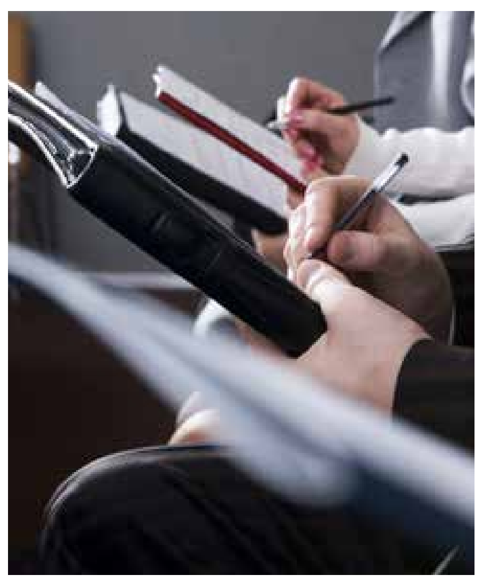
   Have simple and on-point training explaining the business's expectations regarding appropriate workplace behavior and the procedures for addressing inappropriate behavior. In addition, make sure that managers are adequately trained on policies and procedures with respect to underperforming workers, workplace investigations and disciplinary actions. Schedule periodic refresher training for employees and managers.

3. **Act quickly in the event of bullying allegations.**

   Employers should take immediate steps to address a bullying complaint (following the action plan in its appropriate-workplace-behavior policy) and prevent any future occurrence of the alleged inappropriate behavior.

4. **Monitor compliance.**

   Periodically check compliance with your appropriate-workplace-behavior policy to ensure that they are being followed and are effective.



Canada

Demystifying Canadian Employment and Labor Law

By Anneli LeGault (Partner, Toronto)

Introduction

Because Canada is a confederation of provinces and territories, each with the power to pass employment and labor laws, determining the applicable law in a particular situation can be perplexing to a newcomer to the nation's employment scene. In this article, we hope to clear up some of the confusion.

Legislation

Under the Constitution of Canada, employment and labor law are local, provincial matters. As a result, all ten provinces, as well as the nation's three territories, have passed legislation that applies locally addressing basic employment standards, occupational health and safety, discrimination and labor relations. Core employment standards include minimum wage, overtime pay, termination pay, mandatory leaves of absence, vacation and holiday entitlements. Consequently, a company with employees located in three provinces, for example, must ensure that it does not pay less than the minimum wage and overtime pay applicable to the respective locations. Typically, Canadian employers harmonize most of their human resources practices across the country to comply with the highest common denominator.

The legislation is enforced in each province by the local provincial or territorial Ministry of Labour or its equivalent. Employee disputes are heard by the provincial tribunals and courts.

The federal sphere

To muddy the waters, the federal government has legislative authority over certain industries regardless of where their employees are located. These are typically national industries or ones that have been determined to be for the good of Canada. They include the airline; interprovincial trucking, interprovincial railways and shipping; telecommunications; radio and television broadcasting; and banking sectors, as well as certain industries, such as grain elevators and uranium mining. For example, employees of Air Canada or Royal Bank of Canada are governed by the same federal legislation whether located in British Columbia, Alberta or Quebec.

The federal employment laws are codified in the Canada Labour Code, the Canadian Human Rights Act and the Employment Equity Act. About 10 percent of the total Canadian work force falls within the federal sphere. A common mistake made by foreign-based employers (non-federally regulated) is to look to the Canada Labour Code on matters where the provincial law is silent. However, this is not the applicable law.

Common law and civil law

In addition to statutory law, the common law jurisdictions (which comprise all of Canada with the exception of the province of Quebec) have followed the British tradition of judge-made common law that evolves over the years. The most significant common law developments for an employer are (i) the requirement to provide "reasonable notice" of termination and (ii) the concept of "constructive dismissal." What constitutes reasonable notice of termination depends on the individual employee's age, length of service, pay, position and other factors affecting his/her re-employability, such as education. Constructive dismissal refers to the right of an employee to consider his or her employment terminated as the result of some type of unilateral employer action to which the employee has not consented, such as a demotion, a material drop in pay or benefits, or even bullying and harassment in the workplace.

Quebec is a civil law jurisdiction with labor standards and labor relations legislation similar to that of the other provinces, but also governed by the Civil Code of Quebec. Fortunately, its employment law has evolved in a manner similar to that of the rest of Canada. However, employers must be aware that the Charter of the French Language declares French to be the language of the workplace. As a result, in this jurisdiction, employers should seek legal advice before issuing documents to its employees in English.

Federal legislation that applies countrywide

While the legislated terms and conditions of employment are local in nature, there are a few basic federal programs that apply everywhere in Canada.

The Income Tax Act applies to all employees and requires employers to deduct and remit income tax on a regular basis. The Canada Pension Plan is a social security plan that requires employers and employees to contribute from pay and provides a pension upon retirement. The Employment Insurance system is also funded through employee and employer premiums and provides benefits to employees upon lay-off, dismissal and during leaves of absence, such as maternity or parental leave, and sickness benefits in certain situations.

Health benefits

Payment for the government-run medical system is provincial. However, some provinces fund their programs through payroll taxes, while others charge premiums. The government-run medical systems typically pay for doctor's visits (not medical specialists), hospitalization, births, diagnostic tests like MRIs, CT scans and X-rays, and medically necessary surgery. Employers will generally use private insurers to purchase other group benefits such as drug plans, dental plans, vision care, long-term disability and life insurance. None of these are mandatory and they are driven by market conditions and competitive imperatives.

Benefits for time off and medical costs resulting from workplace injuries are not paid through private insurance. Instead, each province has a workers' compensation system funded by employers and administered by the local government.

Privacy and data protection

Only three provinces have passed legislation governing employee personal data protection in the private sector: Alberta, British Columbia and Quebec.

Federally regulated private sector employee data is governed by the Personal Information Protection and Electronic Documents Act (PIPEDA). PIPEDA has been declared through a Data Directive of the European Union to provide an adequate level of protection, allowing European Community Member States to transfer personal data to Canada without additional guarantees.

In all provinces, except the three listed above, non-employee personal data is governed by PIPEDA in commercial situations, such as involving client and customer data.

However, the courts have been slowly and incrementally recognizing a limited common law right to privacy. Since 2012, Ontario at least has recognized the tort of intrusion upon seclusion. Simply put, an individual may be awarded damages for an intentional intrusion upon his or her seclusion or his or her private affairs where there is no lawful justification, and the invasion of privacy would reasonably be regarded as highly offensive.

Conclusion

As you can see from the above, the basic principle of Canadian employment law is that there is no underlying countrywide law. Instead, each province and territory regulates workplaces within its borders, with the exception of a limited number of federally regulated industry sectors.

We hope this article helps multinational employers better understand the Canadian HR legal landscape.

Asia Pacific

Legal interpretation and application of year-end bonuses under Chinese law

By Genwang Zhang (Senior Partner, Shanghai)

The term "year-end bonus" generally refers to the material incentive a company gives to its employees to reward them for their good performance and contribution to its development. With continuous economic growth a goal of many companies, more and more employers are offering, and more employees are expecting, year-end bonuses. This trend raises various legal issues.

I. Legal nature of year-end bonus

A "year-end bonus" is usually the bonus paid by an employer, as specified by its rules and regulations or as otherwise agreed, to an employee at end of year or another agreed-upon date. Year-end bonuses may be paid in the form of: (1) a fixed amount, equivalent to a month's salary, or as 13th- and 14th-months salaries (widely adopted by foreign enterprises), to which all employees are entitled, as long as the employees are all awarded the bonus payment, regardless of individual performance or company profits; (2) a floating bonus, which is a performance bonus paid on the basis of annual individual performance appraisal results and company profits; or (3) a "red packet," generally determined by the boss, without a fixed rule, which might be related to the individual employee's contribution, qualifications, relation with the boss or other factors.

No matter which form is chosen, a year-end bonus is a material incentive to employees. Then what is the essential legal nature of a year-end bonus?

According to Articles 4 and 7 of the "Provisions on the Composition of Total Salary" promulgated by the National Bureau of Statistics,[1] a year-end bonus is a component of "Total Salary" and part of "labor remuneration."

Once the legal nature of the year-end bonus is clear, we have the answers to many questions. For example, disputes about year-end bonuses are typical labor remuneration disputes; therefore they fall into the scope of acceptance of labor dispute cases. Moreover, being in the category of salary, a year-end bonus should be included in the salary counting. Finally, a year-end bonus is taxable as normal wage income.

II. Agreed-upon forms of year-end bonus

Because a year-end bonus is a part of salary, the various forms it can takes are similar to those of base salary and, like base salary, should be agreed upon by both the employer and the employee at the time of hiring or during the employment.

Common forms of agreement with respect to year-end bonuses are:

1. Agreed to individually. As with an individual's base salary, a year-end bonus is agreed to between the employer and the employee and is documented in the employment contract or other agreement.

2. Stipulated by rules and regulations. During employment, the employer, to stimulate the employees' enthusiasm for work, pays a year-end bonus to certain, or even all, employees, in a form stipulated by its rules and regulations. At its core a matter of collective motivation, this form of bonus is much easier to negotiate than a program designed to account for individual differences.

1 Provisions on the Composition of Total Salary, Article 4: Total salary consists of the following six parts: (1) hourly wage; (2) piecework wage; (3) bonus; (4) allowance and subsidies; (5) overtime pay; and (6) salary paid under special circumstances. Article 7: Bonus refers to the labor remuneration paid to employees for their additional efforts and their work to increase revenue and reduce expenditure, including: (1) production bonus; (2) bonus for practicing thrift; (3) labor competition bonus; (4) incentive salary of government organizations and public institutions; and (5) other bonuses.

3. Agreed in the collective contract. Like the form governed by rules and regulations, year-end bonus provisions in the collective contract also apply to certain groups of, and even all, employees.

If a year-end bonus is agreed or stipulated to as above, and the employee meets the agreed-upon conditions, the employee will be entitled to the year-end bonus. A question arises, however, as to precisely when a year-end bonus is paid.

First, from the term "year-end," we may learn that the appraisal period is from the beginning of a year to the end of the year. For this purpose, "year-end" refers to the appraisal period instead of the time of payment of bonus.

Second, "year" does not necessarily mean calendar year and is likely to be a company's fiscal year. To avoid uncertainty, a year-end date should be expressly agreed to by the parties and that should apply for appraisal purposes.

Third, the time of payment of the year-end bonus should also be subject to the agreement between the parties.

Therefore, a year-end bonus is not necessarily required to be paid at the end of a calendar year.

III. Legal questions about year-end bonuses

1. Should a year-end bonus be included in the calculation of economic compensation?

A year-end bonus is a part of salary so it should be included in the calculation of economic compensation.[2]

2. Should the year-end bonus be included in the calculation of double pay if there is no signed written employment contract?

In accordance with the Employment Contract Law and the Regulation on the Implementation of the Employment Contract Law, an employer who fails to enter into a written employment contract with an employee more than one month and less than one year from the date of employment shall pay double salary to the employee every month. However, no national law or regulation specifies whether the year-end bonus is included in double salary under these circumstances. The courts are divided on this question and different precedents have arisen, with some employers having been ordered to pay full salary, others base salary, and still others the salary after deduction of risk and welfare allowances.

3. Is an employee who is employed for less than one year entitled to a year-end bonus?

Conditions for payment of a year-end bonus should initially be subject to the terms of the agreement between the parties. If an employee employed for less than one year is entitled to a year-end bonus by express agreement or as provided for in the employer's rules and regulations, then as long as the contract terms are reasonable, the parties will be required to perform and observe such agreement or provision in good faith.

Ideally, entitlement to a year-end bonus for employment of less than a year should be expressly agreed to. Some companies stipulate that such employee is not entitled to the current year's year-end bonus; some stipulate that such employee is entitled to the year-end bonus on a pro rata basis pegged to the date of employment; and some stipulate that such employee is entitled to the full year-end bonus.

4. Is an employee who leaves before expiration of his employment contract entitled to the year-end bonus?

Conditions for payment of the year-end bonus under these circumstances should be subject to the terms of the agreement between the parties. If it is expressly agreed to by the parties or is provided for in the employer's rules and regulations, as long as the terms are reasonable, the parties are expected to perform and observe such agreement or provision in good faith.

5. Is an employee who takes maternity, sick or other leave entitled to the year-end bonus?

It is specified by the prevailing employment laws and regulations that maternity leave shall be deemed as normal attendance. Therefore, bonuses based on the appraisal of attendance as a full attendance bonus and the year-end 13th month's salary should be fully paid.

For a performance-based year-end bonus, the company cannot assert that an employee has poor performance because he or she took maternity or sick leave. Moreover, whether an employee taking the maternity or sick leave is entitled to a performance bonus is subject to its rules or agreement and is controversial in judicial practice, particularly when it is not expressly specified by rules and regulations or agreed by the parties.

2 Employment Contract Law, Article 47, paragraph 3: Monthly salary refers to the average monthly salary of the employee in the 12 months prior to termination or end of the employment contract.

The widening net of accessorial liability in Australia

By Stephanie Nicol (Partner, Sydney, Gadens*) and Claire Don (Solicitor, Sydney, Gadens*)

The Fair Work Act 2009 (Cth) (the Act) is a principal piece of employment legislation in Australia. Among other things, it sets out minimum terms and conditions of employment (the National Employment Standards), prescribes sources of industrial regulation in the form of industrial instruments (such as modern awards and enterprise agreements), and protects employee rights (such as by providing employees with an avenue to pursue general protection and unfair dismissal claims).

If the Act is contravened, a range of negative consequences can and often do flow, including the imposition of penalties. Importantly, the Act extends liability for a contravention to persons other than the primary perpetrator where such persons are "involved" in the contravention. This is known as "accessorial liability."

A breach of the Act's accessorial liability provisions can result in a penalty of up to AU$54,000 per breach for an organization and up to AU$10,800 per breach for an individual.

What is accessorial liability?

A person is "involved" in a contravention of the Act if the person:

- Has aided, abetted, counselled or procured the contravention
- Has induced the contravention, whether by threats or promises or otherwise
- Has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention
- Has conspired with others to effect the contravention

Over the years, the courts have found that a person will be considered 'involved' based on the following:

- If they have knowledge of the essential facts constituting the contravention
- If they have been knowingly concerned in the contravention
- If they were an intentional participant in the contravention based on their actual or imputed knowledge of the essential facts constituting the contravention (even if they did not know that the matters in question constituted a "contravention").

Some recent examples

An HR manager was recently fined for her involvement as an accessory to a company's breaches of the Act's notice-of-termination provisions. In the same week, two managers and a director were found to be accessories to their company's underpayment of staff.

These two decisions highlight the courts' preparedness to hold individuals liable for their involvement in breaches relating to minimum employment entitlements. Companies and staff alike need to understand the risks to the organization and individuals being held accountable for breaches of the Act, and to strictly adhere to the provisions of the Act and/or the terms of any applicable industrial instrument.

What happened?

In the first decision, the HR manager had given an employee 28 days' notice of termination after being notified by the workers' compensation authority that the company was no longer required to provide suitable alternative duties to the employee. The HR manager reviewed the employee's contract and provided four weeks' notice as per its terms. Unfortunately, due to the employee's age and length of service, the notice period was two days short of the employee's statutory entitlement to notice under the Act.

The company was fined more than AU$20,000 for breaching the Act's notice-of- termination provisions, and the HR manager was personally fined AU$1,020 for her role in effecting the notice and termination. In setting these penalties, the court stated that the penalties should serve as a warning to employers of the need to comply with the legislation to the letter. The decision also highlights the expectations that courts have of individuals and the importance of providing HR managers with adequate training in understanding and being able to identify key issues in employee relations law.

The second decision involved two managers and a director whofailed to pay employees their correct entitlements under the applicable modern award.— In fact, the employees received less than 60 precent of their entitlements. The director, who was heavily involved in the financial aspects of the business, argued that when he purchased the business from its previous owners, he was not given sufficient information about the Australian employment law landscape. He claimed, as did the two managers, that he was simply unaware that either the modern award or Act set the relevant minimum wages and conferred other entitlements.

The court was not persuaded by the defendants' professed naivety, noting that all three had masters degrees (two in business), one had been a union member, and none of the three were particularly credible.

Finding that ignorance was not bliss but amounted to wilful blindness, the court found all three to be accessories to the company's breaches. For their roles in the contraventions, the managers were each fined AU$4,504.50 and the director was fined AU$3,861.

Widening the net

As the above cases illustrate, the accessorial liability provisions of the Act have historically been used against individuals, such as directors and managers. In recent times, however, the Fair Work Ombudsman (a regulator with responsibility for enforcing compliance with workplace laws) has shown a willingness to prosecute organizations involved in a "contract chain"—for example, where a company subcontracts work to a third-party provider.

Under this broader view of the accessorial liability provisions, an organization can be found liable for contraventions of the Act by its contractors, or its subcontractors, where it has:

- Engaged in sham contracting (the Act prohibits a person or organization from representing to a worker it engages that the relationship between them is one of principal and independent contractor when it is, in reality, one of employer and employee)
- Denied or underpaid entitlements to their employees, including wages, leave and other benefits due under industrial instruments, such as modern awards and enterprise agreements.

Lessons for employers and individuals

There are a number of steps that companies can and should take to educate their management and HR teams regarding their obligations under the Act, applicable industrial instruments (such as modern awards and enterprise agreements) and general protections (including the risks to them personally).

Given the Fair Work Ombudsman's recent prosecution of noncompliant contractor arrangements in Australia, companies should be taking steps to audit current contractors to identify any areas of risk. Where a risk is identified, companies should manage that risk by terminating, renegotiating or in-sourcing work where possible. To reduce risks arising in future contracts, companies should require, as part of their tendering process. that contractors demonstrate compliance with relevant employment legislation, and should also put appropriate audit systems in place to ensure continued compliance. Companies should educate their employees responsible for the management of contracts so that they can identify and properly address risks of accessory liability before those risks become a reality.

*The combination of Dentons and Gadens was announced in November 2015, and is expected to be effective in mid-2016.

France

The Risk's of Co-employment Liability in France

By Katell Déniel-Allioux (Partner, Paris)

Against a background of financial crisis and corporate restructurings, French workers have taken to the ramparts. Employees dismissed "for economic reasons" have, in increasing numbers, been filing complaints under the Labor Code, collective bargaining agreements and case law of the French Supreme Court aimed at extending liability for wrongful terminations to shareholders and especially investment funds, particularly in the context of collective economic dismissals. . Employees have been using two theories—co-employment and group—to go beyond the operating company and tap into the financial resources of their former employer's deep-pocketed backers.

Evolution of the French Supreme Court's position on the notion of co-employment

Co-employment has been defined as a relationship between two or more employers in which each has actual or potential legal rights and duties with respect to the same employee. Unlike a single employer-employee relationship, in which the employer bears certain responsibilities to employees, including with respect to termination of employment, in a co-employment situation, these responsibilities may be shared.

The terms of leveraged buyout (LBO) transactions usually specify that, along with the managers' takeover of the company, the investment fund or, technically speaking, its management company, may, in certain cases, direct the company's strategy (often to an extent greater than could a simple shareholder), as well as actively participate, de facto or de jure, in the company's management (through positions held by its representatives in the holding company's management bodies).

It is in this context that there has been an increase in actions by dismissed employees seeking judicial recognition of the "co-employer" status of a parent company, an ultimate controlling company or even a management company. Plaintiffs have been encouraged by court rulings finding that the question of whether a defendant is a co-employer is a factual one that looks to the nature of the relationship, not simply to a corporate organizational chart. "Confusion of interests, activity, management and operating methods" can be sufficient, the court has held. (Cass. soc. June 9, 2004, No. 01-43802; June 26, 2008 No. 07-41294). Through this type of action, employees are trying to obtain additional damages—and even reinstatement in the company recognized as co-employer.

After several decisions on the merits accepting such claims, and thus recognizing the existence of co-employment outside of a formal -subordinate relationship, the French Supreme Court, in its Molex decision (Cass. Soc. July 2, 2014, No. 12-15.208), sent the pendulum swinging in the other direction, stating that:

> "outside any situation of subordination, a company belonging to a group can only be considered as a co-employer, with respect to the personnel employed by another company, provided there is between them, beyond the necessary coordination of economic actions between companies belonging to the same group and in a state of economic domination that this affiliation can create, a confusion of interests, activities and management, demonstrating itself by interference in the latter's economic and social management."

It is interesting to note that since this fundamental ruling in which the French Supreme Court clearly attempted to put a stop to actions on the grounds of co-employment, lower court judges have resisted (see, e.g., Paris CA March 20, 2015, No. 09-09794) by continuing to recognize situations of co-employment.

Meanwhile, the French Supreme Court, for its part, is staying the course and, until now, has quashed every decision recognizing co-employment referred to it.

Accordingly, the following can be noted:

- The fact that a subsidiary is treated in practice as a simple establishment without administrative or accounting structure and without real financial and management autonomy does not establish a confusion of interests, activities and management between the two companies;
- The domination of one company over another does not mean that there is interference in the dominated company's economic and social management; thus, co-employment was not established when the dominating company "suddenly [withdrew] its clientele from the production company without any economic alternative being presented and a fortiori implemented";
- Having the same president for both companies in issue and the intervention of the parent company's general manager in the subsidiary do not constitute circumstances sufficient to establish the confusion of interests and management;
- The granting of credit by a supplier demonstrates a community of interests and activity, not economic domination;
- The fact that a subsidiary does not have autonomy in administering orders, sales, invoicing, personnel and payroll due to its integration in a global system managed by the parent company does not constitute interference by the parent company in the subsidiary's economic and social management.

Redeployment obligation in groups

Prior to any economic dismissal, an employer that is part of a "group" is required to search within that group for positions available to redeploy the employee whose dismissal is being contemplated. Failure to comply with this obligation will result in the dismissal being considered as having no real and serious cause, and the employee can then claim damages (minimum six months' salary, provided the employee has at least two years' seniority and the company employs at least 11 employees).

It is therefore particularly tempting for an employee dismissed for economic reasons by a group controlled by an investment fund (which is itself managed by a management company) to want to extend the notion of group to all the other companies in the fund's portfolio (and even to all the companies in the portfolios of other funds managed by the same management company) in order to invoke a claim of breach of the redeployment obligation.

In the absence of a legal definition of the notion of group in the French Labor Code, reference should be made to (i) the definition given by the French Supreme Court (decisions of April 5, 1995, Nos. 93-43866 and 93-42690) on the redeployment obligation, in which it said that the redeployment possibilities must be "searched for in the group among the companies whose activities, organization or place where business is carried on permit them to permute all or part of the personnel" and (ii) the various definitions given by the French Commercial Code (Articles L 233-1 and L 233-16), which notably refer to the capital links existing between the companies within a group but, also notably, to the notion of dominant influence (which is not necessarily subordinated to capital ownership). For example, although the management company is not a shareholder in the companies of the portfolio of the investment fund which it manages (only the fund is a shareholder thereof), it very often exercises a significant influence in these companies, particularly when the funds' investment is a majority investment.

It was on the basis of the notion of control as defined by the French Commercial Code (notably control by the exercise of voting rights and by dominant influence) that employees claimed recognition of a group that included their company (Sublistatic) and the management company of the shareholding fund.

In dismissing their claim, the Douai Court of Appeal (November 27, 2009, No. 08/03825) found that the management company did not hold any Sublistatic shares and was only the manager of the open-end investment fund.

This decision has been found objectionable by certain legal scholars insofar as it does not take into account the particularism of the shareholding structure of funds and, notably, the fact that an open-end investment fund, which quite often holds the majority of the capital and does not have legal personality, is represented vis-à-vis third parties by the management company that acts in its name and on its behalf and exercises its voting rights in the companies belonging to its portfolio.

However, even if a group within the meaning of the French Commercial Code is recognized as existing between an LBO company, a management company and an open-end investment fund, does this group constitute a "group" within the meaning of the redeployment obligation set forth in the French Labor Code?

The Versailles and Douai Courts of Appeal answered "no" to this question. The grounds of the Versailles Court of Appeal's decision in the SGD case (Versailles Court of Appeal, February 3, 2010, Nos. 09-09068 and 09-09154, SA SGD v/SAS Cognetas) are interesting in that the court concluded that the elements provided by the claimant did not allow it to "find a directional convergence, a continuity of interest between [the management companies and the target company] giving rise, in view of the place where business is carried on, to a possibility of permutation of all or part of the personnel."

The Grenoble Court of Appeal (Grenoble CA September 12, 2011, No. 10/00926) more recently took into account the specificity of open-end investment funds and the specific mission of a portfolio management company, recalling that "the companies managing open-end investment funds and companies in which these funds have been invested do not constitute a group in the sense where a group includes companies whose activity, organization or place where business is carried on permit the permutation of all or part of the personnel."

Therefore, the courts have confirmed that -- as between a management company and the companies in which the funds it manages have shareholdings -- there is no "group," as appreciated by the labor law, for purposes of imposing redeployment obligations.

Germany

Terminating employees due to internal investigations in Germany

By Isabelle Puhl (Associate, Berlin)

When it comes to internal investigations, multinational companies need to reconcile the sometimes conflicting legal requirements of various jurisdictions. Under German law, conflicts typically arise where a foreign law governing, for example, anti-corruption (e.g., the US Foreign Corrupt Practices Act) requires taking a particular action, such as terminating an employee who has been found guilty of compliance-related misconduct.

Multinational companies usually have a great interest in meeting the demands of relevant foreign authorities and taking action to avoid hefty fines and other sanctions. However, just because a foreign law may require an employer to take disciplinary action against an employee may not justify disciplinary action under German law. This is because of a different definition of what constitutes a material breach of duty, and because of the fairly strict procedural requirements for disciplining employees under German law. Especially where companies want to avoid long notice periods and terminate employment for cause, actions need to be planned carefully.

Severe misconduct

Under German law, a dismissal for cause is only valid if the employee has severely violated his or her working duties or if the very suspicion of severe misconduct has destroyed the relationship of trust between the company and the employee. In most cases of compliance-related discipline, it is advisable to use both the proven misconduct and the mere suspicion as the basis for termination of employment.

Where the company wants to dismiss an employee based on suspicion, it is required to duly investigate the case and allow the employee to disprove the suspicion. To do so, the employee needs to know what is at stake. It is therefore not sufficient to conduct a normal interview with the employee during the course of an investigation. Rather, the company needs to raise all of its reasons for suspicion and state explicitly that it is considering disciplinary action. However, if the company thinks that being too open about a disciplinary action or about the overall context of an investigation at an early stage may harm the success of such investigation, it may want to consider issuing the dismissal based only on proven misconduct.

Prior warning letter required? Additionally, a dismissal for cause is seen as the last resort when it comes to taking disciplinary action. Accordingly, labor courts have held that such a dismissal is only justified if it is deemed unreasonable for the company to issue a warning letter instead of a dismissal. A warning letter may be required if, for example, awareness of compliance issues has not been raised by the company in the past or if this was a one-time misconduct of an employee who had previously been employed for many years without any wrongdoing.

Two-week period

One of the most common reasons dismissals for cause have been found invalid is bad timing. The employer only has two weeks after having obtained full knowledge about the facts of a case to issue the dismissal notice for cause. As it is considered necessary to consult with an employee prior to his or her dismissal based on suspicion, the two-week period typically only commences after the consultation with the employee has duly been performed. However, where companies take too much time to investigate the specific allegations with regard to the employee, a labor court may determine that the two-week period has commenced earlier. As most investigations do not focus on one employee specifically but are usually conducted in a wider context, it is often difficult to adhere to the two-week deadline without disclosing relevant information for the entire investigation too early.

The observance of the two-week period becomes increasingly difficult where—apart from the affected employee—other institutions need to be involved in the process. For example, companies with a works council need to inform the works council three days prior to serving the employee with an intended dismissal for cause. The information provided to the works council needs to state all reasons that shall be used to justify a dismissal in the event of future labor court proceedings. The three-day period to inform the works council needs to expire prior to the two-week period for serving the dismissal (i.e., on the 13th day at the latest!), unless the works council has issued a final statement before that. Moreover, certain groups of employees, such as disabled people or pregnant women, enjoy special protection against dismissal that requires prior consent by the respective public authority. Though the approval process can take several weeks, the company needs to apply for the consent of the public authority within the two-week period.

Essentially, all of the aforementioned steps require careful planning by those responsible within a company's HR or compliance department. As the requirement to inform third parties involves some paperwork (particularly in the case of the works council or public authorities), it is highly recommended to consult with a legal advisor as early as possible in order to set up a realistic timeline for each step.

Middle East

Legal updates regarding Israeli law

By Richard Scharlat (Partner, Dentons New York) and by the following lawyers with the Israeli firm of Fischer Behar Chen Well Orion & Co.: Ron Sitton (Partner), Shay Taken (Partner) and Moran Friedman (associate)*

Significant recent case law: employer ordered to provide prior notice to employees in a change of ownership transaction.

Employment Appeal 28597-03-11 Dabush Light – Jordanian Locks Holdings (2005) Limited. Decided on February 11, 2015.

Jordanian Locks transferred the ownership of its plant to another company. The employees continued to work at the factory under the new owner, whichsent letters of dismissal to the Jordanian Locks employees informing them of their immediate termination as a result of the change of ownership.

Jordanian Locks paid it's former employees severance pay for termination of their employment, but refused to compensate them for any additional notice period.

The National Labor Court ruled that the obligation to give employees prior notice before termination (or, alternatively, financial compensation in lieu of notice) is mandatory and applies even when the workplace continues to exist and a new employer is willing to hire the workers and to continue to employ them without a break in their employment. In other words, an employer that wishes to transfer the ownership of its business to another entity should notify employees in advance of this intention, and thus give the employees the choice as to whether to continue working with the new owner. An employer that does not do so will be required to compensate the employees for lack of prior notice.

The National Labor Court based its decision on two grounds:

The first argument: The Law of Notice of Dismissal and Resignation - 2001 states that "an employer that wishes to dismiss a worker will give him or her advance notice under this law." In other words, the provision regarding the duty of an employer to give the dismissed employee notice is a mandatory one that must be adhered to.

The second argument: "[T]he continued existence of the workplace" does not mean that the employees automatically give their advance consent to move to the new employer. Some employees may not be interested in continuing to be employed at the workplace under new owners. In such circumstances, if employees do not receive advance notice from their former employer (or money in lieu of notice), the purpose of the law, which is to enable the employee to prepare for the termination of his or her employment, is thwarted.

The National Labor Court also made clear that an employee's right to prior notice before termination of his or her employment does not depend on whether the employee continues to work at the same workplace after the termination.

Significant recent case law: As part of a claim by a contractor who was recognized retroactively as an employee, an employer may effect an offset or receive monies that were overpaid by the employer as a result of its failure to account for the difference between the employee's compensation as a contractor and the salary of an employee.

Employment Appeal 3575-10-11 Anat Amir - The Israel News Company Limited. Decided on January 21, 2015.

The appellant was engaged by the Israel News Company as an assistant stage manager for six years. The parties entered into an agreement which classified the appellant as providing independent services. The appellant's compensation for providing such services was a significantly higher amount than the salary that would have been due to her had she been classified as an "employee."

The question before the National Labor Court concerned whether the employer was entitled to an offset or a refund of monies that had been overpaid to any member of its staff that was initially classified as a contractor and then later was retroactively recognized as an employee.

The prevailing case law held that it was possible to effect an offset or refund of amounts that had been overpaid to a person who was retroactively recognized as an employee only where there was a **substantial difference** between the compensation paid to the person as a contractor and the salary that would have been paid had he or she been properly designated as an employee.

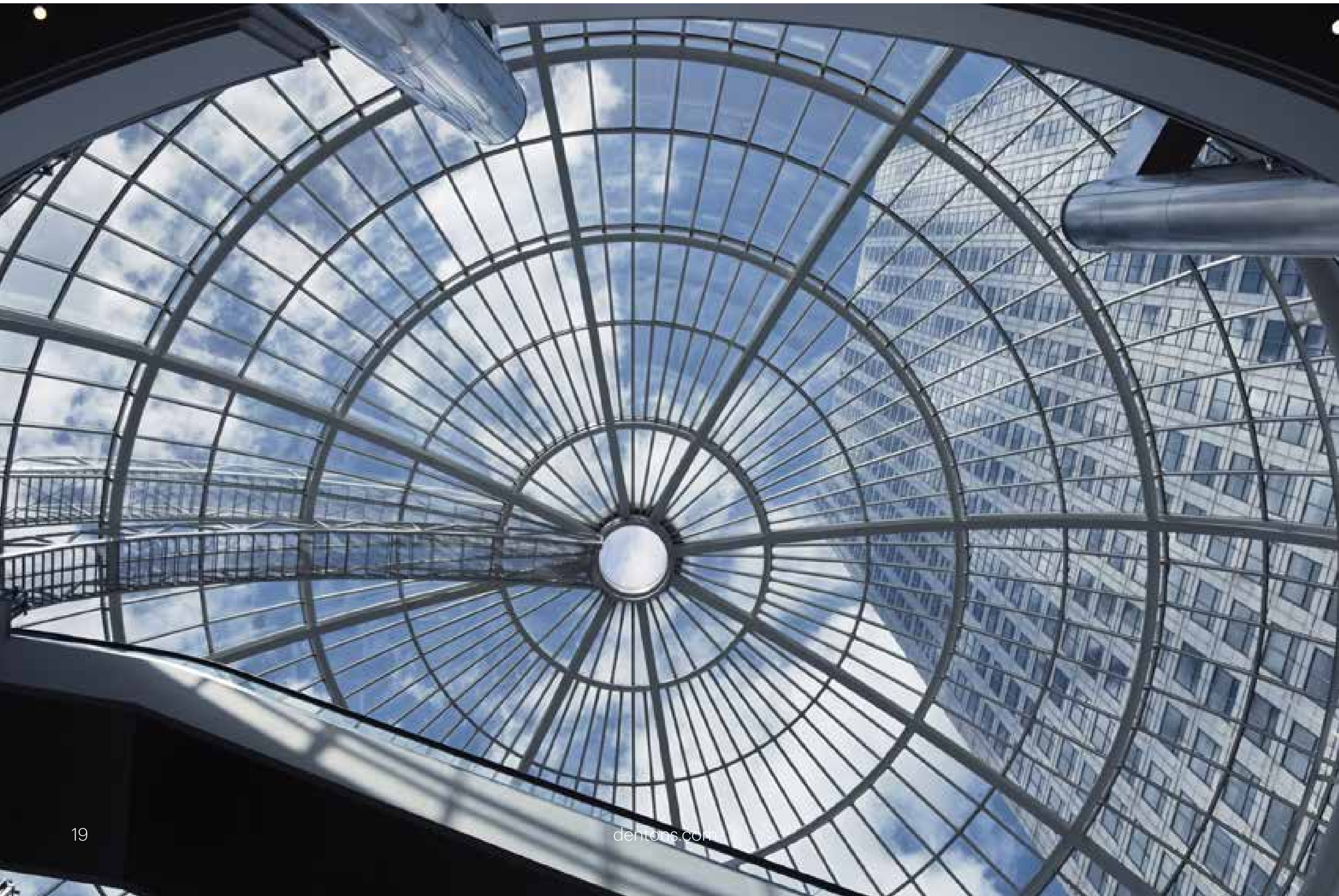
In the case in question, the National Labor Court overturned existing case law and stated that there is no **need to demonstrate a substantial difference** between the compensation as "a contractor" and salary as "an employee."

The National Labor Court also stated that the calculation of social benefits to which the newly classified "employee" would be entitled, should be based on the **salary** as "an employee."

The rate of offset or refund will be the difference between the cost of the alternative salary as an employee, together with social benefits on that salary, and the cost of the total compensation as a contractor.

If the difference in costs is in favor of the employee, he or she **will** be entitled to that difference. If the difference in costs is in favor of the employer; the employer **may** be entitled to that difference. The National Labor Court clarified that its ruling was valid in cases in which there had been a basis for the parties to assume that it was possible to enter into an independent contractor relationship, such as in cases where the employee determined the type of engagement. However, in cases where the employer knew that it was engaging someone as a contractor who should have been properly classified as an "employee," the social benefits to which the employee will be entitled will be calculated on the basis of his or her **compensation as contractor.**

*Fischer Behar Chen Well Orion & Co. is one of Israel's premier full-service law firms and offers its clients professional excellence and personal attention across the spectrum of multidisciplinary business legal services. Richard Scharlat is not admitted to practice law in Israel and does not Practice law in Israel.



UK

A breakthrough in protection for zero hours workers in the UK

By Michael Bronstein (Partner, London), Emma Naughton (Associate, Milton Keynes) and Anjali Raval (Associate, London)

In the UK we have seen a steady rise in the use of zero hours contracts, a development which has generated political controversy. Under a zero hours contract, the employer does not guarantee to provide the worker with any work and pays the worker only for work actually carried out. The worker is expected to be available for work if and when called on by the employer.

Zero hours contracts are used in many industries, but particularly in the retail sector. Proponents of these types of contracts point to their flexibility, noting that they are particularly useful in the case of employers whose needs for workers fluctuate from time to time.

The most up-to-date Office for National Statistics report on zero hours contracts, published in September 2015, stated that, between April and June 2015, around 744,000 people in the UK, or 2.4 percent of the country's workforce, were employed under zero hours contracts for their main employment.

Yet zero hours contracts have been the subject of debate and media scrutiny for some time, and concerns have been raised about the need to protect zero hours workers who, because of the nature of the contracts, are not afforded the same rights and protections as other employees. Statistics also show that people on zero hours contracts are more likely to be women, full-time students, or in younger or older age groups as compared with other people in employment.

The use of exclusivity clauses in zero hours contracts has caused particular consternation and was the focus of much political discourse in the UK in 2015. An exclusivity clause is defined in the Employment Rights Act 1996 as:

"Any provision of a zero hours contract which (a) prohibits the worker from doing work or performing services under another contract or under any other arrangement, or (b) prohibits the worker from doing so without the employer's consent."

An exclusivity clause could therefore prevent a worker from working for someone else, even though the employer with whom that employee had contracted was not providing them with any paid work.

On 26 May 2015, an amendment to the Employment Rights Act 1996, rendering such clauses unenforceable, came into effect. However, many in the UK have questioned the efficacy of the amendment. While exclusivity clauses were made unenforceable, an employer could simply choose not to give any work to an employee who did work for another employer.

Accordingly, Parliament enacted the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015, which came into force on 11 January 2016. These regulations provide that:

1. Any dismissal of an employee employed under a zero hours contract is automatically unfair if the reason or principal reason for the dismissal is that the employee had breached a contractual clause prohibiting him or her from working for another employer. An employee who is dismissed on these grounds is, therefore, able to bring an unfair dismissal claim before an Employment Tribunal seeking a declaration and/or compensation.

2. There is no qualifying period of service required for a zero hours employee to be able to bring such an unfair dismissal claim.

3. It is unlawful to subject a zero hours worker to any detriment if they work for another employer in breach of a clause prohibiting them from doing so. (This third provision extends to workers, not just employees).

There is no doubt that the use of zero hours contracts will remain an issue for debate in the UK and we can expect further transformation in their use over the coming years. However, the new regulations are a positive step for protecting zero hours workers in the UK.

UK: Cases to watch out for in 2016

By MIchael Bronstein (Partner, London), Emma Naughton (Associate, Milton Keynes) and Anjali Raval (Associate, London)

In the ever-evolving sphere of UK employment law, we are likely to see a wealth of developments over the remainder of 2016, as Parliament enacts new legislation and new cases are heard. We are also expecting, in a number of longer-running cases, appeal judgments that could have potentially significant effects on employment law in the UK and how we advise our clients going forward.

Below we take a look at three key decisions which we are eagerly awaiting in 2016:

1. *Chesterton Global Limited (t/a Chestertons) –v- Nurmohamed (UKEAT/0335/14/DM): Whistleblowing*

In April 2015, the Employment Appeal Tribunal (EAT) looked at the scope of a requirement in the Public Interest Disclosure Act 1998 (the key Act which deals with whistleblowing in England and Wales). Under that Act, in order for a worker's disclosure to be protected, the worker must believe that such disclosure is "in the public interest."

The public interest test is a relatively new introduction to the UK whistleblowing law, and the legislation and supporting documentation provide limited guidance on what constitutes "in the public interest." The EAT has seemed to adopt a broad interpretation of the concept.

In the Chesterton case, the EAT was asked to look at an employment tribunal's finding that a disclosure made in the interest of a relatively finite group of 100 or so senior managers employed by Chesterton was in the public interest.

The EAT dismissed Chesterton's appeal, finding that:

a. The question for consideration is not whether the disclosure is per se in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest.

b. The sole purpose of the introduction of the test was to reverse the effect of the earlier case of Parkins v Sodexho Ltd. In that case, the words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature, and there are no wider public interest implications.

The EAT decision has caused employers some concern, as it has the effect of only curtailing the protection afforded to potential whistleblowers in very limited circumstances, where the breach, act or omission alleged is of an entirely personal nature. The disclosure need not be made in the public interest at all—it is sufficient that the worker has a reasonable belief that it is. Accordingly, the test sets a very low bar for claimants to meet.

However, Chesterton has appealed this decision and the Court of Appeal is expected to render a decision this year. It is hoped that the Court of Appeal will seize the opportunity to clarify the "public interest" standard.—

2. *Dawson-Damer –v- Taylor Wessing LLP ([2015] WLR(D) 361): Subject Access Requests*

In the UK, under the country's Data Protection Act 1998 (DPA), a data controller is required to comply with a data subject access request (DSAR) made by any individual whose data it processes, save where the supply of information is not possible or would involve disproportionate effort. Submitting a DSAR is a popular tactic for claimant employees in the UK. Properly complying with a DSAR can be a significant undertaking for the employer and there is currently limited guidance on what would involve "disproportionate effort."

In August 2015, the High Court refused an application for an order compelling Taylor Wessing to comply with a DSAR which, in effect, required the data controller to carry out expensive and time-consuming searches of files dating back over 30 years. The DSAR was requested in order to determine whether or not documents were protected by legal advice privilege for the purposes of disclosure. The High Court held that when dealing with a DSAR, under the "disproportionate effort" exemption, a data controller is only required to supply such personal data as is found after a reasonable and proportionate search. The demands of the claimants were held not to be reasonable and proportionate. Accordingly Taylor Wessing was not required to comply with the request and could rely on a blanket exemption for legal advice privilege.

The claimants in the case have appealed the decision and it is hoped that when this matter comes before the Court of Appeal later this year, it will provide further guidance on what would constitute a reasonable and proportionate search and, indeed, clarify whether that is in fact the right test for determining what would involve disproportionate effort.

We also wait with interest to see what view the Information Commissioner will take of the Court of Appeal's decision and what this may mean in practice for employers in the UK.

3. *USA –v- Nolan ([2009] UKEAT 0328/08/CEA): Collective Redundancy Consultation*

Where an employer "proposes" to make large-scale redundancies in the UK of 20 or more employees at one establishment within a period of 90 days or less, it must consult with representatives of the affected employees regarding the proposal (see Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992).

The term "proposes" has received much attention in case law, chiefly in relation to whether it adequately reflects the language used in the underlying EU Directive, which requires consultation where collective redundancies are "contemplated."

"Proposing" is generally held to occur at an earlier stage than an actual decision by the employer to make redundancies. However, a "proposal" suggests more than a mere contemplation of the possibility of redundancies. Accordingly, it has been notoriously difficult to determine the point at which the possibility of redundancy becomes more than just that and the obligation to collectively consult is triggered.

In the case of Nolan, Ms. Nolan was made redundant following the US government's decision to close the US Army base in Hampshire, where she worked. There had been no consultation with her representative regarding its decision to close the base; rather, there had only been discussion regarding the consequential redundancies that were likely to occur once the decision to close was made.

In 2009, the EAT held that Ms. Nolan was entitled to a protective award for failure to consult. However, the US government was granted leave to appeal the decision and the Court of Appeal must now determine whether the redundancy consultation obligation under UK law arises a) when the employer is proposing, but has not yet made, a strategic decision that may lead to the redundancies of 20 or more employees or b) once that strategic decision has been made.

This distinction is a significant one for employers with employees in the UK, as it is bound to affect how business decisions are made. We are hoping that the Court of Appeal will provide clarity regarding the point at which the obligation to collectively consult actually arises.

United States

Los Angeles and San Diego Increase minimum wage and Paid Sick Leave for Employees

By: Jim McNeil, Nick S. Pujji and Peter Stockburger

In July, employers operating in Los Angeles and San Diego will be required to comply with increased minimum wage and paid sick leave requirements under new ordinances recently approved by each municipality. The Los Angeles ordinance goes into effect July 1 [1], and the San Diego ordinance will likely take effect one week later on July 7. [2] Employers should review their pay and leave policies now in order to ensure compliance on day one.

Minimum Wage Increase

In Los Angeles, the minimum wage will increase incrementally for private sector, non-hotel industry employees as follows:

- Beginning on July 1, 2016, for employers with 26 or more private sector, non-hotel industry employees the minimum wage will be $10.50 per hour, and will increase annually to US$12.00 (July 1, 2017), US$13.25 (July 1, 2018), US$14.25 (July 1, 2019), and US$15.00 by July 1, 2020. The ordinance sets a similar time schedule for private sector, non-hotel industry private employers with 25 or fewer employees, but increases will start one year later, on July 1, 2017, and will reach US $15.00 per hour by July 1, 2021.
- Starting on July 1, 2022, and continuing every year thereafter, the minimum wage will increase in conjunction with the Consumer Price Index, with adjusted rates announced every February 1st.

In San Diego, the minimum wage is set to increase on a similar, but different time schedule:

- US$10.50 per hour on the effective date of the ordinance (likely July 7, 2016), and will increase to US$11.50 per hour effective January 1, 2017.
- Beginning on January 1, 2019, the minimum wage will increase each year in accordance with the Consumer Price Index.

The current minimum wage in California is US$10.00 per hour. That is scheduled to increase to US$11.00 per hour effective January 1, 2017, and will increase thereafter by US$1.00 per year each of the next four years, resulting in a minimum wage of US$15.00 per hour effective January 2, 2021.

Paid Sick Leave Increase

California law currently entitles employees working 30 or more days in California to the following:

- Accrued paid sick leave at the rate of one hour per every 30 hours worked.
- Employees may carry over accrued sick leave from year to year.
- Employers may cap the amount of accrued sick leave at 48 hours.

1 The Los Angeles ordinance was approved by the Los Angeles City Council on June 1, 2016, and was approved the next day by the Los Angeles mayor on June 2, 2016.

2 The San Diego ordinance was originally approved by the San Diego City council, but was placed on referendum which was approved by city voters on June 7, 2016. The ordinance will become effective upon the certification of the election results, which is likely to be July 7, 2016.

- Employers may limit the amount of paid sick leave used by an employee in a year to 24 hours.
- Employers may provide 24 hours of available paid sick leave up front in any given year to avoid the accrual and carry-over requirements.
- If the employee is rehired within one year, he or she is entitled to reinstatement of accrued but unused sick leave.
- Employer is not required to pay out accrued but unused sick leave upon termination.

The new ordinances in Los Angeles and San Diego largely mirror these requirements, but provide different and increased standards in the areas of accrual cap, use and up front payouts:

Requirement	State Law	Los Angeles Ordinance	San Diego Ordinance
Accrue one hour for every 30 hours worked	Yes	Yes	Yes
Accrued leave must carry over from year to year	Yes	Yes	Yes
Accrual cap	48 hours	72 hours	None
Use cap permitted	24 hours	48 hours	40 hours
Reinstatement of accrued but unused leave upon reinstatement	If rehired within one year	If rehired within one year	If rehired within six months
Payout of accrued sick leave on termination	No	No	No
No additional sick leave plan required if present PTO plan meets minimum requirements	Yes	Yes	Yes
Provision of available sick leave up front to avoid carry-over and accrual requirements	Yes (24 hours)	Yes (48 hours)	Silent

Notice and Posting Requirements

The Los Angeles ordinance does not have express notice or posting requirements. So employers operating in Los Angeles will need to continue following the notice and posting requirements under state law. In San Diego, however, employers must provide each employee written or electronic notice of the new requirements at the time of hiring or the law's effective date, whichever is later, at any workplace or job site where any employee works within the city. The notice must be in English and any other language spoken by at least 5% of the employees at the employees' job site. Employers must also retain records relating to this new law for at least three years.

Enforcement and Penalties

The Los Angeles ordinance does not have any express provisions concerning penalties or enforcement. It instead indicates the Los Angeles Office of Wage Standards of the Bureau of Contract Administration will promulgate guidelines implementing the new ordinance. Those guidelines have yet to be announced.

The San Diego ordinance, however, provides specific enforcement guidelines:

- An employer that violates any requirement of the new San Diego ordinance may be subject to a civil penalty for each violation up to, but not to exceed, $1,000 per violation.
- An employer failing to comply with the notice and posting requirements may also be subject to a civil penalty of $100 for each employee who was not given appropriate notice, up to a maximum of $2,000.
- Aggrieved individuals in San Diego will also be able to file a complaint with the city-appointed enforcement agency, which has yet to be announced. The San Diego City Council is scheduled to adopt an "implementing" ordinance on July 11 that is expected to task the city's treasurer's office with enforcement. Submitting a complaint under San Diego's ordinance will neither be a prerequisite nor a bar to bringing a private claim against an employer.
- Remedies available on an action for violation of San Diego's ordinance include: (1) payment of wages owed; (2) an additional amount equal to double back wages withheld as liquidated damages; (3) damages for the denial of the use of accrued sick leave; (4) reinstatement or other injunctive relief; and (5) reasonable attorneys' fees and costs.

Final Thoughts

Impacted employers should immediately begin to review their current policies to ensure compliance by the anticipated effective date of July 1 for Los Angeles and July 7 for San Diego by:

- Reviewing and revising, if necessary, paid sick time and/or PTO policies and procedures to ensure they meet the new ordinance requirements.
- Reviewing attendance and disciplinary policies to avoid potential interference and retaliation claims.
- Reviewing timekeeping, payroll and benefits systems to ensure compliance with the new ordinance requirements.
- Reviewing hourly rates of employees to ensure compliance with the new ordinance requirements.

Dentons' Employment and Labor team is available to help in this effort, and will continue to monitor the developments relating to each ordinance as they develop.

Obama Administration Announces New Sex Discrimination Guidelines For Federal Contractors

By: R Daniel Beale, Jim S. McNeill and Peter Stockburger

On June 14, 2016, the US Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) issued a final rule updating the sex discrimination guidelines governing federal contractors for the first time in forty years. The new rule pulls together legal issues covered by Title VII of the Civil Rights Act of 1964 (Title VII), the Pregnancy Discrimination Act, and the Equal Pay Act. The new rule becomes effective August 15, 2016, and will apply to employers with federal contracts or subcontracts totaling $10,000 or more over a 12-month period. According to the OFCCP, the purpose of the new rule is to implement the provisions of Executive Order 13672, which President Obama issued in July 2014, and to bring the OFCCP sex discrimination guidelines into alignment with recent case law and US Equal Employment Opportunity Commission (EEOC) guidance on Title VII.

The new rule is organized into eight sections, with an appendix of non-mandatory best practices. Key provisions of the new rule include the following:

- The final rule contains an expanded definition of "sex" to include pregnancy, childbirth, or related medical conditions; gender identity; transgender status; and sex stereotyping. Sexual orientation is notably absent from this definition. During the comment period, the OFCCP was asked to add sexual orientation to the list of sex discrimination prohibitions, but the OFCCP declined noting that it remains unsettled whether sexual orientation is encompassed within the word "sex" under Title VII. Although the OFCCP indicated it would continue to monitor developments in this area, it is unclear whether the OFCCP will revisit the issue in the future.

- The OFCCP now recognizes four distinct types of sex stereotyping claims: (1) dress, appearance, and/or behavior; (2) gender identity or transgender status; (3) jobs, sectors, or industries in which it is considered appropriate for women or men to work; and (4) caregiving roles.

- The OFCCP will treat discrimination based on an employee's or applicant's gender identity or transgender status as sex discrimination. Contractors are also now required to allow employees to use the restrooms, changing rooms, showers, and similar facilities consistent with the gender with which the workers identify. This change tracks recent administrative guidance on bathroom access from the EEOC, the DOL, the US Department of Justice and the US Department of Education. The OFCCP's new rule also prohibits employers from treating employees or applicants adversely because they have received, are receiving, or are planning to receive transition-related medical services designed to facilitate the adoption of a sex or gender other than the individual's designated sex at birth. This change largely tracks administrative guidance issued last year by the US Department of Health and Human Services.

- Under the new rule, covered contractors are prohibited from paying different compensation to similarly situated employees because of their sex. And covered contractors may not discriminate on the basis of pregnancy, childbirth, or related medical conditions, including with regard to fringe benefits.

Given the August 15, 2016 implementation date, covered employers should begin to audit their workplace policies and benefits programs now in order to ensure timely compliance. To that end, employers should consider taking the following basic steps:

- Employers that extend health insurance coverage should review their plans for categorical exclusions, such as excluding health services related to gender transitions.

- Employers should consider updating their training programs to ensure employees avoid applying preconceived notions about how employees should dress or carry themselves.

- Employers should consider implementing the OFCCP's best practices, which are included in the new rule's appendix. These suggested practices include (1) avoiding the use of gender-specific job titles such as "foreman" when gender-neutral alternatives are available; (2) designating single-user restrooms as unisex; (3) making changing rooms or showers sex-neutral; and (4) making sure fringe benefits are available to men and women equally.

The Dentons Employment and Labor team is available to help analyze the OFCCP's new rule, and help you review and audit your current workplace policies and practices for compliance.

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