Global Employment Lawyer

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Welcome aboard

We are proud to offer you the initial issue of Dentons' Global Employment Lawyer. Whether you are an employer, human resources executive, in-house or outside counsel, mobility professional, or anyone interested in employment and labor issues around the globe, our goal is to keep you informed of trends and developments in the area of global employment law.

Although we live in an increasingly global economy, employment laws and workplace practices still vary dramatically from country to country, and often from region to region within the same country. When comparing and contrasting the employment laws of just about any two countries, the differences almost always outnumber the similarities. These differences often stem from deep-rooted cultural values or traditions, varying systems of government, or political and economic trends. Multinational employers encounter these differences on a daily basis as they strive to maintain a consistent corporate culture, or at least certain core values. Companies with all their employees in one country are considering whether it is time to expand into new countries and the new workplace rules that such expansion will bring. It is with this backdrop that we proudly offer to you the first issue of Dentons' Global Employment Lawyer. Our Global Employment and Labor Group consists of over 220 employment, immigration, and benefits lawyers in more than 50 cities and 30 countries.

In this issue, our lawyers examine:

- The task of crafting a non-compete clause under English law which is not unreasonably broad in scope, so as to be enforceable in court, without risking unwanted commercial consequences for employers;
- Likely changes to fixed-term employment contracts in Poland in the wake of a recent European Court of Justice determination finding them inconsistent with EU law, and some updates on key global developments in the region;
- Recent legislation in the UAE requiring all employers in Dubai to provide employees with compulsory health care insurance;
- Hidden US tax issues arising from new IRS regulations that consider severance payments made after signing a release potentially to be "deferred" compensation;
- Potential new regulations from the US Labor Department which could impact on whether some executive, administrative and professional employees receive time and one-half wages under the *Fair Labor Standards Act*;
- General guidance on hiring employees in Canada and across multiple jurisdictions; and
- The question of "positive" employment discrimination in South Africa.

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In this issue...

We welcome your input and suggestions about the type of information you want to receive as well as an honest critique of what we have provided. Please feel free to share your own "war stories" with me, with or without attribution, at brian.cousin@dentons.com. At Dentons, we understand what it takes to attract, retain and compensate talent across the globe. Please check out some of the interesting cross-border and international employment matters we have recently worked on by visiting our Employment and Labour practice page.

Thank you for reading and we look forward to receiving your thoughts and comments.

Brian S. Cousin
Editor in Chief
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United States

Hidden US tax issues in signing a release on termination of employment

By Pamela Baker

It is common in the US for an employer to obtain from a terminating employee a waiver and release of all claims (with certain statutory exceptions) against the employer. The consideration for the release is typically the payment of severance.

The customary form of release gives the employee 21 days (45 days if the termination is because of a group layoff), to consider the release, consult with counsel, if desired, and sign. Then there is a 7-day revocation period, after which the release becomes final and binding, and the employer pays, or commences payment of, the severance.[1]

The 21- or 45-day consideration period starts when the severance payments have been agreed upon and the final form of release has been presented.

Until 2010, there was little need to be concerned about the date the final form of release was presented to the employee for signature in relation to the date of termination of employment. That changed when the US Internal Revenue Service indicated[2] it would consider severance payments made after signing a release potentially to be "deferred" compensation, unless strict limitations set by the US Internal Revenue Code on the time and form of payment were both set forth in writing and observed in operation.[3] These limitations require the terms of virtually all terminations that involve the signing of a release to be in writing if there is a potential for "deferred" compensation to be paid.

Under the US Internal Revenue Code, with certain exceptions, any amount of compensation, including severance, that is earned and/or vested in one year that could potentially be paid after March 15 of the subsequent year is "deferred" compensation.[4] An employee may not electively defer compensation unless the election to defer is made prior to the year in which the compensation is earned. Severance is typically "earned" when a qualifying termination occurs. Thus, once the termination has occurred (or is imminent) it is too late to elect to "defer" compensation. There is a 20% excise tax plus interest penalties, all payable by the employee, for violating the rules on deferred compensation.
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1 These time periods have become standard because they are required in order to satisfy the requirements of the 1998 regulations under the *Federal Age Discrimination in Employment Act*.

2 In IRS Notice 2010-6.

3 There are exceptions for severance payable by March 15 of the year after an involuntary termination of employment, and for other amounts payable solely upon involuntary termination of employment to the extent all of these criteria are met: (a) the amount is less than two times the prior year's compensation, (b) the amount is less than US $520,000 (indexed after 2014), and (c) the amount is paid by the third December 31 after termination. The termination must be truly involuntary or must be a resignation on account of a narrowly defined set of "good reasons." Nevertheless, these exceptions cover many severance payments, even if a release is required.

4 Internal Revenue Code Section 409A; Treasury Regulation Section 1.409A-1(b)(4).

Under the applicable rules, payment of "deferred" compensation can only be triggered by a limited number of events. Termination of employment is one of those events.[5] Signing of a release is not one of those events. Generally, a payment made on account of termination of employment will be deemed to have been made in compliance with the deferred compensation rules if it is made during the same year as the termination of employment, or within 90 days after termination, so long as the employee has no ability to affect the year in which payment is made.

However, in some circumstances, the employee could affect the year in which payment is made by delaying the signing of the release. Unless the release document prevents this in all circumstances, the employee will be subject to the excise tax and interest penalties even if, as the facts play out, severance is paid in the same year as termination of employment. This hidden tax issue can be illustrated by the following example:

Employee A is entitled to severance on termination of employment, provided Employee A executes and does not revoke a release. The document contains no time limit on when Employee A must sign the release. This violates the "deferred" compensation rules and will result in a 20% excise tax and interest penalties to Employee A, even if, as the facts play out, Employee A's employment terminates, and Employee A signs the release the same day, allows the revocation period to lapse, and receives payment immediately on lapse of the revocation period (i.e., all within the minimum possible amount of time). The problem is that the documents do not preclude a situation where Employee A could have a termination of employment in November or December, and by delaying signing the release, "elect" to have payment made in the subsequent year.

There are two alternative methods of avoiding the adverse tax result in the documentation of the employment termination arrangement:

- Provide for the severance payment to be made (or commence) "on the 60th day" following termination of employment, provided the release has been executed and the statutory revocation period has expired on or before the 60th day. If the release has not become irrevocable by then, the severance is forfeited. It is also permissible to provide for payment on a date less than 60 days from the termination date, but as a practical matter, in order to allow time for a 45-day consideration period and a 7-day revocation period to elapse, the document should not provide for payment before the 52nd day after termination of employment.

  Or

- Provide for the severance payment to be made (or commence) within 90 days after termination, provided the release has been executed and the statutory revocation period has expired on or before the 90th day, and provided further, that if the 90-day period begins in one year and the revocation period could end in the subsequent year, the payment will be made in the second year.

Incidentally, these timing rules apply not only to the signing of a release, but to any payment dependent on an employee action, such as executing a non-compete agreement.

Fortunately, the US Internal Revenue Service also permits faulty documents to be corrected by revising them to include one of the alternative methods of compliance at any time prior to the employee's termination of employment in order to avoid the excise tax and interest penalties.[6] It's too late if the problem comes to light after termination of employment.

Please confer with Pamela Baker, or another member of the US Pacific Basin Economic Council Group prior to providing for a release as a condition of receiving payments after termination of employment if you have any questions about how these rules work.

5 The other events are death, disability, a fixed date established prior to when the compensation is earned (such as age 65), a change in control of the company, and a documented severe financial hardship that cannot be satisfied by other means. Each of the terms termination of employment (separation from service), disability, change in control, and financial hardship have very specific regulatory definitions.

6 IRS Notice 2010-6, modified by IRS Notice 2010-80.

New relationships with your business' managers, administrators and professionals? The Labor Department's forthcoming overtime regulations

By Seth Harris

Some time this autumn, the US Department of Labor's Wage and Hour Administration will send a draft proposed regulation to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). This regulation, if it is finalized, will make important changes to the rules governing whether executive, administrative and professional employees must receive time and one-half their regular hourly rate of pay for hours worked in excess of forty in a week under the *Fair Labor Standards Act* (*FLSA*). Three months or less after receiving the proposed regulation, OIRA will release it and the Labor Department will publish it in the Federal Register.

Until the proposed regulation is published, we will not know what the Labor Department will propose. But we know that the Obama Administration will make an aggressive push to finalize the regulations and, more likely than not, the overtime rules will change in a meaningful way. On March 13, 2014, President Obama issued a memorandum to his Secretary of Labor directing him to revise the overtime regulations. Of course, the President doesn't need to publish memos to his staff to get things done. By making this assignment publicly, however, the President emphasized that the new proposed regulations will have his strong support and potential opponents can expect a fight over whether more workers should receive overtime pay. The smart bet is that the regulations will be finalized. Expect them by the middle of 2016.

The current test for determining whether executive, administrative and professional employees are exempt from the FLSA's overtime requirement has four elements. First, only employees paid a salary can be exempt ("salary basis"). The salary basis test will likely remain untouched in the proposed regulation. The law in this area is reasonably well-settled and straightforward. Second, the salary must exceed US$455 per week ("salary threshold"). Third, the employee must engage in certain job duties specified in the regulations ("substantive duties"). Finally, the specified duties must be the employee's "primary duty." These last three elements are ripe for revision in the Labor Department's proposal.

The salary threshold is the likeliest part of the test to be changed. The current threshold amounts to US$23,660 for a full-year employee. Discussion in Washington has centered on an increase to US$900 per week or more. Another possibility is that the Labor Department will adopt the average weekly wage of private-sector non-supervisory employees, or around US$683 per week, as the new threshold. At any of these levels, millions of additional workers who are currently treated as exempt will be newly subject to the FLSA's overtime requirement. Every employer that currently classifies any of its managers, administrators or professionals as exempt employees should assess whether the higher salary threshold will change these employees' overtime status. For some employers, the budget impact will be substantial, so planning should begin immediately. Since the proposed rule will very likely index any new threshold to some measure of inflation to reduce the need for future changes to the regulation, employers should expect to undertake this assessment annually, if not more frequently.

The Labor Department's changes to the overtime regulations could end with the salary threshold. But the proposed regulation may go farther. Executive, administrative and professional employees each have different substantive duties tests. However, the proposed regulation would likely focus on the exemption for "executives." An "executive" need only manage a defined unit or establishment, supervise two or more employees, and have the authority to hire and fire, or make recommendations about hiring, firing, promotions or advancement. The Labor Department could propose to make this test more difficult to satisfy. **> Read more on page 5**

There has already been a great deal of grumbling from the business community and trade associations about possible changes to the substantive duties tests. This is the part of the exemption rules that generates the most litigation since it requires a fact-intensive, case-by-case analysis and the outcome cannot always be predicted. Many employers have concluded, for all of its flaws and ambiguities, they are comfortable enough applying the existing test that they do not want it to change. It will be interesting to learn if the Labor Department takes on this fight, even after raising the salary threshold. If it does, and the changes survive the regulatory process, employers will be forced to reexamine the work responsibilities of entire categories of exempt managers, supervisors, administrators and professionals, as well as the people with whom they work.

The proposed regulations may also clarify the meaning of "primary" in the "primary duty" test. Under the existing regulations, it is possible to be an exempt employee even when spending more than half of work time performing non-exempt work, for example, tending the cash register in a retail store or serving customers in a fast-food establishment. Courts have found employees for whom non-exempt work constituted 75 percent, 80 percent, or even 99 percent of their time to be exempt. The Labor Department may propose a bright line test of 50 percent or another fixed percentage as a floor for determining whether exempt responsibilities, like managing for an executive employee, are the "primary duty."

Even though this new overtime regulation is likely to move quickly through the process to finalization, employers have the opportunity to influence the substance of the regulation before it becomes final and has the force of law. The proposed regulation will be open to comment by interested parties, probably for 90 or 120 days. Employers can share their knowledge, experience and evidence in comments filed with the Labor Department during the comment period. They can also suggest how the regulations should change to best serve the 21st century workplace and the people who work in it.

In the meantime, employers who currently classify employees as exempt under the existing regulations should inventory their overtime practices. They should review job classifications and pay structures, compensate misclassified employees, eliminate "off the clock" practices and double-check rate calculations. They should also consider seeking counsel from objective outsiders who can offer unfettered judgment about where they currently stand and where the new regulations might take them.

The new overtime regulations will not be final for at least a year. But it is never too soon to avoid the risk of overtime liability.

Europe

Poland: Update on key project and developments in local employment law

By Aleksandra Minkowicz-Flanek

Key projects

Merger integration in the banking sector

Dentons' Polish Employment Team advised leading Polish bank, PKO BP S.A. in a merger integration with another bank, Nordea Bank Polska S.A. The legal merger of the two banks is planned to be complete in late September / early October 2014. As a result, Nordea Bank Polska S.A. will cease to operate as a separate entity.

This assignment included a number of complex legal and HR issues, in particular:

- Pre- and post-merger employment integration issues
- Advice on relations with employee representatives, i.e. work councils and trade unions
- Identifying and mitigating employment-related risks related to transfer of the undertaking
- Advice on the collective bargaining agreement applicable to the transferred employees
- Employee personal data processing management
- Harmonizing the rules of remuneration of the acquired bank employees
- Advice on solutions to harmonize the rules of granting, settling and paying variable pay components due to acquired bank employees, classified as identified staff

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Regional cross-border merger

The Dentons Employment Team in Poland advised an international leader in the technology market, in connection with the implementation of a regional restructuring plan involving a cross-border merger of workplaces. The advice regarded various employment issues connected with the merger, in particular the applicability of European and local Transfer of Undertakings (Protection of Employment) (TUPE) regulations, drafting additional contracts protecting employees affected by the transfer and recommendations on steps to be taken before and during implementation of the plan.

Key amendments to local employment law

Amendments to fixed term employment contracts

On March 13, 2014, the European Court of Justice (ECJ) determined that Polish regulations on fixed-term employment contracts are inconsistent with EU law. This may herald major amendments to Polish law in the near term. The market expects severe restrictions on the use of fixed-term contracts and additional formalities for employers wishing to terminate them early.

Essence of the problem
The government is considering amendments to labor law to make fixed-term contracts equal in certain aspects with indefinite term contracts, so that employees doing the same work are not discriminated against. Current regulations provide significantly weaker protection for employees on fixed-term contracts, even if their work is performed on the same conditions as employees on indefinite term contracts.

Scale of the problem
Fixed-term contracts account for approximately 27 percent of all employment contracts in the Polish market, making Poland the EU leader in terms of the total number of fixed-term employment contracts. Amendments will certainly bring about some privileges for employees and, in consequence, new additional obligations for employers.

Possible amendments
The amendments may concern the following issues:

- Making the length of the notice period dependent on the length of employment or term of the employment contract, with the proviso that notice periods applicable to fixed-term contracts may be made equal to those applicable to indefinite term contracts, or a completely new notice period may be introduced. Currently, for an employment contract valid for more than six months, the notice period is two weeks, if the possibility of termination was stipulated in the contract; while for an indefinite term employment contract, the notice period is two weeks, one month or three months depending on the length of employment
- An obligation to consult termination of a fixed-term contract with trade unions
- An obligation to give cause for terminating a fixed-term contract
- An obligation to specify the purpose of entering into a fixed-term contract
- Statutory limitation of the maximum total duration of fixed term employment contracts to approximately two-to-three years

Current threats
Although amendments to the current regulations are still at a very early review stage, employers already face related threats. Using the judgment of the ECJ, employees in disputes with employers may already rely on the inconsistency of Polish law with EU law when bringing claims. Therefore, some labor law experts argue that in certain situations employers should already, among other things, apply in fixed-term contracts the notice periods applicable to indefinite term contracts.

UK

Restrictive covenants in English law: one slip can be fatal

By Michael Bronstein

Wherever in the world they may be situated, most employers like the idea of being able to prevent ex-employees from competing with them. It's therefore surprising how different the approaches taken from one jurisdiction to another can be. As is well known, in California non-competition covenants are generally prohibited. In Germany, at least half of the former employee's salary must be paid during the restricted period.

The starting point under English law appears to be less prescriptive. A post-termination restrictive covenant will be enforceable, so long as it is no wider than is reasonably necessary for the protection of the employer's legitimate proprietary interests. Although the catalogue of protectable interests is not closed, those which are well recognised are: confidential information, customer connection and the stability of the workforce. There is no requirement to make any payment during the period of the restriction.

But appearances can be deceptive. The catch is that, if a restrictive covenant is too wide, it is void. The English courts will not rewrite it to make it enforceable, unless that can be done solely by deleting words, applying the so-called "blue pencil" test. So, if the court decides in a particular case that a non-competition covenant for 12 months is too long, the employee is free to compete. The court cannot substitute a shorter period in order to rescue the covenant by making the restraint reasonable in duration.

A recent decision of the Court of Appeal illustrates how far this aversion to rewriting the contract can go. In *Prophet PLC v. Huggett* [2014] EWCA Civ 1013, Prophet employed Mr Huggett as a sales manager. Prophet developed and sold software for the fresh produce industry, specifically that part of it dealing in fruit, vegetables, cut flowers and herbs.

During his employment, Mr Huggett was involved in selling two of Prophet's products, known as Pr2 and Pr3. These were suites of integrated software applications developed by Prophet for the fresh produce industry. They were the only Prophet products with which Mr Huggett was involved during his employment.

After he had been working for Prophet for less than two years, Mr Huggett was head-hunted by a competitor of Prophet, K3. He accepted K3's offer and resigned from Prophet.

Mr Huggett's employment contract with Prophet contained a post-termination non-competition covenant which would prevent him, for 12 months after the end of his employment, from working for a competitor of Prophet, but only: "*... in any area and in connection with any products in, or on, which he ... was involved ...*" whilst he was employed by Prophet. This wording was plainly included to narrow the scope of the covenant, so as to ensure that it was not unreasonably wide and therefore void.

Relying on that covenant, Prophet applied to the High Court for an injunction that would prevent Mr Huggett from working for K3 for 12 months. The injunction was granted but Mr Huggett appealed to the Court of Appeal.

The principal question in the case was not whether the covenant was unreasonably wide but rather how it should be interpreted.

Mr Huggett argued that, construed literally, the covenant could not stop him from working for K3. It applied only to "*... products in, or on, which he ... was involved ...*" whilst he was employed by Prophet. Those products were Pr2 and Pr3, which were not sold by K3 or any other company apart from Prophet.

The counter-argument advanced by Prophet was, in essence, that this might be what the contract **said**, but it could not possibly have been what the parties **meant**. They would not have agreed to an express term of the contract, which had obviously been very carefully drafted, that turned out to be pointless. That would be an absurd result. The reference to "any products" was ambiguous; it was capable of bearing a number of different meanings. In this case, it was clearly intended to mean business process software for the fresh produce industry. Alternatively, as the judge at first instance had found, it meant Pr2 and Pr3 **and** products similar to them. **> Read more on page 8**

The Court of Appeal had no hesitation in rejecting these arguments. In its view, the drafting of the covenant was *"... unambiguously clear ..."*. It applied only to Pr2 and Pr3, because those were the only products with which Mr Huggett had been involved during his employment with Prophet.

Moreover, even if the meaning had been ambiguous, the court could only adopt a different interpretation if there was a clear alternative meaning which the parties must have intended. In this case, there was a range of alternatives, and it was not open to the court to *"... re-cast the parties' chosen language with a view to giving effect to what is said to have been their likely commercial intention."* Prophet had made a bad bargain—almost a nonsensical one—and was stuck with it. The injunction was discharged and Mr Huggett was therefore free to start work with K3.

So the message for employers is clear. To be effective under English law, restrictive covenants need precise drafting so as not to be unreasonably wide, but the draftsman must not lose sight of the commercial consequences of the language used. Since there is no need under English law for the employer to pay the employee during the period of restraint, it would be wise to invest some of that money in retaining counsel with both the requisite expertise and the necessary business sense to avoid the Catch-22 which ensnared Prophet in this case.

Canada

Top employment tips for hiring employees abroad

By Catherine P. Coulter

Just as routine is unlikely to taste the same in Mexico as in Canada, and just as croissants in Almaty may not be quite like croissants in Paris, employment laws differ around the globe. As a result, companies opening up shop in foreign jurisdictions need to be aware that employment laws and HR practices do not necessarily transfer seamlessly from one location to another. Companies looking to succeed in expanding operations to other locations need to keep this in mind and seek employment law advice specific to each location in which they intend to do business. The following list provides some general guidance on employment issues to keep in mind when growing your business across borders.

Employment agreements

While some jurisdictions do not require employment agreements, they are a necessity in others. As an example, most employees in the United States can have their employment terminated "at will" without notice, severance or other compensation being required. Other countries however, such as Canada and the EU countries, require employers to provide terminated employees with reasonable notice of termination, severance or some other form of compensation in order to provide the employee with a period of pay while seeking new employment. Determining what that amount will be is not always straightforward, but having a proper employment agreement signed by the parties at the start of the employment relationship can help to clarify the amount in advance, and save the employer from uncertainty at best and litigation at worst.

Statutory requirements

Many countries have legislation which sets out requirements for things like overtime entitlements, vacation entitlements, leaves of absence and minimum wage. As one might imagine however, there is a great disparity between countries when it comes to the specifics of those entitlements. Just as the July 1st Canada Day is unique to (you guessed it) Canada, the August 20th St. Stephen's Day is unique to Hungary. In addition, while statutory entitlements can vary from country to country, they can even vary within a country. In Canada, for example, the province of Ontario has a unique Organ Donor Leave and the province of New Brunswick has a Court Leave. In addition, some of the Canadian provinces have a Reservists Leave or a Bereavement Leave while others do not. Further, while most Canadian provinces have some form of Pregnancy or Maternity Leave, Parental Leave, Emergency or Sick Leave, and Compassionate Care Leave, those leaves vary from province to province and some of them would be an unknown in other jurisdictions around the world. Likewise, the vacation norm in the US for non-government employees is just two-to-three weeks of paid vacation per year (although there is no mandatory requirement), while the statutory requirement in England is a whopping 28 days.

As can be seen, if a company tries to take its statutory employment practices from one country to another without regard to the applicable statutory requirements, it risks running afoul of the law, not to mention angering its foreign workforce. **> Read more on page 9**

Company protections

For some companies their value is largely in their workforce, while in others it is in their customer base. For yet other companies, their value is in their trade secrets and intellectual property. As a result, many companies desire restrictive covenants such as non-solicitation or non-competition agreements and most companies try to protect their intellectual property through the use of confidential information and intellectual property agreements. What is enforceable in one jurisdiction however, will not necessarily fly in another. For example, non-competition agreements tend to draw the ire of the courts in California, although not all US states react similarly. Likewise, Canadian intellectual property agreements can contain a "waiver of moral rights" provision (allowing the employer who has been assigned the intellectual property to take over rights to the integrity of the intellectual property), but similar US agreements do not contain such a provision.

Jurisdiction

You are a Moscow-based company hiring a few employees in Canada and it may be tempting to just put them onto your template form of employment agreement for Russian employees. The problem with that from a Canadian law point of view however, is that they will be seen to be Canadian employees if they are working in Canada and are not independent contractors. As Canadian employees, they will be entitled to all of the statutory entitlements and other entitlements (eg. to proper notice and/or severance on termination) which Canadian laws provide and if your Russian form of employment agreement does not address those entitlements, it will be invalid and struck down by the Canadian courts. Likewise, an American with a human rights claim against his or her Russian employer is not going to be precluded from bringing that claim in the US just because he or she is subject to a Russian form of employment agreement. Although jurisdictional issues can be complicated, the general rule is that you are employed in the jurisdiction in which you provide services. As a result, it is important for employers to ensure that their employees are governed by employment agreements and policies which reference applicable local laws.

Translation

English is a world language, right? Those of us who speak English may want to think so but of course it is not the case. It is important for employers to remember that certain jurisdictions (eg. France or Poland), require employment agreements to be in the local language. Again, even within countries, this can be an issue. As an example, the province of Quebec in Canada is French-speaking and contracts must be in French unless the parties specifically state otherwise in writing in the agreement, with the opt-out paragraph being required in both French and English.

Conclusion

In addition to the above, there are a number of other issues to be aware of when hiring employees in foreign jurisdictions. Even if individuals are being hired as independent contractors or consultants rather than employees, there are rules and laws in each country which set out differing tests as to whether or not an individual is properly classified as a contractor. Just as you wouldn't set up a company abroad without hiring a lawyer to assist, legal advice should always be obtained to assist with understanding and complying with corporate employment obligations abroad.

Africa

Transformation matters in South African employment equality

By Shehnaz Cassim Moosa

Discrimination can broadly be defined as the biased or unjust treatment of an individual or a group of people that results in that person or group being denied opportunity or rights. Discrimination is often informed by prejudice of some sort, be it class, gender, sexual orientation or race.

At a time when most democracies are furthering human rights legislation, and when bumper stickers inform us that only laundry should be separated on the basis of colour, the idea of 'positive discrimination' certainly seems like an oxymoron. The purpose of this article is to examine the notion of positive discrimination and make sense of this seemingly nonsensical concept generally and in particular in relation to labor law in South Africa.

South Africa's history of racial segregation and oppression permeated all aspects of life and had a devastating impact on labor in the country. Migrant laborers experienced the brunt of this inhuman legislation. Black professionals had limited opportunities to grow and develop, as job reservation for whites was common practice. It was in response to this that the democratically-elected government introduced the *Employment Equity Act* of 1998 (EEA).

The Act recognizes the need to address the historical disparities in employment, promote the Constitutional right of equality and eliminate unfair discrimination in employment. The word 'unfair' draws particular attention, as it suggests that fair or positive discrimination is permissible.

The Act addresses both fair or positive discrimination and unfair discrimination. Unfair discrimination pertains to an employment policy or practice that discriminates directly or indirectly on the grounds of a number of factors including, race, gender, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, language and birth.

Fair or positive discrimination in contrast applies to affirmative action policies. Section 6(2) explicitly states that affirmative action measures do not constitute unfair discrimination. Discrimination is thus not unlawful. This may seem confusing and perhaps even unpalatable to some. After all, how can a constitution allow for any form of discrimination?

The Constitution is the Holy Grail, it is the supreme law of the land and all other laws are guided by what is set out in the Constitution. The South African Constitution is celebrated as the most progressive Constitution in the world. It is heralded as such because it not only protects the rights and freedoms of individuals, but also furthers the ends of justice and transformation by advocating the idea of substantive equality.

The Constitution envisages specific instances in which certain forms of discrimination are deemed to be fair. It does so to address the imbalances of the past. The South African Constitution advocates the idea of substantive equality, and not equality, per se, as a means to create a more equal and prosperous society.

The application of affirmative action employment policies promoting the preference of black over white candidates for a particular employment opportunity or post has become commonplace in an effort to transform South African society. The pursuit for demographic alignment and transformation through corrective action accordingly necessitates the application of discriminatory practices and entrenches the notion of "fair discrimination" in a constitutionally supported effort to redress historical injustice.

Middle East

UAE employment law updates

By Ibrahim Elsadig

As of 1 January 2014, the new Dubai Health Insurance Law No. 11 of 2013 (the Law) came into effect obligating all employers in Dubai, whether individuals or corporate entities, employing employees and paying their salaries in any form to provide the employees with compulsory health care insurance. This applies to all participants in the health insurance arena including health service providers, insurance companies, insurance brokers, claims administration companies, employers, sponsors and beneficiaries. The Law will apply to all employees, including UAE national and non-UAE national employees who are employed in the Emirate of Dubai whether by entities based in development areas and/or free zones. However, the minimum coverage requirement offered will vary between UAE national and non-UAE national employees, as UAE national employees may enjoy an additional insurance coverage and treatment health plans. The minimum health insurance schemes will cover general practitioner, emergency care, treatment with specialists as well as diagnosis, medical surgeries and maternity procedures.

Employers are required to provide health insurance coverage for their staff which complies with the minimum requirements under the Law. The Law prohibits the employers to reimburse the cost of the insurance coverage from their covered staff. In addition, it is expected that the authorities in Dubai will implement new procedures and measures to ensure the compliance of the employers with the Law, such as putting the health insurance coverage as a requirement for the renewal of employees' visas. Employers have to provide basic health coverage with an annual premium anywhere between AED500, and AED700 and a maximum insurance cover per person per annum of AED150,000. The Law did not require employers to provide health insurance coverage for the employee's families, which we can describe as a "fair" practice for employers, which have the option to provide additional medical insurance coverage to its employees' families. If the employers opted not to provide medical insurance to its employees' families, then it becomes an obligation of the employee, if the employee is the sponsor of his/her family in the UAE, to provide his/her family with the required minimum health insurance coverage.

Failure by employers to provide minimum required insurance may subject Dubai employers to fines which vary between AED500 and AED150,000. In case of re-committing the same breaches, more severe fines will apply which can be up to AED500,000.

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About Dentons Global Employment and Labor Practice

Dentons has more than 220 employment, immigration and benefits lawyers located in 50 locations spanning 28 countries who focus their efforts on employment and labor counseling and litigation, immigration issues and benefits matters. With our global presence and contacts, we are one of only a few law firms that can provide multinational businesses with a coordinated solution to all their employment and benefits needs throughout the world. Some examples:

Financial software and services company. A team from China, Hong Kong, Poland, Germany, Canada, France, Spain and the US provided global employment representation, including coordination of opening of an office in China; various global employment matters involving Poland, Hong Kong, Korea, and Mexico; global non-compete project involving the US, China, Hong Kong, Canada, Spain, France, and Russia; corporate and corporate governance advice in Germany.

Major loudspeaker manufacturer. A team from China, UAE, Germany and the US provided US employment representation and coordination of global representation in employment and corporate matters, including China, the United Arab Emirates, Germany, and Hungary; advice regarding and resolution of highly sensitive and completely confidential US employment matter; advice regarding confidential employment matter including FCPA issues.

Leading manufacturer of paper-related products. Our Spanish team took the lead on this multinational matter with potential impacts in Germany and worldwide, regarding the closing of a manufacturing plant in Spain affecting 75 out of 81 employees.

Major conglomerate. A team from the UAE, Oman, Qatar, Kuwait, Egypt, Saudi Arabia and Jordan provided advice on implementing a whistleblowing external reporting hotline and reporting system, for its staff employees in certain countries (UAE, Oman, Qatar, Kuwait, Egypt, Saudi Arabia, Bahrain and Jordan) to report any violations of the company's compliance policy through a third party company, who will provide anonymous reports to the client covering reported issues.

Major airline. UK lawyers working with our Paris office advised on employment implications of transferring contracts within the UK and to France, and dealing with the collective redundancy process for 20-100 employees and negotiating exit packages.

Pharmaceutical laboratory. French team led the cross-border restructuring and collective litigations before Administrative and Employment Courts for an Irish laboratory specialized in feminine health and skin care, in employment law matters with respect to its acquisition of the ethical pharmaceuticals unit of a US consumer product manufacturer and on the related cross-border restructuration in Europe.

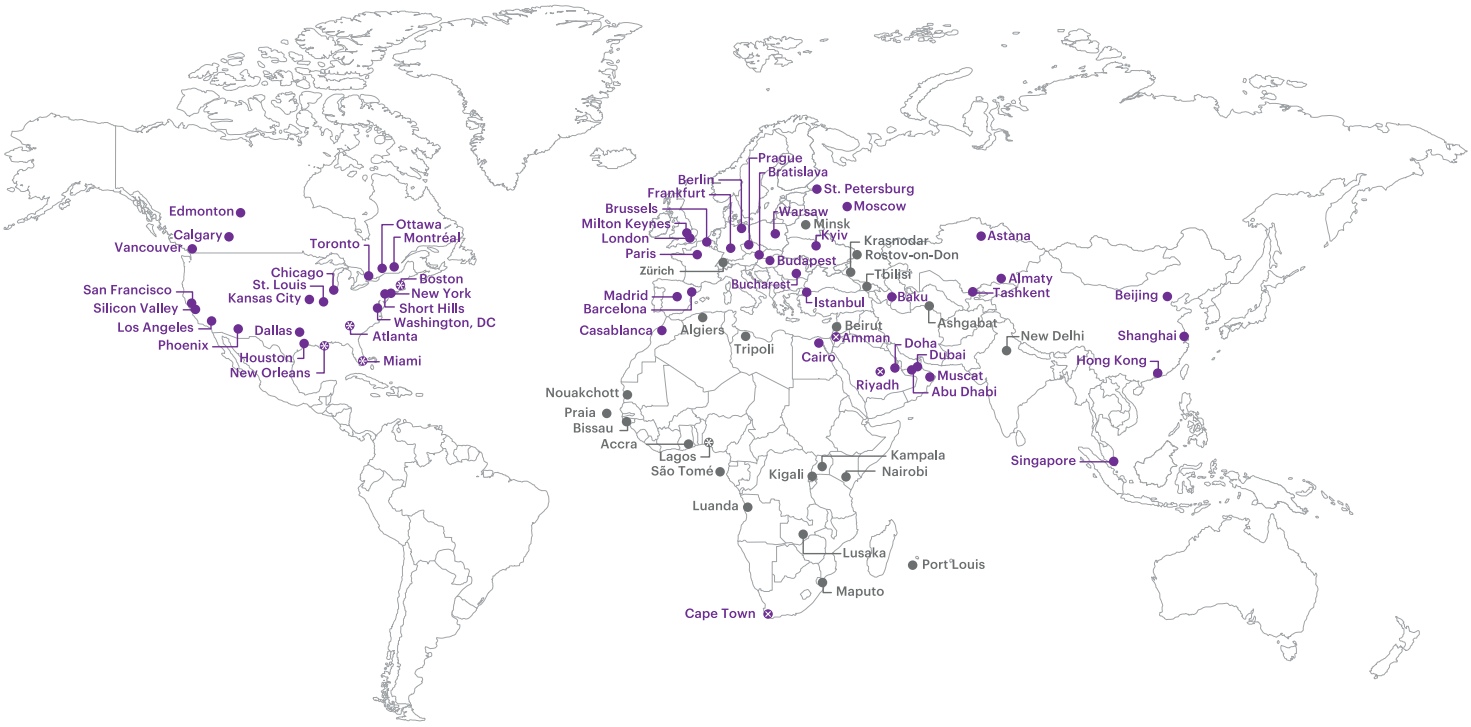
Major railway system. German lawyers working with colleagues in France, the US, Canada, Dubai, Spain and Poland provided advice regarding the form of long-term incentive agreements for the higher corporate managers in twelve different countries, and other employment law related questions.

About Dentons

Dentons is a global law firm driven to provide clients a competitive edge in an increasingly complex and interconnected world. A top 20 firm on the Acritas 2014 Global Elite Brand Index, Dentons is committed to challenging the status quo in delivering consistent and uncompromising quality in new and inventive ways. Dentons was formed by the combination of international law firm Salans LLP, Canadian law firm Fraser Milner Casgrain LLP (FMC) and international law firm SNR Denton. Dentons' clients now benefit from approximately 2,600 lawyers and professionals in more than 75 locations spanning 50-plus countries across Africa, Asia Pacific, Canada, Central Asia, Europe, the Middle East, Russia and the CIS, the UK and the US. The firm serves the local, regional and global needs of a broad spectrum of clients, including private and public corporations; governments and government agencies; small businesses and startups; entrepreneurs; and individuals.

For more information, visit **dentons.com**.

Our locations



Legend
Offices, associate offices[x] and facilities*
Associate firms and special alliances*