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Letter From The Editor

Equal Pay Audits: For Multinational Businesses, It's Not Just About Gender

Brian S. Cousin, Editor in Chief

According to the United States Bureau of Labor Statistics, in 2015, women working full-time in the US had median weekly earnings that were only 81 percent of those of male full-time workers. Similarly, in the UK in 2016, women were paid roughly 18 percent less than their male counterparts, according to the Office for National Statistics. Indeed, equal pay for women has become a global issue, attracting attention from national and local governments around the world as well as from leading multinational companies.

Acknowledging the persistent wage gap between men and women, many multinational companies, including behemoths like Apple, the Gap, Google, Salesforce and SpaceX, have committed to conducting internal pay audits as a first step toward combating gender pay inequality. Last year, Salesforce announced the results of its own internal pay audit for 17,000 global employees. According to Fortune.com, Salesforce spent US$3 million to make salary adjustments for approximately six percent of workers to eliminate discrepancies. Google, in an effort to address the wage gap, sets an incoming employee's salary based on the market rate of the job rather than the person's prior salary. Because it offers salaries based on market rates, Google found that, on average, women receive larger pay increases than men when they join the company.

Numerous governments around the world have also joined the movement to address equal pay for women. In the US, the Equal Employment Opportunity Commission (EEOC) announced plans to collect detailed pay information from US employers. Australia, Austria, Canada, Denmark, Finland, France, Italy, Norway, Sweden and the UK have all passed legislation requiring private sector employers to report on the gender pay gap. Specifically, these countries place a duty on private companies to report on gender pay differences. All except Norway and the UK require companies to make these reports available internally to employees and/or employee representatives. France and the UK even require the report to be published on the company's website.

However, in a world that includes nearly 80,000 multinational companies, the gender pay gap is not the only discrepancy attracting government attention. Numerous legislatures are expanding the focus of the equal pay for equal work movement to include protections against other types of discrimination, such as nationality. For example, at least seven states in the US have passed legislation requiring employers to show that a disparity in wages among workers generally (not just between men and women) is warranted by business needs. These state laws go further than the US Equal Pay Act, which only protects against pay disparities based on gender.

As a result, multinationals must take heed of more than just the various gender equity pay laws at play in the countries in which they do business. They must also be cognizant of the growing number of pay-related discrimination laws aimed at protecting employees on the basis of other factors, like nationality.

In Brazil, for example, equal pay for equal work laws provide that all employees are to be protected, irrespective of age, sex, nationality or other protected status. The Brazilian Federal Constitution lists, as a fundamental right, the equality of all persons before the law, and prohibits any difference in wages based on an individual's sex, age or race. The Brazilian Labor Code states that, when employees' functions are identical, provide equal value and are provided to the same employer in the same locality, the employees shall be compensated with equal salaries, regardless of sex, nationality or age.

Bahrain has adopted a local citizenship law that protects local employees from pay-specific discrimination. Under Bahrain's labor law, "wages and remuneration" of "foreign workers" cannot exceed pay for local "citizens" with "equal skills" and "qualifications" unless necessary for "recruitment."

As legislation protecting against nationality-based pay discrimination becomes more popular, the mantra of "equal pay, equal work" is slowly expanding to include pay equality for all employees, irrespective of both gender and nationality. Multinationals are in a unique position as they must not only be careful to abide by a country's pay discrimination laws, but also must be wary of discriminating against workers, in different countries who perform the same functions for the company. As part of a culture of fairness within their organizations, multinational corporations should carefully examine the causes of pay differences for the same jobs performed in different locations (after controlling for local market differences, cost of living adjustments and local currencies).*

In this edition, we feature articles from China, Germany, Italy, Spain, Turkey, the United Kingdom and the United States. 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.

*Special thanks to my colleague Christina Dumitrescu for her assitance in drafting this note

China

Non-Competes And Employee Post-Departure Reporting Obligations

By Eric Wentao Wang (Partner, Qingdao)

"Non-compete" refers to an agreement concluded between an employer and an employee at the time of hire which provides that, for a certain period after the termination or rescission of the employment contract, the employee cannot conduct business of the same or similar kind to the employer's on his or her own or for others, nor can the employee be employed by other employers conducting the same or relevant kind of business. It is generally a clause in a larger employment agreement but it can also be a completely separate document.

In brief, a non-compete means that employer and employee have agreed that:

- A specific party, i.e., the employee
- Cannot be engaged in a specific business
- In a specific region
- For a specific period

The employee's post-departure obligation to report employment status

The obligation to report employment status refers to an employer's stipulation in the non-compete agreement that the employee make a statement of his or her employment status after the termination, and provide corresponding employment materials. In civil law theory, there is a distinction between "positive acts" and "negative acts" according to the forms of expression. A "positive act," i.e., an action, refers to a legal act positively and actively occurring, such as a sales employee completing a monthly sales mission. A "negative act," i.e., an inaction, refers to a legal act that is manifested in a negative or restraining form of expression, such as fulfilling one's duty not to be absent from work not to be late for work or not to leave work early.

The connection between non-competes and the obligation to report employment status

The non-compete agreement is contractual in nature and is concluded for the purpose of clarifying the employee's non-compete obligations. While the core of the agreement is the non-compete obligation itself, emanating from that core, like the spokes of a wheel, are the required details of such obligation, such as the scope of the company's trade secrets, if any, and the employee's duty to maintain the confidentiality of those trade secrets and any other proprietary and non-public information. The employee's duty to report his or her employment status may also be provided in the agreement.

As can be seen from the above analysis of positive and negative acts, the non-compete obligation is a negative act (i.e., expressed in the form of inaction), whereas the obligation to report employment status is a positive act (i.e., expressed in the form of action). Therefore, the non-compete obligation and the report-employment-status obligation are two fundamentally different aspects of the non-compete agreement and, as such, should be dealt with on their own terms.

For example, the non-compete obligation should be performed in the form of inaction by the employee. Only when the employee engages in a positive behavior violating the prohibitive or restrictive covenants stipulated by the non-compete is the employer entitled to claim liquidated damages from the employee.

Case study

Is it a breach of a non-compete obligation for a former employee to fail to report his or her employment status after employment termination ?

Event playback

Mr. Wang was employed as a client manager by a materials company in Nanjing, China. On April 17, 2012, the company (Party A) and Mr. Wang (Party B) entered into a Confidentiality and Non-Compete Agreement (the Agreement) in which:

- Clause 4 "non-compete after Party B leaves company" provided that:

  "...if Party B leaves Party A for whatever reason, Party B shall actively report to Party A in written form as regards to the performance of the non-compete agreement no later than 30th of every month for the period of two years after termination. The first non-compete report shall be submitted within 15 days after Party B leaves Party A otherwise it shall be deemed as breach of agreement.

- Clause 6 "liability for breach of contract" provided that:

  "...2. If Party B fails to fulfill non-compete obligation and violates Clause 3 and Clause 4 Sub-clause 1 to 4 of this Agreement, it constitutes serious breach of contract and Party B shall pay liquidated damages of 500,000 RMB to Party A..."

- "4. It shall be deemed as serious breach of contract if Party B fails to provide monthly non-compete report in writing after receiving

written notification twice from Party A."

- "5. If Party B's default has caused damages to Party A, in addition to the liquidated damages, Party B shall also compensate for Party A's loss and return all profits achieving from the default of non-compete obligation to Party A."

On July 16, 2012, the company terminated its employment relationship with Mr. Wang on the ground of expiration of the employment contract. From August to November 2012, the company remitted RMB 1,000 to Mr. Wang's wage account, for a total of RMB 4,000. On November 5, 2012, the company applied to the Labor Dispute Arbitration Committee for labor arbitration. When the Committee didn't accept the case within five days, the company, following the rules and procedures on labor dispute resolution, filed an action with the court.

The company argued that Mr. Wang had failed to provide monthly non-compete reports for three consecutive months and that the company was therefore entitled to RMB 500,000 in liquidated damages for breach of the non-compete obligation. During the trial, the company claimed that Mr. Wang didn't submit non-compete reports as required by the confidentiality and non-compete agreement, constituting a breach of contract. The company failed, however, to provide any evidence to prove that Mr. Wang had breached his core non-compete obligation and benefitted from the breach. The court of first instance rejected the company's claims.

The court's analysis

According to Article 25 of the Labor Contract Law, except for the circumstances stipulated in Article 22 (special training) and Article 23 (non-compete), an employer shall not negotiate with an employee on liquidated damages to be paid by the employee. In the present case, the company set up a positive obligation on the employee's part—submitting a monthly non-compete report—in the confidentiality and non-compete agreement. The company further stipulated that the employee's failure to submit such a report would be deemed to be a breach of the agreement and that high liquidated damages shall be paid as a consequence of the breach.

The court held that such a clause ran contrary to the prohibitory labor law provisions and shall be regarded as void and without any binding effect on the employee. Besides, the court noted, the company failed to provide any evidence to prove the employee's default of his non-compete obligation in the Agreement, nor did it produce any evidence of profits resulting from such a breach. Therefore, it concluded, there were no factual or legal grounds obligating the employee to pay liquidated damages, submit non-compete reports or disgorge profits.

Conclusion

An employer is entitled to include in a non-compete agreement an obligation on the part of an employee to report his or her employment status post-departure during the performance of the non-compete agreement. However, in an action for damages against the former employee for violating the employee's post-departure reporting obligation, it is important for the employer to collect evidence, if possible, of a violation of the non-compete obligation itself. Such evidence includes, but is not limited to,

- The employment/working contract or other agreements entered into with the competing company
- Proof of payment of social security fees and building provident contribution
- Pay slip of wages or other service fees
- Work certificate
- Key card to the office
- Evidence proving the employee conducted business and transactions in the capacity of the competing company's personnel
- The competing company's employee list
- Promotional materials containing the employee's information
- The approval or filing by the special industry's administrative department,
- Witness statements and audio-visual materials, etc.

China

Application of Non-Competes to Protect Business Secrets

By Sandy Zhang (Partner, Ningbo)

An enterprise may have no patents or trademarks, but definitely have business secrets. Business secrets— the enterprise's core information assets—are important intangible assets that go to the core competence of the enterprise. For this reason, business secret protection is a matter of widespread concern for Chinese businesses. As the recipients or even creators of business secrets, employees are both the live carriers and holders of business secrets, and the group most likely to disclose them.

Over the past 20 years, employee turnover has increased to the point where job-hopping has become a normal state of affairs. As a consequence, the enterprise often faces not only loss of talent but leakage of business secrets, causing it to suffer serious financial losses and also result in loss of competitive edge. In this environment, non-compete agreements are an essential tool in protecting an enterprise against the possibility of business secret leakage as a result of employee mobility.

I have found that many companies misunderstand, to a large extent, the definition and application of non-compete agreements. As a result, in the event of a dispute, the legality and validity of many non-compete clauses are not upheld by the courts, rendering such clauses ineffective in achieve their intended purpose of protecting the enterprise's proprietary and non-public information. To this end, and with consideration for the fact that local judicial practice and legal interpretations differs from place to place, I help clients gain an understanding of non-compete agreements and how they can be used to protect company assets, and advise on their practical operation in Zhejiang, based on my knowledge of judicial practice in this eastern coastal province of China.

Definition and classification of non-compete

A "non-compete" agreement, also known as "competition restriction," is a covenant under which the employee subject to such special obligation shall not operate, either on its own or on behalf of any other person, the same or similar business as that of the employer, during the employment and/or for a certain period after departure.

There are two types of non-competes: a statutory non-compete and an "agreed upon non-compete." The "statutory non-compete" refers to the mandatory non-compete obligation directly stipulated by laws, which cannot be released through consultation. The provisions of such non-competes can be found in department laws, such as Article 149.1 (5) of the Company Law, Article 32 of the Partnership Enterprise Law, Article 20 of the Individual Proprietorship Enterprise Law, Article 37 of the Regulation on the Implementation of the Sino-Foreign Equity Joint Venture Enterprise Law and Article 109 of the Insurance Law, which laws have binding force only on special groups, mainly corporate directors, officers, partnership members, and managers of individual funded enterprises.

Agreed upon non-competes are non-compete obligations based on the contractual agreement between the parties, as allowed under Labor Contract Law and as expressly agreed to by the parties in advance. Certainly such a restriction is never at one's own sole discretion. To the contrary, in view of the superiority and inferiority of the parties involved in such negotiation, certain limitations on the terms of the non-compete obligation, including geographic scope, duration and type of employment or line of business prohibited, are set forth in Articles 23 and 24 of the Labor Contract Law.

In-service vs. post-departure non-competes

Non-competes fall into two categories based on the start and end dates of the obligation. "In-service" non-competes refers to the non-compete obligation that the in-service employee should bear while in the employ of the company. Officers are subject to a statutory non-compete obligation under China's Company Law. However, ordinary in-service employees have no such statutory obligation. In-service non-compete obligations are not addressed in China's employment laws or the Labor Contract Law, and courts are split on whether to expand the Company Law to include all employees, in one case reasoning that the existence of a post-departure non-compete obligation creates an in-service obligation.

A case in the Bulletin of the Supreme People's Court, 2011, 10: *Unfair Competition Dispute Case – Shandong Food Import & Export Corporation, Shandong Shanfu Group Co., Ltd., Shandong Shanfu Rishui Co., Ltd. vs. Ma Daqing, Qingdao Shengke Dacheng Trading Co., Ltd. Civil Ruling* of the Supreme People's Court (2009) [Min Shen Zi No. 1065] holds that the ordinary employee does not bear a non-compete obligation during employment.

However, *Case 3* in the "2012 Top Ten Model Labor Dispute Cases of Jiangsu Courts," published by Jiangsu High People's Court, holds that the ordinary employee bears a non-compete obligation during employment. It is set forth in Clause 5 of the *Answers of Zhejiang High People's Court to*

Certain Questions on the Trial of Labor Dispute Cases (III) that:

"An employer and an employee have agreed that the employee shall not engage on its own or be employed by another employer to engage in any business competitive with that of the employer during his/her employment and a certain period after departure, and agreed upon liability for breach of contract. If the employer breaches the aforesaid agreement during employment, will the employer's claim against the employee for such liability by reason of non-compete obligation be upheld? Answer: Non-compete term includes, without limitation, the period after termination or ending of the employment contract, so the agreement reached between the employer and the employee on the in-service non-compete obligation shall be valid. The employer's claim against the employee for liability for breach of in-service non-compete obligation may be upheld."

It is clear that the Zhejiang court holds that an in-service non-compete agreement (if any) between an employer and an employee shall be valid. Shenyang Intermediate People's Court and Shenzhen Intermediate People's Court also hold the same viewpoint.

"Post-departure" non-competes, for their part, are expressly allowed in Articles 23 and 24 of the Labor Contract Law, which became effective on Jan. 1, 2008, and which codifies certain well-accepted labor practices, based upon the interpretation and/or policies of the Ministry of Labor and local labor bureaus as well as certain provisions under local regulations, making them applicable nationwide. Among other things, they stipulate the maximum duration of a valid non-compete covenant, that the covenant must be specific as to scope and territory, that an employer must compensate the former employee throughout the covenant's duration, and that liquidated damages are allowed for breach of the covenant. Below, we discuss these elements in greater detail.

Drafting a non-compete clause

In designing a non-compete clause, an enterprise should abide by applicable laws so as to ensure the validity of the clause.

1. Subject of non-compete

In my practice, I have observed that some enterprises adopt an "all-employee non-compete" to protect their business secrets to the greatest extent possible. However, as only a few individuals in such enterprises have access to proprietary and/or confidential information, all-employee non-competes are not only unnecessary and add to costs but, at the end of the day, may not even bind all employees as intended. The Labor Contract Law expressly states that the staff subject to a non-compete obligation shall be limited to the employer's senior management, senior technicians and other personnel with confidentiality obligations. As stated above, courts are divided on whether this provision applies to ordinary employees. Therefore, when an enterprise determines who must sign a non-compete agreement, it should decide based on who is likely to access its confidential information.

2. Range of non-competes

As stated above, non-competes come in two flavors: in-service and post-departure. In my experience, most enterprises have some knowledge of post-departure non-competes but many are completely unaware that the Company Law imposes in-service non-compete obligations on officers and case law has upheld in-service non-compete agreements with ordinary employees. As a result, many in-service officers are breaching non-compete obligations—in many cases resulting in significant economic harm—and are getting away with it when they could be easily identified and found liable for damages. And as for ordinary employees, under current juridical practice, especially in Zhejiang, in-service non-competes, if agreed to in writing between an employer and an employee, are routinely held valid. Therefore, the enterprise that wants to protect its interests to a greater extent may want to add in-service non-compete clauses to its non-compete agreements.

3. Term of non-compete

The Labor Contract Law stipulates that the maximum duration of a valid non-compete covenant must be no more than two years. Accordingly, as a general rule, the term of a non-compete covenant should cover the employment period plus two years after departure. However, the post-departure duration does not have to be two full years. Practically speaking, the enterprise may determine the term of the non-compete in line with the nature and technical features of the confidential information at issue. For some enterprises with rapidly updating information and technology, the term may be appropriately shortened so as to avoid paying out unnecessary non-compete compensation (see below).

4. Non-compete compensation

I have found in working with many enterprises a widespread misunderstanding that a non-compete agreement that does not include agreed-upon compensation will be found invalid. It is, however, explicitly stipulated in Clause 6 of the Interpretations of the Supreme People's Court on Certain Issues concerning the Application of Law in the Trial of Labor Dispute Cases (IV) (hereinafter "Interpretations (IV)") that

whether non-compete compensation is agreed upon or whether the amount of non-compete compensation is agreed too low does not affect the enforceability of the non-compete agreement. Similar provisions are set forth in Clause 2 of the Answers of Civil Trial Chamber I of Zhejiang High People's Court and Zhejiang Labor Dispute Arbitration Commission to Certain Questions on the Trial of Labor Dispute Cases (III).

Accordingly, failure to agree upon financial compensation will not result in the inevitable invalidity of the non-compete agreement, which still has binding force upon the parties and according to which the enterprise is still likely to claim against the employee for liability for breach of non-compete obligation. However, the enterprise may face the risk of a claim for non-compete compensation made by the separated employee.

The amount of non-compete compensation may be different for in-service and post-departure non-competes. With respect to the former, considering that such obligation originates from the employee's duty of loyalty and good faith, for which the employee already receives remuneration, the court generally has not upheld in-service non-compete compensation, which is to say the employer is not required to pay in-service non-compete compensation. As for post-departure non-competes, a floor has been set in the case law, e.g., "30% of the employee's average salary over the twelve-month period preceding the termination or ending of the employment contract and not lower than the minimum salary standard applicable in the place where the employment contract is performed."

5. Liability for breach

Two provisions of the Labor Contract Law specify the liability for breach of a non-compete agreement: (1) the employee shall pay penalty for breach as agreed; and (2) the employee shall be liable for damages, if any, caused to the employer. Reasonable application of such provisions can effectively protect employers' business secrets and prevent breaches by employees.

Although, the penalty amount may be agreed to between the employer and the employee, it should not be too high, otherwise it would not be likely to restrain employees and might be subject to judicial adjustment. In judicial practice, courts have tended to adjust the amount of penalties deemed excessive by taking into consideration the non-compete compensation amount actually received by the employee as well as resulting damages, by reference to Article 114 of the Contract Law, e.g., "If the stipulated penalty for breach of contract is excessively higher than the loss caused by the breach, the party concerned may apply to a people's court or an arbitration institution for an appropriate reduction."

Similarly, the employer may claim against the employee for the part of damages caused (if any) by the employee's breach of non-compete obligation in excess of the agreed-upon penalty amount. Moreover, the employer has the right to request that the employee continue to abide by the non-compete agreement even after the employee has paid such penalty to the employer.

When circumstances change

Generally speaking, the post-departure non-compete obligation shall automatically take effect upon termination or ending of the employment contract, unless otherwise agreed to by both parties. In practice, a non-compete agreement generally has been signed at the beginning of the employment relationship, but over time, the employer's information once considered confidential may no longer be so; the confidential information accessed by the employee may have gone public or other circumstances may have caused the post-departure non-compete to lose practical effect.

Pursuant to the *Interpretations (IV)*, after the post-departure non-compete agreement takes effect, and even though the parties have not agreed on non-compete financial compensation, the employer shall pay the financial compensation if the employee has fulfilled the obligations under the non-compete agreement. In addition, the employer has the right to unilaterally terminate the non-compete agreement, provided that it pays an extra three-month financial compensation for obligations thereunder. Further, if the employer has not paid any financial compensation for three months, the employee shall have the right to terminate the agreement by express act.

Therefore, at an employee's departure, the employer should consider whether it is necessary to require the employee to continue to adhere to the non-compete agreement. If the answer is "no," the employer should consider promptly informing the employee in writing that it is terminating the non-compete agreement in order to avoid unnecessary costs and suits.

[1] Non-Compete Dispute Case – Shenyang Mingjun Properties Co., Ltd. Vs. Wei Xiaoshuang, Shenyang Yike Real Estate Agency Co., Ltd. [2015] Shen Zhong Min Zhong Zi No. 539; Employment Contract Dispute Appeal Case – Shenzhen Lifang Qunying Digital Technology Co., Ltd. vs. Qiu Qiulan [2014] Shen Zhong Fa Lao Zhong Zi No. 1258.

Germany

It's Time To Review Forfeiture Clauses In Standard Employment Contracts

By Minh Riemann (Associate, Berlin)

It is market standard in Germany to insist on forfeiture clauses in employment contracts, i.e., language providing that any claims arising under the contract are forfeited if not exercised within three months after their due date. Unnoticed by many companies, however, was legislation and case law in 2016 that made fundamental changes to this standard affecting the validity of such clauses. First, under the amended wording of German Civil Code (BGB) Sec. 309 No. 13, which took effect on October 1, 2016, employers may no longer require a stricter form than text form for declarations of employees towards their employers. Second, by judgment rendered on August 24, 2016 (5 AZR 703/15), the Federal Labor Court held that a forfeiture clause was invalid because it also applied to minimum wage entitlements under the Act on the Posting of Workers. Accordingly, employers should be mindful of both the legislative amendment and the Federal Labor Court judgment when drafting forfeiture clauses.

I. Forfeiture clauses in standard employment contracts

Two-tiered forfeiture clauses in standard employment contracts typically state that claims arising under the employment relationship shall be forfeited unless they are raised within certain deadlines. Oftentimes these clauses state that a claim will be forfeited unless it is asserted against the other party in writing within three months after the claim's maturity. Some clauses will state that if the other party rejects or ignores a claim, the right to claim lapses unless it is re-asserted, this time before the courts, within three months upon receiving the rejection. If the employment contract contains no forfeiture clause, the parties are subject to a statutory forfeiture period of three years (which commences at the end of the year in which the claim became due).As more employment relationships have been entered into for longer and, in many cases, indefinite, terms, the lack of a precaution period in the contract can lead to uncertainty for both employer and employee.

II. Legislation governing General Terms and Conditions

In Germany, employment contracts and their forfeiture clauses are subject to legislation governing general terms and conditions. As such, they may not unreasonably put the employee at a disadvantage and must comply with Sec. 305 et seq. BGB.

An unreasonable disadvantage is assumed to exist if a provision is not compatible with essential principles of the statutory provision from which it deviates or if the provision limits essential rights or duties inherent in the nature of the contract. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible. Sec. 309 BGB provides standard examples of invalid clauses. If a contractual clause does not comply with these statutory provisions, it is deemed to be invalid. Since any doubts as to the interpretation of the contractual clause is normally to the detriment of the employer, the employer must ensure must ensure that the contractual terms are clear and comprehensible.

III. Amendment to Sec. 309 No. 13 BGB

According to the old version of Sec. 309 No. 13 BGB, clauses in pre-formulated contracts were invalid if they required, for notices or declarations (of the employee)

to be made towards the user of General Terms and Conditions (i.e., the employer), a form that was more stringent than "written form". Pursuant to the amended version of Sec. 309 No. 13 BGB, notices or declarations that are to be made toward a user of general terms and conditions may not be tied to a stricter form than "text form". The requirement for text form is already met if, for example, a declaration is transmitted via fax, e-mail, or text message. On the contrary, according to sec. 126 BGB, written form requires that the document is signed by the issuer in his/her own handwriting. The reason for the amendment was that consumers/employees are usually not aware of the formal requirements of declarations and may therefore stand to lose entitlements if a stricter form is required.

Against the background of this legislative amendment, forfeiture clauses in employment contracts concluded on and after October 1, 2016, may not provide for form requirements that are stricter than text form. As a consequence, companies urgently need to review their standard employment templates to ensure that they do not require a form stricter than text form.

Furthermore, it may well be that the Federal Labor Court will conclude that the new legislation will apply as well to forfeiture clauses in employment contracts concluded before October 1, 2016. In addition, employment contracts, entered into before October 1, 2016, if amended, may be regarded as “new contracts,” subject to the legislative amendment. Therefore, employers should be aware that even minor changes in the contractual terms of an exisiting contract may necessitate an update of the forfeiture clause.

IV. Forfeiture clauses and minimum wage

In a judgment rendered on August 24, 2016 (5 AZR 703/15), the Federal Labor Court concluded that a forfeiture clause was invalid because it covered the entitlement to minimum remuneration pursuant to Sec. 2 of a Regulation Concerning Mandatory Employment Conditions for the Nursing Industry. The Federal Labor Court also concluded that the forfeiture clause was invalid because it violated Sec. 9 Act on the Posting of Workers and that the clause could not be preserved in part because it also violated the transparency requirement of Sec. 307 BGB.

Consequently, entitlements to minimum remuneration under the Act on the Posting of Workers must be excluded from the scope of application of contractual forfeiture clauses. Additionally, it is very likely that the judgment of the Federal Labor Court also applies to mandatory entitlements under the Act on the Regulation of a General Minimum Wage (MiLoG). Pursuant to Sec. 3 MiLoG, the forfeiture of mandatory minimum remuneration claims is excluded. Thus, to ensure compliance with the legislation governing General Terms and Conditions, forfeiture clauses should also explicitly exclude entitlements under the MiLoG.

Italy

Law Relaxes Restrictions On An Employer's Ability To Modify An Employee's Duties And Responsibilities

By Iacopo Aliverti Piuri (Partner, Milan)

In the last couple of years, the Italian government has enacted a set of measures that allow employers to assign employees to lower duties than those previously performed.

Employers are now entitled to unilaterally assign an employee to lower duties, provided that the new duties are included *within the same level* (e.g., 1st level, 2nd level, 3rd level, 4th level) and *the same category* (e.g., manager/middle manager, white collar/blue collar) in which the employee was currently ranked under the applicable National Collective Bargaining Agreement (NCBA).

Organizational restructuring

Moreover, in the case of a reorganization of the company structure that will affect the position of an employee, the employer may assign the employee to lower duties (i.e., duties that one would normally expect to be given to a lower-level employee), provided that the new duties are consistent with the category already assigned to the employee. In such a scenario, the assignment to new duties must be in writing and the employee's level, category and salary must remain unchanged.

Under the new law, employers also may now assign an employee to lower duties, a lower level or a lower category and/or reduce his or her salary, by entering into an individual agreement to be executed before the employee's union representative or the competent labor authority. This applies to situations where a new employment agreement is necessary to preserve an employee's job, to increase the employee's professional skills or to enhance the employee's work-life balance.

Finally, should an employer assign an employee to higher duties, such assignment shall become permanent after an uninterrupted six-month period or, alternatively, for the period of time set forth in the applicable NCBA. The employee has the right to refuse the permanent assignment.

Comment

This new law points to the Italian government's clear focus on providing employers with the necessary flexibility to modify their companies' structure to suit their business needs.

Turkey

Improving The Parental Rights Of Employees: The Right To Work Part-Time

By Gözde Manav Kılıçbeyli (Senior Associate, Istanbul) and İpek Bahçekapıl (Associate, Istanbul)ı

Last year the Turkish government, introduced significant improvements to the parental rights of Turkish employees. Whether these new rights will be sufficient to allow for workplace practices to adapt to the realities of modern family life is questionable, but they certainly can be seen as a step forward.

Law No. 6663 (The Amending Law) introduces:

1. The right of new parents to work part-time for a meaningful period of time
2. Maternity leave, under certain circumstances, for fathers and adopting parents
3. The right to unpaid leave, after maternity leave has been fully used, for half of the normal weekly working time for a specific period of time
4. The entitlement, after giving birth or adopting a child, to half-time working allowance to be paid by the Social Security Administration.

This article will focus on the first of these changes: the right of new parents to work part-time.

The right to work part-time: Main principles and conditions

The Amending Law, through two new paragraphs added at the end of Article 13 of the Labor Law, provides new parents the right to work part-time. A Regulation on Working Part-Time after Maternity Leave or Unpaid Leave (the Regulation) sets forth further details about this new right.

1. What is "part-time" work?

Working part-time is defined as employment for up to two-thirds of the regular working period of a full-time employee in a particular workplace. Thus, for example, if the regular working period of a full-time employee in a workplace is 45 hours, working for 30 hours or less would be regarded as part-time.

2. When does the right to work part-time exist and how is it exercised?

A biological parent-employee, when the other parent also works, is entitled—with a few exceptions—to work part-time during the period starting from the end of the paid maternity leave, and any unpaid leave (if taken), until the first day of the month following the child reaching the age of compulsory education (i.e., five and a half years old). A parent adopting, either individually or together with his or her spouse, a child under the age of three may exercise this right from the date custody of the adopted child is given to the parent(s).

A parent-employee who wants to benefit from the right to work part-time must notify his or her employer in writing one month prior to starting part-time work. According to Article 9 of the Regulation, this request must include (i) the commencement date of the part-time work, (ii) the starting and finishing times of each working day, and (iii) if he or she will be working fewer than all other normal working days, the employee's preferred working days.

What happens next—or more precisely, just how much discretion the employer has with respect to the employee's request—is somewhat unclear. Article 15 paragraph 1 of the Regulation provides, seemingly in conflict with Article 9, that:

"The employer will determine the

time period during which part-time work will be performed within the determined daily and weekly working periods, by taking into account local traditions, the nature of the work and the employee's request."

There are at least two views on how to interpret this provision. According to one view, it is the employee who is entitled to determine how many hours in a day and a week he or she will work, with the employer only determining which days and which particular hours the employee is to work, taking into account local traditions, the nature of the work in question and the employee's stated preferences. The other view is that, notwithstanding the employee's stated preferences, the employer has complete discretion as to setting the employee's working days and hours, limited only by the employer's obligation to consider the employee's preferences (which is really no meaningful limit at all). We believe that this issue will be addressed and clarified in scholarly articles and/or decisions of the Turkish Court of Appeals.

As to the issues of compensation and the division of other monetary benefits with respect to the employee who exercises his or her right to work part-time, the Regulation requires that such remuneration be paid on a pro rata temporis basis, i.e., according to the percentage the part-time work is of the employee's previous working hours.

With limited exceptions, only one of the parents is allowed to exercise the right to work part-time. Given that, the parent-employee exercising this right must attach to his or her written request a document certifying that his or her spouse works. In other words, if one of the parents does not work, then the working parent is not entitled to exercise this right.

The exceptions to the requirement that both parents work, as set forth in the Regulation, include:

a. When one of the parents has an illness that requires continuous treatment and care, provided this condition is verified through a medical report obtained from a general or university hospital

b. When the parental right is given to only one of the parents by a court, and that parent makes the request to work part-time

c. When a child under the age of three is adopted by a single individual

An employee's request to work part-time must be accepted by the employer, subject to the limited exceptions listed in the next section. In other words, the employer is obliged to accept the request—although, as previously mentioned, the question of how much discretion the employer has in determining the details of the part-time work is an open one—and to arrange the requested part-time work within one month of receipt of the request. The employer must also immediately inform the employee, in writing, of its acceptance of the request. If the employer fails to respond as such, the request enters into force on the date specified by the employee in his or her request (or, at the latest, on the following working day). It should also be noted here that a valid request by an employee to work part-time is not deemed a valid reason for termination of employment, provided the employee starts the requested part-time work on the specified date.

The right to work part-time is not available for certain types of work

Significantly, an employer, in certain limited circumstances, has the right to reject an employee's request for part-time work, including for the following types of work, the exact nature of which is set forth elsewhere in Turkish law:

a. Work performed by a person who is (i) expected to work full-time while providing certain medical services, (ii) a "responsible manager (mesul müdür)", (iii) a "responsible doctor (sorumlu hekim)", or (iv) a "laboratory officer" in a private healthcare organization

b. Certain industrial work, the nature of which requires a "continuous" working schedule and for employees to work "successive" shifts

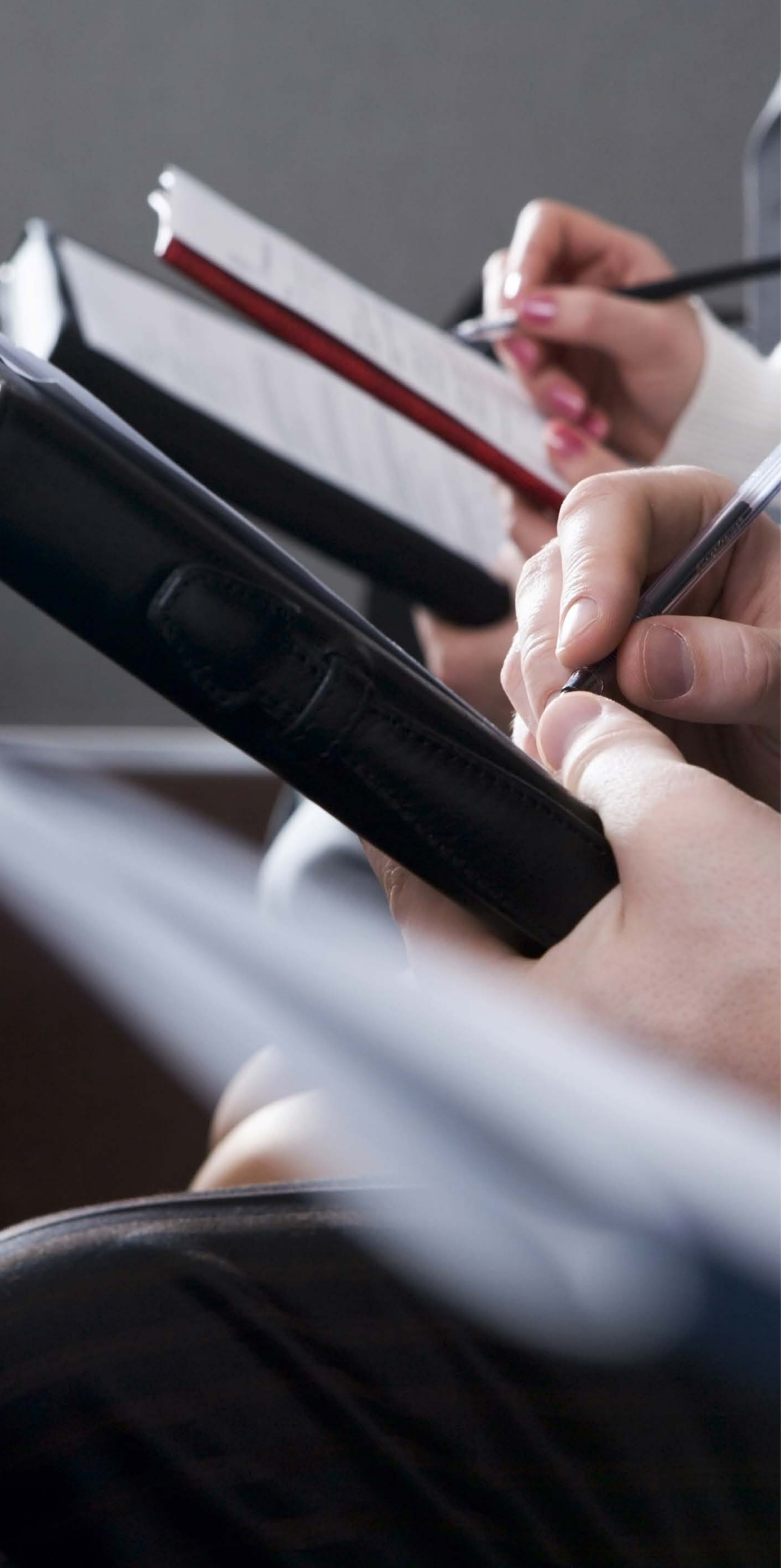
c. Certain seasonal, "campaign" (e.g., a limited sales campaign) or contractual work (taahhüt işleri) that is performed for a period of less than one year due to its nature

d. Work whose nature does not allow for dividing the working periods between different working days (e.g., transportation-related work involving long distance travel by land, air or sea).

Regarding the above, the Regulation provides that parties to a collective labor agreement may determine the types of works where part-time work is allowed, whether or not one of the specified types of works set forth above is involved.

3. Does the Amending Law include a right to return to full-time work?

An employee who has commenced working part-time pursuant to the Amending Law and Regulation may return to full-time work prior to using all hours granted by providing written notice to the employer at least one month in advance of the return to full-time work. In this case, however, the employee may not once again request part-time work for the same child.



When an employee who had been working part-time returns to full-time work, the employment agreement of any employee hired as a replacement is automatically terminated. At the same time, if an employee who has started to work part-time pursuant to the Amending Law and Regulation terminates his or her employment agreement, the employment agreement of the replacing employee is converted to an indefinite term, full-time agreement as of the termination date, provided the replacing employee consents to this conversion in writing.

Conclusion

While the Amending Law and Regulation set forth detailed rules regarding the right to work part-time, it also leaves a certain amount of uncertainty about the exercise of this new right. If, for example, it turns out employers are deemed to have full discretion when determining the working days and hours employees will be allowed to work on a part-time basis, then employers may, as a practical matter, end up rendering the new right to work part-time meaningless. It will be of great importance that this and other ambiguities are addressed by the Parliament and/or the courts as soon as possible.

We will be following developments associated with this new law closely and will provide updates as necessary. In the meantime, please to not hesitate to contact us with any questions you may have about this important new law and/or to request assistance regarding any implications it may have for you or your business.

Spain

Termination Pay Can Include Bonuses And Other Variable Pay

By Alejandro Alonso Dregi (Partner, Madrid) and Daniel Tojo (Associate, Madrid)

In the past few years, the Spanish financial crisis, which has persisted since 2008, has led to many companies choosing to assign a more significant role to bonuses or variable pay rather than fixed salary. By granting incentives linked to the achievement of specific goals, companies are guaranteed that employees' pay will be proportionate to their performance.

First of all, it is important to briefly discuss variable salary regulation. Royal Legislative Decree 2/2015, of October 23, which approves the Workers' Statute (Employment Act), establishes the definition of salary in Article 26.1 as:

"[T]he totality of the economic payments received by employed workers, in cash or in kind in exchange for actual work, whatever the form of compensation is, or for the rest periods that can be counted as work, shall be considered as salary."

In keeping with the above, it is clear that a bonus (or variable salary) must be defined as salary, since it is awarded in exchange for work carried out by employed workers, as opposed to other payments, such as severance compensations, expense disbursements, Social Security contributions, etc.

Moreover, Section 3 of the above-referenced Article 26 states that:

"The structure of salaries shall be determined through collective bargaining or, in its absence, through the individual contract. This shall include basic salary as fixed compensation (...), and, if applicable, the salary supplements established depending on the circumstances regarding the employee's personal circumstances, the services carried out, or the company's situation and results, which shall be calculated in accordance with the criteria agreed. Likewise, there shall be agreement as to whether or not such salary supplements are subject to consolidation. Unless otherwise agreed, those supplements linked to the job position or the company's situation and results shall not be consolidated."

In other words, the Employment Act gives the parties the freedom to establish the salary structure, which allows them to include salary supplements, such as a bonus or variable pay.

Based on the above, it is clear that (i) a bonus/variable pay is considered salary, and (ii) the parties are free to agree to such forms of compensation. Therefore, unless stated otherwise in the applicable collective bargaining agreement (CBA), variable pay is supplementary and subject to a margin of discretion by the company since its granting is voluntary (i.e., the company can set the benchmarks, as long as they are achievable).

Once the concept and the legal nature of the bonus/variable pay have been clarified, it is important to assess what happens to this supplementary payment when an employee leaves the company. Should the bonus always be paid? If so, should it be paid in full or proportionately? Will the type of termination and the granting and the fulfillment of objectives affect the bonus payment? Finally, should the bonus amount be taken into account when calculating severance compensation?

The general rule holds that if an employee does not fulfill the objectives set by the company, he or she will not be entitled to receive the bonus. Notwithstanding the foregoing, several points must be taken into account:

The Supreme Court has held that if a bonus has already been fully accrued because all previously designated goals have been met, its payment cannot be conditional upon the employee permanency in the company until such time that the bonus is paid. Thus, any provision in the permanency clause stipulating that a bonus will not be granted because the company has yet to pay it, even though the employee has fully met the bonus conditions and has completely accrued its totality, shall be declared null and void.

In addition, the Supreme Court established that the bonus must be paid when non-compliance with the permanency condition is due to the company's unilateral decision (for instance, if the employee is terminated prior to the bonus full accrual due to unfair dismissal). On the other hand, courts have accepted the non-payment of the bonus when the permanency condition is breached by unilateral decision of the employee, such as in cases of voluntary resignation, or when lack of payment takes place as a result of employee misconduct which leads to a disciplinary fair dismissal.

But what happens if the bonus does not have a permanency condition and the employee voluntarily leaves the company? The Supreme Court established that, in the case that the bonus payment is not conditional

upon the employee's permanency in the company until the goals have been fully reached, and if the employee voluntarily resigns from the company or is fairly terminated, he or she shall receive the bonus in proportion to the objectives achieved.

Moreover, it is important to refer to a recent National High Court (*Audiencia Nacional*) ruling which declared that a company had to pay the full bonus for the year 2015 to its employees because the specific goals to be reached during that year were not communicated to them and, therefore, it could not be fairly argued that they had not reached such objectives. The ruling states that targets must be known by the employees in advance (i.e., prior to the beginning of the bonus accrual). In this specific case, since the company could not provide evidence that such goals were communicated, the court saw the company as carrying out a substantial modification of the employees' working conditions without using the legal procedure established by law and, therefore, declared such modification null and void.

Bearing in mind the above, one can conclude that the (full or partial) payment or non-payment of a bonus will depend on several factors, such as the inclusion of a permanency condition, the initial setting (and communicating) of objectives and the achievement (or failure to achieve) such goals, as well as the kind of termination (resignation or fair/unfair dismissal).

Finally, we provide below a discussion of whether or not one must include variable salary in a severance compensation payment, an important question as the answer can have a considerable impact on the amount to be paid to an employee upon his or her termination.

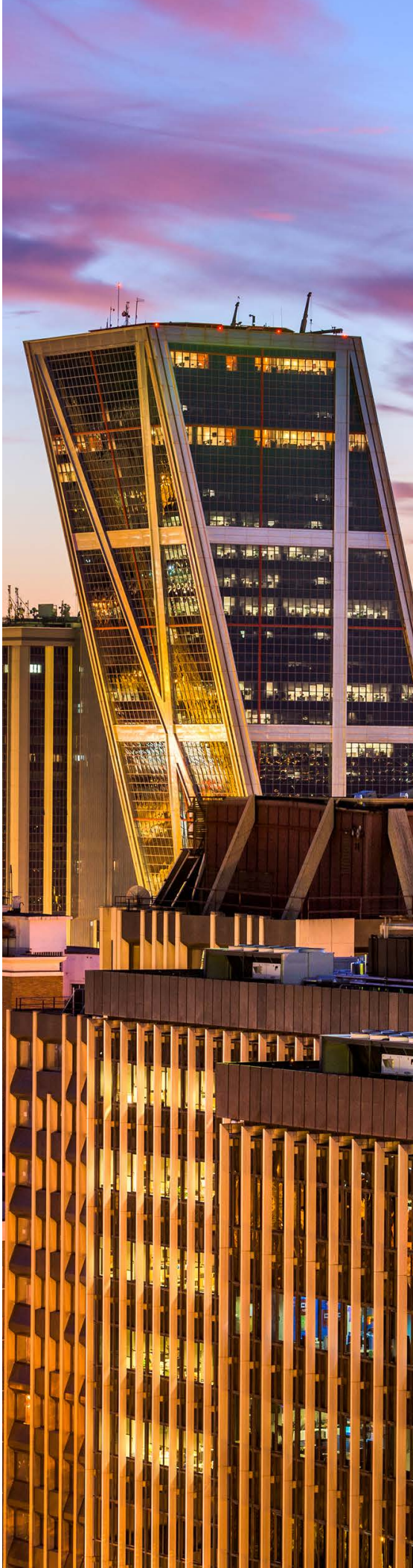
As a general principle, in accordance with case law, taking into account, as stated above, that bonus or variable salary is considered salary, it must be included in a severance compensation payment. As stated by the Supreme Court, this includes any bonus or variable salary paid within 12 months prior to termination, even if such bonus has accrued prior to such payment.

The following are exceptions to the general rule that variable pay be included in a severance compensation payment:

1. **If the parties have expressly agreed that the bonus will not be included in the severance compensation payment**. However, this statement is contestable and depends on the specific case. Note that this exception contradicts the above-mentioned settled case law holding that all forms of salary obtained by the employee must be included for severance compensation calculation purposes.

2. **If it is an exceptional and extraordinary bonus**. According to case law, the severance compensation need only include variable salary granted and accrued on a permanent / stable basis.

3. **If it is a variable salary that accrues within several years (pluri-annual bonus)**. In such a case, unless otherwise agreed, only the portion of the bonus paid within 12 years prior to termination must be included for severance compensation calculation purposes.



UK

Employee Post-Termination Restrictions Under English Law: Five Things You Need To Know

By Michael Bronstein (Partner, London)

It is often the case that the drafting of post-termination restrictions only comes into focus on enforcement. Ideally, however, the careful drafting of such restrictions should be a priority when drafting employment contracts and the rationale for the drafting should be well-documented in the event enforcement becomes necessary in the future. Careful drafting is particularly important as the UK courts have strict rules on the enforceability of post-termination restrictions due to the doctrine of restraint of trade, which provides that a post-termination restriction will be presumed unenforceable unless an employer can show that the clause does no more than is reasonably necessary to protect a legitimate business interest.

We have identified the following five considerations that you should always bear in mind when drafting a post-termination restriction under UK law:

1. The starting point

An agreement in restraint of trade that goes beyond what is necessary to protect an employer's legitimate proprietary interests will be deemed void and unenforceable.

2. All or nothing—void means void

The UK courts do not approach employee competition litigation in the same manner as they consider a breach of a commercial contract, i.e., a court will not rewrite an unreasonably wide restriction to make it reasonable. In a nutshell, overreaching can have severe consequences. The post-termination restriction should focus on the legitimate proprietary interests that the business is entitled to protect and be limited in terms of reach, scope and duration.

The only exception to this rule is that the courts have the discretion to sever an offending part of a clause using the "blue pencil" test (in simple terms, this means the courts can delete part of a clause if it does not affect the residual meaning). However, you should exercise caution in relying on this approach, not least because of the considerable time and expense involved in litigating these matters in the High Court, with no assurance of success. Any ambiguity in a post-termination restriction should also be avoided as courts will, understandably, be unwilling to uphold a post-termination restriction on public policy grounds in circumstances where the employee is uncertain as to what he or she has signed up for.

3. Three main categories of "legitimate proprietary interest"

- Trade secrets and confidential information
- Customer connections and goodwill
- Stability of the workforce

You should always take care to identify which legitimate proprietary interest you are intending to protect when drafting a post-termination restriction. Often, this is self-evident. For example, a non-poaching clause is intended to protect the stability of your workforce; a non-solicitation clause to protect your customer connections; and a confidentiality clause to protect your trade secrets. You could choose to document this in the employment contract itself or keep an external record.

4. The reasonableness of a restriction will be judged as of the time the agreement was made

Employers need to be careful to make sure that post-termination restrictions are suitable for employees at each stage of their career.

If a restriction was unenforceable at the time an employee joined your business as a junior employee, it will still be unenforceable if that employee is promoted to a more senior position within your business. This often causes problems for employers when dealing with a home-grown talent who, in a rags-to-riches tale, progresses from office worker to CEO.

One practical solution would be to reconsider the reasonableness of the restrictive covenant when you offer the employee a promotion and, if it requires amending, making the promotion conditional on the employee entering into new terms.

To assess reasonableness, you need to consider the reach, scope and duration of the particular post-employment restriction as applied to the particular employee. Please find examples below:

- **Reach.** If an employee works solely for the benefit of the UK branch of your business, and then leaves to join one of your competitors in China, you cannot prevent the employee from working in China, unless he or she will be servicing the UK market from there.
- **Scope.** Imagine you work in HR for a financial institution. One of your senior equities brokers leaves to join a competitor trading government bonds. The courts

could find that a clause preventing the employee from trading a different product would be unenforceable, but the facts must be considered on a case-by-case basis.

- **Duration**. The typical length of a restrictive covenant is 6 to 12 months. When drafting post-termination restrictions for a junior member of your team, you are unlikely to successfully keep him or her out of the market for 12 months unless there are exceptional circumstances, such as if it is standard practice in your industry (e.g., insurance) or the employee has come into your business with a view to reaching partnership (or the equivalent) within a short period of time. This is another reason why it is so important to document the grounds for imposing post-termination restrictions.

5. Get it right and the weaponry is serious

As an employer, you are in a strong position if you have enforceable post-termination restrictions. Well-drafted post-termination restrictions may act as a deterrent to employees against misbehaving. If you suspect a breach, a simple resolution may be to write to the employee and remind him or her of the post-termination restriction, which should put a stop to the unlawful activity.

If this does not work, then the law can step in to help, provided that the post-termination restrictions do not exceed what is reasonably necessary to protect your legitimate proprietary interests.

Evidence is king in litigation, and the first step if your business suspects foul play should be to preserve all (potential) evidence that you have. Technology is usually the first port of call. We suggest you quarantine the laptops, mobile phones and email accounts of any offending employees.

The courts can help you in the following ways:

- The court will have discretion (frequently exercised) to enforce the post-termination restrictions by injunction (interim as well as final)
- A speedy trial may be ordered, which will give you quick resolution of the matter
- The court may also award damages
- The loser normally pays the winner's costs
- The new employer could also be liable for unlawfully inducing the employee's breach of contract.

Springboard injunctions

Dentons' UK Employment team also has experience successfully seeking springboard injunctions against badly behaving former employees and new employers. Springboard injunctions aim to deprive the wrongdoers of the unfair head start they have obtained as a result of their unlawful activity, and can be very beneficial for helping a company recover losses. Springboard injunctions can restrain the wrongdoers from competing with your business, even where the post-termination restrictions are unenforceable and, in some situations, keep the wrongdoers out of the market beyond the time when the post-termination restrictions would otherwise have expired.

Conclusion

Restrictive covenants can be a critical tool for businesses to protect themselves from employee competition. If employers invest in the drafting of their post-termination restrictions at an early stage, they will reap the rewards if employees step out of line after termination.

UK

New Rules on Modern Slavery

By Michael Bronstein (Partner, London)

The UK has been leading the way in the battle to combat modern slavery in Europe. New rules that require businesses to report what they are doing to tackle slavery and human trafficking have been in force since October 2015. The rules are based on the California Transparency in Supply Chains Act, which was signed into law in October 2010 and went into effect in January 2012. That law requires certain companies to report on their specific actions to eradicate slavery and human trafficking in their supply chains.

The UK rules apply to commercial organizations (both companies and partnerships) that "supply goods or services" and have annual revenue of more than £36 million. They apply to all businesses that carry on ***any part*** of their business in the UK, so foreign companies are as vulnerable as UK-incorporated entities.

In addition, although the rules only apply directly to entities with annual revenue of more than £36 million, the impact of the rules will be much more widely distributed. The requirement to report on slavery within an organization's supply chain means that many smaller companies will be asked by their customers to provide information about their own organization's hiring practices. While there are no automatic consequences arising from any information provided, suppliers will need to be aware of possible ramifications. For example, a company that has significant high-risk providers in its business (or, indeed, in its own supply chain) may become a less attractive supplier to an upstream customer that has to report on slavery and human trafficking. This means that the ripple-down effect of the new rules may well be substantial.

Businesses that are in scope must publish an annual statement that (1) details the steps taken by their organization to ensure that slavery and human trafficking are not taking place in any part of their business or supply chain; or (2) states that no such action was taken. Statements must be published annually for financial years ending on or after March 31, 2016.

Businesses have a lot of flexibility in how they report as there is no prescribed format for the statement. However, the rules suggest that the statement include information about:

- The organization's structure, business and supply chains
- The organization's policies and due diligence process on slavery and human trafficking
- The areas where risks related to slavery and human trafficking exist and how these have been assessed and are being managed
- The organization's effectiveness in ensuring slavery and human trafficking are not taking place and any relevant performance indicators
- The training available to staff on these issues.

The statement must be published on the company's website and there must be a link to the statement in a prominent place on the homepage. It must be approved by the board of directors and signed by a director or equivalent.

There is currently no formal enforcement regime in place. We expect that most "enforcement" will take the form of NGO investigations and "name and shame" campaigns in the press.

Any business that falls under this new regime, if it has not already done so, should assess its level of risk and determine when and how it will comply with the new rules. Smaller organizations (i.e., that don't meet the revenue threshold) should also be ready to respond to requests for information from their customers. In some areas, such as staff training, putting suitable measures in place is a relatively straightforward matter. In other areas, such as capturing and assessing the relevant information to include in a disclosure statement, will be more complex. Nevertheless, this is a topic that is become increasingly prevalent in the press and it behooves every business to assess its own risk areas and consider what steps may be appropriate to manage them.

United States

Guns At Work: The Implications Of The Fifth Circuit's Recent Decision In *Swindol v. Aurora Flight Sciences Corporation*

By Lino S. Lipinsky (Partner, Denver) and Deborah F. Lempogo (Associate, St. Louis)

The US Court of Appeals for the Fifth Circuit's recent decision in *Swindol v. Aurora Flight Sciences Corporation* casts new doubt on the enforceability of employer policies prohibiting employees from carrying firearms onto their employer's property. Applying Mississippi law, the *Swindol* court carved out an exception to the employment-at-will doctrine for employees who, consistent with state law but in violation of their employer's policy, store a firearm in a parked vehicle on the employer's premises.

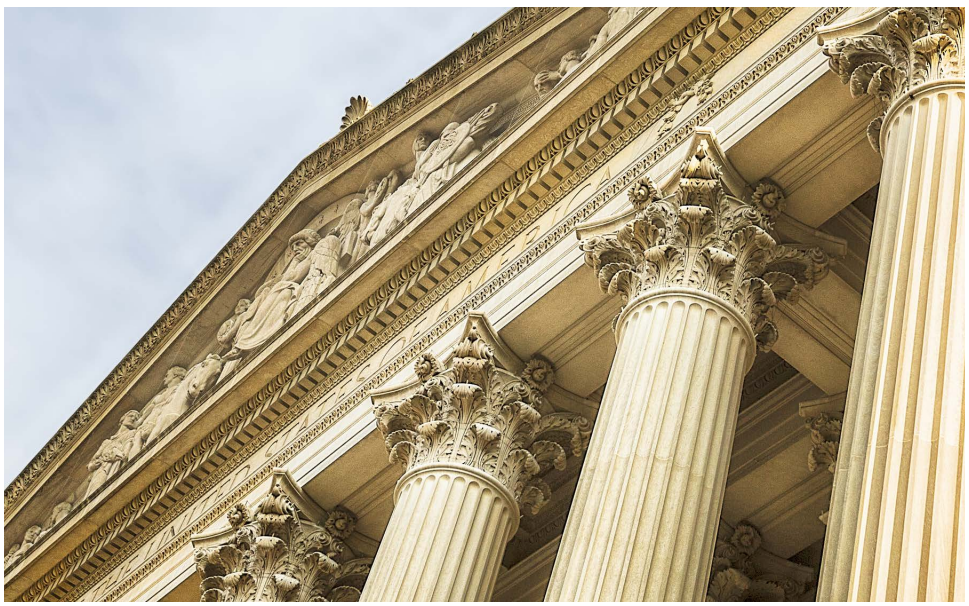
The decision is particularly significant in that the court held that employees may sue their employers for adverse employment actions that are inconsistent with Mississippi's "guns-at-work" statute. Section 45-9-55 of the Mississippi Code provides, in relevant part, that "a public or private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area."

At least 15 other states have enacted statutes which, similar to Section 45-9-55, constrain an employer's ability to restrict guns on its premises. Prior to *Swindol,* courts that had examined this issue had declined to create a private cause of action for employees who were penalized for carrying firearms onto their employer's property.

Swindol brings into sharp focus the tension between two competing public policies: employees' Second Amendment rights and employers' efforts to avoid workplace violence. According to the Bureau of Labor Statistics, an average of 551 workers are killed each year as result of workplace shootings. Employers can be held liable for their employees' acts of violence at the workplace under various legal theories, including violations of the federal Occupational Safety and Health Act and various state law tort theories, such as negligent hiring, negligent supervision and negligent retention. To manage their legal risks and to provide a safe workplace for their employees, many employers have implemented policies barring employees from bringing firearms onto the employer's premises.

In *Swindol*, the plaintiff, Robert Swindol, was an employee of defendant Aurora Flight Sciences Corporation (Aurora). Aurora terminated Swindol's employment after discovering a firearm in his vehicle parked on Aurora's property, in violation of company policy prohibiting firearms on its premises. Swindol filed suit against Aurora in the US District Court for the Northern District of Mississippi, asserting claims for wrongful discharge and defamation. Relying on Section 45-9-55, Swindol argued that Aurora's firearms policy was illegal and that the company had terminated his employment in violation of Mississippi's public policy favoring gun rights. Aurora moved to dismiss for failure to state a claim for relief under Fed. R. Civ. P. 12(b)(6), arguing that Section 45-9-55 did not create an exception to the at-will doctrine. The district court agreed with Aurora and dismissed the case. The Fifth Circuit reversed.

In the absence of controlling precedent, the Fifth Circuit certified the following question to the Mississippi Supreme Court, the state's highest court: "Whether in Mississippi an employer may be liable for a wrongful discharge of an employee



for storing a firearm in a locked vehicle on company property in a manner that is consistent with Section 45-9-55." After reviewing the case law creating public policy exceptions to the at-will doctrine and the legislative history of the Section 45-9-55, the Supreme Court held that "[t]he Legislature has independently declared via Section 45-9-55 that terminating an employee for having a firearm inside his locked vehicle is legally impermissible." Accordingly, the Supreme Court concluded that "an employee is wrongfully discharged if terminated for an act specifically allowed by Mississippi law, the prohibition of which is specifically disallowed by . . . statutory law."

Applying this decision, the Fifth Circuit found that the statutory exception recognized by the Mississippi Supreme Court was akin to a public policy exception. Therefore, the US Court of Appeals for the Fifth Circuit determined that an at-will employee has the right to maintain an action for wrongful discharge if terminated based on a policy that violates Section 45-9-55. The Court of Appeals concluded that Swindol had stated a claim for wrongful discharge under Mississippi law.

What impact does the *Swindol* decision have on employers' workplace firearm policies? For Mississippi employers, it means that they cannot enforce employment policies that violate Section 45-9-55. The ruling thus constrains their ability to implement gun-free workplace policies. Although the Fifth Circuit's decision is not controlling outside Mississippi, employers in other states need to consider whether their workplace firearm policies are consistent with the applicable state laws addressing an employee's right to carry firearms. Courts in other states, particularly those with public policies favoring gun rights, could use the reasoning in *Swindol* to reach similar decisions. Importantly, employers—and particularly those with facilities in more than one state—should be mindful of these "guns-at-work laws" when crafting workplace firearm policies, employment agreements, employment policies and employee handbooks. Employers with employees in multiple states should consider tailoring separate firearm policies for each applicable jurisdiction.

At the same time, employers should not read *Swindol* too broadly. The decision only prohibits adverse actions against employees who violate policies prohibiting storage of firearms in parked vehicles. Indeed, most "guns-at-work laws" permit employers to maintain policies banning firearms from their actual work premises. For this reason, employers must be familiar with the details of the gun rights statutes in each state where their employees are located.

[1] Swindol v. Aurora Flight Scis. Corp., No. 14-60779, 2016 WL 4191136 (5th Cir. Aug. 8, 2016).

[2] Id. at, *2. The Fifth Circuit reached a similar conclusion in Parker v. Leaf River Cellulose, L.L.C., No. 15-60034, 2016 WL 4245455, at *1 (5th Cir. Aug. 10, 2016). Based on its decision in Swindol, the court vacated its prior order affirming the district court's dismissal of the plaintiff's wrongful discharge claim.

[3] Miss. Code. Ann. § 45-9-55 (West 2016).

[4] Id.

[5] Alaska Stat. § 18.65.800; Ariz. Rev. Stat. § 12-781 (A); Colo. Rev. Stat. § 18-12-214; Fla. Stat. § 790.251; Ga. Code § 16-11-135; Kan. Stat. § 75-7c10 ; Ky. Rev. Stat. § 237.106; La. Stat. § 32:292.1; Me. Rev. Stat. tit. 26, § 600; Minn. Stat. § 624.714; N.D. Cent. Code § 62.1-02-13; Okla. Stat. tit. 21, § 1289.7; Tenn. Code § 39-17-1359; Tex. Labor Code § 52.061; Wis. Stat. Ann. § 175.60.

[6] Bastible v. Weyerhaeuser Co., 437 F.3d 999, 1008 (10th Cir. 2006); Hansen v. Am. Online, Inc., 96 P.3d 950, 952(Utah 2004); Stewart v. FedEx Exp., 114 A.3d 424, 428 (Pa. Super. Ct. 2015), appeal denied, 126 A.3d 1285 (Pa. 2015); Bruley v. Vill. Green Mgmt. Co., 592 F. Supp. 2d 1381, 1387 (M.D. Fla. 2008), aff'd sub nom. Bruley v. LBK, LP, 333 F. App'x 491 (11th Cir. 2009).

[7] US Bureau of Labor Statistics, Workplace Homicides from Shootings, January 2013, available at http://www.bls.gov/iif/oshwc/cfoi/osar0016.htm

[8] Under OSH Act employers have a general duty to provide a safe workplace for their employees. 29 U.S.C. §654(a)(1) (2011)

[9] Swindol, 2016 WL 4191136, at *1.

[10] Id.

[11] Swindol v. Aurora Flight Scis. Corp., No. 1:13-CV-00237-SA-DAS, 2014 WL 4914089, at *1 (N.D. Miss. Sept. 30, 2014), aff'd in part, rev'd in part and remanded, No. 14-60779, 2016 WL 4191136 (5th Cir. Aug. 8, 2016).

[12] Id. at *3.

[13] Id.

[14] Id. at *1.

[15] Swindol v. Aurora Flight Scis. Corp., 805 F.3d 516, 523 (5th Cir. 2015), certified question answered, 194 So. 3d 847 (Miss. 2016).

[16] Swindol v. Aurora Flight Scis. Corp., 194 So. 3d 847, 854 (Miss. 2016).

[17] Id.

[18] Swindol, 2016 WL 4191136, at *2.

[19] Supra note 5.

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