Global Employment Lawyer

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In this issue...

Letter From The Editor

Brian S. Cousin, Editor in Chief

We are proud to present to you the February 2018 issue of the Dentons' *Global Employment Lawyer*.

In this edition, we feature articles from six different countries—Canada, China, Costa Rica, the Netherlands, Poland and the US. Please let us know what you think of the articles. We welcome suggestions for how we can improve our content. As always, we thank you for your readership and look forward to your comments and suggestions.

Introducing a New Global Employment Update Product: Employment Law Insights and Solutions (ELIS)

In listening to our multi-national clients over the last few years, it has become clear to us that many of our readers would value a global employment law update product that regularly and succinctly identifies important changes in the law and, where appropriate, offers practice tips and solutions. As a result, we have created a new product: *Employment Law Insights and Solutions (ELIS)*.

ELIS is an additional resource which can be customized to meet the particular needs of your business. The goal of *ELIS* is simple—to keep you informed of the latest developments in employment law so you can better manage the risks and opportunities arising from the ever-changing employment law landscape. Unlike the *Global Employment Lawyer*, *ELIS* contains short 3-4 sentence "alerts" rather than fully developed articles. What's more, *ELIS* can be tailored to each Dentons client to cover only those countries or issues of interest to the client.

In the special first edition of *ELIS*, which was released in September 2017, we identified some of the most important legislative developments and court decisions in the employment arena from the first half of 2017. A copy of that publication can be accessed here.

Tailoring *ELIS* for your business

ELIS can be tailored for each subscriber and formatted to enable the subscriber to share the key information and action items with its legal, HR, and business teams world-wide. *ELIS* can be provided by email or through secure online access.

What to expect of *ELIS* in 2018

Production of the next *ELIS Special Edition (2017 Year-in-Review)* is already underway, with the intention of releasing it in just a few short weeks. The issue will feature a look back at the top employment law stories of 2017 and what's ahead for 2018.

If you would like to learn more about how *ELIS* can help you and your business stay ahead of the compliance curve, please feel free to contact me at brian.cousin@dentons.com or any member of the Dentons team.

Recent Developments

Dentons welcomes Meaghen Russell as a partner in our Employment group in Toronto

Dentons welcomes Meaghen Russell as a partner in our Employment, Labor and Pensions group in our Toronto office. Meaghen's practice involves advising and representing employers on a wide range of employment and labor matters, including complicated human rights issues, workplace accommodation, wrongful dismissal litigation, and employment contracts and policies. She has represented clients in numerous trials, mediations and hearings before various tribunals. Meaghen regularly provides training to clients on a variety of topics, including workplace accommodation, and workplace violence and harassment.

Dentons welcomes new US immigration counsel Ellen Kief

Dentons welcomes US immigration lawyer Ellen Kief as counsel. Based in Vancouver, Ellen's practice focuses on US business immigration for corporate clients and organizations in Canada, the US and worldwide. For more than 11 years, Ellen was an immigration practitioner in Boston, where her practice involved US cross-border travel, business visas, investor visas, family visas, permanent residence and citizenship.

Strategic alliance with Brazil's Vella Pugliese Buosi Guidoni

Dentons and Vella Pugliese Buosi Guidoni (VPBG), one of the most respected law firms in Brazil, have launched a strategic alliance that provides high-quality legal services to clients within Brazil, the world's ninth largest economy. Joining the global E&L team is partner Marcos Renato dos Santos, senior associate André Luiz Ferreira Alves, and associates Caetano Dallora, Marcele Filuszteck Silva, Carolina Vassilas Grigorini, Luiz Junqueira, Renata Rodrigues, Isabelly dos Santos Miranda Silva, and Paulo Xavier.

Dentons now open for business in Scotland

Dentons is now open for business in Scotland following our combination with Maclay Murray & Spens, one of Scotland's leading law firms. The combination enables us to offer a deeper bench and smarter resourcing than our UK competitors. Joining the global E&L team are partners Amanda Jones, Mark Hamilton, and David Knox, and associates Katie Lamb, Laura Morrison, Claire Maclean, Claire McKee, Laura O'Neill, and Elise Turner.

Dentons combines with Peru's Gallo Barrios Pickmann

Dentons has combined with Gallo Barrios Pickmann in Peru, one of the strongest and fastest-growing economies in Latin America. Joining the global E&L team are associates Pamela Duffy and Jaime Zegarra.

Dentons again recognized in BTI Consulting's Litigation Outlook

In both 2017 and 2018, BTI Consulting named Dentons' US Employment and Labor Practice a "Litigation Powerhouse" in both employment litigation categories: Complex Employment Litigation and Everyday Employment Litigation. Dentons was one of just four firms to achieve this recognition.

Dentons launches Nextlaw Global Public Affairs Network

Dentons recently launched its Nextlaw Global Public Affairs Network. The platform on day one featured 60 public affairs and public relations firms spanning 100 countries, and more to come. It connects leading public affairs firms across multiple regions to opportunities arising from clients' increasingly complex needs, which often call for solutions in the court of public opinion as well as a court of law.

Dentons launches in-house counsel consultancy

Dentons launched Nextlaw In-House Solutions, a strategic consulting service, with more than 50 former general counsel across the globe ready to provide multi-disciplinary solutions to in-house counsel. Services can range from delivering solutions to improve the management of external counsel relationships and legal spend to leveraging innovation and legal technology to enhance the value delivered by legal departments. The team also provides mentoring for new general counsels or counseling on risk and compliance issues, as well as experienced interim or permanent in-house support wherever and whenever needed.

Dentons launches groundbreaking easy to use, free anti-bribery tool

Dentons launched our groundbreaking interactive web-based tool that puts key aspects of global anti-corruption laws at your fingertips, allowing for quick, customizable comparisons across multiple jurisdictions. Leveraging our global platform and award-winning commitment to technological innovation, we launched this first-of-its kind, free platform that allows you to create customized user-friendly comparisons of laws from a list of 23 countries, across a list of 16 key points. Read the complete article here.

Dentons named International Law Firm of the Year by *The Lawyer*

Dentons was named "International Firm of the Year" at *The Lawyer* Awards, one of the most prestigious accolades within the legal industry. We were recognized for our continued international expansion over the last 12 months, for our innovation through the development of Nextlaw Labs and Nextlaw Global Referral Network, and most importantly for our efforts to boost cross-selling within the Firm.

Canada

SCC in *Stewart v. Elk Valley*, Upholds Employer's 'No Free Accident' Alcohol and Drug Policy

By April Kosten (Partner, Calgary) and Barbara B. Johnston, Q.C. (Partner, Calgary)

On June 15, 2017, the Supreme Court of Canada released a landmark decision in *Stewart v. Elk Valley Coal Corp*. (2017 SCC 30), reinforcing the right of employers to take proactive risk mitigation and management measures through the adoption of alcohol and drug policies to ensure workplace safety.

In this case, plaintiff Ian Stewart (Stewart) worked in a safety-sensitive mine operated by defendant Elk Valley Coal Corporation/Cardinal River Operations (Elk Valley), which had an alcohol and drug policy (the "Policy") that required employees to disclose any addiction issues before the occurrence of an alcohol or drug-related incident. Employees who adhered to the Policy and self-disclosed would be offered treatment. However, those employees who failed to self-disclose and tested positive for alcohol or drugs after being involved in an accident, could be terminated.

Stewart was involved in a workplace accident and subsequently tested positive for cocaine. During an investigation meeting with his employer following the positive test, he stated that he was addicted to cocaine. Stewart had not disclosed his addiction prior to the incident. Pursuant to the Policy, Elk Valley terminated his employment. Stewart argued that he was terminated for his addiction, which constituted discrimination under section 7 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5.

History

The Alberta Human Rights Tribunal (the Tribunal) held that while Stewart suffered from a disability, namely addiction, he was terminated for breaching the Policy, not his addiction (2012 AHRC 7). Therefore, there was no prima facie discrimination. Further, in the alternative, the discrimination alleged constituted a bona fide occupational requirement (BFOR) and Elk Valley accommodated Stewart's disability to the point of undue hardship. The Court of Queen's Bench and Court of Appeal dismissed the appeal of the Tribunal's decision (2013 ABQB 756 and 2015 ABCA 225).

Supreme Court of Canada

The Supreme Court of Canada dismissed Stewart's appeal in an 8-1 decision. Chief Justice McLachlin delivered the majority decision on behalf of herself, and Justices Abella, Karakatsanis, Côté, Brown, and Rowe. Justices Moldaver and Wagner issued joint reasons, concurring in the result, disagreeing with the majority on the issue of prima facie discrimination, but finding that the employer met its obligation to accommodate to the point of undue hardship. Justice Gascon issued dissenting reasons.

Prima Facie Discrimination

The majority found no basis for interfering with the Tribunal's decision. The issue was whether the employer terminated Stewart because of his addiction, or for breaching the Policy prohibiting alcohol and drug use and failing to disclose his addiction.

The majority found that the Tribunal thoroughly reviewed all of the evidence and that its decision that Stewart was terminated for breach of the Policy was reasonable. A key factor in this decision was the Tribunal's finding of fact that Stewart had the capacity to comply with the terms of the Policy.

Stewart argued that addiction was a factor in his termination because denial was part of the addiction and prevented him from disclosing his addiction prior to the accident. The majority, like the Tribunal, rejected this argument, stating (at para 39):

> **It cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy**. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. **The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence** [Emphasis added. Citations omitted.]

In this case, there was ample evidence to support the Tribunal's conclusion that there was no prima facie discrimination. The majority opined that where the cause of termination is breach of a workplace policy or other conduct attracting discipline, the mere existence of an addiction does not establish prima facie discrimination. Such an interpretation would lead to the conclusion that employers would never be able to sanction addicted employees who fail to comply with a workplace policy even if there was evidence that the employee could fully comply with the policy but chose not to comply.

Accommodation

The majority, having found no prima facie discrimination, did not consider whether Stewart was reasonably accommodated. Justices Moldaver and Wagner, however, having found prima facie discrimination, also considered the issue of accommodation. The justices held that Elk Valley reasonably accommodated Stewart. Stewart's immediate termination was reasonably necessary so that the deterrent effect of the Policy was not significantly reduced. The concurring opinion stated (at para 55):

> Elk Valley's coal mining operation was a "safety-sensitive environment". In such a workplace, it was crucial to deter employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences. Workplace safety is a relevant consideration when assessing whether the employer has accommodated the employee to the point of undue hardship. [Citations omitted.]

The employer had a valid objective in preventing employees from using drugs in a way that could give rise to "serious harm" in its safety-sensitive workplace (para 55). Lesser measures, such as subjecting Stewart to an individual assessment or imposing a limited unpaid suspension instead of termination, would have undermined the Policy's deterrent effect and compromised the employer's objective. As a result, the Tribunal's conclusion was reasonable, given that incorporating these aspects of individual accommodation would result in undue hardship. The justices also noted that Stewart was offered the opportunity to apply for employment after six months, provided that he completed a rehabilitation program—which the employer even agreed to subsidize subject to certain conditions. There was also evidence that there would have been vacant positions available if Stewart had applied. On this basis, Justices Moldaver and Wagner concurred in the appeal's dismissal.

Conclusion

The majority of the Supreme Court affirmed the right of employers to take proactive measures to prevent workplace incidents by implementing and enforcing alcohol and drug policies. Employers can require employees to self-disclose substance abuse issues prior to workplace incidents and may be able to impose discipline for a failure to comply. Employers do not have to give employees multiple chances to comply with a workplace policy even if an employee suffers from a disability. Simply having a disability and being subject to a workplace policy or disciplinary action cannot be assumed to constitute discrimination. If expert evidence demonstrates that an employee has the capacity to control his behavior notwithstanding the disability, an employer may still be able to impose discipline on that employee.

More broadly, the decision in *Stewart v. Elk Valley* recognizes the unique nature of safety-sensitive workplaces and the critical need to deter alcohol and drug use in such environments. Employers may impose sanctions for breach of safety policies, even when an employee may suffer a disability because to do otherwise would undermine the deterrent effects of the policy. The decision also reaffirms the importance of considering workplace safety in a BFOR analysis of an employer's standard or policy.

China (Mainland)

Employment and Labor Update

By Grace (aoshuang) Yang (Attorney at Law, Shanghai)

In China,[1] employment relationships are governed mainly by the Labor Law of the People's Republic of China (LLPRC) and the Employment Contract Law of the People's Republic of China (ECLPRC). The LLPRC was enacted on January 1, 1995, and the LCLPRC was enacted on January 1, 2008. Additionally, the Social Insurance Law of the People's Republic of China (SILPRC), enacted on July 1, 2011, requires employers and employees to purchase social insurance. Discrimination, salaries and benefits, and labor protection are also governed by other relevant statutes and regulations, some of which are discussed below. In addition, district regulations and policies of every province and city are valuable and persuasive resources, particularly because local judges often consider the regulations and policies of the forum's provincial government.

Discrimination

Pursuant to the Employment Promotion Law of the People's Republic of China (EPLPRC), the employer should not discriminate against any candidate because of his or her ethnic background, race, gender, religious beliefs or other protected status. Employers may not discriminate while advertising, interviewing or hiring employees. For example, advertising that only males are allowed to apply for an open position would be illegal, unless a law or regulation provides that females are unsuitable for that specific position.

Employment Contracts

Entering into a contract: Under the LCLPRC, the statute of frauds requires both the employee and employer to sign a written contract within one month of the start of employment. Otherwise, the employer will owe the employee double the wage rate for time already worked. In addition, after one year of the employee working without a written contract, an unfixed-term employment contract shall be deemed to have been established between employer and employee. (Article 82)

The employment contract should: (i) identify the name, domicile and legal representatives or managers who are in charge of the company; (ii) identify the name, domicile and resident ID card number or other valid identifying documents of the employee; (iii) specify the contract period; (iv) describe the job and the place of work; (v) specify the salary; (vi) provide the terms of social insurance; (vii) provide the terms of labor protection, working conditions and protection against occupational hazards; and (viii) include a number of other required provisions (Article 17).

Recognized types of contracts: Employment contracts are divided into three types: (i) fixed-term, (ii) unfixed-term, and (iii) ends upon completion of a specific project.

- The fixed-term employment contract identifies a specific end date.
- The unfixed-term employment contract does not specify a specific end date.
- The employment contract ending upon completing a specific project is an event-defined fixed-term contract where the employment relationship ends upon the completion of a specific project or, if the project consists of multiple phases, a specific phase, if that is made clear in the contract.

Unfixed-term employment contract by operation of law: In case of any of the following circumstances, the employer must enter into an unfixed-term employment relationship with its employee upon the employee's request, unless the parties reach an agreement:

- The employee has consecutively worked for the employer for no less than ten years;
- The employer and employee have consecutively entered into fixed-term employment contracts at least twice; and
- The employer does not enter into a written employment contract with the employee within one year of the employee starting to work for the employer.

Termination of employment contracts: In Mainland China, employment is not at-will and the employer must comply with the Fourth Chapter of the ECLPRC, which governs the "termination and ending of employment contracts." An employer and employee may not stipulate any clause regarding the termination or ending of the contract that is not governed by the ECLPRC. Additionally, if the employer dismisses its employee unilaterally and an employee files a lawsuit in response, the employer shall bear the burden of proof in the lawsuit.

Salary

The employer and employee should negotiate salary based on the principle that equal work shall be equally paid of fair pay for work performed. Additional factors that are also relevant include, but are not limited to: working years, position, practice area, and market supply and need. Also, the district governments distribute their policies regarding annual raises to adjust for minimum salary.

The salary must be paid in official currency (i.e., renminbi) and the employer may not pay the employee with things such as property or stock.

Daily salary: Workers are paid monthly. To arrive at their daily salary, divide the monthly salary by the number of paid days per month, which averages 21.75. (365 days minus 104 weekend days divided by 12 months).

Minimum salary: If a full-time employee performed normally, the employee's monthly salary must not fall below the minimum salary of local province or city. By way of example, the minimum salary of some provinces are as follows: please see Table 1

Average salary: For Shanghai, the average salary in 2016 was RMB 6,504 per month. For Beijing, the average monthly salary in 2016 was RMB 7,706.

Table 1

Province/City	Minimum Salary Per Month	Effective Date
Beijing	RMB 2,000	September 1, 2017
Shanghai	RMB 2,300	April 1, 2017
Tianjin	RMB 2,050	July 1, 2017
Shenzhen	RMB 2,130	July 1, 2017
Shandong Province	From RMB 2,130 to RMB 1,470	July 1, 2017
Guangzhou Province	From RMB 1,895 to RMB 1,210	May 1, 2015
Note: In some cities and provinces, the minimum salary does not include the individual-paid social insurance fee.		

Table 2

Categories	Days	Benefit	Who pays	When
Public Holiday	11	Full salary	The employer	Operation of law
Annual Leave	5–15[3]	Full salary	The employer	Upon employee's application or employer arrangement
Marital Leave	3 days plus other days provided by local regulations	Full salary	The employer	Upon employee's arrangement
Funeral Leave	1–3	Full salary	The employer	Upon employee's arrangement
Maternity Leave	98[4] plus other days provided by local regulations	Allowance for life and medicine fee	Birth insurance	15 days before the due date or scheduled delivery
Sick Leave	3-24 months	Partial salary	The employer	Upon employee's arrangement

Hours

Normal working hours: As a general rule, employees work 8 hours per day, 40 hours per week, with 2 full days off. Additionally, the employer must provide paid time off for 11 national holidays.

- Working days per year: 250 (365 days minus 104 weekend days[2] and 11 national holidays)
- Working days per month (avg.): 20.83 (250 divided by 12)

Overtime: Employees who work more than the statutory working hours in a week (40) are to be paid for overtime according to law. Exempt employees (e.g., managers, salespersons) do not have to be paid for overtime unless the OT occurs on a statutory public holiday.

Table 3

	Payment Base[5]	Basic Endowment Insurance		Medical Insurance		Unemployment Insurance		Employment Injury Insurance		Maternity Insurance	
		R	E	R	E	R	E	R	E	R	E
Company	RMB 3902-19512	20%	8%	9.5%	2%	0.5%	0.5%	0.2%–1.52%	-	1%	-

Employer=R; Employee=E

Flexible working hours: Employers do not have to count the hours of exempt employees, whose working hours are flexible, the same way they count hours for other employees. To adopt an alternative method of counting hours for exempt employees, the employer should get the approval from the Department of Labor and Employment.

Integrated working hours: To pay an employee according to an Integrated Working Hours calculation, two conditions must exist: (i) as a result of having the employee work unusual hours due to particular circumstances, the employer has to calculate the employee's hours based on week, month, quarter, or year; and (ii) the employer gets approval from the Department of Labor and Employment. When using this method of hours calculation if the actual working hours are longer than the usual working hours of the employee, the additional hours are regarded as overtime hours and the employee must be paid overtime.

Holidays and Benefits

The employees are entitled to be paid their salary for legal holidays. The salary is paid either by the employer or the social insurance.

Please see table 2.

Social insurance

According to the Social Insurance Law of the People's Republic of China, social insurance is comprised of five components: (i) basic endowment/statutory pension insurance, (ii) medical insurance, (iii) work-related injury insurance, (iv) unemployment insurance, and (v) maternity insurance. These insurance categories must be purchased as a package.

By way of example, the requirements in Shanghai are broken down as follows: Please see table 3.

Compliance and corporate policies

Staff handbook: Under Article 4 of the ECLPRC, the employer must establish, and modify as needed, internal rules and regulations, and take actions to ensure that employees' rights are protected while they perform their jobs. In addition, under Article 39, if an employee materially disobeys the rules and regulations of the employer as set forth in the Staff Handbook, the employer may terminate the employment contract. Thus, creating the Staff Handbook is a valuable and efficient way to govern the employee's conduct.

Confidentiality, non-competition & non-disclosure: In addition to government protection of trade secrets and intellectual property, employers are allowed to create regulations to protect trade secrets. These regulations can be as broad as the employer desires, as long as they do not contradict any currently established statutes. The employer may also sign confidentiality agreements with the employee, to prevent the employee from disclosing trade secrets or intellectual property. In addition, the employer may request that the employee sign a non-compete agreement. Such an agreement may provide that, for a reasonable period (no more than two years after employee's departure), the employee is not allowed to do any business or work for any company that competes against the employer. Notably, considerable compensation to the employee is required for the non-compete agreement to be considered valid. If the employee violates the agreement, the employee may be required to pay the employer for damages as a result of the breach—the amount of which is typically included as part of the initial non-compete agreement.

Obeying the district laws and policy: To establish a company and hire employees in Mainland China, the employer must obey LLPRC and ECLPRC. Additionally, the employer must also adhere to local labor regulations and policies in its jurisdiction, including, without limitation, the applicable minimum wage standards and sick leave wage calculation. Marital leave and maternity leave is also governed by local regulations and standards.

Foreigners personnel employment management

Application of employment license: According to law, foreigners[6] (foreign personnel) who work in mainland of China must also apply for "alien employment license of the People's Republic of China."

Participation in social insurance: According to the Social Insurance Law of the People's Republic of China, an employer must participate in social insurance for foreigners (basic endowment insurance, basic medical insurance, work-related injury insurance, unemployment insurance, and maternity insurance). The social insurance fee is paid proportionally between the employer and the employee.

Recently, China entered into the "Agreement between the People's Republic of China and the Federal Republic of Germany on Social Insurance" with Germany. Additionally, China entered into "Interim measures agreement between the People's Republic of China and the Republic of Korea for Endowment Insurance Premium Absolution" with Korea. These two bilateral agreements stipulate that if an employee from Germany or Korea who works in China is able to provide an "Insurance Certificate" issued by designated Germany or Korea agencies, a German employee may waive the basic endowment insurance and unemployment insurance fee, and a Korean employee in China may waive the basic endowment insurance fee.

[1] In this article, "China" means mainland China, excluding Taiwan, Hong Kong, and Macanese.

[2] There are 52 weeks a year and employees get 2 days off per week, so in total the yearly two-day weekends amount to 104 days per year.

[3] Depending on employee's social length of service.

[4] Maternity leave is 98 days, but if there is dystocia then the maternity leave shall be extended for another15 days. In the case of a multiple birth, the maternity leave shall be extended by 15 days for each additional infant.

[5] The minimum amount is 60% of the entire city employees' previous year average wages. The maximum amount is 300% of the entire city employees' previous year average wages.

[6] Refers to those who do not possess Chinese nationality.

Costa Rica

Labor Procedure Reform Law Makes Sweeping Changes to Labor Code

By Anna Karina Jiménez (Partner, San José) and Daniel Rodríguez (Associate, San José)

On July 25, 2017, Costa Rica's Labor Procedure Reform (Reforma Procesal Laboral or RPL) Law No. 9343 became effective. Despite its name, the law amended not only the procedural part of the country's Labor Code, but also the collective bargaining law and individual labor law governing the employer-employee relationship—348 articles of the Labor Code in total, or nearly half of the country's labor and employment laws.

Obtaining approval of the RPL was a long and difficult slog. In September 2012, lawmakers approved a version of the RPL dating back to 2000. A month later, former Costa Rica President Laura Chinchilla vetoed the law—only to withdraw the veto in May 2013.

A year and a half later, in December 2014, current President Luis Guillermo Solís lifted the veto. In August 2015, the Constitutional Chamber of the Supreme Court declared both Chinchilla´s withdrawal of the veto and Solís´ lifting of the veto unconstitutional. Consequently, in December 2015, the nine political parties of the nation's Legislative Assembly filed a new bill of law which, in January 2016, was jointly signed by President Solís, the President of the Legislative Assembly and the President of the Supreme Court of Justice. It was not until July 2017 that the RPL became law.

Judicial procedure

Procedurally, the RPL creates an internal reorganization of the labor courts throughout the country. It also limits the scope of some of the labor courts to only analyzing and deciding employment and labor matters —thus establishing new jurisdictional structure.

Prior to the RPL, labor law matters could last three or four years, or even longer. With the aim of resolving matters in a much shorter period of time, the RPL mandates that many types of matters that previously had to be adjudicated via written communications will henceforth be handled orally. Now, following the response to the lawsuit, there will be a preliminary hearing, at which the judge will hear motions, oppositions, and defenses, including with relation to the admissibility of evidence at trial, and, in complex cases, a supplementary hearing if needed.

In addition, under the RPL, in a case brought by an employee where not all possible claims were included, the judge is now permitted to advise the parties that the court may raise damage amounts above the amount sought by the employee.

The RPL also creates a Public Labor Defense Office to provide free legal assistance to employees whose monthly salary is lower than about US $1,400. Employees who earn more may also request the Office's help, but must pay for it.

Collective action

In connection with collective action by employees, the RPL requires that, even if a workplace is unionized, the union cannot call a strike unless it has the support of at least 50 percent of the workforce. The point of this threshold is to ensure a more representative decision, one made with greater participation of the employees. If there is no union at the company, or a group of unions whose membership, alone or collectively, constitutes 50 percent of the workforce, a secret ballot will take place with the participation of all employees. Under this scenario, the secret ballot must have an affirmative result and the votes of at least 35% of all the employees at the company to validate a strike.

Likewise, the RPL clarifies the manner in which workers are to be notified when a strike has been declared illegal or otherwise terminated and the amount of time they have to return to their workplace. It also ensures that they are able to return under the same work conditions they enjoyed before the strike began.

Finally, the RPL shortens the amount of time a judge has to issue a decision regarding the legality or illegality of a strike to three days.

Individual labor law

With respect to individual employees, the RPL amendments address four main areas: (i) dismissal letters, (ii) discrimination, (iii) special protection for employees (with certain conditions) and (iv) statute of limitations.

Under the RPL, a letter of dismissal must be given to the employee at the time the employer orally communicates the dismissal. If the employee refuses to accept it, the letter must be filed with the nearest office of the Ministry of Labor within 10 calendar days of the dismissal. Once the letter is given to the employee, a one-year statute of limitations for the employee to file any claim or labor lawsuit begins to run;—however, the RPL also sets forth a list of events or circumstances that will toll the statute. If the dismissal is for cause, the dismissal letter must explain the reason(s) for the dismissal and, in the event of an eventual claim or lawsuit, only this explanation will be taken into consideration by the court.

Discrimination is not a new topic in the Labor Code. However, the RPL extends the number of protected classes to fourteen, from the prior four (age, gender, ethnicity and religion). The ten new protected classes are: race, sexual orientation, marital status, political opinion, national ascendency, social origin, affiliation, handicap, unionization, economic situation, or any other analogue discrimination form.

Under the RPL, employees deemed deserving of special protection (e.g., union leaders, women on maternity leave or breastfeeding, minors, sexual harassment claimants, employees claiming a conflict with the union, or any other employee who is awarded a special protection, by law or regulation) will have the right to due process prior to dismissal, either in a proceeding before the Ministry of Labor or the Labor Court, depending on the employee.

In order to protect employees from discrimination and other wrongs, a special procedure has been established allowing a judge, as a precautionary measure, to suspend injurious administrative acts. Under this procedure, the cause of the lawsuit must be given within 24 hours after it is filed and the defendant is then given a period of time to render a report. In addition, lower court decisions may now be appealed to the Second Chamber of the Supreme Court. Depending on the decision of the court, the employer may be responsible for some of the employee's legal fees and/or costs.

If the Ministry of Labor or the Labor Court determines that the employer has the right to dismiss the protected employee, the Ministry will issue a decision allowing the dismissal, and the employer has up to one month from the date of the decision to dismiss the employee.

Regarding the statute of limitations, the employee has six months to terminate the employment relationship for cause, and the state has two years to sanction an employer for any violation to the labor laws.

Even though it is still too early to understand all the implications of the RPL, we recommend that our clients in Costa Rica, as well as businesses interested in setting up operations in Costa Rica, become informed about these changes and their effects by seeking professional legal advice from the Dentons Muñoz Costa Rica Employment and Labor Law team.

Netherlands

Corporate Group Decision Making and Employee Participation

By Eugenie Nunes (Partner, Amsterdam)

In the management structure of global companies, the de facto management of a Dutch subsidiary may, in practice, be in the hands of the (ultimate) shareholder. This business practice is often part of a matrix organization, in which the decision-making process is determined by the specific business activity, irrespective of location or country.

Certain decisions made by a shareholder, even if they are not made as such by the management of the subsidiary for which a works council has been set up, may nevertheless be deemed to have been made by that subsidiary. A clear understanding of the effective decision-making process in global organizations—and the effect of that process on requirements in the field of employee participation—is critical for steering that process in the right legal direction.

'Attribution' and 'co-management'

In Dutch employee consultation processes, the concepts of "attribution" and "comanagement" are distinguished in connection with intergroup relations.

The concept of attribution does not directly relate to the employee participation/works council structure at a Dutch company. Rather, attribution of shareholders' decisions relates to the management of the subsidiary and the de facto interference by the shareholder in the Dutch business activities.

The concept of attribution applies to a situation in which the decision that has been made by a group company interferes with the business of the Dutch subsidiary for which the works council has been set up in such a way that—for the purpose of employee consultation rights—it is deemed to have been made by the subsidiary. In that case, the subsidiary is required under the Dutch Works Councils Act to present the proposed decision to the works council for its advice or consent.

The concept of co-management applies to a situation in which the group company has, in practice, a systematic (ongoing) influence on the decision-making process regarding the business of the Dutch subsidiary such that it can be deemed to co-manage the company. In the case of co-management, the works council may claim its right to be informed and its right to be consulted at both the co-managing company and the Dutch company. Notably, case law on this concept often relates to circumstances in which the Dutch management has been involved in the decision-making process to a certain extent. But legal authors generally assume that the works council can claim its right to be consulted even if the Dutch management was not involved in the decision-making process. In that case, the shareholder and the Dutch subsidiary must jointly present the proposed decision to the works council for advice or consent.

Intergroup relations

In business practice, no agreements between works councils and the management of shareholders of the related companies create the right of advice or consent for the works council regarding decisions that are made or proposed by the shareholder, but are nevertheless attributed to the subsidiary. It is possible to enter into a discussion with the shareholder in an attempt to reach an agreement within the meaning of Section 32 of the Works Councils Act and to agree that certain proposed decisions will be presented to the works council for (i) its advice (Section 25 of the Works Councils Act) or (ii) its consent (Section 27 of the Works Councils Act). If so, the shareholders agree that certain decisions they make which affect the Dutch subsidiaries will be attributed to the Dutch subsidiaries and will be subject to the Works Councils Act.

Works councils' rights in the case of attribution or co-management

Case law shows that, in practice, works councils do claim attribution of shareholders' decisions to the company for which they were set up—and therefore the right of advice or consent.

Claiming this right starts with a letter to the shareholder that the works council is aware of a proposed decision that, in its view, is subject to its advice or consent. The works council may state that its advice must be (or should have been) requested at such a time that it can substantively influence the decision that will ultimately be made. If so, the request for advice must include: (i) the reasons for the intended decision; (ii) the anticipated consequences for the employees of the Dutch business; and (iii) the proposed measures in light of those consequences. Before the works council gives its advice, at least one consultation meeting must take place. After the works council's advice has been given, the board may make a final decision. The board must notify the works council of its decision in writing and, if applicable, must explain why it has not followed all or part of the works council's advice.

If the shareholder refuses to observe these rights, the works council may take legal action, in which case the following applies.

If the decision is made without the works council's advice being requested in accordance with Section 25 of the Works Councils Act, the works council may inform the shareholder in writing that:

- The shareholder's proposed decision and its imposition on the Dutch subsidiary, being subject to the works council's advice, cannot be implemented.
- If the shareholder denies the works council its rights, the works council has one month from the day it was informed, or otherwise became aware, of the decision to apply to the court for injunctive relief.
- The court procedure implies that the works council may appeal the board's decision to the Enterprise Court at the Amsterdam Court of Appeal.
- The Enterprise Court then determines whether the shareholder's decision is indeed attributable to the Dutch company; or whether co-management by a group company is involved, and whether the decision is manifestly unreasonable. A distinction is generally made between procedural requirements and the merits of the decision itself. The procedural requirements require strict compliance. With regard to the merits of the decision, due to the managerial prerogative, an injunction will follow only if the decision is manifestly unreasonable.
- If the decision is considered manifestly unreasonable, the Enterprise Court may order the company to withdraw its decision in whole or in part or, in the event of noncompliance, may prohibit the company from implementing its decision and impose a penalty. In the case of co-management, the Dutch company and the co-managing group company are both subject to the court order.

If a decision subject to Section 27 of the Works Council Act and taken without the consent of the works council, the decision is null and void if the works council invokes this nullity within one month after being notified or otherwise made aware of such decision.

Conclusion

Under Dutch law, the consequences of noncompliance with the rules on employee participation may be drastic and may include the obligation to withdraw a company's decision, in whole or in part, or a ban on implementing such a decision—quite unique outcomes in the global legal landscape. It is worth keeping a close eye on the decision-making process in group structures and, at an early stage, addressing any discussions related to employee participation. Transparency and effective communication are key. The general counsel will play an important role in steering this process in the right legal direction.

Poland

Working Time Management in a Business Service Center

By Agnieszka Fedor (Counsel, Warsaw)

Over the past five years the Polish market for business service centers has doubled—to more than 190,000 employees in over 930 centers. It is still one of the fastest growing sectors in the country, despite stiff competition from other CEE Countries, with its reasonable employment costs.

It seems fairly obvious that one of the key factors in the success of a business service center is skillful management of the employee's working time, as this directly influences efficiency and profitability.

There are two basic models for business service center operations in Poland: (1) those that provide services only within Europe (and some of those only within the EEC) and (2) those that provide their services globally. Due to limited time zone differences, the first model is much easier to implement in terms of planning and time management, whereas the second model requires continuous operation and personnel availability around the clock—following the sun and business hours in Russia, London, New York and Shanghai.

The regulations governing working time in Poland are quite restrictive and require employers to put in a lot of effort at the initial phase, i.e. when designing working time systems and related documentation. Employers are also required to collect a large amount of working-time related data and records—and to make them available at the request of the labor inspector.

At the same time, employers may make use of solutions offered by the law to tailor working time schemes to their business model and specific needs.

The business service center sector has been growing so rapidly in Poland that provisions of the Polish Labor Code have been amended to address its specific needs. Human resources managers at the first generation of service centers complained about their inability to comply with the Labor Code's business requirements when providing services globally. For example, Polish law only allows for work on Sunday and national holidays in very limited cases. Before this law was amended, service centers were not among those limited cases worthy of exemption. As a result, the centers were unable to provide their services in a situation where, for example, a Monday in Hong-Kong was still a Sunday in Warsaw, or where a Polish national holiday was a regular business day in other countries.

In 2014, following significant pressure from the service centers, Poland implemented new provisions in its Labor Code allowing employees who provide services to recipients outside Poland via electronic communication or telecommunication devices to work on Saturdays and Sundays, subject to one condition: The day when the recipient receives said services must be a working day in the recipient's location. The same principle applies to support staff essential to these services.

Initially, the difficulty of implementing relevant procedures, verifying time zones, ascertaining public holidays in multiple countries and producing evidence of compliance in the event of a visit from the labor inspector was immense. Despite that, many centers made liberal use of this exemption, especially the provision making it applicable to support staff, since the need to provide IT and administrative support on working days was easy to justify. In many instances, the new rule was extended to entire organizations. Due to its popularity, the labor inspection issues were short-lived, implementation of this provision became more rational, and it is no longer causing any significant issues.

Service centers are focused on efficiency and finding the best business solutions. This has led to companies implementing very flexible regimes that test the boundaries of the nation's working time regulations, such as expanding the definition of shift work to include a group of employees that works only on weekends and widely implementing home-office work to maximize the availability of employees for global teams, minimize the amount of office space needed (a significant cost factor) and enable employees (mainly women) who must juggle work challenges and family obligations to spend more time at home.

Improper time management, including failure to strictly supervise the performance (e.g., correspondence flow) of subordinate employees, often results in serious financial risks, including the payment of significant sums in overtime. For service centers, the initial period of operation is particularly sensitive because, due to operational needs, employees frequently work long hours and exceed working time norms. Implementing well-drafted internal regulations and procedures may significantly limit these risks, but employers also should be aware that the technological solutions used by service centers to track all user activity can also provide very useful evidence to employees (or, in many cases, ex-employees) in the event of litigation relating to unpaid overtime.

Employment and Labor lawyers are able to support and address many specific business and operational needs of business service centers, but this process requires cooperation from the parties and understanding of the environment and the challenges faced by such organizations.

United States

A Global Whistle-Stop Tour

By Cynthia Jackson (Partner, Silicon Valley)

Codes of conduct not only implicate corporate compliance obligations under US law for US-based multinationals, but also compliance with the employment and data privacy laws in the foreign jurisdictions where their subsidiaries operate. Despite sometimes significant differences between the laws of the different jurisdictions, most multinational companies want a single, "user friendly" global code of conduct. However, accomplishing that requires an understanding of local laws. Without such an understanding, even the best-intentioned companies can, in their quest to be ethical, end up violating local civil, constitutional and criminal laws.

Some countries encourage robust reporting by employees of illegal activities occurring in an organization. One such country is the US which permits employers to require reporting of any suspected violations, affords whistleblowers anonymity to allay concerns of retaliation, requires in-depth investigation into whistleblower claims by senior management or boards of directors, and encourages, or at least allows for, prompt "no-tolerance" remedial measures against not only wrongdoers but also those who knew but failed to disclose a violation by others.

In contrast to the US scheme, some countries limit what can be reported beyond local management or local law enforcement; are suspicious of hotlines and anonymity, which is believed to lead to malicious and unfounded accusations; require "proportionality" balancing of the seriousness of the alleged violation against the invasion upon personal privacy involved in ferreting it out; limit the collection and transmittal of personally identifiable information communicated via a hotline and/or uncovered during an investigation; and proscribe who may view such reports and findings. In addition, many countries do not consider a violation of US law by a local employee as providing a basis for disciplinary action unless it would also constitute "cause" under local employment law.

How did this happen?

In the US, anonymous reporting of any and all illegal or unethical conduct is encouraged. Sarbanes-Oxley §301 requires audit committees of US publicly traded companies to establish anonymous whistleblower hotlines. The New York Stock Exchange rules, while not specific, encourage reporting of illegal or unethical behavior. The US Sentencing Commission Guidelines Manual expects reasonable steps for compliance, such as anonymous and confidential hotlines. Federal contractors are expected to have internal controls and reporting mechanisms (48 Code of Federal Regulations §3.1000). US regulators view anonymous hotlines as both an important tool to allow employee watchdogs to blow the whistle, and an employee-friendly way to provide retaliation protection.

In contrast, anonymous whistleblower hotlines do not evoke such warm feelings among EU member states. Instead, they conjure up memories of World War II, when children reported their parents, condemning them to death; or when co-workers or neighbors, under the cloak of anonymity, turned each other in, often without giving the accused adequate opportunity to rebut the charges.

This cultural collision manifested itself most starkly in 2005, when France concluded that two US-based, publicly traded companies had violated French employment and data privacy laws in implementing US-required SOX anonymous whistleblower hotlines for employees of their French subsidiaries. A German court reached the same conclusion, putting the Securities and Exchange Commission and US enforcement scheme at odds with EU law. With the SEC and the EU recognizing that this was an untenable situation, in February 2006, Article 29, a collective body of EU data privacy authorities, opined that anonymous hotlines should be permitted, provided certain conditions were met, including: (i) limiting whistle-blowing to alleged accounting, banking, financial, governmental anti-corruption and "vital interest" or "moral integrity" interests; (ii) discouraging (or at least not encouraging) anonymity over identifiable reports, although confidentiality should be kept; (iii) limiting who may be incriminated through hotlines; (iv) limiting the collection of data to what is strictly necessary to verify allegations; (v) deleting data promptly upon completion of the investigation, unless legal or disciplinary proceedings are initiated; (vi) informing people who are incriminated promptly; (vii) limiting whistleblowing administration to a limited number of specially trained individuals, bound by confidentiality obligations; and (viii) adhering to all data privacy laws, including data privacy registrations, filings and proper data transfer vehicles (e.g., EU Model Contracts, Privacy Shield, Binding Corporate Rules).

The diverging EU path for reporting

It was left to each EU member state to adopt the advisory opinion and, even then, the Working Party did not attempt to define what it meant by "moral integrity" or "vital interest." As a result, even within the EU, differences began to emerge as to what compliance policies were worthy of whistleblower-reporting to the US and what hotline reports should be handled locally. Belgium and the Netherlands, for example, have not adopted bright-line lists of hotline-reportable topics and instead have taken the position that only matters that cannot be handled in Belgium or, in the case of the Netherlands, only matters that are substantial abuses that exceed the national level of the Dutch company, should be communicated to the US through hotlines, to be determined on a case-by-case basis. Spain and Portugal, on the other hand, still do not permit anonymous hotlines at all. Sweden, for its part, in addition to requiring general data privacy compliance and filings, restricts hotline reports to concerns about managers and above.

The UK, Ireland, Germany, Italy and France all permit communication of Sarbanes Oxley-like violations and Foreign Corrupt Practices Act violations on anonymous hotlines (provided certain data privacy safeguards are met) but France has a much more restrictive view than the others of what constitutes "moral integrity" or "vital interest." In France, only the following types of violations may be reported via a hotline: financial, accounting, banking, anticorruption, antitrust, discrimination or harassment, workplace health, hygiene and safety, environmental protection and—recently (July 2017) augmented to include a crime—"manifest and serious" infringement of an international commitment ratified or approved by France or a "serious threat or damage to public interest."

France does not allow "any and all Code violations" or "any and all legal or policy violations" to be reported on a hotline; reports beyond the topics specified by the French data privacy authority (CNIL) must be handled locally. In such cases, US investigators may find that they need to physically

go to the country to conduct their investigation rather than having local French management transport the data (soft or hard) to the US. Further, unlike most EU members, which allow employers to state that employees "should" report certain violations, France only permits employers to "encourage" hotline reporting.

In contrast to the "restrictive" EU jurisdictions, the UK, Ireland, Germany, Italy and most of the rest of the world allow for typical US Code violations to be reported through anonymous hotlines *provided* local data privacy and employment requirements are followed. To avoid proliferation of codes, global companies operating in "restrictive" countries should remove language requiring that every code violation be reported via a US hotline and instead direct overseas employees to country-specific reporting protocols so that these differences can be lawfully addressed. With artful drafting and site references, this "routing" can be accomplished in a single global code without voluminous footnotes or convoluted instructions.

Some policies just don't translate

Even if the differences in reporting requirements are addressed in a company's global code, data privacy notices and/or on hotline sites to accommodate jurisdictional differences, some substantive US employment policies simply do not lend themselves to global application. The most notable examples are US policies that refer to (i) employment "at will," (ii) discipline for actions or inaction that do not rise to the level of "cause" for discipline under local laws, (iii) employee surveillance or monitoring, (iv) trade sanctions against Cuba, or (v) policies that purport to control a non-employee family member or to penalize an employee for a family member's conduct.

Typical US Title VII nondiscrimination policies may also violate local employment laws. For instance, some Islamic countries *require* employers to discriminate on the basis of sex or religion. Many countries, such as Germany, *require* employers to take age, disability and marital status into consideration as part of an economic dismissal selection process. These issues can usually be addressed by deleting problematic US code language and, instead, requiring employees to comply with all applicable discrimination laws, supplemented with more robust policies where permitted.

Local implementation requirements

If companies have works councils or trade unions, codes typically require consultation prior to implementation. In France, employers must, at least 30 days before implementation, post the code in the workplace and file copies with the French labor inspector and labor courts for comment. China requires that the code be the product of a "democratic process"; failure to follow certain prescribed procedures can render it a legal nullity. In some countries, employee consent to the code must be obtained, whereas in others, employee acknowledgement is strongly suggested. Several countries require that, for a code violation to be the basis of discipline, the code must have been incorporated into work rules or employee contracts. Even then, employee consultations or warnings may also be required before imposing discipline. Translation into the local language is legally required in several countries (and certainly advisable elsewhere). And in some countries, employees may not be disciplined for violating the code of a foreign parent. The local subsidiary must adopt the code as its own, in order to discipline an employee for violating it.

The fix

No global company should put itself in the otherwise avoidable "catch 22" of being required under US law to take prompt investigatory and, if necessary, remedial action while, at the same time, being prohibited from doing so under local employment and data privacy laws. Fortunately, proper code drafting, reporting processes and training in advance of a hotline ringing can all but eliminate this exposure.

United States

Another Blow to Employment Arbitration Clauses in Hawai'i

By Scott Prange (Associate Attorney at Alston Hunt Floyd & Ing (Dentons Hawaii affiliate))

In *Gabriel v. Island Pacific Academy, Inc.*, the Hawai'i Supreme Court refused to enforce an arbitration clause in an employment agreement where the chosen arbitrator's standard operating procedures required the employee to pay half the arbitration costs up front. The Court held that the clause was substantively unconscionable and, therefore, unenforceable where the associated arbitration costs were so prohibitively expensive as to deter the employee from bringing a claim. The Court further held the proper remedy was not reformation but to strike the entire arbitration agreement because it was pervaded by the unconscionable terms.

The employment agreement between Gabriel and Island Pacific Academy (IPA) contained the following arbitration clause:

> Arbitration. The parties desire that any dispute concerning the Agreement be handled out of court. Accordingly, they agree that any such dispute shall, as the parties' sole and exclusive remedy, be submitted to an arbitrator licensed to practice law in the State of Hawaii and selected in accordance with the standard procedures of Dispute Prevention Hawaii [sic]. The arbitrator will not be entitled to add to or subtract from its terms. Should either party start any legal action or administrative proceeding against the other with respect to any claim related to this Agreement, or pursue any method of resolution of a dispute other than mutual agreement of the parties or arbitration, then all damages, costs, expenses and attorneys' fees incurred by the other party as a result shall be the responsibility of the one bringing the suit or starting the proceeding.

Although the clause only provided that the parties submit any disputes to an arbitrator "in accordance with the standard procedures of Dispute Prevention Hawaii," the circuit court found that Dispute Prevention and Resolution Hawaii, Inc. (DPR) was in fact the arbitral body. The circuit court demanded that DPR's standard operating procedures be submitted after Gabriel argued that DPR would require her to pay half of the cost of arbitration and half of the deposit for the arbitrator's fees upfront.

DPR's standard operating procedures stated:

> **I. DPR FEES & COSTS**
> Any out-of-pocket expenses incurred by the DPR appointed neutral (e.g., air fare, lodging, meals) in conjunction with a DPR proceeding are to be borne equally by the parties and shall be paid to the appointed neutral from funds deposited by the parties with DPR for that purpose.
>
> **II. ADVANCE DEPOSITS & REFUNDS**
> DPR policy requires that each party submit advance deposits toward the anticipated fees and expenses of the DPR appointed neutral on an equal or pro rata basis. DPR may require the parties to submit additional deposits during the pendency of the arbitration proceeding based on the expected duration of the matter. DPR and the DPR appointed neutral reserve the right to suspend their services for non-payment by any party. In the event of inadequate or non-payment of requested deposits by a party, DPR may request that the other party(s) involved in the proceeding submit additional deposits to assure that an adequate sum is available to compensate the DPR neutral.

The Court agreed that, pursuant to DPR's standard operating procedures, Gabriel would have had to pay half

of the arbitration costs upfront. The Court then found that Gabriel would have been deterred from accessing the arbitral body because she was unable to pay the costs. Gabriel had submitted a personal declaration and supporting exhibits showing:

- While at IPA, her salary was $45,000 annually;
- She was without a full-time job, having financial difficulty and unable to pay for the costs of arbitration; and
- DPR would have charged $20,318.74 for a four-day arbitration, and that she would have had to remit a $10,200.00 deposit.

The Court clarified, however, that an arbitration agreement requiring employer/employee cost-splitting is not per se unconscionable; rather, it is a fact-dependent inquiry, turning on whether the costs of submitting to arbitration would deter the employee from bringing a claim. Here, the Court estimated that Gabriel's arbitration costs would have been somewhere between one-fourth and two-thirds of her contracted, annual salary, and that, therefore, the cost split was a deterrent.

The takeaways: Draft an employment arbitration clause carefully. Consider the implications of incorporating, wholesale, the procedures of a particular arbitral body; avoid including provisions a court might consider burdensome on an employee; and seek a Hawaii employment lawyer's legal advice or review.

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United States

Trump Revokes Obama's "Fair Pay and Safe Workplaces"

By Jessica Abrahams (Partner, Washington, DC) and Richard Scharlat (Partner, New York)

President Donald J. Trump has loosened the federal government's grip on businesses looking to secure federal contracts. On March 27, 2017, the president signed Executive Order 13782 revoking executive orders by President Barak Obama that had regulated the conduct of federal contractors. President Trump's EO 13782 expressly revokes Obama's EO 13673, also known as the "Fair Pay and Safe Workplaces" order, as well as subsequent amendments, set forth in Section 3 of EOs 13683 and 13738.

President Obama issued EO 13673 on July 31, 2014, with the stated purpose of ensuring that federal contractors comply with applicable labor laws. EO 13673 contained three major provisions that separately addressed (i) disclosure of compliance with labor laws, (ii) paycheck transparency and (iii) arbitration clauses for claims of sexual harassment, sexual assault, and discrimination.

More specifically, EO 13673 required federal agencies to include provisions in their solicitations to potential service providers directing them to disclose "whether there has been any administrative merits determination, arbitral award or decision, or civil judgment" for violations of certain labor laws issued against them within the preceding three years. The list of applicable labor laws includes, but is not limited to, the Fair Labor Standards Act, the National Labor Relations Act, the Occupational Safety and Health Act of 1970, Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act and the Americans with Disabilities Act of 1990. EO 13673 also required all agency solicitations and contracts to include that service providers must issue to individuals performing work under the contract a document containing information on "that individual's hours worked, overtime hours, pay and any additions made to or deductions made from pay." EO 13673 further required agencies to include in their solicitations and contracts a provision that service providers are prohibited from including in their contracts with employees clauses requiring the arbitration of claims arising under Title VII of the Civil Rights Act of 1964, or sounding in any tort relating to or arising out of sexual assault or harassment.

President Trump's EO effectively revokes these requirements and directs all executive departments and agencies to "consider promptly rescinding any orders, rules, regulations, guidance, guidelines, or policies implementing or enforcing the revoked" EOs. Although it remains to be seen exactly how individual agencies will implement President Trump's EO in their solicitation and contracting practices, service providers looking to secure federal contracts can reasonably expect to face fewer hurdles throughout the contracting process. For example, service providers bidding on federal contracts may no longer be required to disclose recent labor law violations and may be free to include mandatory arbitration clauses with respect to sexual harassment, sexual assault, and discrimination claims in their employee contracts.

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