

# Employment

Global

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## The Global Employer™

Equity in the Workplace



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# Equity in the workplace

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Baker & McKenzie's Global Employment Practice Group is pleased to present its 49th issue of *The Global Employer*<sup>TM</sup> entitled "Equity in the Workplace."

This issue contains a collection of articles from 13 jurisdictions which examine various issues regarding equality in the workplace. Countries continue to pass new legislation that aims to create an equal environment for all employees regardless of age, gender, or race.

One issue that continues to be at the forefront is the right to equal pay for equal work which is addressed in articles from Argentina, Austria, Canada, Colombia, Japan, and Russia where the principle of equal pay for equal work, regardless of gender, race, nationality, religious beliefs, etc., is examined. The issue of pay equity is further examined in articles from Germany and Mexico where the equal pay principle is extended to agency workers and when dealing with outsourcing companies; and in Vietnam where there is discussion of new legislation to harmonize the minimum wage.

Articles on benefits are also included, such as the new termination law in Belgium which eliminates the difference in notice requirements for blue and white collar workers and the new vacation legislation in The Netherlands which ensures equal accrual of vacation time for all employees.

Other articles include one from the United Kingdom where gender equality in the boardroom is examined and articles from the United States where diversity in the workplace and California's Transparency in Supply Chains Act of 2010 are discussed in depth.

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Our Global Employment Practice includes more than 400 locally qualified practitioners in 40 countries. We have more lawyers with mastery of the subtle intricacies of labor, employment, immigration and benefits issues in more jurisdictions around the world than any other leading law firm. *Chambers Global 2011* ranks both our Global Employment and Global Immigration practices as Tier 1. Baker & McKenzie is recognized by *PLC Which lawyer?* Labour and Employee Benefits Super League 2011, as the top global law firm with our Global Employment practice ranked in 24 countries, and we are among the 10 firms US general counsel list most often as "go-to" advisors on employment matters.

## Equal pay for work of equal value, under similar circumstances

Many labor rights that govern Argentina stem from the National Constitution (“Constitution”). Among its provisions, Section 14bis of the Constitution establishes a number of workers’ rights, including dignified and equitable working conditions; limited working hours; paid rest and vacations; fair remuneration; minimum vital and adjustable wage; equal pay for equal work; participation in the profits of enterprises with control of production and collaboration in management; protection against arbitrary dismissal; stability of the public worker; and free and democratic labor union organization.

Consistently, the Supreme Court has ruled that the equal treatment rule arising from Section 14bis of the Constitution should be interpreted as equal rights must be recognized under the same circumstances and that judges have the authority to determine reasonably whether equal or different circumstances exist.

In addition, the Constitution incorporates certain international treaties within the rank of constitutional rights. These treaties (among others, the Universal Declaration of Human Rights,

the International Covenant on Economic, Social and Cultural Rights, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights) are related to human rights and many of them defer to the non-discrimination principle.

Argentina is also a member of the International Labor Organization and has approved several international labor conventions (Equal Remuneration Convention, 1951 (No. 100), and Discrimination (Employment and Occupation) Convention, 1958 (No. 111)) which strive against discrimination in employment and occupation, and which highlight the equal pay principle.

Further, Section 81 of the Employment Contract Law (ECL) rules that employers must treat their employees equally under identical situations. The law also rules that such equal rights principle is not violated when an employee is treated differently in response to reasonable principles, such as more efficiency, dedication, attitude towards work or reduction of work, etc.

According to these regulations, employers could not apply different salary policies to employees in the same

level, organization, category, etc, unless the different treatment is based on performance, outstanding results of the employees, or on any other objective criteria not implying impermissible discrimination.

The underlying issue in Argentina would not only involve the rule equal pay for equal work set forth by the Constitution, but also an analysis of what type or level of “discrimination” (from the Latin “*discriminare*” meaning to “distinguish between”) is allowed. In effect, there is no restriction in the ECL that would prohibit setting special qualifications for eligible employees to a given benefit (e.g., excluding employees with certain seniority or with special characteristics) as long as reasonable criteria are applied.

In connection with this reasonable criterion and as a first note, discrimination based on sex, race, nationality, religion, political affiliation, union affiliation, or age is prohibited.

Therefore, unequal treatment would be then defined as involving arbitrary discrimination based on sex, religion, or race, but not as involving treating individuals differently in response to reasonable principles, such as more efficiency, dedication, or reduction of work.



An employee who suffers workplace discrimination also may seek relief under the ECL. The employee may bring suit to recover the salary that would have been earned absent the discrimination, or may treat the discrimination as an offense terminating his or her employment due to a constructive dismissal and claim regular severance from the employer.

In addition, according to the Antidiscrimination Law 23,592, those who, on arbitrary grounds impede, obstruct, restrict, or in any way reduce the equal exercise of the rights and guarantees set forth in the Constitution

(arguably, a violation of the rule equal pay for equal job), shall be obliged to take back the effects of the discriminatory act or to cease such conduct. Under the law, the cases based on race, religion, nationality, ideology, political or union opinion, gender, economic position, social condition, and/or physical characteristics are in particular considered discriminatory acts.

In summary, an employee who suffers mistreatment in connection with salary levels could claim to have his or her salary adjusted according to the general criteria applied to the rest of the

employees. Should the employer fail to comply with that request, the employee could consider that attitude as an offense and enter into a constructive dismissal. In this scenario, the employee would reasonably claim the payment of statutory severance for termination without cause.

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## News from Austria

# Equal pay for equal work? Closing the gap in Austria

In 2011, a new law came into force that is designed to improve income transparency within companies and reduce the pay gap between men and women. Until the recent legislation, Austria was one of the last countries within the European Union to address the issue of equal pay on a legal basis.

The recent legislation has not been the first step in order to reduce the pay gap between men and women. In 2004, for instance, Austria implemented the EU-Directive 2000/78/EC establishing a new general framework for equal treatment of men and women in the workplace as stipulated in the Austrian Act on Equal Treatment. At this point, equal pay laws had already been in effect – but not effective – for more than 30 years. Thus, the demand for equal pay is not new, but it has recently become a highly debated subject among the public as well as the politicians. The Austrian Government was aware of these

demands and proposed a new law which has taken further steps in order to reduce the existing salary gap.

As lack of transparency has turned out to be one of the crucial issues, Austria has now followed the example of other countries. Greater transparency of income within a company is a vital prerequisite for preventing income discrimination and is thereby serving to close the existing salary gap.

According to recent publications, female full-time employees have to work approximately 70 days more per year in order to achieve the same yearly

income as their male colleagues. Depending on the source of the respective study and its data, women still earn 18 to 27 percent less than male colleagues in comparable positions.

Without apparent justification, women entering the workforce are often directly or indirectly discriminated against through a job grade scale that is different from that of their male colleagues. In Austria, most employees are subject to a collective bargaining agreement which sets forth a minimum salary requirement based on an initial grading by the employer. Men seem to be consistently placed in higher pay

grade levels than women and these initial pay grade assignments often result in discrimination, even if seniority is taken into account. Throughout the whole employment relationship, men tend to receive more and higher pay raises, bonus payments, and overtime pay than their female co-workers with similar seniority.

In contrast to these facts, court claims remain uncommon, largely because female employees are reluctant to take action that might prejudice their employment. As an alternative, employees may prefer to seek advice and information from the Non-Discrimination Commission or from the Equal Opportunities Lawyer. The Non-Discrimination Commission has the power to determine whether an act of discrimination has occurred and can formally request that the employer remedy such breach. Furthermore, the Commission can also seek declaratory action, but it has no power to impose a penalty on the employer or to award compensation to an employee.

Nevertheless, discrimination claims can be brought before the labor courts by the employee or the Federal Chamber of Employees. However, female employees suing their employers – as a result of the Commission’s report – still risk their employment and incur high costs. Even though the burden of proof was reversed by Austrian legislature in 2004, it has not helped the situation due to the lack of an inquisitorial system in such proceedings.

Therefore and as a first step, the Non-Discrimination Commission and the Equal Opportunities Lawyer have been given the right to legally obtain information from the Austrian social security authorities with regard to the income data of comparable employees.

Furthermore, the new law sets forth an obligation for companies of a certain size to regularly perform an internal salary study. Beginning in 2011,



companies with more than 1,000 employees will be required to issue such a salary report. Every year until 2014, even smaller companies will be obliged to do so (i.e. companies with more than 500 employees in 2012, with more than 250 employees in 2013, and with more than 150 employees in 2014). Companies with less than 151 employees will not be subject to this regulation in order to protect individuals and take data protection rights into account. In any case, the identity information of the employees must be kept confidential by all informed persons. Informed employees breaching this duty may be punished by a penalty amounting to a maximum of EUR 360. This penalty has been criticized by employees’ representatives because employers will not be subject to any penalty in the event that they fail to publish the salary report.

The salary reports are required to be issued only every second year. Employers must inform the works council of the findings of such report and the works council is entitled to demand consultations with the employer. If there is no works council, the employer must publish the report on an internal bulletin board or otherwise make it available to the employees within the company.

According to recent estimations, approximately 70 percent of the

employers will fulfil their statutory duty and publish a salary report for 2011. Employee representatives have therefore criticized the salary reports as being ineffective and demand mandatory penalty payments. However, such penalty payments are currently not on the political agenda of the Austrian government.

The new regulations have been integrated into the existing Austrian Act on Equal Treatment. The following important changes aimed at minimizing the gender pay gap have also been set into force:

- Beginning in 2012, job advertisements (internally or externally) must contain information on minimum wages/salaries applicable according to statutory law or the applicable collective bargaining agreement. Further, payments exceeding minimum wages/salaries, if any, must also be stated in such job advertisements. After a first warning, employers can now be fined up to EUR 360 if they fail to do so.
- The minimum damages to be awarded in harassment cases have been raised from EUR 720 to EUR 1,000.
- Another measure designed by the Austrian government in order to

reduce the pay gap between men and women and establish further transparency is the so called “income calculator.” This online tool enables employees to calculate the average income of a comparable employee. By using this tool, women can realistically assess their potential income and take this as a basis for future salary negotiations.

- A recurring proposal in order to reduce the gap between men and women are mandatory quotas for the supervisory boards of larger

corporations. The Austrian government has only partly taken up this demand: effective as of 2013, corporations preponderantly owned by the state of Austria shall voluntarily fulfil a 25 percent gender quota.

Thus far, politicians are still reluctant to implement more rigorous laws to force employers to treat men and women equally. Therefore, time will show if the aforementioned legal provisions, in particular a higher transparency of income within a company, are a suitable

means for eliminating income discrimination and closing the existing gender pay gap.

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## News from Belgium

# Termination law creates equal treatment amongst workers

### Recent Developments

With the enactment of new termination rules in April 2011, the Belgian Legislator aimed at narrowing the difference in notice periods between blue and white collar employees in Belgium. The new termination rules might, however, have a short life. In July 2011, the Constitutional Court of Belgium judged these rules insufficient to eliminate the unlawful discrimination between blue and white collar employees.

### Implications for Employers

As of January 1, 2012, new notice periods apply in Belgium to employers and employees terminating employment contracts. For employers, the most important effects of the new termination rules will be the small increase in notice periods for blue collar workers and the introduction of fixed notice periods for all categories of white collar employees. The new termination rules will apply only to employment contracts starting on January 1, 2012 or later (hence leaving existing contracts governed by the old termination rules). The July 2011 ruling of the

Constitutional Court is likely to instigate further changes to Belgium's termination law in the near future. While the scope of these changes remains unclear, it can be expected that if different notice periods were to subsist between blue and white collar employees by July 8, 2013, employers will face claims of blue collar workers seeking equal treatment.

### What the New Termination Rules Say

Important to note is that the new termination rules will apply to employment contracts with an agreed

start date no earlier than January 1, 2012. The old termination rules will continue to apply to employment contracts starting before January 1, 2012. If parties to an existing employment contract enter into a new contract starting on January 1, 2012 or after, the new termination rules will only apply if there is an interruption of more than seven days between both contracts.

In the following paragraphs, we provide an overview of the key issues that could arise from the new termination rules when employers terminate employment contracts.



### *New Notice Periods for White Collar Employees*

For white collar employees earning less than EUR 31,467 (2012 amount) gross a year, there are no changes as they will remain entitled to a three month notice period per any commenced five years of service with the employer. The duration of the notice period for white collar employees earning more than EUR 31,467 (2012 amount) gross a year, is now expressly defined by law and no longer depends on a post-termination agreement to be negotiated between the parties or the judge's decision. As a rule of thumb, their notice period will amount to 30 days (29 days as from January 1, 2014) per commenced year of service with the employer without being less than the aforementioned three months per five years of service. If the employee's annual gross remuneration exceeds EUR 62,934 (2012 amount) at the time of entering into service, parties keep their right to agree on other notice periods (not less than three months per five years of service) before the start of employment.

### *Calculation of Termination Indemnity*

A termination indemnity is due when an employment contract is terminated without (sufficient) notice period. The amount thereof is equal to the employee's current remuneration and benefits corresponding to the remainder of the applicable notice period. The new termination rules clarify the calculation method of the termination indemnity for white collar employees. A formula allows for the conversion of the employee's monthly remuneration into a daily remuneration for the purpose of calculating the termination indemnity. The law now also states that, when (part of) the employee's remuneration is variable, only the average variable remuneration of the last 12 months prior to termination must be taken into account.

### *Financial Contribution to the Closure Fund*

For any dismissal of white collar employees earning more than EUR 62,934 (2012 amount) gross a year, regardless of whether their employment contracts fall within the scope of application of the new termination rules, employers will have to pay a contribution equal to three percent of the termination cost to the Closure Fund. It is unclear as from when employers will have to pay this financial contribution. A Royal Decree is still needed to further implement the practical terms and conditions of such financial contribution as well as its entry into force.

### *Dismissal Allowance for Blue Collar Workers*

Effective January 1, 2012, blue collar workers, regardless of whether their employment contracts fall within the scope of application of the new termination rules may, under certain conditions, receive a dismissal allowance from the National Unemployment Office on top of their normal termination entitlements.

The new termination rules also bring some changes to the notice periods that both blue and white collar employees must respect in the event of resignation.

### **What the Case Law of the Constitutional Court Says**

The difference of treatment in notice periods between blue and white collar employees in Belgium has been criticized for a long time. In a 1993 ruling, the Constitutional Court hardly found such difference of treatment legally justified. At that time, the Constitutional Court could, however, live with it, considering a gradual harmonization of the statuses of blue and white collar employees more appropriate than an abrupt elimination of any discrimination between both categories of employees.

### *Seniority as Interim Worker*

Past services that an employee has accrued for the employer as an interim worker must be added to the employee's seniority, up to a maximum of one year, for the purpose of calculating the notice period. It is, however, required that the employee was hired by the employer to perform the same function no more than seven days after the period of agency work. Successive periods of agency work can be taken into account provided the interruptions between these periods do not exceed seven days.

### *New Notice Periods for Blue Collar Workers*

Notice periods for blue collar workers increase by 15 percent, unless derogatory business sector rules were already in effect before January 1, 2012. The notice periods under these derogatory business sector rules will continue to apply after January 1, 2012. Each business sector will have to evaluate by January 1, 2013 whether or not to apply the same 15 percent increase on its derogatory notice periods.

It is in that context of narrowing the difference of treatment in notice periods between blue and white collar employees that the Belgian Legislator enacted the new termination rules, which were only meant as a step towards harmonization.

In the recent ruling of July 7, 2011, the Constitutional Court rejected such a step-by-step approach. With regard to the new termination rules, the court deemed the difference of treatment in notice periods between blue and white collar employees constituted unlawful discrimination and set a deadline of July 8, 2013 for the Belgian Legislator to take appropriate remedial action.

### Action to Consider

While the new termination rules are effective January 1, 2012, unless further changes enter into force as a result of the July 2011 ruling of the

Constitutional Court, companies need to keep in mind the following:

- Save in certain circumstances, the new termination rules will only apply to employment contracts that went into effect on January 1, 2012 or later. As the new termination rules provide for fixed notice periods for all categories of white collar employees, hence putting aside the Claeys formula, it might have been, in some cases, worth postponing the employment start date for new hires until after January 1, 2012. (The Claeys Formula is used in Belgium by the practitioners of social law to evaluate the notice period that has to be respected when an employee is dismissed.)
- For employment contracts already in effect on January 1, 2012, the old termination rules will, in principle, continue to apply.

### Conclusion

The new termination rules set out a temporary framework only. Belgium's termination law will indeed reach its destiny when no difference of treatment in notice periods will subsist between blue and white collar employees. If the Belgian Legislator fails to complete that mission by July 8, 2013, employers can expect claims from blue collar workers asking for a "leveling up" of their notice periods.

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## News from Canada

# Ontario introduces new gender wage gap program

### History of Pay Equity in Ontario

The province of Ontario has had legislation requiring equal pay for work of equal value for male and female job classes (or "pay equity" as it is known in Ontario) since January 1, 1988 when the *Pay Equity Act* came into force.

That Act required all employers with 10 or more employees to use a "gender neutral comparison system" to compare male and female job classes in their establishment in order to determine whether male and female job classes of equal value had the same rate of pay ("job rate"). If they did not, the job rate for the female job classes was to be

increased to bring it up to that of the male job class. This method of comparison was known as the "job-to-job" comparison method.

Large private sector employers (those with 100 or more employees) were required to prepare and post a Pay Equity Plan in their workplace within a

certain time line. Employers with 10 to 99 employees could choose to post a pay equity plan and phase in wage adjustments or to not post a plan and make all adjustments on this first pay equity adjustment date. All such plans or adjustments were required to be completed, at the latest, by January 1, 1994.

The *Pay Equity Act* was amended effective July 1, 1993 to include proportional value as another method of comparison of job classes. Briefly, if the original Pay Equity Plan using the job-to-job comparison method left one or more female job classes without a male comparator, the employer was required to conduct a further “Proportional Value” assessment. Proportional Value involves choosing a representative group of male job classes and determining the relationship between the value of work performed and their job rate. The female job classes are then analyzed to determine if the same pay relationship or pattern applies to them. Typically, this is done by developing a job rate line or by regression analysis. If the female job classes are lower paid than the representative group of male job classes, pay equity adjustments must be paid.

After an employer’s original Pay Equity Plan was developed, all employers were required to “maintain pay equity.” If there were changes that resulted in the Plan no longer being appropriate for the job classes covered by the Plan, the employer was required to develop a new Pay Equity Plan. Changes which made a Plan no longer appropriate included:

- Addition or subtraction of jobs;
- Changes in job duties or responsibilities which were sufficient to alter the value of jobs in a pay equity plan;
- Changes to the composition of the workplace; or
- Gender neutral comparison system no longer adequately captures the work.

The Act is enforced by the Pay Equity Commission (“Commission”). Under the Act, there are two methods of

enforcement, complaint based and monitoring.

Any employee can file a complaint with the Commission, alleging any of the following:

- Pay equity has not been done by their employer;
- The Pay Equity Plan does not comply with the Act;
- The Pay Equity Plan is not being implemented according to its terms;
- They were fired, penalized, or harassed because of pay equity;
- Changes in the workplace make the Pay Equity Plan no longer appropriate; or
- Pay equity is not being maintained.

There are no time limits on employee complaints and employees can make anonymous complaints.

In addition, the Commission also reviewed pay equity compliance by audit. An employer under audit was required to provide sufficient information to the Commission so that it could assess whether the employer had complied with the Act. If it had not done so, the Commission assigned a Review Officer to work with the employer until they were satisfied that pay equity had been achieved.

### **New Ontario Wage Gap Program**

The Act also empowers the Commission to “conduct research and produce papers concerning any aspect of pay equity and related subjects and make recommendation to the Minister [of Labour] in connection therewith.” It also provides that the Commission shall conduct such studies as the Minister requires and make reports and recommendations in relation thereto.

In January 2011, the Commission, acting under this authority, introduced the Wage Gap Program (the “Program”) to determine if gender wage gaps still exist in workplaces in the province. According to the Commission, the primary goal of the Program is to collect data to determine whether gender discrimination in pay practices is still prevalent in Ontario.

In its initial phase, the Commission is contacting all private sector employers in Ontario with more than 500 employees to collect basic wage data. The employers were asked to provide a list with the following information:

- Each job title or position in their workplace (for each employee);
- Whether they were male or female;
- Pay as of December 31, 2010;
- Salary range for the position, if applicable; and
- Years of service.

According to the Commission, this information will be assessed on the basis of several factors, including merit adjustment, type of work performed, and years of service with the employer. If the assessment suggests that there are gender wage gaps in the employer’s workplace, its file will be referred to a Review Officer, who will then monitor their compliance with the Pay Equity Act.

In its next phase, the PEO intends to gather data from employers with 250-500 employees. It anticipates that all Ontario workplaces, regardless of sector or size, will be canvassed by the time the Program ends.

Any employer who does not respond to the Commission’s letter will also be referred to a Review Officer for monitoring.

## Concerns for Employers

The Commission states that the information will not be shared with other government organizations; that it may only be made public in aggregate anonymized form; and that the data is gathered for the purpose of determining whether gender wage gaps persist in Ontario workplaces. The Commission also assures that there is no intention to publish information that could identify individuals and that any requests for public access to information that could identify individuals and their compensation rates would be declined.

The Commission states, however, that it may also use the information for its own internal purposes, as noted above, potentially triggering a referral to Review Services as part of its pay equity compliance program. Accordingly, employers should be aware that the Program is not simply an anonymous collection of data for the study of pay equity, but can result in a compliance audit by Review Services.

## Recommended Action for Employers

It has been over 20 years since the Pay Equity Act came into force in Ontario. Many employers worked hard to develop Pay Equity Plans and meet the legislative requirements. Businesses naturally change over time. Employers should review their existing Pay Equity Plan to ensure that it continues to reflect the realities of the organization, the employees and staffing positions and structure.

Such a review should include consideration of the following:

- Have new jobs been created or jobs eliminated since the original Pay Equity Plan was prepared?
- Have there been changes in the duties and responsibilities of any of the retained positions?
- Have the number of males and females in any position changed?

- Did the business go through a reorganization, amalgamation or other significant corporate change that altered various positions or affect the definition of establishment?
- Have there been structural changes to pay or salary ranges that are no longer reflected in the original Pay Equity Plan?
- Has a union been certified or de-certified?

When the Commission contacts an employer, up-to-date policies and a current Pay Equity Plan will be the best way to prove the employer's continued compliance with the Act.

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## News from Canada

# Pay equity in Quebec

## The Quebec Pay Equity Act (the "Act")

The purpose of the Quebec Pay Equity Act is similar to that of Ontario's Act, that is, to correct differences in pay scales between jobs traditionally (or predominantly) held by women and jobs traditionally (or predominantly) held by men, where such differences in pay scale are attributable to discrimination based on gender.

The Act requires employers to compare and evaluate jobs traditionally held by women to jobs traditionally held by men within the organization, to determine the objective "value" for the organization of the work performed. In the event such comparison/evaluation determines that jobs traditionally held

by women are undervalued (i.e. are paid less than jobs traditionally held by men that are of equal value to the organization), the Act requires the employer to implement salary adjustment for jobs traditionally held by women.

All employers with 10 or more employees in the province of Quebec are required to comply with the legislation. The specific obligations that an employer will have depend on a number of factors. First, the number of employees that the employer has in Quebec mandates certain obligations –

smaller employers (less than 50 employees) must do a pay equity analysis, but are not legally obligated to prepare a formal plan or establish an employer/employee committee. Employers with 50-99 employees have more extensive obligations and employers with 100+ must establish a committee to assist with implementing pay equity.

The timelines for compliance will depend on when the company first employed employees in Quebec. Most employers were to have completed their pay equity analysis by December 31, 2010.

Finally, in addition to the obligations under the Act for employers who have 10 or more employees, there is a reporting requirement for all employers with six or more employees which only came into force on March 31, 2011. This report is required as a result of a Regulation passed under the Act. There is a form, the *Déclaration de l'employeur en matière de l'équité salariale* ("Declaration") prescribed by the Minister of Labour that must be completed within six months of the end of the company's fiscal year. If an employer fails to file this report it can be subject to fines.

The information required in the Declaration includes the following:

- Whether the business is federal or provincial;
- The date that the company began activities in Quebec;
- The number of employees during the company's pay equity reference period, which has to be determined from the Act;
- The nature of the company's business;
- The date of the posting of the results of the company's pay equity

exercise; and

- The date of the posting of the results of the assessment for the maintenance of pay equity.

### Pay Equity Committees

Employers whose enterprise employs 100 or more employees are required to establish a Committee. The Committee must be composed of a minimum of three members, two-thirds of whom must represent the employees. Further, at least half the members must be women. Further, the selection of employee representatives must ensure representation of the "major predominantly female job classes and the major predominantly male job classes."

An important obligation imposed by the Act is contained in section 15, as follows:

*15. No employer, certified association or member of a pay equity committee may, in the establishment of a pay equity plan, act in bad faith or in an arbitrary or discriminatory manner or exhibit gross negligence with regard to employees in the enterprise.*

The employer must provide training to every employee representative in order for them to actively participate in the Committee's activities. The Committee establishes its own rules, including rules governing when/how meetings are held. Employee representatives may absent themselves from work, without loss of pay, to attend training, attend Committee meetings, and perform any Committee task. If such events occur outside working hours, such time will be deemed to be worked time and the employer will be responsible to pay to the employee the wages to which they would be entitled.

The employer is required to disclose to the Committee all information the Committee requires in order to

establish the pay equity plan (the "Plan"). The employer must facilitate the collection of any information required by the Committee. All members of the Committee are bound by confidentiality obligations with respect to any information disclosed to the Committee by the employer.

If the employees do not designate their representatives, the employer may establish the Plan alone, but provide the Pay Equity Commission (the "Commission") with notice, which notice will be prominently posted in the workplace. Further, if forming the Committee is "highly problematic" or if the employees are no longer participating, the Commission may, on application by the employer, authorize the alteration of the composition of the Committee, despite the requirements of the Act. The Commission may not authorize such altered composition if the employer has elected to establish a Plan alone and has posted a notice, as described in the first sentence of this paragraph.

### Committee Input

The Committee plays a significant role in the preparation of the Pay Equity Plan. The elaboration/implementation of a plan can generally be divided into four phases:

1. Identification of female/male job classes;
2. Assessment and selection of methods/tools used to determine job value;
3. Evaluation of job value; and
4. Determination of adjustment payments.

The Committee is exclusively responsible for the first three phases of the Plan. With regards to the fourth phase, although the employer decides the terms and conditions under which

adjustment payments will be made, it can only do so after having consulted with the Committee.

### Employee Representatives

The employer must permit employees to select their own representatives by way of a meeting held in the workplace. The employer may apply to the Commission to authorize another mode of selection, although it is unlikely that such application will be approved unless the employer can demonstrate difficulties inherent in holding a meeting for the election of such representatives.

However, the employee-members of the of the Committee cannot be a “senior management officer.” An employee will be qualified as a senior management officer if:

- The employee is a high-ranking official within the hierarchical structure enterprise;
- The employee exercises his or her duties with a large degree of freedom;
- The employee has significant decision-making power; and
- The employee participates in the business-direction and the business policies of the enterprise.

### Committee Disputes

The employee representatives, as a whole, as well as all of the employer representatives, as a whole, each have one vote within the Committee. In the event there is no majority decision

amongst the employee representatives of the Committee (i.e. if the employees cannot demonstrate a “united front”), the employer is empowered to determine the matter.

That being said, in the event the representatives of the Committee do not agree on the application of the Act, any party can submit the dispute to the Commission, who can then determine the question or proceed by way of conciliation.

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## News from Colombia

### Equal job, equal pay principle

The “equal job, equal pay” principle has undergone considerable development in the jurisprudence of Colombian High Courts (Supreme Court of Justice, Council of State and Constitutional Court). Established by article 143 of the Colombian Labor Code, this principle is one of the most clear reflections of the “equality” principle incorporated in article 13 of Colombian Political Constitution.

This provision states that all Colombian citizens have the right to be treated as equals, by governmental authorities and by normal citizens, and not to be discriminated against for any reason. Hence, the philosophy underlying article 143 of the Labor Code is to materialize the constitutional right into labor relations, particularly with regard to the salary of workers.

Parties in an employment relationship are entitled to establish remuneratory conditions within the employment agreement as long as they comply with certain inalienable minimum rights established by our laws to protect employees, for which employers must be in compliance. In practice, and subject to these minimum rights, salary levels depend on the criteria of employment, the qualifications of the

employee, and, in general terms, on the specific characteristics of the activity.

In light of this principle, an employee’s remuneration, depends on his or her abilities and on the functions they must perform, and not on the conditions or circumstances of the employer. Employers are able to establish differences in the amount of salaries or remuneration as long as they are

supported by objective reasons such as activities, duties, and conditions of efficiency.

The expression “equal salary” has been construed by our labor courts as the compensation for the services rendered, including the payment of fixed and variable salaries, extra legal benefits, and, in general, compensation schemes.

The above mentioned principle is not absolute and its final interpretation is based upon subjective criteria. The applicability of this principle will depend on the criteria of the Judge and the evidence that the parties gather in the judicial process. According to the jurisprudence of the Constitutional Court, the employer will have to prove that the difference in the employee’s remuneration is due to objective and reasonable motivation and that the employee will only have to allege the

violation of the “equal job, equal pay” principle.

Salary and social benefits are certain and indisputable rights of the employees and therefore they cannot be waived. When employees claim discrimination and provide evidence that the employer had no objective reasons for having different salary schemes among its employees, the employer can face considerable economic penalties upon a judicial claim derived from petitions for adjustment of salary, social benefits, extralegal benefits and other labor payments, plus penalty indemnities if it is proven that there are no objective reasons for the differentiation.

In order to diminish risks related to the “equal work, equal salary” principle and avoid remuneration discrimination claims, the most recommended practice is to have two different profiles of employees (i.e. years of experience,

educational background, foreign language skills, objective and measurable performance, among others). The ideal scenario is for people among the two groups to have different profiles, qualities and attributes. If it is not possible to identify those objective reasons, then differences in salary schemes will eventually provoke employee claims. The jurisprudence of the Constitutional Court has given the principle of “equal job, equal pay” the condition of being a fundamental right, and therefore subject to protection through the “*acción de tutela*.”

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## News from Germany

# Equal pay for agency workers

The hiring of agency workers has become increasingly popular with companies in Germany to enhance flexibility and to reduce labor costs. The agency (Verleiher) may contract out an agency worker temporarily, whereas the hirer (Entleiher) can engage an agency worker without becoming his or her actual employer. The statutory framework is complex and became tighter again in 2011. One of the new regulations with direct effect on costs and flexibility is the enforcement of the equal pay principle.

### The Equal Pay Principle

The agency may grant equal employment conditions to the agency worker. Equal employment conditions include the equal pay principle, according to which, the agency worker shall receive equal pay for equal work. “Pay” has a broad meaning and refers to

all remuneration, including not only the monthly salary but also, for example, overtime pay, holiday pay, bonus and commission. The hirer takes into consideration the remuneration of comparable employees in their decision about equal pay for agency workers. If the agency worker is a substitute for a former employee, the remuneration of

the former employee will generally be a determining factor. If the hirer does not employ comparable employees, the remuneration of an employee who would be employed directly by the hirer in the position of the agency worker determines the equal pay level. It may be that the evaluation of the remuneration in the company of the

hirer is not possible. In this case, the remuneration of employees working for equivalent employers shall stipulate the equal pay remuneration. Besides equal pay, agency workers are entitled to use, for example, the employer's social facilities, such as nursery school, canteens, etc.

### **Collective Bargaining Agreements**

The law allows for agreement on less favorable employment conditions in collective bargaining agreements. Employers have made excessive use of this option so that equal pay was the exception rather than the rule. After a long public debate, the legislature has now introduced further amendments in the Personnel Leasing Act to strengthen the equal pay principle.

### **Rehiring of Employees**

Some companies have followed a so-called "sale and lease back" procedure, where employees were dismissed and re-hired as agency workers with a lower remuneration on grounds of collective bargaining agreements. This is no longer permissible. Since May 2011, employees who have been employed by the hirer within a period of six months prior to being hired out from the agency cannot be employed with a lower remuneration, even if a collective bargaining agreement regulating less favorable conditions for the agency worker are in place.

### **Minimum Wage**

Upon application of employers' associations and trade unions, the Ministry of Labor and Social Affairs has to decide on the introduction of a minimum wage. If statutory law introduces such a minimum wage, a collective bargaining agreement with a lower remuneration than the minimum wage can no longer be applied to justify an exception to the equal pay

principle. In this case, the agency will not only have to pay the minimum wage, but will have to apply the equal pay principle with the consequence that the remuneration of comparable employees of the hirer must be paid. The agency will further have to pay the minimum wage in times when the agency worker is not leased out.

The associations filed an application for minimum wages in November 2011. The application refers to a minimum hourly wage of EUR 7.89 for Western Germany and EUR 7.01 for Eastern Germany. From November 1, 2012 the minimum hourly wage shall be EUR 8.19 for Western Germany and EUR 7.50 for Eastern Germany. The Ministry of Labor and Social Affairs has not yet decided on the application. It can be expected, however, that sooner or later, a certain minimum wage will be introduced for the agency workers.

### **Equal Pay for Previously Unemployed Persons**

Thus far, the payment of a lower remuneration was permissible for agency workers who were previously employed if certain requirements were taken into consideration. Due to the changes in the Personnel Leasing Act, previously unemployed persons now have the right to be treated according to the equal pay principle from the beginning of their contract.

### **Current Trends Regarding Equal Pay**

In December of 2011, the trade union of the chemical industry entered into an agreement on equal pay with the federal employers' association of personnel service providers. The parties had previously agreed upon a collective bargaining agreement deviating from the equal pay principle, which was binding for agency workers in the chemical industry. The collective bargaining agreement generally still

applies. After three months, however, the agency worker shall receive a salary raise in steps until the remuneration is equal to the remuneration of the comparable employees of the hirer. The remuneration will therefore automatically increase on an equal pay level. The agreement will not come into force until further conditions are fulfilled: the largest employers' association and trade unions of other industries must enter into equal agreements. Only then will the collective bargaining agreement become effective and it is likely that the other associations will follow.

### **What Employers Should Do**

Before hiring agency workers, the hirer and the agency should compare the remuneration (including all benefits) of comparable employees of the hirer with the remuneration (and benefits) granted by the agency.

This is very important for both parties. Agreements not respecting the equal pay principle are null and void. As a consequence, the agency worker can claim equal pay with comparable employees from the agency. In the past year, numerous agency workers filed claims for equal pay. The hirer itself becomes liable for past social security contributions if the agency has to pay additional remuneration to the agency worker. Furthermore, the agency may claim compensation from the hirer if the hirer provided inaccurate information about employment conditions.

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## The right to equal pay in Japan

Japan has enjoyed a less than stellar reputation when it comes to enforcing equal treatment of women in the workplace. Only a few decades ago, women were routinely expected to serve tea in the office and were often required to retire if they became married or pregnant.

Although the numbers of women in the workforce have since increased, the gender divide is still clear. Women make up 43 percent of university graduates but only eight percent of senior leadership positions. However, from a legal point of view, the right to equal pay is supported by some solid enforceable rights, which are increasingly being enforced by the Japanese courts. Japan's population demographics – an increasing proportion of elderly are outweighing a declining number of children – have also encouraged the government to push for equality in the workplace with the explicit aim of increasing the number of women in the labor market.

### Background

Japanese women have enjoyed a right to equal pay, at least in theory, since 1947. In this year, the Japanese Constitution

was adopted under the Allied occupation. In what must have seemed a radical concept at the time, Article 14 of the Constitution provides:

*“All people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin.”*

The Labor Standards Act was also enacted in 1947, and provides in Article 4 that:

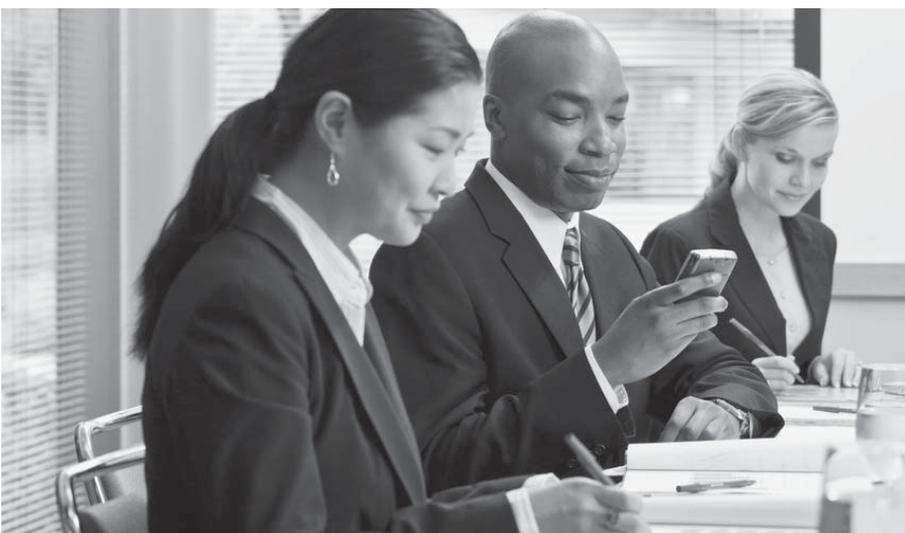
*“An employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages by reason of the worker being a woman.”*

Discrimination against women in the workplace was socially accepted in the postwar period, and women were

routinely subjected to inferior working conditions. The expendable labor of women, in part, allowed the lifetime employment system for male employees to flourish. However, from around the mid 1960's, in the midst of a labor shortage, Japanese courts began making a number of decisions that increased the profile of women's rights in the workplace. In the case of *Sumitomo Cement v Suzuki* (1966) for example, the Tokyo District Court held that the widespread practice of forcing female employees to retire upon marriage was unreasonable and contrary to public order.

Following the UN adoption of the Convention on Elimination of All Forms of Discrimination Against Women in 1979, the Japanese government may have felt pressure, as a major international economic power, to further address discrimination against women. In 1985, Japan passed the Equal Employment Opportunity Act (EEOA), but the legislation was condemned as not having “teeth.” Employers were required to “make their best efforts” not to discriminate, and there were no penalties for non-compliance. There was also no right under the Act for individuals to bring private actions against employers, and disputes were dealt with by a three-stage mediation process that required the consent of both parties, and was easily frustrated by the employer.

A revised version of the EEOA was implemented in 1999, and the best efforts standard was removed.



Employers are now prohibited from discriminating against female employees with regard to recruitment, hiring, training, assignment, promotion, fringe benefits, mandatory retirement age, and termination. The mediation process now requires only the consent of one party.

The EEOA was revised again in 2006, and the explanatory memorandum issued by the Ministry of Health, Labor, and Welfare states that the changes were motivated by the falling birthrate, aging population, and the resulting need to ensure that women's skills and abilities were more fully utilized in the labor market. The revisions address a number of loopholes, including prohibiting discrimination in distribution of work and granting of responsibilities, solicitation of resignation, change of duties and form of employment, and amendment of the employment contract. Additional protections are also afforded to employees who become pregnant and give birth. Employers are now prohibited from terminating or subjecting an employee to disadvantageous treatment due to a decrease in productivity resulting from pregnancy or birth. Termination of an employee within one year of pregnancy or birth will be presumed invalid, unless the employer proves otherwise. Sexual harassment has also been added to the list of disputes that can be mediated under the Act.

However, the EEOA still does not afford victims a private cause of action and the only real sanction is a public announcement (although a fine of up to JPY 200,000 may be levied for failure to comply with a request from the Prefectural Labour Bureau for a report).

## What Claims Can be Brought in Relation to Equal Pay?

A female employee who believes that she has been subjected to discrimination on the basis of gender (including pay discrimination) can take one or more of the following steps:

- **Complaint to the Labor Standards Bureau regarding a breach of the Labor Standards Act:** The Labor Standards Bureau can conduct an investigation of the employer, and may issue instructions to the employer to rectify the breach. Breach of Article 4 could potentially subject the employer to a fine of up to JPY 300,000 or imprisonment for up to six months.
- **Complaint to Equal Employment Office of the Prefectural Labor Bureau regarding a breach of the Equal Employment Opportunity Law:** The EEOL encourages voluntary settlement of complaints, and if an employer receives a complaint under Article 7, they should first attempt to achieve a voluntary settlement. If either of the parties requests assistance to resolve a dispute, the Prefectural Labor Bureau may give necessary advice or guidance, or make recommendations to the parties. If either of the parties applies for mediation, the dispute can be referred to the Disputes Adjustment Commission for mediation. There is no specific penalty for breach of the EEOL, but the Minister of Health, Labor, and

Welfare has the power to request reports from employers, and to give employers advice, guidance, and recommendations. If an employer does not comply with any recommendations provided by the Minister, the Minister may make a public announcement to that effect.

- **File a suit against the employer based on tort (claim for compensatory damages flowing from the employer's unlawful act):** An employee who has been subject to wage discrimination on the basis of gender can file a civil suit against the employer and claim for: (i) the difference between her past wages and the wages she would have received but for the employer's unlawful act; and (ii) damages for pain and suffering.

Lawsuits regarding equal pay are relatively rare, although there are a handful of high profile cases where female employees have succeeded with claims against large Japanese companies. Due to the economic, procedural, and cultural barriers to litigation, an aggrieved employee is probably most likely to first make a complaint to the Labor Standards Bureau.

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## Economic unit and equal payment

As the world becomes more global and specialization is the keystone for most cost–efficiency structures, the question arises on whether work can be conceived as a commercial product and equal payment should be the rule of thumb among employees performing the same activities. The Mexican Courts have initiated a new set of interpretations with the intention of limiting the use of specialized workforces, outsourcing companies and economic differences among skilled personnel.

The Mexican Federal Labor Law (“FLL”) recognizes work as “a social right and obligation” that cannot be considered as a commodity nor be subject to commerce. The FLL also contemplates the principle of equal pay for equal work. The FLL does not forbid or limit the execution of personnel services agreements to provide personnel to a third party in order to participate in its core or non-core activities, commonly known as outsourcing.

Notwithstanding the above, when dealing with outsourcing companies, the figure of intermediacy contemplated by the FLL plays a relevant role, as to the

extent that an intermediary, is defined as the person or entity that hires or intervenes in the hiring for the services of an individual to perform work for a third party.

In practice, several Mexican companies use outsourcing to perform certain specialized activities that are different from those performed by their own employees. However, a significant number of corporations, through outsourcing, have their own employees performing the same activities as those performed by outsourced employees but are compensating them differently.

This situation derives from the fact that, normally, outsourced employees receive fewer benefits and lower salaries than those normally paid to the employees of the recipient of the services (beneficiary). It also arises when the directly hired employees are under a Collective Bargaining Agreement granting substantial benefits to which outsourced employees are not entitled.

Another important difference in the compensation is derived from Profit Sharing, which is not provided to outsourced employees but, rather, only to direct hires of a company. In Mexico, employees are entitled to participate at a rate of 10 percent of the Company’s annual profits. (In this regard, Section 120 of the FLL defines “profit” as the taxable revenue in each company under the Mexican Income

Tax Law.) Although outsourced employees are entitled to participate in the outsourcing company’s Profit Sharing Program, its profits are normally lower than those of the entity benefiting from the outsourced services.

Considering the above, isolated Courts of Appeals from different jurisdictions are now adopting the criteria that the principle of equal pay in these circumstances is not respected. They are finding that when a company acts as the personnel provider for another entity, which in turn, provides the capital and the infrastructure required for the production of a certain product or services and if both entities participate in the same process, then from a labor standpoint such structure shall be deemed as a single economic unit. Therefore, both companies shall be responsible for the fulfillment of labor obligations arising from the employment relationships, considering that the outsourcing entity providing labor is an establishment within the Company and that both entities conform as a single economic unit.

The Courts are also adopting the criteria that even though outsourcing is not limited or forbidden under Mexican Legislation, when an agreement is exclusively executed in order to provide personnel services to perform core activities of the beneficiary of the services, this agreement should be considered null



and void in view of the principle that labor shall not be considered as a commercial product.

Even when not new, this criteria may give employees and unions the legal means to claim that outsourced employees shall receive the same salaries and working benefits as those granted by the beneficiary of services to its own employees (if any). In other words, if an outsourcing company is found to be an intermediary that hires employees for its client or clients, or if the personnel services agreement is declared null and void, legally, this would entitle

outsourced personnel to the same benefits as those provided by the entity receiving the personnel services and the employees may claim from either or both companies the payment and compliance of all labor obligations arising out of an employment relationship.

Among the benefits that employees may claim from both companies is the profit sharing that both companies may generate in a given fiscal year, the benefits and compensation received by the direct employees of the recipient of the services working in the same

position and with the same qualifications and the mandatory severance established in the FLL should the employee be terminated without just cause.

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## News from the Netherlands

# New vacation legislation eliminates the difference in accrual rates

### Introduction

As of January 1, 2012 new legislation regarding the accrual and lapsing of vacation days will come into force in the Netherlands. The new legislation introduces a shorter period wherein statutory vacation days will lapse and removes the difference in accrual of statutory vacation days between sick and non-sick leave.

### Most Important Changes That Take Effect on January 1, 2012

Under the current legislation, all accrued, but untaken, vacation days will lapse five years after the calendar year in which the days have been accrued. As of January 1, 2012 statutory vacation days<sup>1</sup> will expire six months after the end of the calendar year in which they have been accrued. Statutory vacation days accrued in 2012 will therefore expire on July 1, 2013. The new six-month expiration period will only apply to the statutory days. The limitation period of five years will continue to apply to the non-statutory vacation days as well as to

the statutory days if the employee, within reason, has been unable to take these days.

The second big change regards the accrual of statutory vacation days. Under the current legislation, employees on sick leave only accrue vacation days during the last six months of their illness period. The European Court of Justice considered this unlawful discrimination against sick employees. Therefore, as of January 1, 2012, the difference in accrual of vacation days will cease to exist. Sick employees will accrue statutory vacation days during the entire period

of sick leave, and not only during the last six months of it.

### Practical Consequences

The new legislation has various practical consequences for the employer's holiday administration. As of January 1, 2012, the employer must distinguish between the following in its records:

- Vacation days accrued before January 1, 2012 and still subject to the five-year limitation period;
- Statutory vacation days accrued after January 1, 2012 and subject to the

new six-month expiration period;

- Non-statutory vacation days accrued after January 1, 2012 and subject to a statutory five-year limitation period, unless other arrangements apply;
- Vacation days accrued after January 1, 2012 that the employee has not reasonably been able to take are subject to a five-year limitation period.

The order in which employees take vacation days will change. As of January 1, 2012 employees first take the vacation days subject to the six-month

expiration period and subsequently the vacation days subject to the five-year limitation period. The only exception is if the latter vacation days are due to elapse first.

Of course, it is still – to a certain extent – possible to deviate from the statutory rules. Parties could for instance agree that the employee will not accrue non-statutory vacation days while on sick leave or that days off sick are regarded as non-statutory vacation days. Another possibility is to agree that days on which the employee is sick

during agreed upon vacation leave will be regarded as vacation days.

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<sup>1</sup> According to Dutch Law, the statutory minimum holiday entitlement is four times the agreed number of working hours per week, e.g. 20 days per year on the basis of fulltime employment. However, employers may grant additional vacation days, so-called 'non-statutory vacation days'.

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## News from Russia

# Pay equity rules in Russia

One of the main Russian Federation labor law principles is that of equity of remuneration for work of equal value. This principle is supported by the International Labor Organization's Conventions ratified during the times of the USSR as well as effective Russian labor laws.

In particular, the Labor Code of the Russian Federation provides that an employee's pay is based on the work performed by this employee and specifies that the remuneration of each employee depends on the employee's qualifications, the complexity of the work done, and the amount and quality of work. Under Russian law, an employee's remuneration is not subject to any upper limit, and discrimination in establishing or altering the terms of payment is explicitly prohibited. According to Article 135 of the Russian Labor Code, each employer sets out its own compensation system and working conditions must meet the standards set by the applicable labor legislation,

collective agreements, and local normative acts of the employer. Furthermore, the Russian Labor Code establishes the base principle of prohibiting discrimination on the grounds of gender, race, nationality, language, social origin, property status, place of residence, religious beliefs, affiliations with social associations, and other circumstances not connected with the professional qualities of the workers. Article 19 of the Russian Constitution contains a similar provision. Nevertheless, Article 3 of the Labor Code does permit preferential treatment for certain classes of individuals that are viewed by the State as requiring additional protection or to

whom an affirmative action applies. Additionally, under Russian law, persons who believe that they have been subjected to discrimination related to employment may apply to the court for the reinstatement of their injured rights, as well as for damages to compensate them for financial losses and moral harm. "Moral harm" is a Russian legal concept similar to "psychological suffering and distress" in the West.

Employers doing business in Russia should always observe some basic rules and recommendations to avoid the risks of employees' claiming compensation for discrimination.

## Different Salaries of Employees Working in Different Localities

In practice, employers sometimes establish different salaries and provide different benefits packages to employees who work in different localities. This poses the question of whether such a practice could give rise to discrimination claims from employees even if the difference in pay is based on the different costs of living and different situations on the labor market (i.e. rate of unemployment) in the different localities.

In general, Russian labor law and court practice do not give a definitive answer to these questions. On the one hand, this practice is generally accepted in Russia, to the extent that all major Russian employers that hire people in different locations adhere to this approach and adjust their compensation policies to local market trends. Moreover, the State itself de-facto supports it by establishing the obligation of employers to pay special increments to the salaries of employees working in the so-called areas of the Far North and other localities with abnormal climatic conditions, and provide other special benefits to these employees.

On the other hand, we must remember that the Russian Labor Code in Article 3 directly prohibits the granting of advantages on the basis of circumstances not connected with an employee's qualification. Therefore, the above practice could theoretically be viewed as discriminatory. To mitigate this, most diligent employers when setting out base salaries for employees at different locations separate positions by structure (departments, divisions, offices, branches) located in different areas.

As a separate note, under Russian labor rules, employers are obligated to issue a special document called "staffing schedule" which contains a list of all job positions at the company and the amount of the base monthly salary as

well as the amount of any increment to be paid to employees working in each job position. Prudent employers do not show all positions in one staffing schedule, but create separate staffing schedules for each division and/or other structure at a location. In a dispute, such employers may prove that employees working in the same job positions in the same structure are granted equal remuneration and can easily explain the difference in salaries of employees working in different structural subdivisions by the different cost of living and different market conditions in different locations.

## Different Salaries for Employees Holding Equal Positions

In Russian court practice, the vast majority of courts maintain the stance that employees occupying the same or similar job positions are usually doing the same work, and, therefore, should be compensated equally. Since the amount of compensation to be paid to an employee employed in a particular job position must be indicated in the staffing schedule, an employee may claim that they are being discriminated against in cases where they learn that their colleagues working in the same job position receive a more generous remuneration. If an employer establishes different salaries for

employees occupying the same job positions, it may risk that employees' claims of discrimination are to be recognized by the court as substantial.

The main reason for employers establishing different compensation levels for employees is an employee's qualifications, work experience at the particular company and in the particular position, efficiency at work, etc. However, to further reduce the risks of discrimination claims, the employer should focus on the internal documentation regulating the compensation system, i.e. local normative acts on the compensation system, staffing schedules, job descriptions, etc.

It is important that an employer avoid establishing equal positions with different compensations and/or establishing a salary range for equal positions. For this purpose the company may establish a staffing system with a differentiation of positions (senior, middle-level, and junior positions). In other words, the employer should create a system of job positions/groups depending on the complexity of the work for the purposes of standardization of the labor compensation system and establishing the amounts of remuneration for a particular position.



The compensation system for employees may be formed by establishing benefits for employees depending on their qualifications, work experience, and performance. This approach may help an employer to explain or justify the difference in compensation and benefits of employees holding similar positions at the company.

Frequently, employers aim to include provisions in the employment agreement stipulating reduced salary and benefits during the probation period. This approach contradicts Russian legislation and may also lead to labor disputes.

An employer also should keep in mind that a discrimination problem may not appear automatically. The issue may be raised by a relevant regulatory authority (labor inspectorate), which may disclose discrimination during an audit. Alternatively, it may be raised by employees. Irrespective of the initiating party, the outcome may be the same: the employing company will have to

bring the compensation and benefits of its workers to some more or less uniform level. In addition, if an employee or a group of employees bring a discrimination case in court, which is specifically allowed in Article 3 of the Labor Code, they may also be entitled to compensation for moral harm. In addition to litigation costs, this may involve additional material expenses for the employer.

### **Gender Discrimination in Payment for Work**

In accordance with international normative acts, employers are obliged to provide pay equity between the genders. International Labor Organization Convention No. 100 “Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value” has been ratified by the USSR in 1957 and is effective in Russia. Under this Convention, the countries that ratified it must observe the principle of equal compensation to men and women for work of equal value.

This principle applies to all types of remuneration for work including base salaries, additional payments, bonuses, and other types of payment.

Generally, the principle of gender equality in remuneration for work also implies that the employer should provide equal employment conditions for such employees, equal conditions for evaluation of their work, and for promotion. In practice, some employers may prefer to promote men to senior positions rather than women; in Russia, however, court cases on gender discrimination in the workplace are extremely rare.

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## News from the United Kingdom

# Gender equality in the boardroom: a Pan-European overview

With the September deadline having passed for FTSE 350 companies to announce targets for the number of women on their boards, the focus on gender parity in the boardroom has never been stronger.

This is not just a UK issue. Many jurisdictions across Europe have introduced or are considering legislation to deal with the underrepresentation of women at the senior management level. This briefing focuses on the requirements in a number of key jurisdictions.

The purpose of this update is to summarise the requirements and goals for achieving a greater number of women on boards, as well as to provide practical steps for compliance.

### **Why is Change Needed?**

Although, in the UK, the number of

women and men in the workforce as a whole is almost equal, the proportion of women in senior management and board-level roles is very low (of FTSE 350 companies, currently only 242 of 2742 board seats are held by women). At the current rate of change, it is estimated that it will take more than

seventy years to achieve gender balanced boardrooms in the UK's largest 100 companies.

## The UK Position

Lord Davies' recent report, 'Women on Boards' (published in February 2011), sets out a number of recommendations for FTSE 350 companies to increase female board-level participation, including:

- *Targets:* announced targets for the percentage of women on FTSE 350 boards in 2013 and 2015 in September 2011. FTSE 100 boards should aim for a minimum of 25 percent by 2015.
- *Disclosure:* disclosing annually the number of women in board and senior executive positions, and in the organisation as a whole, together with "meaningful information" about the company's appointment process.
- *Recruitment:* considering the appointment of women from outside the corporate mainstream and considering whether any non-executive board positions can be advertised.

Other recommendations include the possibility of amending the Corporate Governance Code to require listed companies to establish a boardroom gender diversity policy (and disclose details of this annually).

Although the report adopted a middle ground by suggesting targets, rather than imposing quotas, more prescriptive measures may follow if insufficient measures are made. Boards are therefore faced with increasing the number of women at board-level in a relatively short period of time, and in circumstances where the pool of senior female talent may not exist for reasons outside of their control, or face the prospect of more stringent measures.

The use of new positive action provisions in the Equality Act 2010 may be a means of bridging this gap (although it is not without its own risks), together with the other practical steps set out on page 24.

## Practical Steps to Compliance

Many UK and multinational employers have already taken a number of steps to identify and retain female talent, but generally the reasons for under-representation are complex and not easy to solve. The recommendations in the Davies Report are a useful starting point, suggesting that appointments might periodically be advertised, the pool of candidates could be widened, and women should be given the opportunity to obtain relevant experience, for example through non-executive directorships in other organisations and in the charity not for profit sectors. Executive search firms can also play a key role in ensuring there is a diverse pool to select from. Many larger employers have already adopted mentoring schemes, but given mixed reports as to their success, they may wish to think more creatively about what has and has not worked, and help those who act as mentors to take on more of a sponsor role. There is not necessarily a one-size-fits-all solution, however, and companies will need to review their own situation and the success of any existing programmes, to identify approaches most likely to work for them in the UK and all of their relevant markets. Employers who wish to review their data about women in the senior talent pool to establish where the underrepresentation lies may also want to seek advice on how to do so and maintain privilege in the result.

In the UK, the Equality Act 2010 allows employers to take positive action in recruitment or promotion to address diversity issues, provided that certain specific criteria are met (for example, the successful candidate is "as qualified

## The European Picture

*European Commission*

In March 2011, the Commission called on publicly listed companies within the EU to voluntarily sign a pledge to increase the percentage of women on corporate boards to 30 percent by 2015 and to 40 percent by 2020. The Commission will assess the impact of this in March of 2012 before considering whether regulation at European level is required. A Recent Green Paper on an EU Corporate Governance Framework has also asked whether companies should be required to "ensure a better gender balance on boards." These steps provide a clear indication that, notwithstanding national regulation and legislation, there is movement at European level towards the imposition of quotas.

as" the other candidates, and the employer does not have a policy of routinely promoting persons with a particular protected characteristic). However, there is currently considerable uncertainty about how companies will be able to comply with these requirements in practice: until this uncertainty is resolved, employers may be reluctant to rely upon positive action to promote greater numbers of women to board roles.

Positive action is also permitted in Sweden, Italy, France and Spain, although specific legal advice should be sought before relying on any positive action provisions in these jurisdictions.

## France

Legislation passed in January 2011 requires listed companies with over 500 employees and a net turnover of at least EUR 50 million (for the past three years) to ensure that at least 40% of their board positions are held by women. Deadline for compliance is January 2017, although from January 2014, a 20% quota will apply. From January 2011, if there are no women on the board of any company to which the quotas apply, then at least one woman must be appointed in the next General Ordinary Assembly. From 2014/2017, appointments which do not comply with the statutory targets (and which do not go towards correcting any imbalance) will be null and void. Directors' fees may also be suspended until the composition of the board meets the quota.

**Quota:** 40%.  
From January 2011, must appoint at least one woman on to board.

**Deadline:** 2014 (20% quota).  
2017 (40% quota).

**Sanction:** Appointments deemed null and void and directors' pay suspended until quotas met.

## Germany

There is currently no legislation in force addressing board-level gender equality, although the issue is the subject of intense political debate. The Corporate Governance Code recommends that companies aim for "an appropriate consideration of women" in managerial roles and board positions. Several companies have voluntarily introduced targets. In March 2011, all 30 companies listed on the DAX share index promised to increase female board representation by a third by 2013.

**Quota:** N/A.  
Corporate Governance Code recommends giving "appropriate consideration to women".

**Deadline:** N/A.

**Sanction:** None, although failure to comply could result in legislation.

## Sweden

The Swedish Corporate Governance Code requires listed companies to "strive" for equal gender distribution on the board. The requirement is for companies to 'comply or explain' (although, in practice, the concept of "striving" is too vague to determine whether companies have failed to comply). In addition, all companies with more than 25 employees are required to implement an Equality Plan, which should set out any measures to be taken in order to improve gender equality.

**Quota:** 40%.  
Corporate Governance Code recommends companies "strive" for equal gender distribution on boards. Companies to implement an Equality Plan.

**Deadline:** N/A.

**Sanction:** 'Comply or Explain'.

## UK

**Quota:** N/A.  
The Davies' Report makes recommendations for FTSE 350 companies to follow.

**Deadline:** Disclose targets in September 2011.

**Sanction:** None, although failure to comply could result in legislation.

## Italy

Legislation is currently being debated which would require listed companies and companies controlled by public entities to ensure that one third of elected board positions are held by women. The deadline is the first renewal of the board, one year after the legislation comes into force (for this first renewal, the quota will be lowered to one fifth). A failure to comply may result in a formal warning, and continued non-compliance may lead to financial penalties of between EUR 100,000 - 1 million. In addition, employers with over 100 employees must submit a report every two years to the relevant Equal Opportunities Committee, setting out the numbers of male/female employees, new hiring and training programmes, and details of position, pay and promotions.

**Quota:** Proposed – one third.  
Two yearly report to Equal Opportunities Commission.

**Deadline:** The first review of the board one year following introduction of legislation (one fifth quota applies in first instance).

**Sanction:** Formal warning followed by financial sanction of up to EUR 1 million.

## Spain

Legislation passed in 2007 requires companies with over 250 employees to "endeavour to" reach a minimum 40% share of each sex on boards. The deadline for compliance is 2015, although there are no formal sanctions for non-compliance. In addition, all companies are required to disclose details of the gender of personnel (including board members) in their annual accounts. Corporate Governance Codes also apply to certain sectors, and require companies to explain any particularly low female board representation, and steps being taken to resolve this.

**Quota:** 40%.  
Corporate Governance Codes apply to certain industry sectors.

**Deadline:** 2015.

**Sanction:** No formal sanctions.

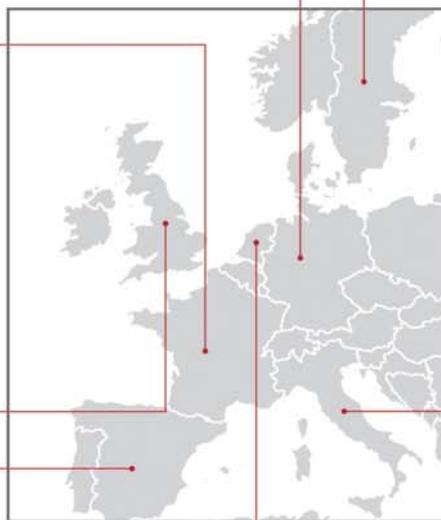
## Netherlands

Legislation is currently being debated which would require large companies (with more than 250 employees, a net turnover of EUR 35 million and assets of EUR 17.5 million) to have at least 30% of each sex on the supervisory board and board of directors by 2016. Companies must comply with the requirement or explain their failure to do so. In addition, there are currently a number of voluntary initiatives aimed at promoting women to executive roles (for example, 'Talent to the Top') which produced guidelines or reports to encourage companies to take action.

**Quota:** Proposed – 30%.  
Number of voluntary initiatives.

**Deadline:** 2016.

**Sanction:** 'Comply or Explain'.



## Conclusion

The issue of women on boards is a hot topic which does not look as though it will be going away. With deadlines approaching in a number of jurisdictions, companies should be taking steps at the earliest opportunity to address any imbalance. Failure to do so may result in potential legal, financial or reputational risks. In addition, given that the topic is under scrutiny at a European level, failure to meet national targets at this stage could result in stricter quotas being imposed across Europe.

Aside from the potential legal risks of addressing greater female board participation highlighted above, companies who fail to diversify their boards may suffer a competitive disadvantage.

Boards work at their best when there is a diversity of skills and backgrounds with statistical evidence suggesting that companies with more women directors can expect an increase in profitability, a greater focus on corporate governance, and a reduced risk of insolvency. Provided the pool of talent is there to draw from, it should be a win:win.

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## News from the United States

# California requires supply chain disclosures

Nothing more tragically represents the most egregious forms of pay inequity than the exploitation of children and forced labor through human trafficking and slavery. Effective January 1, 2012, California law will require covered retail sellers and manufacturers to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods they offer for sale.

Directly covered companies are those that define themselves as “retail sellers” or “manufacturers” in their principal business activity code as reported on the entity’s tax return filed with California, that “do business” in California and that have at least US\$100,000,000 in worldwide gross receipts.

The bill, known as the California Transparency in Supply Chains Act of 2010 and found at Section 1714.43 of the California Civil Code, also requires the California Franchise Tax Board to make available to the California Attorney General a list of retail sellers and

manufacturers required to disclose efforts to eradicate slavery and human trafficking. If the retail seller or manufacturer has an internet website, the bill also requires the retailer or manufacturer to post its disclosure with a “conspicuous and easily understood link” describing its human trafficking and slavery eradication efforts or lack thereof. If the retail seller or manufacturer has no internet web site, it is required to give consumers written disclosure within 30 days of receiving a written consumer request.

## Economic Recessions Heighten the Risks of Exploitation

In 2000, the United States enacted the Victims of Trafficking and Violence Protection Act of 2000 and established an Interagency Task Force to Monitor and Combat Trafficking. Despite efforts to eradicate this global plight, the U.S. Department of Labor in September 2009 released a report required by the Trafficking Victims Protection Reauthorization Acts of 2005 and 2008 which named 122 imported goods from 58 countries believed to be produced by forced labor or child labor in violation

of international standards. In its recently published 2011 report, the Department of Labor updated its List of Goods Produced by Child Labor or Forced Labor, identifying even more: 130 goods from 71 countries around the world made by forced labor and/or child labor. Such goods include common agricultural goods such as tobacco, cotton, sugarcane, coffee and cattle; manufactured goods such as bricks, garments, carpets and footwear; and mined and quarried goods such as gold, diamonds and coal.

In its 2011 report, the U.S. Department of Labor noted with alarm that sweatshops are neither a thing of the past nor limited to developing countries, finding that it exists in the United States as well as other developed countries. Citing estimates by the International Labour Organization (ILO), the U.S. Department of Labor noted that 12.3 million people are trapped in forced labor worldwide and that approximately 215 million children are working as child laborers--115 million of whom participate in hazardous labor.

### **California Reacts by Requiring Larger Retail Sellers and Manufacturers to Disclose Specific Measures**

The United States is the world's largest importer but there have been fewer than forty U.S. federal enforcement actions on record in the past 80 years. In response, California has pulled the cover back, requiring larger retail sellers and manufacturers doing business in California to disclose to consumers their efforts to supply products free from the taint of slavery and trafficking. This statute is not limited to those retail sellers and manufacturers headquartered in California, but instead extends to those merely "doing business" within California as long as they have US\$ 100 million dollars in worldwide gross receipts.

The new California law requires that the

disclosure shall, at a minimum, state to what extent, if any, the retail seller or manufacturer does each of the following:

1. Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure must specify if the verification is not conducted by a third party;
2. Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure must specify if the verification is not an independent, unannounced audit.
3. Requires direct suppliers to certify that material incorporated into the product complies with the laws regarding slavery and human trafficking of the country or countries in which they are doing business;
4. Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking; and
5. Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigation risks within the supply chain of products.

Although the California statute itself does not define human trafficking or slavery, the history suggests that it will look to the definition under the International Labor Convention No. 182 on child labor and 18 USC Chapter 77 on "forced labor." Specifically, prohibited child labor includes the sale and trafficking of children; debt bondage and serfdom; forced or compulsory labor; use, procuring or offering of children for prostitution or pornographic performances; use,

procuring or offering of a child for illicit activities including use in armed conflict or drug trafficking; or work which is likely to harm the health, safety or morals of children. This last category is obviously intended to cast a wide net for the protection of children from exploitation. Forced labor includes providing or obtaining labor or services by means of 1) force, threat of force, physical restraint or threat of physical restraint; 2) serious harm or threats of serious harm; 3) abuse or threatened abuse of law or legal process, or 4) any scheme, plan or pattern intended to cause the person to believe that if he/she did not perform such labor or services that person or another person would suffer serious harm or physical restraint.

A similar bill is pending in the U.S. House of Representatives (HR 2759), known as the Business Transparency on Trafficking and Slavery Act. This proposed federal law would amend Section 13 of the Securities and Exchange Act of 1934 and require companies to include in their annual reports to the SEC a disclosure describing any measures the company has taken during the year to identify and address conditions of "forced labor, slavery, human trafficking and the worst forms of child labor" in the company's supply chains.

### **Increasing Legislative Social Responsibility**

The California Transparency in Supply Chains Act of 2010 is only the most recent in a host of statutes putting the spotlight on responsible supply chain practices. With limited exception, for years labor compliance within the global supply chain had been largely, and practically speaking, a matter of voluntary Corporate Social Responsibility (CSR), largely driven by a positive sense of good global corporate citizenship or a negative concern of corporate vilification by consumer activists, non-governmental



than it is in practice. Companies should not casually purport to adopt various “international standards” unless and until they fully understand their requirements and are prepared to embrace, audit and monitor their supply chain for compliance. Some seemingly innocuous “feel good” references to some international standards could inadvertently represent to consumers that the company does not permit its suppliers to engage in “at will” employment, to require (ie. “force”) overtime even if paid in compliance with overtime laws, or to even lawfully oppose a union organizing drive even where such actions are otherwise lawful. Because the remedy for violations of B & P Section 17200 and 17500 can be “disgorgement of profits,” it puts a premium on 100 percent accurate website postings and disclosures.

### **Say What You Mean and Mean What You Say**

For those covered companies that wish to disclose that they have in fact taken measures to eradicate human trafficking and slavery in their supply chains, there is work to be done beyond merely drafting the website policy. Before posting their supply chain disclosures on their websites, covered companies should conduct due diligence of their intake procurement processes, including verification protocols, audit processes, supplier certifications including what the supplier has done to ensure that material incorporated into its products complies with anti-trafficking and slavery laws, adoption of internal accountability standards and procedures for those suppliers failing to meet company standards, and procurement training, or be prepared to disclose on its website that it is lacking in one or more areas. Companies should review and potentially modify their supplier agreements, purchase orders, and any Supplier Codes or corporate social responsibility (CSR) policies to ensure that they in fact require what the covered companies represent they do on

organizations (NGO’s) or branding concerns. Corporate responsibility in the supply chain, however, is no longer an option. Covered retail sellers and manufacturers will now be statutorily required to act or be required to self report that they have chosen to turn a blind eye. This statute joins an increasing list of U.S. laws legislating responsible sourcing. Although the Smoot-Hawley Tariff Act has prohibited importation into the United States of goods made with forced labor or convict labor since 1930, it has broad exceptions and is focused more on protecting American manufacturers from unfairly priced goods as opposed to protection of consumers from tainted goods. The federal Lacey Act also bans U.S. importation of illegally sourced fish, wildlife, plants and products such as illegally sourced timber and wood products. In addition, laws are increasing requiring due diligence and disclosures related to companies’ supply chains. The recently enacted federal Dodd-Frank Act requires companies that use coltan, cassiterite, gold, wolframite or their derivatives or other minerals financing conflict in the Democratic Republic of the Congo or an adjoining country to disclose the origin of those minerals. California has passed a similar conflicts mineral law.

### **Watch the Company You Keep**

Unless your company does not care about having to disclose that it has taken no measures to ensure that it is not knowingly or inadvertently promoting slavery and human trafficking in its supply chain, your company has until January 1, 2012 to verify, audit, obtain certifications, and conduct internal accountability of its suppliers, and to train its supply chain management in eliminating illegal child or forced labor within its supply chain. The exclusive remedy of the statute is an action brought by the State Attorney General for injunctive relief, but nothing limits remedies available for violations of any other state or federal law.

In reality, the teeth of this statute lies with the consumer in not only its buying power, but also statutory consumer claims that can and have been brought under California Business and Professions (“B & P”) Code Section 17200 for unfair business practices and Section 17500 for false advertising. In describing and disclosing their efforts to eradicate slavery and human trafficking on its webpage or in response to consumer inquiries, companies must avoid purporting to be a better “global corporate citizen” in its supply chain

their websites, including whether audits and verifications, if any, are independent and unannounced.

Even for those companies not directly covered by the new California Transparency in Supply Chain Act, companies around the world should

expect that they will be receiving requests for certifications and verifications as well as increasing audits from their customers that are covered up the supply chain. The new California statute now squarely makes practices of suppliers thousands of miles away, a California legal compliance issue.

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## News from the United States

# EU diversity initiatives put companies on a tightrope

Both EU countries and the U.S. have laws which prohibit discrimination against women and other minorities. Notwithstanding many companies' commitment to diversity, women remain a minority when it comes to representation in senior management and on Boards of Directors.

Research from the 2011 Grant Thornton International Business Report reveals that women currently hold 20 percent of senior management positions globally, down from 24 percent in 2009, and up just 1 percent from 2004. Some governments are stepping in and pressuring for greater female representation in corporate leadership positions.

This March, the European Commission called on publicly listed companies within the EU to voluntarily sign a pledge to increase the percentage of women on corporate boards (to 30 percent by 2015 and 40 percent by 2020). The Commission will assess the impact of this action in March 2012 and explore policy options for targeted measures if no sufficient progress is achieved. Earlier this year, Germany's top 30 companies listed on Frankfurt's DAX index similarly pledged to set company-specific goals to promote more female managers and to increase female representation on their boards by 30

percent by 2013. Other EU jurisdictions, such as France, already have adopted laws containing mandatory minimum requirements for representation of women on corporate boards.

These initiatives may have an impact in the U.S. as EU companies with U.S. operations review promotion practices and consider measures to increase women managers which encompass employees working in the U.S. Implementing preference programs or quotas in the U.S., however, can put companies on a tightrope. On the one side lies the risk of creating adverse evidence that can be used by current female employees in gender discrimination lawsuits. On the other side is the risk of reverse discrimination lawsuits by male employees who may have been denied the promotion or career advancement opportunity. This paper examines the legal framework for the adoption of voluntary affirmative action plans in the U.S. and

offers practical suggestions to help foreign employers with U.S. operations implement diversity goals and minimize legal risks under federal anti-discrimination laws.

### **U.S. Anti-Discrimination Laws and the Legal Framework for Voluntary Affirmative Action Plans**

U.S. anti-discrimination laws protect applicants and employees from discrimination on the basis of protected characteristics. In particular, Title VII of the Civil Rights Act of 1964 makes it illegal for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). In addition, the statute makes it unlawful for an employer to "limit, segregate, or classify his

employees or applicants for employment in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(2). Employers who violate Title VII are subject to damages, including backpay, frontpay, compensatory and punitive damages, injunctive relief, and attorneys' fees and costs. Through its express language, Title VII discourages employers from implementing affirmative action programs that preference minority groups and therefore inherently discriminate against men "because of" their sex. At the same time, in an effort to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity, employers sometimes voluntarily adopt affirmative action plans that give preferential treatment to minorities<sup>1</sup>. Such plans take varied forms and may include programs addressing various employment practices, including hiring, training, retention, and promotion.

While employers adopt voluntary affirmative action plans for laudable and legitimate business reasons, affirmative action is highly controversial and employees in majority groups can challenge such actions under Title VII. In these cases, employees in majority groups claim that they were denied specific benefits or opportunities based on their race or sex in violation of Title VII's anti-discrimination provisions. Accordingly, employers must exercise caution when adopting and implementing voluntary affirmative action plans and comply with Equal Employment Opportunity Commission ("EEOC")<sup>2</sup> guidance and Supreme Court precedent.

#### *EEOC Guidelines*

The EEOC encourages voluntary affirmative action and diversity efforts to

improve opportunities for minorities in order to carry out the Congressional intent embodied in Title VII. According to the EEOC, "persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes" of the statute. The EEOC has promulgated Guidelines on Affirmative Action that offer companies a safe harbor from reverse discrimination claims under Title VII based on an affirmative action plan. While these guidelines do not have the force of law, they are entitled to judicial deference to the extent they are persuasive.

The safe harbor guidelines provide that voluntary affirmative action may be taken when: (1) an analysis reveals that existing or contemplated employment practices are likely to cause an actual or potential adverse impact; (2) a comparison between the employer's workforce and the appropriate labor pool reveals that it is necessary to correct the effects of prior discriminatory practices; and (3) a limited labor pool of qualified minorities and women for employment or promotional opportunities exists due to historical restrictions by employers, labor organizations, or others. To qualify for the safe harbor under these guidelines, the employer must: (1) conduct a reasonable self-analysis of current employment practices; (2) have a reasonable basis for concluding that action is appropriate; and (3) take reasonable action in accordance with the plan. 29 C.F.R. § 1608.4. If employers use good faith in attempting to meet these criteria, they can claim a safe harbor for their affirmative action programs (at least before the EEOC).

#### *Supreme Court Precedent*

While understanding EEOC guidance is a must, as a practical matter, affirmative action law in the U.S. has been primarily shaped by Supreme Court decisions. In the pivotal case, *United Steelworkers of American v. Weber*, 443 U.S.

193 (1979), the U.S. Supreme Court identified criteria that a voluntary affirmative action plan must meet to withstand a reverse discrimination challenge under Title VII. In *Weber*, the Supreme Court upheld a voluntary plan adopted by Kaiser Aluminum and its union to target the effects of prior discrimination by craft unions, which had denied blacks training opportunities. To increase the number of black craft employees, the company created a new training program along with two seniority lists – one for white employees and the other for black employees. The voluntary plan imposed a 1:1 white to black ratio, meaning that for every white trainee selected for training, a black trainee was required as well. The plan provided that these preferences would last until the plant's percentage of black skilled craft workers approximated the percentage of blacks in the local labor force.

In upholding the plan, the Court noted that while Title VII prohibits discrimination against minority and nonminority groups, "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." According to the Court, the following requirements must be met before a voluntary affirmative action plan may be considered legally permissible: (1) the plan must further the purpose of Title VII by breaking down patterns of racial segregation and hierarchy; (2) must open employment opportunities for minorities in professions that have traditionally been closed to them; (3) must not unnecessarily impede the interests or preclude the advancement of majority employees; and (4) must be temporary in duration (i.e., not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance).

The Supreme Court examined its second major workplace affirmative action plan almost a decade later in *Johnson v. Transp. Agency, Santa Clara*

*County, Cal.*, 480 U.S. 616 (1987). There, a transportation agency adopted a voluntary affirmative action plan designed “to achieve a statistically measurable yearly improvement in hiring, training and promotion of women and minorities...in all major job classifications where they were underrepresented.” The plan did not require (or permit) quota-based hiring and promotion, but did allow the consideration of the sex of an applicant as a factor when hiring and promoting to remedy low percentages of women and minorities in the agency as a whole and in several job categories. When a female employee was selected, a male employee who had received a higher rating in the interview process brought suit under Title VII.

In concluding that the plan did not violate Title VII, the Court reaffirmed that “an employer seeking to justify the adoption of a [voluntary affirmative action] plan need not point to its own prior discriminatory practices, nor even evidence of an ‘arguable violation’ on its part.” Rather, it need point only to a “conspicuous...imbalance in traditionally segregated job categories.” The Court also established that “a comparison of the percentage of minorities or women in the employer’s work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise...” In contrast, where jobs require special training, the proper “comparison should be with those in the labor force who possess the relevant qualifications.”<sup>3</sup>

The Supreme Court’s more recent decision in *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671 (2009), also is worth noting. In that case, the City of New Haven, Connecticut decided not to certify results of a test adopted to rank firefighters for promotion after the examination resulted in disproportionately higher number of white applicants than minority applicants. When the city, fearing

disparate impact liability under Title VII, scrapped the test and did not fill the positions, a group of white and Hispanic applicants sued, claiming a violation of Title VII and of the equal protection clause. The Court clarified that before an employer can engage in intentional discrimination and take affirmative action to avoid or remedy disparate impact on minority employees or applicants, the employer must have a “strong basis in evidence” to believe it will be subject to liability under federal or state anti-discrimination statutes if it fails to take the race conscious discriminatory action.

*Ricci* did not specifically address the parameters of employers’ consideration of race and gender in voluntary affirmative action programs under Title VII. Nor did the majority opinion cite to *Weber* or *Johnson* (even though the parties’ legal briefs and the dissenting opinion made arguments that expressly relied on these cases as precedent). Accordingly, while the ultimate impact of *Ricci* on voluntary affirmative action remains uncertain, for now, existing Supreme Court precedent in that area should continue to control. At the same time, language in the opinion, coupled with the current composition of the Supreme Court, suggest that the pendulum is swinging away from

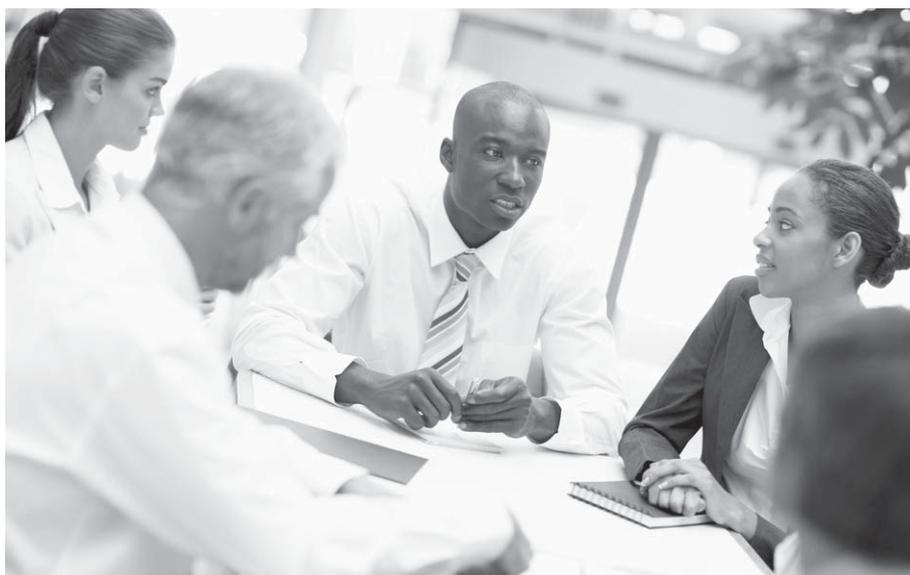
approval of affirmative action and towards a more “colorblind” system in the U.S.

### **Practical Considerations for EU Employers Seeking to Adopt Voluntary Affirmative Action Plans**

#### *Analyze Whether There is a Manifest Imbalance*

As an initial matter, an employer should analyze – internally or with the assistance of an outside expert – whether a manifest imbalance exists in the workforce. The mere belief that women are underrepresented in the workforce is not a sufficient basis to support the implementation of a voluntary affirmative action plan, nor is a post-hoc rationalization defense. Rather, an employer must perform a statistical comparison before adopting such a plan.

Employers should keep in mind that while identifying a manifest imbalance does not support a prima facie case under Title VII or otherwise concede liability under federal anti-discrimination laws, it does require the employer to concede past disparities in its treatment of women as compared to male employees. Such a concession can



undermine the employer's ability to defend its past practices against claims by current female employees. Moreover, even when the employer makes changes to existing employment practices, if those practices have a lingering effect on pay, they are subject to the Lilly Ledbetter Fair Pay Act and there remains two years of trailing liability for back pay for the class of female employees.

#### *Protect the Analysis*

In deciding whether to undertake a statistical comparison or analysis of its workforce, the employer should consider at the outset whether its analysis will be discoverable and used to support a discrimination lawsuit by female employees in the current workforce. By retaining attorneys to provide advice based on such analysis, employers may be able to structure the analysis to protect it from disclosure. There are three privileges that, depending on the circumstances, may apply: the attorney-client privilege, the attorney work product doctrine, and the self-critical analysis privilege. At the same time, employers should understand that if the adoption or application of the voluntary affirmative action plan is challenged in a reverse discrimination lawsuit, as a general rule, the employer cannot use the analysis as a basis for changes to its employment practices without losing its privileged status.

#### **Ensure Flexibility and Avoid Making Minority Status a Determinative Factor**

Flexible implementation of voluntary affirmative action plans is more likely to comply with anti-discrimination laws than strict adherence to mechanical criteria and procedures. For example, employers should not award a certain number of "points" to a female applicant simply because she is female. Point systems and other similarly arbitrary systems used to qualify applicants can easily result in the hiring of a candidate who is otherwise under-qualified simply

because a minority characteristic gave the candidate more total points than a more qualified, non-minority candidate. Rather, minority status should only be used as a "plus factor," and not assigned an arbitrary value. Moreover, employers should not use gender or other protected categories as the determinative factor in making hiring decisions or promotional decisions within the context of its plan, but rather consider gender as one of many factors in the decision.

#### *Periodic Monitoring*

Voluntary affirmative action plans and other remedial measures should be monitored periodically to determine whether the manifest imbalance has been corrected. As noted by the Supreme Court, voluntary affirmative action plans will not be valid unless they are adopted as a temporary measure to eliminate a manifest imbalance in the workplace. Accordingly, in adopting such plans, employers should identify the imbalance, make a specific plan to address the imbalance, and outline a timetable or define success. In addition, employers should commit in its plan to revisit the manifest imbalance analysis to determine whether there remains a need to continue the plan.

#### **Other Considerations to Achieve Diversity**

##### *Potential Defense Based on FCN Treaties*

International employers attempting to navigate U.S. constraints on voluntary affirmative action plans also should consider the availability of Friendship, Commerce and Navigation ("FCN") treaties as a defense to reverse discrimination claims under U.S. law. These treaties often allow foreign companies to engage within the U.S. certain employees "of their choice." While there is an apparent conflict between the "of their choice" language and the anti-discrimination mandates of Title VII, these treaties may provide

U.S.-incorporated companies greater protection for certain employment and assignment decisions made by their foreign parent.

Whether a company can invoke the protections of a treaty or agreement depends in the first instance on the language of the treaty. In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), the Supreme Court held that the FCN treaty between the United States and Japan did not exempt wholly owned American subsidiaries of Japanese companies from Title VII. According to the Court, the language of the treaty, confirmed by its negotiating history, compelled the conclusion that a company's place of incorporation would control the applicability of the treaty. Because Sumitomo was incorporated under New York law, it was a company of the U.S. rather than of Japan. *Sumitomo*, however, does not resolve all issues of treaty interpretation. Indeed, the Supreme Court expressly reserved judgment on whether a similar interpretation would apply to FCN treaties between the United States and other countries, reasoning that other treaties, "although similarly worded, [might] have different negotiating histories."

Moreover, lower courts have held that an American subsidiary of a foreign parent might assert its parent's treaty rights if, for example, the parent company dictated the subsidiary's discriminatory conduct, or the two entities share a common identity or are otherwise considered an "integrated enterprise." For example, in *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991), Quasar, a division of a U.S.-incorporated company owned by a Japanese corporation, discharged its American executives and gave preferential treatment to executives sent temporarily to the United States by the Japanese parent. The Seventh Circuit held that Quasar could invoke the Japanese FCN Treaty because the parent company directed Quasar's actions.

Companies also must assess whether the employment practices are covered by the treaty. Some courts have found that even broadly worded treaties do not entitle a foreign company operating in the United States to select among American citizens on the basis of their age, race, sex, religion, or national origin. Likewise, courts construing the scope of particular FCN treaties have determined that the protection they extend is only the right of foreign companies covered by the treaty to prefer citizens of their own countries for executive, management, and other identified positions and does not entitle a foreign company to discriminate on the basis of race, sex, age, or any other protected class. Thus, the extent to which FCN treaties can be used to protect foreign companies from lawsuits under U.S. anti-discrimination laws depends on numerous factors.

*A Viable Alternative: Promoting Diversity in the Workplace*

Given the numerous challenges inherent in implementing a voluntary affirmative action program in the U.S., companies often rely on other measures to promote a diverse workforce. Companies can explore changes to their workplace to make it one that embraces diversity in approach, in culture and in opportunity. Creating a culture of inclusion and respect for diversity is critical to the success of any diversity initiative. Components of a successful diversity policy include a commitment from senior leadership, an understanding of the business case for diversity, actionable goals, accountability and oversight by senior leadership and a commitment to training, education and regular communications around the strategy. Companies have adopted a variety of measures to implement their diversity strategy including:

- Ensuring organizational responsibility for diversity and inclusion (i.e., Chief Diversity Officer);
- Supporting community and national organizations committed to the advancement of minority groups;
- Developing partnerships with organizations that help link businesses operated by women and other minorities with large corporations;
- Using resumes without names for initial review;
- Ensuring a diverse slate for key positions and having candidates interviewed by a diverse panel of reviewers;
- Adopting diversity performance accountability measures for executives (i.e., awarding bonuses based on success in measured improvements in several areas such as hiring a diverse workforce and creating a welcoming environment for all employees); and
- Monitoring minority and female employee satisfaction levels and employee participation rates in diversity education.

Employers also should consider adopting gender neutral policies and practices that facilitate and support an individual's desire to be successful in the workplace. For example, employers can implement policies such as flex-time, telecommuting, offering childcare services, and other policies to encourage women to remain in the workforce.

**Conclusion**

While the adoption of voluntary affirmative action plans in the U.S. raises complex issues, by working with competent local attorneys and consultants, EU employers can adopt measures to increase diversity among their employee ranks in the U.S. in order to implement diversity goals imposed by their home governments or other organizations. At the same time, employers can improve diversity within their organizations by developing and implementing a robust diversity policy and practices and by adopting gender-neutral policies that promote flexibility and diversity in the workplace.

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<sup>1</sup> Voluntary affirmative action plans are distinguishable from mandatory affirmative action plans in that they are voluntarily implemented by private employers. Mandatory affirmative action plans are required for federal contractors and subcontractors. The United States Office of Federal Compliance Programs oversees the administration of mandatory affirmative action plans for government contractors and subcontractors. Employers considering implementing voluntary affirmative action plans may be well-served to review affirmative action plans adopted by federal contractors.

<sup>2</sup> The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing Title VII and other federal laws that make it illegal to discriminate against a job applicant or an employee because of a protected characteristic (i.e., sex). The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law.

<sup>3</sup> The most recent affirmative action cases decided by the Supreme Court, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), approved diversity as a justification for voluntary measures in the college admissions context under a constitutional analysis. In the private employment sector, courts continue to utilize the traditional Title VII framework established in *Weber* to analyze voluntary, remedial affirmative action plans.

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## Minimum wage harmonization: trending towards a law

Making a law on minimum wages (“MW”) is not a new topic. Since its inception, the International Labor Organization has adopted a large number of legal instruments on minimum wages. So far, Member States have adhered to these instruments in adopting domestic policies.

In Vietnam, the Government recognizes the effects that minimum wages can exert on labor relations and thus uses them as tools to appease rank-and-file workers to reduce the likelihood of them calling industrial actions. Various wage proposals have been drafted in accordance with the Vietnamese Government’s program for reforming compensation, social insurance, and related policies during the 2008 - 2012 period and, specifically, to harmonize the minimum wage requirements for domestic and foreign invested businesses. Further to this reform program, minimum wages have been raised on an annual basis, taking into account changes in the Consumer Price Index (“CPI”) and the Gross Domestic Product growth rate, as well as the current labor market. At the same time, there have been numerous recommendations that Vietnam should adopt a MW law. The idea is currently being debated and the prospect of a new law passing seems to draw near. This article will capture an overview of Vietnam’s MW and premises for the advent of a MW law.

### Vietnam’s Minimum Wage Regime and Paradoxes

Until 2010, there were three types of MWs in Vietnam, namely the General MW, the MW applicable to Vietnamese companies (“Domestic MW”), and the MW applicable to foreign-invested companies (“FDI MW”). The General MW is fixed at a single rate and it is used as a basis to calculate social, health,

and unemployment insurance contributions and benefits and other welfare allowances, including pensions. Meanwhile, the Domestic MW and FDI MW provide for minimum monthly wages that enterprises must pay workers. These rates hinge on regional demarcations. Vietnam divides the country into four regions based on their level of development and cost of living to which a corresponding rate of Domestic and FDI MWs will be fixed. However, as of 2011, FDI MW and Domestic MW have been leveled off into a common regional MW (“Regional MW”) as part of a move to remove discriminatory compensation between private and FDI sectors<sup>1</sup>. At the time of this writing, the General MW is approximately USD39.67; the Regional MW is between approximately USD67.30 to USD96.15 depending on regional demarcations. The adjustment of MW has been recently annualized, taking into account the economic growth rate, the CPI, the labor market demand, and supply nexus.

The MW rates in Vietnam are low. Fundamentally, MW functions to protect the low wage workers from falling below the poverty line. However, with the current rates, MW fails to discharge their mandate. By 2009 poverty lines applicable to the period of 2011-2015, a person living on or less than VND400,000 (approximately USD21) and VND500,000 (approximately USD26) in the rural and urban areas respectively

is considered poor<sup>2</sup> whereas the maximum MW rates for a worker in these two areas would approximate USD67 and USD90 respectively. Consider that a worker earning a MW may have to support a family of three. By any measurement (be it by food or calorie method) the workers’ basic needs are barely met. Historical accounts of MW show that the 1993 MW just met 40 percent and the 2006 MW met only 67 percent of basic needs<sup>3</sup>. In fact, the MW rate and the poverty line are very close. By an international poverty line of approximately USD1.25 per day per person, the 2011 General MW rate is just above this line<sup>4</sup>.

Albeit low, MW is generally viewed by policy-makers and economists to carry gigantic missions: MW contributes to stabilizing macro-economic performance; promoting sound and harmonious labor relations; and acts as a reference wage for social benefit calculations. Constant fears are mongered among government officials that a rising MW would increase the inflation and unemployment rates. This hypothesis may sound economically rational. Increasing consumption and higher labor costs are perennial factors leading to increasing inflation and unemployment pressures. Therefore, it is conventional wisdom that curbing MW at certain rates would lower inflationary pressures. Labor unrest in the industrial zones is likely to follow such action. Workers are eager for governmental decisions on raising

MWs and they are prepared for walkouts and stoppages when employers do not adjust their salaries on time.

The General MW is a reference wage and thus causes a pecuniary burden on state budgeting. It is used not only for calculating social benefits, but also the lowest wage rate in the public sector where the higher wage rates are calculated by multiplying the lowest rate with a coefficient. Therefore, if the General MW is raised to satisfy low wage workers' basic needs, a host of other parasitic benefits would surge. Hence, state budgets will likely fail to meet subsequent rising pensions, social allowances, and high wages.

### Trending Towards a Law

#### Current State of Play

In Vietnam, MW regulations exist in the Labor Code and other implementing documents. Article 56 of the Labor Code states that:

*“The minimum wages are fixed on the basis of the cost of living afforded by an employee who is employed in the simplest job under normal working conditions, which is to compensate the simple labor*

*service performed and to set a portion aside for reproducing extensive labor services and is used as a reference for calculating wages for other types of labor. Subject to consultation with the Vietnam General Confederation of Labor and the employers' representatives, the Government shall determine and promulgate from time to time a general minimum wage, a minimum wage for each region, and a minimum wage for each industry. When the consumption price index increases resulting in reduction of the employees' wages in real terms, the Government shall adjust the minimum wages to ensure the real wages.”*

The factual rates of MWs are fixed by the Decrees annually adopted by the Government to index the MWs to the changing CPI. The 2011 MWs are regulated by Decree No. 22/2011/ND-CP, dated April 4, 2011 of the Government on General Minimum Wage (“Decree No. 22”) and Decree No. 7. These Decrees will be replaced by new ones next year to index the MW to the upcoming year inflation.

#### International Legal Framework

MW and regulating MWs have become a universal issue dating back to the

early 20th century. Even from the early days, the founding Members of the International Labour Organisation (“ILO”) considered one of the aspects that should be the subject of regulations on conditions of work was a wage that provided to workers “a reasonable standard of life as this is understood in their time and country,” thus responding to the concerns expressed by those member States that had signed the Peace Treaty of Versailles and considered that there was an urgent need to improve conditions of work, inter alia, by “the provision of an adequate living wage.”<sup>3</sup> So far, the ILO has adopted a number of legal instruments concerning MWs, namely the Minimum Wage-Fixing Machinery Convention (“C. 26”), 1928; the Minimum Wage-Fixing Machinery Convention (Agriculture) (“C. 99”) and Recommendation (R. 89), 1951; and the Minimum Wage-Fixing Convention (“C. 131”) and Recommendation (“R. 135”), 1970.

However, none of the above Conventions gives an exact definition and term as to what a MW should be. Convention No. 26 uses the term “Minimum Rates of Wages” whereas Convention No. 131 refers to “Minimum Wages.” The formal definition of MW was not coined until a meeting of experts convened by the Governing Body. These experts stated that the MW “represents the lowest level of remuneration permitted, in law or fact, whatever the method of remuneration or the qualification of the workers; MW is the wage which in each country has the force of law and which is enforceable under the threat of penal or other appropriate sanctions. MW fixed by collective agreements made binding by public authorities is included in this definition.”

In addition to the ILO as a formal forum to address the MW issue, others such as SA8000, Codes of Conduct enforced by buyers also pose the issue of MW compliance. For example, the



SA8000 requires that “Wages paid for a standard work week must meet the legal and industry standards and be sufficient to meet the basic need of workers and their families; no disciplinary deductions.”

#### *Propose a Law*

Vietnam is in the global economy and must, in one way or another, comply with these international standards. In fact, Vietnam has been a member State of the ILO since 1993 and so far ratified 17 ILO Conventions, but not including any of MW Conventions mentioned above. However, there has been serious compliance at the level of law and commitments of the Government with respect to these specialized standards.

Therefore, recently the codification of MW regulations into a single body of law has been discussed. The Social Affairs Committee of the National Assembly issued the Official Dispatch No.610/UBXH12 dated May 15, 2008, supplementing the law-making agenda of the National Assembly, Legislature No.12. The Central Communist Party adopted the Resolution No. 20-NQ/TW dated January 28, 2008. These two seminal documents reiterated that “*Adopt a Law on Minimum Wage to complete the legal system in the market economy, to*

*effectuate the Wage Reform Project, and to meet international integration requirements.*”

As per our informal discussions with officials from the Ministry of Labor, War Invalids, and Social Affairs – a Governmental agency responsible for drafting the Minimum Wage Law (“Law”), the Law is proposed to meet the following requirements: (i) clarify the concept, meaning, scope and target of application of the MWs; (ii) MW-Fixing Mechanism; (iii) delink MW from the public sector wages and social benefit; (iv) merge Domestic MW and FDI MW by 2012 in order to enforce the non-discriminatory principle under the WTO; and (v) types of MWs; the Law should hinge on the fundamental principle of MWs being used to protect low wage workers from impoverishment and exploitation. Policy-makers further uphold the idea that MWs are not just “minimum” in themselves, but should be “living.” In practice, a number of enterprises take advantage of the low MWs to pay workers just above the MWs only to avoid violating the laws. And the MWs should be detached from the calibration of pensions, social and health insurance, and other types of allowances to relieve the financial burden from the State budget.

## **Conclusion**

**It may be too hyperbolic to say a MW Law is to perfect the legal system, but at least it aims at a realistic goal of securing better living conditions for low wage workers. This may be food for thought for the upcoming Legislature of the National Assembly when it embarks on creating such a law.**

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<sup>1</sup> The Government issued Decree No. 70/2011/ND-CP dated August 22, 2011 regulating the regional minimum wage for employees working in companies, enterprises, cooperatives, cooperative groups, plantations, households, individuals, agencies and organizations hiring labor. [Decree No. 70]

<sup>2</sup> Directive No. 1752/CT-TTg of the Prime Minister dated September 21, 2010 directing a general census on poor households for making policies on social security in the period of 2011-2015.

<sup>3</sup> Computed by the Institute of Labor and Social Affairs under the Ministry of Labor, War Invalids and Social Affairs in the framework of the World Bank-Funded Project on Enhancing Capacity in Wage and Social Insurance Analysis, 2010.

<sup>4</sup> 2011 General MW is \$39.67 per month.

<sup>5</sup> ILO: Minimum wages: Wage-fixing machinery, application and supervision, Report III (Part 4B) (General Survey), International Labor Conference, 79th Session, Geneva, 1992.

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