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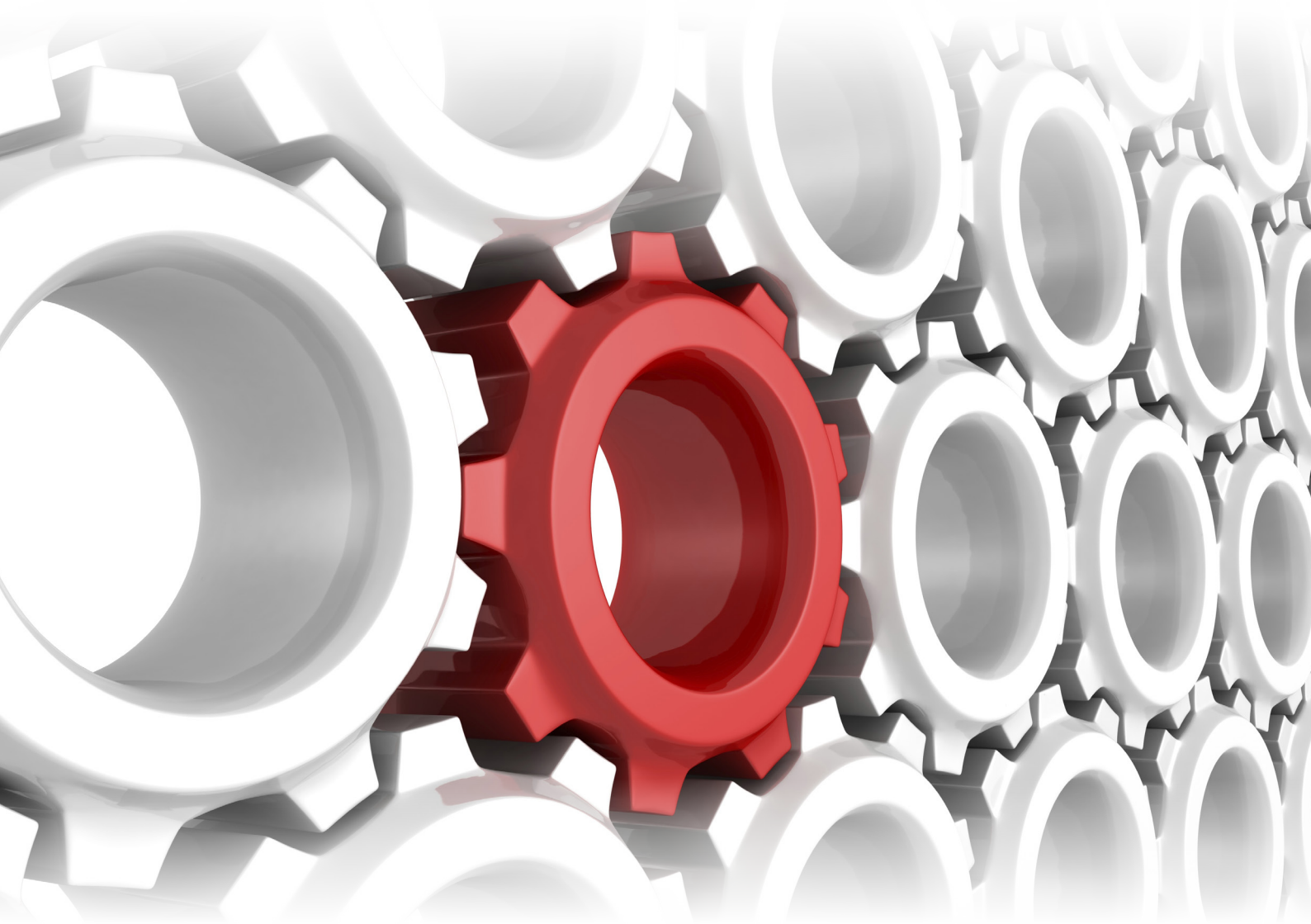
The Global Employer™

Recent Trends and Developments in Employment and Labor Law



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The Global Employer

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Baker & McKenzie's Global Employment Practice Group is pleased to present its 57th issue of The Global Employer™ entitled "Recent Trends and Developments in Employment and Labor Law" In this issue, we review changes to the law in 2014, and the impact of those changes on seven jurisdictions.

Among the topics addressed inside, are a look at high profile judicial rulings and legislative changes that took place in Argentina which have a continuing impact on both employees and employers. In China, we offer a review of key details to be aware of with relation to labor dispatch, work safety and collective bargaining, while in Hong Kong we review the introduction of paternity leave, new protections against sexual harassment and the publishing of the discrimination law review. In the Philippines, trends, developments and changes related to monthly contribution rates to the Philippine Social Security System, labor laws compliance certification system, and licensing for recruiting companies are addressed.

Other overviews include the top labor law developments of 2014 in Ukraine, the calculation of holiday pay in light of the CJEU's decisions in two key cases in the UK and 2014 significant labor developments in light of NLRB decisions in the US.

In this issue, you will also find updates on paid sick time trends in the US and new sanction rules related to working hours in Sweden.

Argentina

Highlights of 2014 and the Impact of New Judicial and Legislative Trends

2014 was marked by high profile rulings and laws that had an important impact on employees and employers alike. Both the judicial as well as the legislative front surprised employees and employers with new sanctions to unrecorded employment relations, income tax treatment of payment under mutual separation agreements and worker's compensation insurance which implied important changes to current labor relations.

The Negri Precedent

According to Argentine legislation when terminating an employment relationship without cause, employees are entitled to mandatory payment based on seniority equal to his/her highest monthly and regular gross salary of the last twelve months for each year of service or any fraction thereof in excess of three months -Section 245 of the ECL.

For purposes of calculating this severance, the highest monthly and normal salary of the last year has a legal cap: it may not exceed three times the average of all the remuneration contemplated in the applicable collective bargaining agreement. This cap is applicable for unionized and non-unionized employees.

Notwithstanding the foregoing, in 2004 the SCJ interpreted -in the precedent in re:"Vizzoti, Carlos A. vs. AMSA S.A."- that when in practice the application of the cap meant a reduction of the highest monthly and regular salary of the employee in more than 33 percent, such cap becomes unreasonable and therefore unconstitutional. Based on that, the SCJ ruled that the legal cap related to the collective bargaining agreement may not be lower than 67 percent of the highest monthly and regular salary of the employee.

On the other hand, Section 20, paragraph i) of the Income Tax Law ("ITL") sets forth an exemption for severance payments related to years of service in case of dismissals. However, as a consequence of the precedent in re: "Vizzoti" it was debatable whether the amount paid as severance indemnification in excess of the limit of Section 245 of the ECL -and of the guidelines set by the SCJ in "Vizzoti"- is exempted from income tax.

In other words, it has been discussed whether the portion of such severance payment in excess of the limit established by the ECL and "Vizzoti" also falls under the scope of the income tax exemption established by Section 20 paragraph i) of the ITL.

In this regard, the Federal Tax Administration ("FTA") issued Ruling 43/2006, and more recently Ruling 4/2012 addressing this matter. FTA understands that the portion of severance payment made in excess of the limits established in the judicial precedent in re: "Vizzoti" falls out of the scope of the income tax exemption referred and, thus, is subject to income tax withholdings.

Fernando Horacio Negri filed an action against the FTA, in order to obtain a refund of the Income Tax that his employer withheld from a bonus. The bonus was paid for the termination of employment, under a mutual agreement concluded within the terms of section 241 of the ECL.

The dispute was to determine whether the bonus paid for the termination of employment is, or is not taxable. In this regard, it is important to mention that ITL establishes in section 2, subsection 1, that individuals residing in Argentina pay the tax only on those incomes of a periodical nature that imply the permanence of the income-producing source. Moreover, pursuant to section 20, subsection i), compensations for seniority in cases of dismissals and those which are related to death or disability caused by accidents or disease, are exempt from Income Tax.

The Attorney General held that the bonus was a direct consequence of the termination of employment. In other words, it was the result of the loss of the income source. Consequently, the Attorney General considered that the payment of the bonus lacked periodicity, nor was the source permanent, not requiring it to be subject to Income Tax, pursuant to section 2, subsection 1, of the ITL.

By a decision issued on July 15, 2014, the SCJ confirmed the opinion issued by the Attorney General. In order to reach such conclusion, the justices held that the bonus payment was triggered by the termination of employment and that for the employee this circumstance implies that the income source was eliminated.

The justices explained that the bonus for the termination of employment lacks the periodicity and permanence in source requiring it to be subject to Income Tax, pursuant to section 2, subsection 1, of the ITL.

Decree 762/2014. Worker's Compensation Insurance for Temporary Workers hired through Employment Agencies. Recently, the Executive Branch passed Decree No 762/2014 (the "Decree"), that modifies the insurance coverage of those employees rendering services through contingent term employment agencies. According to the Decree, those workers provided by contingent term employment agencies rendering services for the user company, must be included in the payroll of the user company. The occupational risk insurance must be obtained by the user company, and such insurer shall comply with the corresponding benefits provided under the Workers' Compensation Law as long as the temporary employee performs services for the user company. This, coming into force on 1 September 2014.

Resolution 759/14, has recently stated that the provisions of the Decree 762/2014 concerning temporary workers assigned to user companies, will not affect occupational risk insurance hired before the effective date of the Decree, and until the expiration date of the contract entered into the insurer and the corresponding contingent term employment agency.

Law 26,940. Promotion of Registered Employment Relationships and Prevention of Labor Fraud. Among the highlights of Law 26,940 the creation and implementation of the Public Registry of Employers with Labor Sanctions [PRELS] stands out. This includes all companies which includes all companies that do not register their employees, hire children or adolescents outside the legal limits or engaged in trafficking of individuals.

Employers who are sanctioned due to violations of the Law, and while incorporated in the PRELS, will not be able to:

(a) Access programs, welfare or development activities and benefits implemented or funded by the Federal Government;

(b) Access bank credits granted by public entities;

(c) Celebrate different kinds of agreements including purchase, services, lease, consulting, leasing, etc. with public entities. Furthermore, the offender may not participate in public bids, public works and services concessions, and/or licenses.

Those employers who are penalized as recidivists regarding the same violation within a three-year period and are beneficiaries under the Simplified System for Small Taxpayers will be excluded from said regime and lose benefits deriving therefrom.

It will also prevent them from deducting for income tax purposes the labor costs and expenses related to their employees.

The Law also provides, as a way to promote recorded employment relations, for a reduction in employers' contributions, regarding companies with up to 80 employees, for a 24-month period regarding new hires. The contributions designated for health and medical coverage and worker's compensation insurer are not included.

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China

Significant Legal Developments in China – 2014

Employment law reforms

There were many important legislative developments in Chinese labor law during 2014. The most significant included the issuance of Provisional Regulations on Labor Dispatch, the amendment to Safe Production Law, and the issuance of Regulations on the Administration of Occupational Hazard Notifications and Warning Signs. We set out below key details which practitioners should be aware of in relation to labor dispatch, work safety and collective bargaining.

Labor Dispatch

Historically there has been a lack of clarity in the rules relating to labor dispatch. Following amendments to the PRC Employment Contract Law ("ECL") in July 2013, labor dispatch was restricted to use for limited positions and at a capped rate of the total workforce. On January 24, 2014, the Ministry of Human Resources and Social Security issued the Provisional Regulations on Labor Dispatch ("Labor Dispatch Regulations"), which clarify some important issues on the use of dispatched workers. The term "dispatched workers" is similar to temp workers, agency workers or contingency workers as used in other countries. The key provisions of the Labor Dispatch Regulations are set out below:

- Dispatched Workers Capped at 10 percent of Total Workforce

  The Labor Dispatch Regulations specify that dispatched workers may not make up more than 10 percent of an employing unit's workforce. When calculating this ratio, the number of dispatched workers should be divided by the total number of directly employed employees and dispatched workers at the employing unit. Companies that use dispatched workers exceeding this maximum ratio are allowed a two-year grace period expiring February 28, 2016. Before reducing its use of dispatched workers to the 10 percent ratio or below, a host company is not allowed to hire any new dispatched worker.

- Employee Consultation Required to Determine "Auxiliary Positions"

  Labor dispatch is only permitted to be used in positions that are temporary, auxiliary or substitute in nature but the ECL does not provide a clear definition of an "auxiliary position." The Labor Dispatch Regulations now stipulate that a company can determine which positions are auxiliary through consultation with all employees or an employee representative council, or the union (if there is one), but the company does not need to reach an agreement with employees. If a company fails to go through the consultation procedures, the labor authorities may order rectification and give a warning, and if there are any losses incurred by any dispatched worker, the company is also required to pay compensation.

- Additional Grounds for Return of Dispatched Worker

  In addition to the scenarios specified in the ECL, where a host company may return a dispatched worker to the staffing agency, the Labor Dispatch Regulations clarify that a host company may also return a dispatched worker to the staffing agency when: (i)

the host company undergoes a major change of objective circumstances or conducts a mass layoff, (ii) the host company goes bankrupt, dissolves, has its business license revoked, or is ordered to shut down, etc., or (iii) the labor dispatch agreement between the staffing agency and the host company expires.

The Labor Dispatch Regulations have provided useful clarification but there are still some tricky areas where more guidance is needed. For example, the Labor Dispatch Regulations remain silent on whether the open-term contract rules also apply to dispatched workers; there is no further guidance as to how "equal pay for equal work" should be interpreted / implemented; it is unclear whether dispatched workers hired outside the allowable scope could claim for de facto employment with the host entity; and given the strict rules on labor dispatch, many companies are changing their hiring methods from labor dispatch to outsourcing, however there remains no clear definition of "outsourcing" under PRC law.

Work Safety

The frequency of work safety accidents in recent years resulted in pressure on the government to make legislative changes and to take steps to address the inadequate sanctions and absence of an effective supervision system under the current law. The government has issued several regulations on occupational health and work safety from late 2013 onwards. The key changes have included more stringent rules for companies to follow and an increase in the power given to the work safety inspection authorities to maintain a safe working environment. In particular, there are substantially heavier fines imposed on companies and more serious sanctions for failures including criminal sanctions for primary responsible managers.

The Regulations on Administration of Occupational Health Records ("Health Records Regulations") issued in December 2013, increased employer obligations in terms of maintaining and retaining occupational health records. On November 13, 2014, the PRC State Administration of Work Safety issued the Regulations on the Administration of Occupational Hazard Notifications and Warning Signs ("Notification Regulations"), which increase employer obligations in terms of notifying employees of occupational hazards and setting up warning signs at workplaces. In particular, the Notification Regulations require employers to specify in the employment contract the potential occupational hazards and their consequences, as well as the protective measures and treatments; make public their occupational hazard prevention and protection policies; and set up warning signs at workplaces and employees' work stations, as well as on equipment, packaging for materials (or products) and storage sites, etc.

On August 31, 2014, the PRC Standing Committee of the National People's Congress issued an amendment to the 12-year old Safe Production Law ("Work Safety Amendment"), to address ongoing safety problems and provide more effective safety protection to workers. The Work Safety Amendment came into force on December 1, 2014. The changes significantly increased the severity of punishment for non compliant companies and also tightened their responsibilities to prevent work safety accidents, as summarized below:

- Companies will receive comparatively heavier fines for work safety accidents according to the severity level of the accident, with the most severe fines ranging up to RMB 20 million.

In addition to possible criminal liability, penalties will also be imposed on the primary responsible manager if the accident occurs due to his/her failure to comply with the law. This will range from 30 percent to 80 percent of the manager's annual income for the previous year based on the seriousness of the accident.

- Possible administrative or criminal liability will be imposed on the primary responsible manager for failure to organize immediate rescue at the time a work safety accident occurs or if he or she leaves their post or even escapes during the accident investigation period.

- Work safety inspection authorities can order companies to suspend operations or construction or cease usage of facilities or equipment. They are authorized to force a company to suspend operations by cutting off the electricity supply or supply of civil explosives, to compel the company to carry out its work safety duties.

- Workplace safety training must be provided to directly-employed employees, dispatched employees and student interns. The fine imposed on any employer for failure to provide training and failure to rectify such a non compliance within the time limit ordered by relevant authorities can be up to RMB 100,000.

Collective Bargaining

Recent developments in collective bargaining have placed pressure on companies, particularly in the Fortune 500, to establish collective bargaining mechanisms. The requirements for such mechanisms have gone beyond empty slogans. In the past, although many companies had conducted collective bargaining and signed collective contracts with their employees, the terms of most collective contracts were very general, and in many cases were just a reflection of the basic legal requirements or the company's existing compensation and benefits policy. Now according to a Working Plan released by All China Federation of Trade Unions, the terms of the collective contract should be detailed enough

to be easily performed, though this Working Plan is not legally enforceable. In addition, according to the Working Plan, the ACFTU will try to push companies to involve as many employees in the collective bargaining process as possible.

Developments and trends

There were a number of discernible trends following some of the legislative changes in 2014, these included employers undertaking internal staff restructuring due to the Labor Dispatch Regulations. Employers have chosen to directly engage dispatched workers whilst others were made redundant as the work has been outsourced to contractors.

Many foreign invested companies went through a mass layoff in 2014 for various reasons. Some of the mass layoffs caused strikes. In an effort to help cushion the impact of changing business conditions and encourage companies not to lay off employees, the Ministry of Human Resources and Social Security and other government departments jointly issued a circular in November 2014 to grant eligible enterprises subsidies for stabilizing employment. This subsidy policy will be effective until the end of 2020. At the end of 2014, the Ministry of Human Resources and Social Security also released a draft regulation on mass layoff, which expands the categories of employees who are protected from being laid off.

During 2014, many employees went on strike because of grievances in relation to rights and benefits. In particular there was a strike wave in Guangdong province. In April 2014, approximately 30,000 employees of the largest shoe factory in Dongguan went on strike as the employees found that the factory had not paid the appropriate amount of social insurance and housing fund contributions for them. The strike lasted for half a month, and according to the media, it was the largest strike in the PRC since 1949. This strike galvanized many employees to focus on their legal entitlements to social insurance and housing fund contributions. Other strikes were motivated by various reasons such as dissatisfaction with wages, working environment, overtime compensation, severance pay, or an employer's relocation, restructuring, merger or acquisition, etc. It is likely that there will be an increase in strikes in the PRC given that employees are becoming more aware of their rights and have become more assertive in pursuing these.

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Hong Kong

Hong Kong saw a number of changes in 2014, most had been widely anticipated such as the introduction of statutory paternity leave for eligible fathers, new protection for employees from sexual harassment by customers in the goods and services industries and the Labour Tribunal's new power to order security for payment on an award. However, the event that received the most attention related to a consultation as opposed to an actual change. In July 2014, the Equal Opportunities Commission published the Discrimination Law Review and sought feedback on 77 proposals some of which were controversial. We set out more detail on these topics below.

Statutory paternity leave

The Hong Kong Employment Ordinance was amended on 24 December 2014 introducing an entitlement of three days' of paid paternity leave for eligible fathers whose children are born on or after 27 February 2015. The leave will be paid at four-fifths of the employee's average daily wages earned during the 12 months immediately prior to when the paternity leave is taken. The Bills Committee had made recommendations to provide seven days' paternity leave at full pay. However, this was rejected by the Legislative Council as being too onerous for small and medium sized enterprises although the government has pledged to review the position after one year.

Discrimination Law Review

The Equal Opportunities Commission ("EOC") launched a comprehensive review of discrimination laws in July 2014. The Discrimination Law Review ("DLR") was the first review of Hong Kong's anti-discrimination legislation since the passing of the four anti-discrimination laws: the Sex Discrimination Ordinance, the Family Status Discrimination Ordinance, the Disability Discrimination Ordinance and the Race Discrimination Ordinance. The public consultation process on the DLR had to be extended due to an overwhelming level of interest from the public and other organisations, which led to the EOC's website crashing. The two proposals which caused the most controversy were whether to legislate against discrimination based on nationality, citizenship and residency status, (which seeks to address anti-Mainlander sentiment in Hong Kong) and whether to widen the definition of marital status to include de facto relationships including same sex relationships. Other interesting proposals included:

- Whether to introduce a statutory duty or requirement to provide reasonable accommodation for people with disabilities;
- Whether to extend protection for sexual harassment to workers employed by different employers working in a common workplace; and
- Whether to merge all four anti-discrimination ordinances into one.

The EOC's objective is to "modernize, harmonize and simplify." The EOC has confirmed that the DLR is not seeking to consult on introducing new protected characteristics such as sexual orientation, gender identity, intersex status, or age. The EOC plan to hold separate consultations on the feasilbilty of developing legislation to protect individuals with those characteristics and had commissioned studies into this in 2014. The EOC aims to publish the results of these studies early in 2015 and to issue a report with recommendations to the government following a review of the responses to the DLR consultation, in the middle of 2015. It is inevitable that significant change is coming to the field of discrimination. The EOC designed some of their proposals based on legal developments in the discrimination laws of the UK and Australia. It is anticipated that Hong Kong's discrimination laws will provide a higher level of protection similar to these jurisdictions in the medium to long term. It is advisable that employers follow these developments carefully in order to have adequate time to prepare their organisations to meet the challenges ahead.

Amendments to the Labour Tribunal Ordinance

On 24 December 2014, the Labour Tribunal Ordinance was amended to enhance its powers. The key changes included the following:

(i) clarification that the Labour Tribunal has jurisdiction to hear all types of employment related monetary claims including for unliquidated sums;

(ii) a general power to order a party to give security if it is just and expedient to do so, in order to minimise undue delays and abuses of the adjudication process. If the party fails to give security when ordered to do so, the Tribunal may dismiss the claim, stay the proceedings or enter judgment on the claim; and

(iii) amendment of the time limit for enforcing Labour Tribunal awards from 12 months to six years, to align with other civil claims.

Employers facing vexatious claims or litigants who are delaying the proceedings unnecessarily, will welcome amendment (ii) above as providing some recourse in such difficult circumstances.

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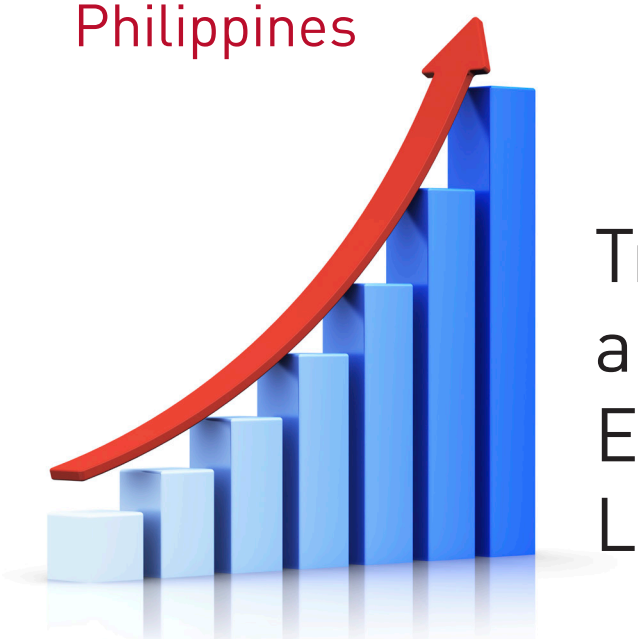

Trends, Changes and Developments in Employment and Labor Law in 2014

Increase in the Monthly Contribution Rates to the Philippine Social Security Agencies

Starting January 2014, the increase in the monthly contribution rate to the Social Security System ("SSS") from 10.4percent to 11 percent and the maximum monthly salary credit from PhP15,000 to PhP16,000 became effective. The additional 0.6 percent in the contribution rate will be shared equally by the employer and the employee who shall pay 7.37 percent (from 7.07 percent) and 3.63 percent (from 3.33 percent), respectively. For the self-employed and voluntary members, among others, they shall shoulder the total rate of 11 percent.

To view a table of the updated SSS Schedule of Monthly Contribution, click HERE.

Starting January 2014, the new premium rate of 2.5 percent for the Philippine Health Insurance Corporation ("Philhealth") will likewise become effective. The employer and the employee will equally share the monthly contribution. The salary bracket floor starts at PhP8,000 and the salary bracket ceiling has been pegged at PhP35,000.

To view a table of the PhilHealth Premium Contribution Table for 2014, click HERE.

Employers in the Philippines are required to report their employees for coverage with and, to withhold from the employees' salaries the employees' contribution and remit the same, together with the employer's contributions, to the aforementioned social security agencies, among others. Failure to withhold and remit the monthly contributions may subject the employer to penalties (i.e., interest on the contributions that have not been paid or remitted) and fines, and subject its responsible officers to criminal sanctions (i.e., imprisonment).

Labor Laws Compliance System Certification Process

On August 2014, the Philippine Department of Labor and Employment ("DOLE") issued Department Order No. 131, series of 2013, as Amended ("Amended DOLE DO 131-13), or the Manual on Labor Laws Compliance System and Procedures for Uniform Implementation.

Pursuant to Amended DOLE DO 131-13, an assessment, visit and investigation shall be undertaken by the Labor Laws Compliance Officer ("LLCO") in all establishments, branches, and workplaces and worksites, to determine compliance by establishments with all Philippine labor laws including labor standards laws, Occupational Safety and Health Standards, and other related laws and issuances. This will cover provisions on wages, hours of work and other non-monetary benefits as well as the standards that refer to the work premises, required personal protective equipment and health programs, and other related laws dealing with occupational safety and health. In addition, it will also cover workplace observance of labor rights and key indicators in the country's decent work profile.

The certification process will be conducted by the LLCO together with the employer's and employees' representatives through a joint assessment of the establishment's compliance with all labor laws. If the establishment is found compliant, the establishment will receive a Certificate of Compliance ("COC") which is valid for two (2) years, unless there is a complaint which would warrant the conduct of a Compliance Visit; or if there is an imminent danger, or a fatal accident, trigger the conduct of an Occupational Health and Safety Investigation. If there are gaps or deficiencies, the LLCO will assist the establishment to comply through corrective actions by providing technical assistance and educating both the employer and the employees for better conformity with all labor laws and standards. Once compliance is satisfied, a COC will be issued.

There are also other allowed certification process such as through the tripartite team's certification process of the DOLE Regional Tripartite Industrial Peace Council (RTIPC) under the Incentivizing Compliance Program. This is equivalent to the COC where the establishment may apply, or get nominated to be processed for the issuance of a Tripartite Certificate of Compliance with Labor Standards (TCCLS), which is valid for three (3) years, or any of the other certificates or awards (e.g., Gawad Kaligtasan at Kalusugan (GKK), Child Labor Free Establishment (CLFE), LMC Awards, Productivity Olympics, or the Secretary's Award.

Employers should not deny access to the LLCOs to their employment records and workers, otherwise, they may be considered to have violated Article 128 of the Labor Code of the Philippines and subject their responsible officers to criminal charges.

Priority establishments are those: (i) engaged in hazardous work; (ii) those employing child employees; (iii) engaged in contracting and subcontracting arrangements; (iv) Philippine registered ships or vessels engaged in domestic shipping; (v) employing 10 or more employees; and (vi) other priority establishments as may be identified in subsequent issuances.

Recently, we have seen the DOLE's aggressive implementation of Amended DOLE DO 131-13 with LLCOs conducting assessments and site inspection in many establishments during the year.

Licensing for Establishments Engaged in Recruitment and Placement for Local Employment

On 20 November 2014, the Philippine Department of Labor and Employment ("DOLE") issued Department Order No. 141-14, series of 2014 ("DO 141-14"), or the Revised Rules and Regulations Governing Recruitment and Placement for Local Employment.

Under DO 141-14, every person, partnership or corporation intending to engage or is engaged in the recruitment and placement for local employment through an agency or through an electronic medium is required to obtain a license from the appropriate DOLE Regional/Field Office having jurisdiction over the place where it intends to establish its office. Persons conducting recruitment activities for local employment on behalf of a private employment agency is likewise required to obtain an Authority to Recruit from the appropriate DOLE Regional/Field Office.

Applicants for the license to operate a private employment agency should, among others, be a Filipino citizen or be a partnership or corporation with 75 percent of the authorized capital stock is owned or controlled by Filipino citizens.

Persons or entities engaging in recruitment activities without the necessary license or authority or recruit may be deemed to be engaged in illegal recruiting and as such, be subject to fines, penalties and even criminal action.

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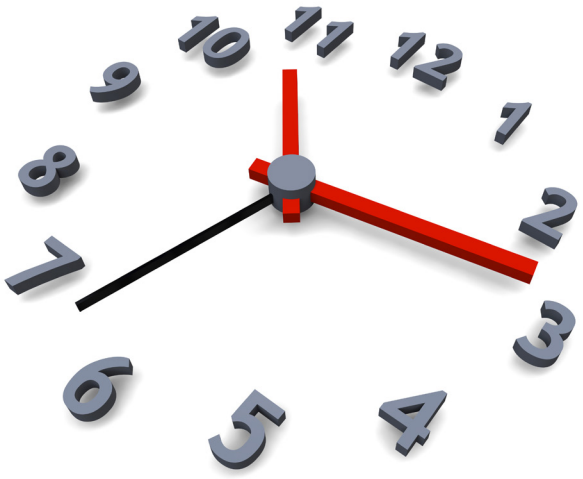

New Sanction Rules in the Working Hours Act can be Expensive for Ignorant Employers

In July 2014, new sanction rules were enforced in the Swedish Working Hours Act. The new rules have given employers a strict liability to ensure that the rules regarding working hours are followed. Earlier, the employer could only be liable to pay a fine if the rules were broken with intent or by negligence. Now, the employer can be liable to pay expensive fees to the Swedish Work Environment Authority even though the employer was not aware, or should have been aware that the rules on working hours were broken.

The purpose of the new rules is to create a more efficient sanction system so that the Working Hours Act regulations are followed to a greater extent. This will also reduce the risk that companies will try to gain competitive advantage in the market by not following the rules in the Act.

In addition, the fact that employers now have a strict liability will also likely lead to shortened time between the time that the offense took place and the time the sanction is imposed on the employer.

Before 1 July 2014, only violations of the rules on overtime could lead to sanctions for the employer - the so-called overtime sanction. This rule that has been expanded and also targets violations of the rules on regular working hours, on-call hours, additional hours, daily and weekly rest periods in the Working Hours Act. Previously, violations of these rules led to criminal penalties, where it was required that the employer acted with intent or by negligence.

The fees in 2014 are equivalent to approximately USD 60 per hour for all hours the employee works or are on call in excess of the legal requirements.

For many employers who, consciously or unconsciously, have not had sufficient supervision over employees' working hours, the new rules may lead to a rude awakening. With strict liability, an employer may be liable to pay expensive fines even though the error was not committed deliberately or even by negligence.

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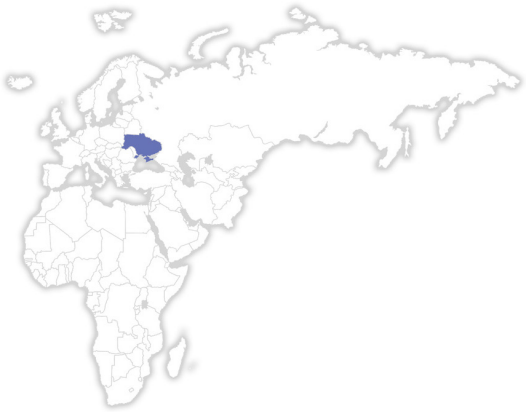

Ukraine

Top Labor Law Developments in Ukraine

There have been several noticeable developments during 2014 and early 2015 that significantly affect employers operating in Ukraine. We examine each development in further detail below.

Reforms to Mandatory State Social Insurance of Employees

In the first quarter of 2015 the statute reforming mandatory state social insurance and payroll legislation, as well as some other aspects of employment, became effective (the "Law"). The Law, among other changes, reduces the payroll tax (the Unified Social Tax (the "UST")) rate if the specified cumulative conditions are satisfied by the employer.

The Law provides that if an employee's salary does not exceed the Minimum Monthly Salary (i.e., is not more than UAH 1,218, or approximately USD 51 at the current exchange rate), the current rate of the UST will apply to such employee's salary, i.e., between 36.76 percent and 49.7 percent (depending on the class of professional risk of the company's operations). The rate of 34.7 percent is applicable to the fees paid to freelancers engaged under civil law contracts.

An employer is entitled to apply a lowering factor when calculating its obligations under the UST if all of the following conditions are satisfied:

a) the employee's salary (or the fees of the freelancer) has increased by 20 percent over the average salary (fee) payable by the company in 2014;

b) the average payment for an employee (freelancer) after applying this factor will be not less than the average salary (fee) payable by the company in 2014;

c) the number of employees and freelancers for the current month does not exceed 200 percent of the average number of employees and freelancers for 2014.

The lowering factor is calculated by the company by dividing the average salary/fee paid in 2014 by the average salary/fee for the current month of 2015 (i.e., the month for which the payroll tax (the UST) is being calculated). However, the factor applied cannot be less than 0.4. As of 1 January 2016 the lowest permissible value of the factor will be 0.6.

Fines for failure to pay the UST

The Law significantly increases fines that could be imposed on employers. In case of failure to pay the UST or if the payment is delayed, the company will have to pay a fine of 20 percent of the delayed amounts. There are also fines for violations of the procedure for reporting the UST, although the amounts are insignificant at the moment (less than USD 10). A repeated violation within 12 months is punishable by an increased fine (less than USD 100 currently).

Changes to the procedure for admitting employees to work

Under the Law an employee may not be admitted to perform work

unless (1) the fact of employment has been recorded in writing (in the form of an "internal order") and (2) the employer has informed the State Fiscal Service of the fact of employment of the relevant employee. Sanctions apply if the relevant authority discovers an employee is working without a record of employment, or if an employee who has been hired part-time according to the employment record actually works full time. In that case, such authority will require that the employer (1) pay salary to the employee of not less than the average salary in the same industry in the same region during the relevant period (in addition to any salary that has actually been paid to the employee), and (2) pay the Personal Income Tax and the UST on the amounts of the salary imputed as per the above.

Financial sanctions for employers for labor law violations

For violations of the Law, employers may have to pay fines equal to 30 times the Minimum Monthly Salary (UAH 36,540 or USD 1,537) for any of the following: (1) admission of an employee to work without the employment record prescribed by the Law; (2) recording employees for part-time work while actually using the employees full-time; (3) failure to withhold and remit the Personal Income Tax and to pay the UST.

Also, a fine equal to three times the Minimum Monthly Salary (UAH 3,654 or USD 154) may be imposed for failure to pay salaries (and relevant payroll taxes) when due or if the delay in payment exceeds one month or payments are only partial. Note that the Ukrainian labor laws require salary payments at least twice a month and the interval between the payments may not exceed 16 days.

For failure to observe the minimum state guarantees regarding salaries (in particular, if the salary is lower than the statutory Minimum Monthly Salary), employers must pay a fine equal to 10 times the Minimum Monthly Salary (UAH 12,180 or USD 512). Other violations of the Ukrainian labor laws are punishable with a fine equal to the Minimum Monthly Salary (UAH 1,218 or USD 51).

Administrative liability for company officers for violations of labor laws

Company officers may be subject to administrative fines ranging from 30 to 100 times the Personal Income Tax Exemption limit (UAH 510-1,700 or USD 21-72) for failure to pay salaries, or for only partial payment, when due. Also, company officers may have to pay fines ranging from 500 to 1000 times the Personal Income Tax Exemption limit (UAH 8,500-17,000 or USD 358-715) for: (1) admitting an employee to work without an employment record; (2) admitting foreigners to work without a Ukrainian work permit.

Criminal liability of company officers for labor law violations

The Law has increased the liability of company officers for violations related to payment of the UST. In particular, the Law provides for imposition of a fine of between 1,000 and 2,000 times the Personal Income Tax Exemption limit (UAH 17,000-34,000 or USD 715-1,430), or for deprivation of the right to occupy certain positions or to engage in certain activities for up to three years.

In addition, the Law provides for the criminal liability of officials for illegal termination of employment (1) for personal reasons, or (2) in retaliation for an employee reporting a violation of the Law of Ukraine "On Preventing and Combating Corruption." The punishment may be any of the following: (1) a fine equal to 2,000 to 3,000 times the Personal Income Tax Exemption limit (UAH 34,000-51,000 or USD 1,430-2,146); (2) deprivation of the right to occupy certain positions or to engage in certain activities for up to three years; or (3) correctional labor for up to two years.

Liability and additional grounds for dismissal of company officers

In June 2014, amendments to the legislation on protection of investors (the "Amendments") established new grounds for termination of company officers. Namely, "removal from office" (at any time, without cause or any justifications/explanations) has become possible. Companies are allowed to remove or to suspend from office any member of the company's executive body at any time regardless of any restrictions set forth in the relevant constituent documents of the company. In the event of termination on these grounds, the company officer will be eligible for a severance payment of at least six months' average salary.

Under the Amendments, company officers may be held liable for the lost profits of the company if they are responsible for such loss. The new rules apply to all company officers, but companies have no discretion to include additional provisions on liability of their officers in the company's constituent documents. The current Ukrainian corporate laws establish that corporate officers include the members of the executive body, of the supervisory body (board of directors), if any, and of the audit committee. A number of draft laws proposed currently extend the this definition to include certain senior and midlevel managers.

In certain cases company officers will incur only limited liability (in the amount of the caused damage, but

no more than one month's average salary). In particular the liability is limited if the damage was caused by: (1) mistaken/unjustified payments to employees; (2) incorrect accounting for and inadequate storage of money or valuables; and (3) failure to take the necessary measures to prevent down time.

In addition, in March 2015, further draft legislation on the protection of investors' rights (the "Draft Law") introduced provisions on corporate officers' liability for damage caused to the company; akin to the concept of fiduciary duties. In particular the Draft Law provides for liability of corporate officers of joint stock companies for the harm caused to the company by their acts (omissions) in the full amount of the caused harm. Moreover, any agreement that limits/excludes such liability or otherwise contradicts this provision will be null and void.

Liability of company officers for violation of banking legislation

On 2 March 2015 the Verkhovna Rada of Ukraine adopted a law significantly increasing the liability of the company officers of banks effective as of 8 March 2015 for violation of banking legislation. In particular, persons related to banks (i.e., the CEO of a bank, the head of the internal audit service, the heads and members of the committees of the bank, etc.) or other persons that may be subject to inspections of the National Bank of Ukraine (i.e., banks, branch offices of banks, the qualifying shareholders and the members of bank groups) may be subject to administrative fines ranging from 2000 to 5000 times the Personal Income Tax Exemption limit (UAH 34,000-85,000, or USD 1,430-3,576) for violation of banking legislation, inter alia, presentation of invalid (incomplete) data on assets and transactions.

Bringing a bank to insolvency in a way that caused extensive damage to the state or creditor (i.e., if the amount of such damage is more than UAH 170,000, or USD 3,576) is considered a crime for company officers of banks who may be punished by imprisonment for up to five years, or imprisonment for the same term with a fine ranging from 5000 to 10000 times the Personal Income Tax Exemption limit (UAH 85,000-170,000, or USD 3,576-3,576) and deprivation of the right to occupy certain positions or to engage in certain activities for up to three years.

Mobilization into the army and other war-related considerations for employers

On 14 January 2015, the third wave of partial mobilization was declared in Ukraine by Order of the President No. 15/2015 "On Partial Mobilization." It should last for a period of 210 days and will be carried out in three stages. Under Ukrainian law both men and women may be mobilized into the army. For women the age limit is 50 years. For those men who have not served in the military or have a rank of colonel or below, the age limit is set at 60 years old. Higher army officers (major general, lieutenant general, colonel-general and army general) can be mobilized until the age of 65 years.

Persons who may not be mobilized

Ukrainian law exempts the following from mobilization into the army, namely: (1) personnel reserved by their employers for the period of mobilization and war time according to the procedure established by the Cabinet of Ministers of Ukraine; (2) persons temporarily unsuitable for military service, as confirmed by a conclusion of a military-medical commission (for up to six months, with subsequent re-examination); (3) men who support three or more children under 18 years (such men can volunteer for military service); (4) men or women who by themselves support children under 18 years (such men and women can volunteer for military service); (5) men and women who take care of a disabled adult (I and II disability groups) under 23 years; (6) adoptive parents, caregivers, guardians, foster parents who take care of orphans or children deprived of parental care under 18 years (such persons can volunteer for military service); (7) persons who provide everyday care to disabled individuals, if no one else can replace them; (8) members of the Parliament of Ukraine, members of the Parliament of the Autonomous Republic of Crimea; (9) students and post-graduate students who study full time.

Protections for mobilized employees

Employers may not terminate the employment of an employee who has been summoned to the army during mobilization. From 10 February 2015 an employer also may not dismiss an employee who has voluntarily joined the army (under a contract): at a time when national security is under threat, during mobilization or after announcement of war. This prohibition is effective for one year after the employee was mobilized or voluntary joined the military under a contract. During this period, the relevant employee is entitled to receive his/her monthly salary, which is calculated as an average of his/her salary payments for the last two months before mobilization. By law the employer should be reimbursed for such payments by the state, but the relevant procedure has not yet been developed or published.

Also employers may not dismiss those employees who have served in the Army long enough to become eligible for demobilization, but have chosen to continue their military service. Such employees are

protected from dismissal even if they have served for more than one year from their mobilization (or voluntary joining the army). Currently, the law contains no indications as to when the employment of such employees may be terminated (apart from the obvious termination grounds: in the event of the employee's death).

Obligations of employers

Employers also have some additional obligations connected with mobilization, namely: (1) to ensure the timely arrival of the mobilized employees at the meeting points designated in the relevant notices of the military commissariats; (2) to maintain a register of employees who are liable for military service, of reservists or those called up for military service; (3) to take the required actions to reserve (protect from mobilization) the employees who are essential to the functioning of the business; (4) to make, as determined by law, buildings, structures, transport/other materials available to the army or any other relevant authority.

The CEO of a company (e.g. the director) is generally responsible for keeping the record of employees who are subject to military draft, reservists or recruits. The director's duties include: (1) within seven days informing the relevant district's military commissariats about newly hired or dismissed employees who are subject to military draft; (2) upon the military commissariats' request, informing the employees who are subject to military draft that they need to report to the commissariat on a certain date and ensuring their timely arrival there; (3) making sure that the record of employees who are subject to military draft is complete and accurate; (4) checking whether newly hired employees have military registration cards or certificates of registration with the relevant district military commissariat; (5) preparation and submission to the relevant district military commissariats of the list of persons that must be registered (by 1 December of the current year); (6) verifying, at least once a year, whether the information in the personal cards of employees complies with the records of the military commissariat; (7) amending the personal cards of employees if there are changes concerning marital status, place of residence, education, place of employment or position occupied by draftees and reservists; (8) notifying the military commissariats about such amendments to the personal cards of employees by the 5th day of each month; (9) keeping a log of the inspections of the record of employees who are subject to military draft.

Application of the Military Tax is prolonged

The application of the Military Tax, which was introduced in 2014 until 1 January 2015, was prolonged. The measure is set to raise additional money for the Ukrainian army until the Parliament of Ukraine enacts a decision stating that the reform of the army has been completed. The Military Tax is currently withheld at the rate of 1.5 percent from all income of individuals subject to taxation.

In particular, an employer is obliged to withheld and remit 1.5 percent of the salary of the employer together with all accrued bonuses, allowances and other compensatory payments (i.e., compensation for business trips, however without reimbursement of transport, accommodation, daily allowance; compensation for unused vacation; year-end bonuses; compensation for overtime work and night shifts; for high achievements at work, dangerous or harsh working conditions, etc.) that constitute the payroll of the employer. However, the Military Tax is not withheld from such payments as assistance in connection with temporary disability, pregnancy, childbirth and other childcare allowances, severance payments, etc.

Extended Unpaid Vacation

On 15 January 2015 certain amendments regarding unpaid vacation were adopted by the Parliament. From that date employers may allow unpaid vacation on the grounds and for the entire period of an anti-terrorist operation taking place in the area where the employer is located plus the time required for the employee to return to the workplace from the location where the employee sought safety. Thus, the existing restriction on a maximum 15 days duration of unpaid vacation does not apply in the areas affected by such events as anti-terrorist operations.

Work permits for foreigners: new rules

On 11 February 2015, Resolution No. 42 of the Cabinet of Ministers of Ukraine "On Certain Business Deregulation Matters" (the "Resolution"), which simplifies the procedures for issuance and renewal of permits to use foreign labor in Ukraine, came into effect. The Resolution has introduced the following changes:

(1) Recruiting foreign labor will be deemed justified if the foreign national/stateless person holds a degree from any of the top 100 universities named in any of the following rankings: Times Higher Education, Academic Ranking of World Universities by the Center for World-Class Universities at Shanghai Jiao Tong University, QS World University Rankings by Faculty, or Webometrics Ranking of World Universities.

(2) The hiring of a foreigner will also be considered justified if such employee (a) will occupy a managerial position and is a founder (co-founder) of the employing entity, or (b) has copyright or related rights and is employed to exercise them, or (c) will occupy a managerial position (e.g., a database administrator, software development engineer, or software development assistant engineer) with a legal entity engaged in the IT industry.

(3) Filing for renewal of a work permit may be done within 20 days of its expiry date (compared to 30 days previously).

(4) The employment center is required to approve the relevant decision within seven business days (compared to 15 business days previously), and to communicate its decision, including by email (which is new), to the employer within two business days (compared to three business days previously).

(5) The employers must submit a copy of the employment agreement (contract) with the respective foreign national to the employment center within seven business days (compared to three business days previously) from the effective date of such agreement (contract).

(6) There is no restriction on how many times the employer may apply for the renewal of a work permit (previously a work permit could be renewed only once).

Amendments to the Personal Data Protection Law

From 2014 the owner of personal data (e.g. an employer) must notify the Ukrainian Parliamentary Commissioner for Human Rights (the "Ombudsman") about the processing of personal data that is of particular risk to the rights and freedoms of the subjects of personal data within thirty days after the beginning of such processing.

Personal data that is of particular risk include information about (1) racial, ethnic or national origin; (2) political opinions, religious or philosophical beliefs; (3) membership of political parties and/or organizations, trade-unions, religious or civic organizations of a particular ideology; (4) data concerning health; or (5) sex life; (6) biometrical data; (7) genetic data; (8) administrative records or criminal convictions; (9) pre-trial measures; (10) measures taken under the Law of Ukraine "On Investigative and Detection Measures"; (11) violent acts committed, and (12) location and/or movements. However, no notification is required when processing is necessary to keep the open database in order to provide information to people; is carried out in respect of personal data of members of an association, if such data will not be transferred; or is carried out with the personal data of employees.

Liability for failure to follow the above requirements may result in imposition of an administrative fine of up to UAH 17,000 (approximately USD 715).

Changes in Anti-discrimination Legislation

As of 2014 the Ukrainian anti-discrimination laws have been significantly changed. New terms have been introduced, such as "facilitation of discrimination" and "declared intent of discrimination." Also the definition of the term "discrimination" has changed. In particular, discrimination is now not "an act or omission of a certain person", but "existence of circumstances resulting in discrimination against certain persons or groups of persons." Moreover, a person who has experienced discrimination is required only to state the facts demonstrating that discrimination has really occurred. Therefore employers carry the burden to prove that there was no discrimination.

In addition to the Ombudsman and the courts, a discrimination claim can be made to other government authorities, authorities of the Autonomous Republic of Crimea, local government authorities, and the relevant officers of such bodies. We note that employers are required to appoint a person responsible for accepting grievances of employees who believe that they have been discriminated against. In addition, employers have to include a provision regarding the obligation to appoint such a person in the collective agreement of the enterprise.

Conclusion

Overall, the purpose of the labor law changes is (1) to encourage employers to pay salaries officially in full by reducing the rate of the UST and increasing employers' liability for violation of labor laws; (2) to protect the employees mobilized into the army; (3) to simplify the procedure for obtaining work permits for highly skilled foreigners needed by foreign investors; (4) to simplify the laws on data protection and bring them closer to European standards.

The adoption of the new Labor Code in 2015 is one of the publicly announced goals of the Ukrainian Parliament. Hence, further changes to Ukrainian labor law are expected in 2015.

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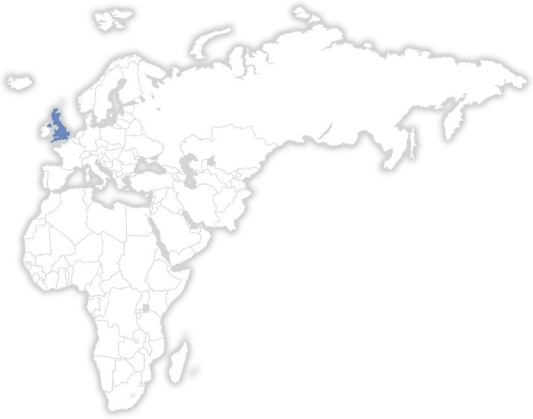

United Kingdom

Calculating Holiday Pay in Light of CJEU Decisions

Following the flurry of cases we saw in 2013 grappling with the issue of statutory holiday and sickness absence, the focus this year has turned to the calculation of holiday pay following the CJEU's decisions in Williams v British Airways [2011] and Lock v British Gas [2014] and, most recently, the EAT's judgment in Bear Scotland v Fulton [2014]. This is an area that employers should approach with care. The direction of travel of the courts gives rise to significant potential liability for employers, both in terms of future holiday payments and possibly for past payments going back several years, although the EAT's judgement in Bear Scotland may limit the scope for employees to claim for substantial past payments.

Bear Scotland Ltd v Fulton and others
EAT, 4 November 2014

Workers in the UK are entitled to a minimum of 5.6 weeks of paid holiday (including bank holidays) under the Working Time Regulations ("WTR"). That right implements the Working Time Directive ("WTD"), and also "gold-plates" it, since the WTD only requires that workers receive a minimum of 4 weeks of paid holiday, including bank holidays.

In 2002, the Court of Appeal confirmed in its decision in Bamsey v Albion Engineering and Manufacturing plc that, in most cases, holiday pay need not include a payment to reflect overtime pay that an employee has earned, unless that overtime is both guaranteed (i.e. the employer must offer it) and compulsory (i.e. the employee must work it, if it is offered). As a result, staff who regularly work overtime often receive less pay during their holidays than they typically receive while working.

In 2012, the CJEU ("Court of Justice of the European Union") handed down its decision in Williams & Others v British Airways Plc. That decision suggested that holiday pay for the 4 weeks of holiday guaranteed under the WTD should correspond to the normal pay that an employee would receive while at work. Strictly speaking, that decision related only to staff in the civil aviation industry such as pilots and cabin crew to whom specific legislation applies.

However, earlier this year, in the case of Lock v British Gas Trading Limited, the CJEU concluded that the same principle applied to non-aviation sector employees under the WTD and required that holiday pay

should include an element to reflect commission payments that the employees had missed out on under the commission schemes in issue as a result of going on holiday.

Claims for underpayments of holiday pay may be made under the WTR, where the time limit for bringing such claims is three months from the date on which the relevant holiday pay should have been paid. Alternatively, claims may be brought as claims for unlawful deductions from wages, in which case the employee can claim for a series of deductions, provided that the claim is brought within three months of the last in the relevant series of deductions. It has until now been unclear how far back that series can go, with commentators typically suggesting that it is either limited to the last 6 years, or potentially extends to all underpayments in the same employment since the enactment of the WTR in 1998.

The claimants in these three conjoined appeals (Bear Scotland Ltd v Fulton and others) each regularly worked overtime, and were paid additional sums for working those hours. That overtime was "non-guaranteed", in that it was not guaranteed by the employer but it was compulsory on the part of the employees if it was offered. In addition, in two of the three cases, the employees received additional allowances if they were required to travel for work purposes. However, in all three cases, the employee's holiday pay consisted of basic pay only, and excluded the payments received in respect of overtime and travel allowances.

The Claimants relied on Williams and Lock in asserting that their holiday pay should include an element reflecting overtime pay and travel allowances. The Respondents asserted that the principles outlined in Williams did not extend to "non-guaranteed" over time. They further asserted that, if the WTD did extend to non-guaranteed overtime pay, the UK WTR which sets out how holiday should be calculated would be incompatible with European law, so if the employees had a claim at all, it was against the UK Government for failing to implement the WTD properly. The UK Government, intervening in the case, supported the respondents' argument that "non-guaranteed" overtime need not be included in the calculation of holiday pay but argued that, if that was wrong, the UK legislation could be interpreted consistently with European law, such that any underpayments for past holiday pay should be made good by the employers.

The EAT accepted the Claimants' assertion that payments that the Claimants received for "non-guaranteed" overtime should be reflected in the calculation of holiday pay for the 4 weeks of holiday guaranteed by the WTD (although not for the additional 1.6 weeks required by the WTR or other enhanced holiday offered by the employer). It also accepted that the travel allowances should be included to the extent that they did not cover travel expenses, but reflected time spent travelling. If the payments had been intended merely to cover travel costs such as train fares, the payments would not have to be included.

The EAT also concluded that the UK legislation could be interpreted consistently with European law, with the result that the Respondent employers were liable to pay the underpaid holiday pay to the Claimants. The EAT achieved this result by rewriting the relevant part of the legislation. Though somewhat unclear, the result of this rewriting appears to be that, in most cases involving "non-guaranteed" overtime or allowances, holiday pay for the 4 weeks of leave guaranteed by the WTD should be calculated by reference to the average of such payments received over the twelve weeks preceding the relevant leave.

Finally, the EAT examined the question of whether the underpaid holiday constituted a "series of deductions", such that the employees could claim underpaid holiday going back over a lengthy period. In a novel decision, the EAT determined that, a gap of three months or more between underpayments would effectively break the series. The EAT also indicated (without deciding the point) that the first 4 weeks of leave taken in any leave year should be deemed to be the leave required by the WTD, and any additional holiday taken can be calculated under the normal principles of the WTR. Employees who will be impacted by this decision are reasonably likely to have had a three month period in the last year where they did not receive holiday pay (because it was not taken) or the holiday pay they received did not constitute an underpayment because it was not part of the 4 weeks required by the WTD. Based on the EAT's decision, that three month break would have broken the series of deductions and the employee would be unable to claim for underpayments prior to that point.

The EAT granted leave to appeal to the Court of Appeal, recognising that the "series of deductions" point in particular was an important issue. Unite, the trade union which represented some of the claimants in this case, has announced that it will not be appealing the EAT's decision. No announcement has yet been made by the employers as to whether they will appeal.

This issue is very significant to employers who pay "non-guaranteed" overtime and travel allowances of the nature in issue in this case, but which are not included in holiday pay. Furthermore, this issue extends beyond "non-guaranteed" overtime and the travel allowances which were at issue in this case. In February 2015, the Employment Tribunal in Lock is scheduled to consider how the CJEU decision in Lock (that commission payments should in certain circumstances be reflected in the holiday pay) should be implemented into UK law, and whether the UK WTR can be interpreted consistently with the CJEU's decision. The Government has also announced the establishment of a "task force" of employer organisations which will examine how the impact of Bear Scotland may be limited.

The Government has since introduced new regulations, the Deduction from Wages (Limitation) Regulations 2014, which imposes a 2 year long stop on claims for back pay from the date of the ET1 and expressly provides that the right to paid holiday is not incorporated as a contractual term in employment contracts. The Regulations come into force on 8 January 2014 and will apply to claims submitted on or after 1 July 2015.

For the time being therefore, a gap of more than 3 months between underpayments will break the series of deductions, and for claims brought on or after 1 July 2015, there will also be a 2 year long stop on back pay claims. Whilst both developments will be welcomed by employers, this may incentivise workers with existing claims for arrears of holiday pay to bring claims now, before the 2 year limitation period takes effect. It would be open to them to challenge the Bear Scotland "series of deductions" point and try to argue for losses going back, potentially as far as 1998, although they would have to go to the EAT or Court of Appeal to do so. Therefore, although both of these developments will be welcome for employers, the possibility of substantial claims for back pay has not been entirely removed, and employers should seek advice on their potential exposure, and the options open to them in respect of it.

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United States

Paid Sick Time Laws Enacted Across the United States

Paid sick leave laws gained momentum in 2014 in the United States. Unable to pass paid sick leave legislation on a national platform, the states and large cities have acted on their own to pass paid sick leave laws. In 2014 alone, twelve states or localities passed paid sick leave laws. At the local level, numerous cities have passed paid sick leave laws, including San Francisco, Oakland, Seattle, New York City, Portland and Eugene in Oregon, and six different cities in New Jersey. (A full review of New York City's paid sick leave law can be found here.) At the state level, California, Connecticut, and Massachusetts have each passed state-wide paid sick leave laws. (To see a full review of California's paid sick leave law, click here.) In contrast, a few states have refused to endorse paid sick leave, adopting laws that prohibit local governments from establishing the right to paid sick leave, such as Florida, North Carolina, and Arizona. Because of increasing efforts from grass-roots organizations, employers should expect additional states and localities in the U.S. to address paid sick leave in the near future.

Perhaps the biggest challenge for multi-jurisdictional employers in the U.S. will be dealing with the laws' various differences. Many of the laws differ in key areas, such as which employees are covered, how much sick time employees accrue, permissible uses for accrued sick leave, and whether sick leave can carry over from year to year. For instance, covered employees in Connecticut accrue one hour of paid sick leave for every forty hours worked, while covered employees in California and Massachusetts accrue one hour of paid sick leave for every thirty hours worked. Accordingly, employers with locations in multiple jurisdictions with paid sick leave laws will have to craft separate sick leave policies for each location.

Moreover, some locations will be governed by multiple paid sick leave laws. For example, employers who already provide paid sick leave under San Francisco's ordinance, which was passed in 2006, will not necessarily be in compliance with California's paid sick leave law, going into effect in 2015. These employers will need to consider separate or harmonized policies that comply with the applicable local ordinances and state laws.

As an alternative, employers can adopt an ERISA plan that covers PTO and sick leave benefits, by following certain regulatory protocol under ERISA. When done correctly, this can allow employers to have one uniform nationwide policy and pre-empt these various state and local sick pay ordinances. Click here to read more on ERISA-governed PTO and sick pay plans.

Employers in the U.S. should continuously monitor whether any of the jurisdictions in which they operate have passed paid sick leave laws. Most paid sick leave laws are broader in use, carry-over, and accrual rights than common PTO policies. Given the differences in the laws, U.S. employers should review their policies now, as they will likely need to broaden them in some way and may need to craft separate sick leave policies, possibly for each location subject to a paid sick leave law.

Our November 19, 2014 webinar, "Navigating Paid Sick Leave Laws in the US," provides an overview of the various state and city laws on paid sick leave, personal time off systems, and ERISA-regulated PTO plans. To request complimentary access to this and other archived webinars from our series, please click here.

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United States

Labor Year in Review: NLRB Targets Non-Unionized Employers and Expands Worker Rights

The National Labor Relations Board (NLRB) pursued its pro-labor agenda in 2014, issuing decisions generally viewed as highly favorable to organized labor on a wide variety of topics, including confidentiality policies, workplace investigations, workplace civility, social media, joint employer standards, and appropriate bargaining units. The NLRB ended the year with a flourish. In December, it held that employees with access to workplace email can use their employers' email systems to communicate about Section 7 matters and issued its "quickie election" rule, which shortens the period for representation elections by dramatically altering employer rights in election proceedings.

These decisions pose significant challenges for employers when it comes to protecting the confidentiality of business information, promoting a courteous and respectful work environment, limiting access to employer property and business systems, and ensuring fair elections. See our key takeaways, summaries of NLRB decisions, and planning tips below.

Employer Takeaways

Based on recent NLRB decisions, employers should consider the following actions to minimize labor risk going forward:

- Ensure confidentiality policies avoid broad, general prohibitions and undefined terms that could be read to prohibit the discussion of wages, hours and other working conditions.
- Review current policies related to workplace investigations to determine whether the language tracks that of the approved language in the NLRB Office of the General Counsel Advice Memorandum and consult with counsel before disciplining or terminating an employee for violating the confidentiality of an internal investigation.
- Carefully review proposed disciplinary action in circumstances where the employee may be engaged in protected activity, particularly when social media use is involved. Statements and activities related to wages, hours, benefits, or other terms of employment may be protected even if they are disruptive or obscene.
- Consider adding savings clauses to employee policies and work rules to make clear that the policy or rule is not intended to interfere with Section 7 rights.

- Review IT policies with business-only use restrictions. If employees use email at work, prohibiting employee use of email to communicate regarding terms and conditions of employment during nonworking time will constitute an unfair labor practice.
- Review your company's readiness to respond to an election petition under the NLRB's new election procedures. Together with Specialty Healthcare, these rules have the potential to significantly alter the organizing landscape. Employers should consider whether to conduct additional training or planning related to union organizing activity and develop an effective communications plan to respond to union organizing in advance.
- Consider organizing unit standards when establishing departmental structure, reporting relationships, job duties and training to minimize the risk of micro-units.

Employers can expect new compliance challenges in 2015 as the NLRB continues to target non-unionized employer policies and broadly interpret Section 7 of the NLRA, which gives employees the right to, among other things, organize and engage in concerted activity to improve their pay and working conditions and for mutual aid or protection. Employers will need to decide whether to change their policies and practices in view of NLRB rulings or risk unfair labor practice charges.

Significant NLRB Decisions in 2014

I. Employee Handbook Policies

The NLRB pursued non-unionized employers for violating employees' Section 7 rights based on common employee handbook policies, including those addressing confidentiality, internal investigations, courteous workplace behavior, social media restrictions, electronic communications, and workplace access rules. Employers who have not updated their employee handbooks in recent years should do so now. The precise wording of employer policies and work rules can make all the difference when it comes to assessing their validity under the NLRA.

A. NLRB Decisions Challenge Employer Policies Protecting the Confidentiality of Information

Informal Rule Prohibiting Discussion of Discipline Decisions Unlawful

In Philips Electronics North America Corporation, 361 NLRB No. 16 (2014), a Board majority held that an employer violated Section 8(a)(1) by maintaining an informal rule preventing workers from discussing discipline decisions. In Philips, an employee on final warning for threatening and berating coworkers told other employees that he was being disciplined because of a co-worker's complaints against him. The co-worker informed HR that the employee was publicly accusing her of getting him in trouble. The employee was terminated, at least in part, for violating an unwritten rule making employee discipline confidential.

According to the NLRB, "[i]t is important that employees be permitted to communicate the circumstances of their discipline . . . so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense." The NLRB reached its decision notwithstanding the employee's testimony that he was not aware of any policy or rule prohibiting an employee from showing or discussing discipline with other employees and that when he received his final written warning none of the supervisors or managers told him that the warning was confidential.

Planning Tip:
For now, employers should review their current policies related to investigations to determine whether the language tracks that of the approved language in the NLRB's Advice Memorandum (issued in 2013 and available here) that clarifies its position on confidentiality in workplace investigations. In addition, to minimize legal risk, employers should consult with counsel before disciplining or terminating an employee for violating the confidentiality of an internal investigation.

Policies Protecting Trade Secret and Business Information

The NLRB continued to target employer confidential information policies designed to protect trade secret and proprietary business information and to safeguard privacy rights. For example, in Lily Transportation Corp., Case No. 01-CA-108618 (ALJ April 22, 2014), the ALJ found that a trucking company's policy that prohibited "[d]isclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files" was unlawful because employees could reasonably interpret the language as prohibiting them from discussing wages and conditions of employment.

Similarly, in Fresh & Easy Neighborhood Market, 361 NLRB No. 8 (2014), the NLRB held that a grocery store chain violated Section 8(a)(1) of the Act by maintaining a confidentiality rule that stated: "Keep

customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained." The majority found that employees would reasonably interpret the rule to state that all employee information was confidential and disclosure was allowed only for the purpose for which it was obtained. In doing so, the Board rejected the ALJ's conclusion that employees would not interpret the rule in that manner because the rule was part of a code of business conduct addressing ethical matters and prohibited only the release of "collected" and "confidential" information such as social security numbers, medical information, and other information usually maintained in personnel files and not relevant to Section 7 rights.

In Flex Frac Logistics, LLC v. NLRB (March 24, 2014), the 5th Circuit upheld the NLRB's finding that a company's confidentiality policy violated Section 7 of the NLRA. There, the employer, a non-union trucking company, terminated an employee based on the following confidentiality clause:

> Employees deal with and have access to information that must stay within the Organization. ... Confidential information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; Silver Eagle Logistics LLC organization management and marketing processes, plans and ideas, processes and plans, our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any Silver Eagle Logistics LLC records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

The Court held that the prohibition against divulging or discussing "our financial information, including costs", could include wages. The Court further noted that the clause did not indicate that "some personnel information, such as wages, is not included" and thus could reasonably be construed by employees as interfering with Section 7 rights.

The NLRB offered employers some good news in Food Services of America, Inc., 360 NLRB No. 123 (2014). There, a Board majority found that an employer did not violate Section 8(a)(1) of the Act by terminating an employee who transferred hundreds of business emails from his company email account to his and another employee's personal email accounts. The Board rejected the General Counsel's argument that the discharge was unlawful because the employee was discharged for violating an unlawful confidentiality policy. According to the NLRB, while the employee's conduct arguably implicated concerns underlying the Section 7 rights of others, she was not discharged for discussing wages or other terms and conditions of employment, but based on her deliberate betrayal of her employer's confidentiality interest.

Planning Tip:
Employers should ensure confidentiality policies avoid broad, general prohibitions and undefined terms that could be read to prohibit the discussion of wages, hours and other working conditions.

B. NLRB Decisions Make It More Difficult for Employers to Promote a Courteous Workplace

Recent NLRB decisions ordering the reinstatement of insubordinate and profane employees and generally invalidating workplace incivility codes have extended protected conduct. The prevalent use of social media, texting and apps further complicates the problem, extending workplace issues off-site.

In Plaza Auto Center, Inc., 360 NLRB No. 117 (2014), a case sent back to the Board from the Ninth Circuit, the NLRB Board confirmed its earlier ruling that an employer violated the NLRA when it terminated an employee for cursing at his employer in a meeting about his pay. The employee called his manager a "f***ing crook" and an "a**hole"; told the owner of the company that he was "stupid" and that nobody liked him; and shoved his chair and said that if the company fired him, they would regret it.

On remand, the NLRB agreed with the Ninth Circuit's finding that the nature-of-the-outburst factor weighed against protection, but determined that the employee's conduct was not menacing, physically aggressive, or belligerent. It further found that the other Atlantic Steel factors weighed in favor of protection. The subject matter of the meeting concerned the employee's concerted complaints related to terms and conditions of employment, including his

compensation and policies governing salespeople; the outburst took place in a closed-door meeting away from other employees; and the employee's conduct was provoked by the employer's unfair labor practice of telling the employee that he could quit if he did not like the employer's policies.

In Food Services of America, Inc., 360 NLRB No. 123 (2014), a Board majority held that an employer violated the Act when it discharged an employee for harassing a coworker by repeatedly telling her by instant message and in person that she was going to be fired. According to the panel, one employee's warning to another that the latter's job is at risk - even if inaccurate - constitutes protected conduct. Neither the repetition of the statements nor their distressing impact rendered them unprotected.

In Hitachi Capital America Corp., 361 NLRB No. 19 (2014), an NLRB majority held that an employer violated the Act by maintaining an unlawful rule prohibiting employees from engaging in "inappropriate behavior while on company property." The majority stated that it was unnecessary to determine whether the rule was facially unlawful because the employer applied it to restrict an employee's exercise of Section 7 rights when she engaged in protected concerted activity by sending disrespectful emails to company supervisors questioning a new Inclement Weather Day policy. While the warning did not expressly cite the "inappropriate behavior" rule, the warning characterized the employee's emails as "rude," reminded the employee this was not her first warning for using "inappropriate/profane" language, and instructed her to address all employees "with respect" in the future.

In Purple Communications, Inc., 361 NLRB No. 43 (2014), a Board panel found that the employer's "no-disruption" rule, which prohibited employees from "causing, creating or participating in a disruption of any kind during working hours on company property," was unlawful. The Board agreed with the ALJ's conclusion that this language could be interpreted as barring Section 7 activity, including the right to engage in a work stoppage, because the rule did not define or limit the meaning of "disruption" or state that it was not intended to refer to such activity.

In Dignity Health d/b/a St. Rose Dominican Hospitals, 360 NLRB No. 126 (2014), the NLRB ordered the reinstatement of an employee discharged for violating the employer's zero tolerance anti-retaliation policy. The employee had frequent disputes with another hospital employee who worked as a cashier. He was placed on administrative leave after he threatened the cashier by stating that he would "take care of [her]." While on leave, the employee circulated a petition requesting signatures from other employees who had issues with the attitude and conduct of the cashier. The hospital subsequently reinstated the employee and warned him that hospital policy prohibited retaliation against the cashier and other coworkers. When the employee continued to collect signatures and pursue measures to have the cashier disciplined, he was terminated. The NLRB panel found that this activity was both concerted and for mutual aid and protection under Section 7 of the Act.

In Hill and Dales General Hospital, 07-CA-053556 (2014), the NLRB held that the employer's "Values and Standards of Behavior" policy violated the NLRA. The policy required employees to "not make negative comments about [other employees]," to represent the organization "in the community in a positive and professional manner in every opportunity," and to "not engage in or listen to negativity or gossip." According to the Board, these requirements could stop employees "from making statements to third parties protesting their terms and conditions of employment – activity that may not be 'positive' towards the [employer] but is clearly protected by Section 7."

In Hoot Wing LLC & Ontario Wings LLC dba Hooters of Ontario Mills, an ALJ reinstated an employee terminated based on her threatening and obscene comments accusing a co-worker of "rigging" a bikini contest. Despite the intimidation and foul language, the ALJ ordered Hooters to reinstate the employee with backpay and invalidated policies that included obligations to be respectful. According to the ALJ, the employer's rule prohibiting insubordination toward managers and lack of respect toward fellow employees or guests was unlawful because it did not have a sufficient limiting clause, such as limiting the rule to behavior or conduct that does not support the "company's goals or objectives," and, therefore, could chill protected activity. Hooters' social networking policy and its policy requiring employees to be "respectful to the company and other employees" were also deemed to be violations.

In contrast, in Copper River of Boiling Springs, LLC, 360 NLRB No. 60 (2014), a Board majority

determined that a restaurant's policy prohibiting "insubordination to a manager or lack of respect and cooperation with fellow employees or guests" was lawful. The panel noted that the rule specifically prohibited "displaying a negative attitude that is disruptive to other staff or has a negative impact on guests" and was limited to unprotected conduct that would interfere with the employer's legitimate business concerns. The ALJ also found the following provisions to be lawful:

Unauthorized dispersal of sensitive Company operating materials or information to any unauthorized person or party. This includes but is not limited to policies, procedures, financial information, manuals, or any other information contained in Company records.

Any other action or activity which the Company believes represents an actual or potential threat to the smooth operation, goodwill, or profitability of its business.

Planning Tip:
Workplace policies requiring respectful and courteous behavior should clearly state the exceptions to the rule and provide examples of protected and prohibited activity. In addition, employers should carefully navigate workplace disputes, which can implicate federal and state anti-discrimination, harassment and bullying laws in addition to the NLRA.

C. Social Media

Section 7 of the NLRA limits an employer's right to restrict an employee from communicating via social media on issues such as wages, hours, benefits or other terms and conditions of employment. In 2014, the NLRB continued to strike down social media policies it deemed overbroad.

In Lily Transportation Corp., Case No. 01-CA-108618 (ALJ April 22, 2014), the ALJ found that the employer's social media policy unlawfully interfered with employee Section 7 rights. The policy provided:

"Employees would be well advised to refrain from posting information or comments about Lily, Lily's clients, Lily's employees or employees' work that have not been approved by Lily on the internet, including but not limited to blogs, message boards, and websites. Lily will use every means available under the law to hold persons accountable for disparaging, negative, false, or misleading information or comments involving Lily or Lily's employees and associates on the internet and may take corrective action up to and including discharge of offending employees."

In Three D, LLC d/b/a Triple Play Sports Bar and Grille, 361 NLRB No. 31 (2014), a Board panel held that an employer violated Section 8(a)(1) of the Act by discharging two employees for participation in a Facebook discussion involving claims that they owed additional income taxes because of the employer's withholding mistakes. The panel emphasized that employees have a statutory right to act together to improve terms and conditions of employment or otherwise improve their lot as employees, including the use of social media to communicate with each other and with the public. In reaching its decision, the NLRB rejected the employer's contention that the two employees lost the protection of the Act because the Facebook posts were made in a public forum accessible to both employees and customers and adversely affected the employer's public image.

The NLRB further held that the employer's internet/blogging policy violated the Act. The policy provided:

The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the Company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

The majority found that employees would reasonably interpret this rule as prohibiting any discussion about their terms and conditions of employment deemed "inappropriate" by the employer. The rule contained only one other prohibition – against revealing confidential information – and provided no examples of what the employer considered to be inappropriate.

In Durham School Services, L.P., 360 NLRB No. 85 (2014), an NLRB majority set aside the results of an election in part because of the employer's social networking policy. The policy required that contacts by employees with parents, school representatives and school officials be "appropriate" and prohibited

publicly sharing "unfavorable information related to the company or any of its employees."

Planning Tip:
Given the significant risks around brand, confidentiality and privacy posed by rapid and global dissemination of tweets and posts, companies should carefully develop computer usage and social media policies to address these concerns. Employers should proceed cautiously and consult with counsel before disciplining or terminating an employee based on his or her social media use.

D. NLRB Decisions Expand Access to Employer Equipment and Facilities

The NLRB's 2014 rulings both narrowed the circumstances under which an employer may limit use of email systems and expanded off-duty employees' access to the workplace.

Employees Are Entitled to Use Email for Protected Concerted Activity

In Purple Communications, 21-CA-095151 (2014), the NLRB overruled its decision in Register Guard and adopted a presumption that employees who have been given access to the employer's email system in the course of their work are entitled to use the system to communicate about Section 7 matters while on nonworking time. The NLRB's decision raises numerous issues which is likely to spawn new unfair labor practice charge litigation for some time. For example:

- While the majority indicated that an employer may apply "uniform and consistently enforced controls (e.g., prohibiting large attachments or audio/video segments) to the extent such controls are necessary to maintain production and discipline," it did not provide guidance on this issue. Similarly, the NLRB did not clarify what circumstances might justify a total ban on nonwork email use.
- Employers who choose to impose a working-time limitation could face challenges related to how they monitor and enforce the limitation. While employers have the right to monitor emails on their computer systems, the NLRA prohibits unlawful surveillance of Section 7 protected concerted activities.
- The decision could impact non-solicitation and non-distribution policies. According to the majority, individual messages sent and received via email may constitute solicitation or distribution depending on their "content and context."

The NLRB did address an employer's obligation to retain Section 7 messages, noting that such messages need not be stored any longer than other messages consistent with generally applied record-retention processes.

Planning Tip:
Purple Communications likely will be appealed. In the meantime, employers that have adopted IT policies with business only use restrictions should review these policies. If employees use email at work, prohibiting employee use of email to communicate regarding terms and conditions of employment during nonworking time will constitute an unfair labor practice. Such a policy likely would result in the reversal of a favorable election outcome. In addition, employers (particularly those involved in the organizing process or other labor proceedings) should ensure email monitoring activities do not specifically target union or other employee protected activity.

NLRB Expands Off-Duty Employee Access to Employer Facilities

In American Baptist Homes of the West d/b/a Piedmont Gardens, 360 NLRB No. 100 (2014), a Board panel held that a retirement facility violated Section 8(a)(1) of the Act by posting a sign prohibiting union meetings in an employee break room, by maintaining a policy prohibiting employees from remaining on its premises after their shift unless previously authorized by a supervisor, and by enforcing that policy against two employees who sought access to the employer's premises to communicate complaints to management. The majority found that the policy was unlawful because it contained an exception, indefinite in scope, under which off-duty access was permitted with supervisory authorization. In this regard, the NLRB rejected the employer's argument that the policy was lawful because in practice it had permitted off-duty employees to enter the nursing home in only three limited circumstances—when an employee picked up a paycheck, attended a scheduled meeting with human resources, or arrived early for the night shift. The majority found that the record did not establish that those were the only circumstances under which employees had been granted access in the past.

In Durham School Services, L.P., 360 NLRB No. 85 (2014), a Board majority set aside the results of an election in part because of the employer's off-duty access policy. The policy provided: "Off-duty employees should not enter (except for legitimate business reasons)

any Company facility not open to the general public and are prohibited from interfering or causing a disturbance with an on-duty employee's performance of his/her work duties." The majority agreed that the policy failed to satisfy the test in Tri-County Medical Center because it did not prohibit off-duty access for any purposes, but, rather, only, in the employer's opinion, for those purposes which are not "legitimate business reasons." It also improperly prohibited off-duty employees from accessing outside nonworking areas of the property.

II. Board Reaffirms D.R. Horton Ruling that Class Action Waivers in Arbitration Agreements Violate the NLRA

In April 2014, the Fifth Circuit denied the NLRB's petition for an en banc rehearing of a divided panel ruling from December 2013 in D.R. Horton holding that federal labor law does not prohibit mandatory arbitration agreements barring employees from pursuing class or collective claims. Notwithstanding numerous federal appellate and district court decisions rejecting its position, the Board reaffirmed its controversial D.R. Horton decision in Murphy Oil USA, Inc., 361 NLRB No. 72 (Oct. 28, 2014). There, the majority once again held that arbitration agreements with class and collective action waivers, required as a condition of employment, violate the National Labor Relations Act (NLRA) and are unenforceable.

Planning Tip:
While employers continue to face some risk of litigation over the use of class waivers based on the NLRB's position, most federal appellate and district courts have declined to follow the D.R. Horton decision.

III. NLRB Makes It Easier for Unions to Organize

A. NLRB Adopts Quickie Election Rule

In December 2014, the NLRB adopted its so-called "quickie" election rule. The final rule is substantially similar to the rule first proposed in 2011 and subsequently struck down by a federal judge in 2012. The rule already has been challenged - this month the Chamber of Commerce sued the NLRB alleging that the rule restricts employers' ability to communicate with employees in violation of the First Amendment and the NLRA. Unless enjoined by a federal court or postponed by the Board, the final rule will take effect on April 14, 2015.

The new rules significantly shorten the period for representation elections by dramatically altering employer rights and obligations in election proceedings. Elections could be held as early as 14 days after a petition. Since campaigns frequently begin months in advance of an employer's knowledge, the new rules will make it difficult for an employer to assess the situation and to explain its position to employees.

Among other changes, the new rules will:

- Require the employer, when an election petition is filed, to post and distribute to employees a Board notice about the petition and the potential for an election to follow;
- Require pre-election hearings generally to be set to begin eight days after a hearing notice issues;
- Require an employer to file a "Statement of Position" in advance of the hearing setting forth the employer's position on numerous legal issues. Any issues not raised in the statement generally will be deemed waived;
- Require the employer to provide, in advance of the hearing, a list of the names, shifts, work locations, and job classifications of the employees in the petitioned-for unit, and any other employees that it seeks to add to the unit;
- Limit the scope of pre-election hearings and give regional directors and hearing officers the authority to exclude evidence and prevent pre-election litigation over voter eligibility and inclusion issues;
- Limit post-hearing briefs to when the regional director determines that they are necessary;
- Make the review of any post-election decision totally discretionary with the NLRB, rather than mandatory;
- Require the employer within 2 work days (now 7 days) of the direction of election to provide the union with the name, home address, telephone number, and email address of all eligible voters (currently only employees' full names and residence addresses must be provided); and
- Permit the electronic filing of election petitions and the related showing of interest to support the petitions.

You can view a comparison of current and new procedures here and the text of the Final Rule here.

Planning Tip:
Employers should establish employee relations programs and clear channels for employees to

communicate with management. In addition, employers should assess the vulnerability of possible voting (bargaining) units to union organizing activity; train managers and supervisors to recognize early signs of organizing; and develop a response (i.e., campaign strategy and materials) to union organizing and elections in advance. A "campaign in a box" strategy can position employers to respond quickly in the event of a union petition. Finally, it is critical for employers to review policies and procedures for compliance with the NLRA. If the NLRB determines that an employer policy interferes with employee rights under the NLRA, the policy can be used to set aside an election won by the employer (even if the policy is not enforced).

B. "Micro-Unit" Bargaining Unit Standard Increases Organizing Odds

In 2013 in Specialty Healthcare, the NLRB redefined the standard for determining bargaining units in non-acute health care facilities, holding that unions can organize a relatively small bargaining unit consisting of employees sharing a "sufficient community of interest," even if the group excludes other employees who do similar work. Under the decision, an employer challenging a petitioned-for unit of employees on the grounds that additional employees were wrongly excluded must show that the excluded employees "share an overwhelming community of interest" with the unit the union wants to organize. Based on this standard, unions can target small or "micro" bargaining units within companies - particularly where efforts to organize larger groups have been unsuccessful - to increase their chances of winning an election.

In Macy's Inc., 361 NLRB No. 4 (July 22, 2014), an NLRB panel approved a union's effort to organize a unit at a Macy's store made up only of the cosmetics and fragrance sales workers. According to the NLRB, these employees shared a community of interest not shared by other store employees because they were located in the same department, were supervised by the same managers, and had little regular contact with other store employees.

In contrast, in Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman, 361 NLRB No. 11 (July 28, 2014), the NLRB unanimously rejected a Regional Director's decision ordering an election among a petitioned-for "micro" bargaining unit consisting of women's shoe sales associates working in two areas within a store. While the Board determined that the employees were readily identifiable as a group based on their function, they did not share a community of interest. According to the NLRB, the petitioned-for unit consisting of the entire Salon shoe department and only a select portion of employees out of a second department did not conform to the departmental structure established by the employer.

Planning Tip:
Employers should consider organizing unit standards when establishing departmental structure, reporting relationships, job duties and training. Employers that cross-train and move employees across departments and positions can minimize the risk of micro-units. According to the NLRB, "significant interchange" between workers can demonstrate a community of interest. Common supervision is another factor that can weigh in favor of a larger unit.

IV. NLRB May Significantly Broaden the Joint Employer Standard

Recent actions by the NLRB signal a potential seismic change in the Board's 30-year old joint employer doctrine.

In December 2014, the NLRB General Counsel's office issued complaints against a national restaurant chain and 13 of its franchisees alleging that they jointly retaliated against workers who participated in protests over the minimum wage earlier in the year. According to the NLRB' General Counsel, the restaurant chain, "through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of" the NLRA.

In May 2014, the NLRB invited interested parties to file amicus briefs in Browning-Ferris Industries, Case 32-RC-109684, addressing whether the Board should adhere to its existing joint employer standard or adopt a new standard. In Browning-Ferris, the union filed a representation petition seeking certification as the representative of sorters, housekeepers and screen cleaners allegedly jointly employed by Leadpoint Business Services and BFI. The ALJ found that Leadpoint, a company that provides work teams for companies that operate material recovery facilities, was the sole employer of the workers. According to the ALJ, BFI did not "share or codetermine

those matters governing the essential terms of employment" of the Leadpoint workers at its facility. Rather, Leadpoint was exclusively responsible for recruiting, screening, supervising, hiring and promoting its employees and determining their terms and conditions of employment (e.g., wages, schedules, holidays, duties, benefits).

The union appealed, urging the Board to revert to its pre-1984 joint employer standard and adopt an "industrial realities" / "indirect control" test. Under this test, joint employer status would be established if one entity possesses sufficient authority over the employees or their employer such that meaningful bargaining could not occur in its absence. According to the union, BTI exerts sufficient control over Leadpoint employees because it, among other things, owns and operates the facility at which they work, sets shift times and overtime hours, determines the number of employees who work and where they work; and retains the authority to reject or discontinue using any workers for any reason.

If adopted by the NLRB, this standard would impose a far-reaching expansion of the joint employer standard and increase the risk of a joint employer finding in common contractual business arrangements, including temporary staffing, subcontracting and franchise agreements.

V. NLRB Strikes Down Long-Standing Deferral Rules

On December 15, 2014, the NLRB issued a decision substantially departing from 30 years of precedent that will dramatically change the way disputes are handled under a collective bargaining agreement (CBA). In Babcock & Wilcox Construction Co., 361 NLRB No. 132 (2014), the NLRB revisited the so-called "deferral standard" used to determine whether parallel cases may proceed under a CBA's contractual arbitration provision and the NLRB's unfair labor practice (ULP) process. For the past 30 years, the NLRB would defer to the decision of an arbitrator in cases involving violations of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act. Section 8(a)(1) relates to interference with employee rights, and 8(a)(3) relates to discrimination for an employee's union activities or sympathies.

In many cases relating to employment termination, an employee could claim parallel rights under 8(a)(1) and 8(a)(3). To avoid re-litigating an issue already resolved by the parties in arbitration, any charge filed would be deferred so long as "the contractual issue is 'factually parallel' to the unfair labor practice issue, the arbitrator was presented generally with the facts relevant to resolving that issue and the award is not "clearly repugnant" to the Act." Olin Corp., 268 NLRB 573 (1984). Since Olin, an employer could rest relatively assured that it would not be subject to litigating employee terminations for employees covered by an existing CBA before the NLRB - and certainly not before both the NLRB and an arbitrator.

In February 2014, the NLRB sought comments regarding the deferral standard at the urging of its General Counsel. The General Counsel sought a standard that would virtually eliminate deferral and allow NLRB jurisdiction over substantially more cases. In Babcock, the NLRB stopped short of the General Counsel's suggested standard, but nonetheless implemented a far more limited deferral standard than set forth in Olin. Now, the burden of proof has been shifted to the party seeking deferral (usually the company) from the previous burden which was placed on the party opposing deferral (usually the union). The standard has changed also. The party seeking deferral must show:

- The Parties Presented Statutory Arguments: In many termination cases, the parties argue only about "cause" under the CBA. The new standard requires more than that; parties must now include evidence and arguments about Section 8(a)(1) and 8(a)(3) where applicable to have an opportunity to argue deferral.
- The Arbitrator Evaluated Statutory Arguments (or was prevented from doing so by the party opposing deferral): It is not enough for the parties to argue statutory claims - the arbitrator must also evaluate them in making a decision.
- NLRB Law Reasonably Permits the Award: This additional standard requires the party seeking deferral to show not only that the arbitrator heard evidence and considered the statutory claims, but that the arbitrator followed NLRB precedent.

As noted by NLRB Member Miscimarra in his dissent, the modified deferral standards "effectively guarantee that ... arbitration will not be final and binding. The outcome will be more work for the [NLRB], at the expense of speed, predictability, and certainty for the long litigation treadmill that is associated with [NLRB] and court litigation of unfair labor practice claims." The current NLRB has

shown that it intends to expand the scope of rights given to employees, and the new deferral standards will provide an expanded venue to enforce those rights.

Planning Tip:
Employers are almost certain to face some duplicative litigation before arbitrators and the NLRB. To enhance the ability to defer cases, employers should consider the following:

- During contract negotiations, consider amending the grievance and arbitration provisions to specifically include NLRB statutory claims as covered causes of action.
- Before arbitration, confirm with the union and the arbitrator that both statutory and contractual claims will be raised (and ensure the arbitrator is experienced with NLRB statutory rights).
- Include evidence necessary to defend statutory claims during the arbitration hearing, and argue statutory claims and NLRB precedent in the post-hearing brief. Should the union oppose evidence relating to statutory claims, or the arbitrator refuse to accept such evidence, make a good record before the arbitrator by including offers of proof as to the evidence that would have been presented.

Practical Implications for Employers
Employers who have not updated their employee handbooks in recent years should do so now. It is clear from the NLRB's 2014 decisions that the NLRB will continue to aggressively attack employer handbook policies. In this regard, the precise wording of employer policies and work rules can make all the difference when it comes to assessing their validity under the NLRA. Accordingly, employers should choose their language carefully and consult with attorneys well versed in labor law to ensure their policies and practices comply with the NLRA.

On the organizing front, the NLRB's new election rules have the potential to dramatically alter the landscape. Accordingly, employers should assess their labor relations policies and practices and consider whether to conduct additional training or planning related to union organizing activity. Similarly, employers should prepare for the possibility of quicker elections and develop an effective communications plan in advance to respond to union organizing.

We will continue to monitor NLRB rulemaking initiatives and decisions. In the meantime, please contact any of the lawyers on our US labor team for more information about these developments and how to minimize labor risk in the New Year.

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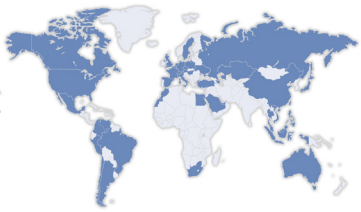

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About Baker & McKenzie's Employment Law Practice:

At Baker & McKenzie, we understand that business success requires legally sound, strategically savvy labor and employment policies and practices. With 77 offices in 47 countries, Baker & McKenzie has an unparalleled global reach to serve the needs of employers. Our Global Labor, Employment & Employee Benefits Practice Group includes more than 500 lawyers strategically positioned around the globe. We help employers navigate and understand the ever-changing requirements necessary to comply with local and international laws and customs, prevent unwanted employee issues from arising, and continuously adapt to the realities of worker issues in an intensely competitive global economy.

FOR MORE INFORMATION:

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