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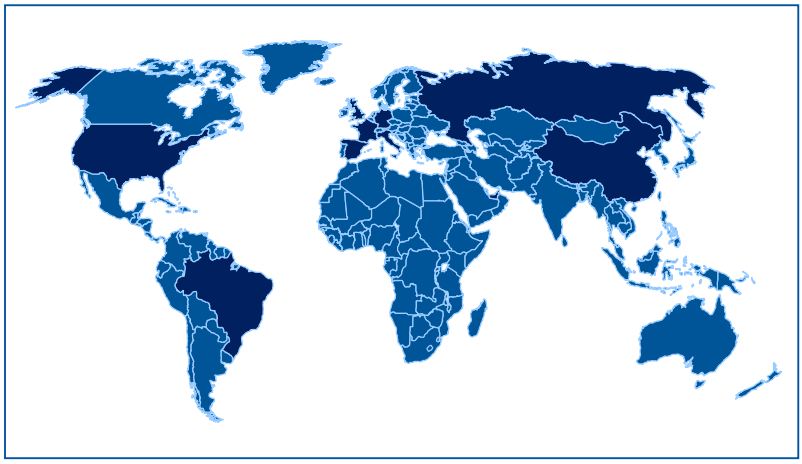
COVINGTON & BURLING LLP

January 19, 2012

ADVISORY | International Employment Law Update

A summary of recent labour law developments across the globe, including:

- Brazil;
- France;
- Germany;
- Italy;
- Netherlands;
- People's Republic of China;
- Russia;
- Spain;
- United Arab Emirates;
- United Kingdom; and
- United States



BRAZIL

Brazilian Central Bank imposes restrictions on the remuneration of executives of Financial Institutions

Resolution 3921/10 of the Brazilian Central Bank sets out the required standards for any remuneration policy that applies to executive employees of Financial Institutions and other Institutions authorized to operate through the Central Bank. Considered a landmark in the Brazilian financial sector, the Resolution was published on November 25, 2010, and came into force on January 1st, 2012.

The Resolution applies to employed and self-employed executives who are Statutory Directors and Members of the Board of Directors of a corporation (S.A.), as well as executives of a private limited company (Ltda.). Remuneration includes payments made in kind, for example, shares and assets, and comprises both fixed compensation (i.e. salary, fees and commission) and variable compensation (i.e. bonus, profit sharing and other incentives linked to the performance of the executive).

The main goals of the new Resolution are to: (i) create guidelines for the governance and review of a Financial Institution's remuneration policy; (ii) impose limits on variable compensation; and (iii) allocate responsibility for the approval, operation and disclosure of the remuneration policy.

Likewise, the Financial Institution's remuneration policy must be compatible with its risk management policy, in order to discourage risky financial transactions. Factors to be taken into consideration include current and potential future risk (taking into account the overall financial results of the Institution), the ability to generate cash flow for the Institution, the current economic environment and the potential to forfeit or clawback remuneration over time if appropriate to reflect poor investment decisions.

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FRANCE

Working time for executives: agreements based on a number of working days per year (so-called *forfait-jours*)

French law provides a specific working time scheme for executives (*cadres*), so-called forfait-jours, whereby working time is computed in days per year, as opposed to a number of hours per week. On June 29, 2011, the French Supreme Court rendered an important decision on this matter which reduces the flexibility previous available when employing executives.

Based on French and European rules, principally the French Constitution, the EU Charter of Fundamental Rights and the European Social Charter, the French Supreme Court considered that the forfait-jours scheme must be compatible with the French Working Time Regulations, which govern the maximum working hours and daily and weekly time off.

In order to do so, French companies must monitor executives' working time closely, including by:

- keeping track of the number of days worked per annum;
- recording the duration of time off; and
- meeting with executives on a regular basis in order to discuss workload, work duration and time off.

Where a company fails to comply with these requirements, executives can successfully claim compensation and back-pay of wages for overtime in excess of 35 hours per week, with a 5-year statute of limitation. In addition, infringement of the working time regulations could be deemed illegal work (*travail dissimulé*).

Companies should take the following steps: (i) check whether internal working time policies are compliant with these requirements; (ii) negotiate amendments to such policies with staff representatives; and (iii) introduce steps to monitor executives' working time.

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GERMANY

Applicability of German "Acquired Rights" provisions to offshoring

In a ruling dated May 26, 2011 (case No. 8 AZR 37/10), the German Federal Labour Court held that the provisions of the German Civil Code governing the automatic transfer of employees on the sale of a business (or part of a business) also apply to relocations of businesses or part of a business abroad (known as "offshoring").

In this important case, an operating unit of a German-based employer was relocated to a new site in Switzerland, less than 60 km away from the old site in Germany. Prior to the relocation the Plaintiff was given notice of dismissal by his German employer on grounds of closure of the business.

The Federal Labour Court held that the dismissal was invalid because the German Civil Code provisions stipulate that termination on grounds of the transfer of a business or part of a business is invalid. The employer could not invoke closure of the business as a ground for termination merely because the operating unit was transferred to a location in Switzerland. The fact that the new site was less than 60 km away from the old site meant that the operating unit was held to have retained its identity post-transfer - a key requirement of the German Civil Code.

The decision has given rise to considerable debate among legal commentators. For example, the Federal Labour Court did not offer any guidance on whether there is a maximum distance after which a transfer of business will no longer be assumed. The rights and obligations of foreign purchasers involved in the transfer of business also remain unclear, although it is expected that

they will be considered to have the same duties with respect to transferring employees as a domestic purchaser.

The case is likely to give rise to increasingly creative strategies for avoiding the application of the German Civil Code to offshoring situations - for example by first relocating and only then transferring the business (or part of a business).

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ITALY

Reforms to the Italian collective bargaining system

In order to increase the flexibility of the employment relationship during the European debt crisis, the Italian Government has introduced radical changes to the Italian collective bargaining system.

In particular, article 8, Law no. 148/2011 (which came into force on August 13, 2011) allows collective bargaining agreements at both company and district levels to derogate, even in less favourable terms, from the provisions of the industry-level collective bargaining and of Italian national law.

The new article applies to many aspects of the employment relationship, including the regulation of employees, background checks, flexible employment contracts and even protection against unfair dismissal. For this reason, article 8 has been strongly criticised by Trade Unions and some legal commentators, who have accused the Government of introducing a law that is unconstitutional.

In addition, the Italian Government is planning to amend art. 18, Law no. 300/1970, which provides for the reinstatement of employees if they are found to have been unfairly dismissed by their employer. The proposal, which will only apply in limited circumstances, is to replace the requirement to reinstate with a requirement to pay financial compensation. Further new legislation is expected in the coming months.

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NETHERLANDS

Important changes to Dutch law governing holiday

On January 1, 2012, the Dutch law governing holidays was amended. Under Dutch law full-time employees are entitled to a statutory minimum of 20 days of holiday per year. However, most employers grant their employees additional holiday ("non-statutory holiday"), in excess of the statutory minimum pursuant to a sector wide or company collective labour agreement or an individual labor agreement. Employees will be paid in lieu of any untaken entitlement to statutory and non-statutory holiday on termination of their employment, unless the right to such holiday has lapsed in accordance with the law. Under the previous law, any untaken holiday would lapse automatically five years after the end of the calendar year in which it was granted.

Dutch law previously stipulated that employees on sick leave would only accrue holiday during the last six months of sickness absence. However, following a 2009 decision by the European Court of Justice ("ECJ") that employees on sick leave continue to accrue statutory holiday in the same way as employees who are not on sick leave, the Dutch Government has amended the law to bring it in line with the ECJ's decision.

Under the amended law, employees on sick leave will (from January 1, 2012) accrue the same number of statutory holidays as employees who are not sick. This will lead to additional expense for employers on top of the existing obligation to pay employees on sick leave at least 70% of salary (up to a certain statutory maximum amount) during the first two years of absence. In order to reduce the financial burden on employers, the Dutch government has amended the law so that untaken statutory holiday will now lapse six months after the end of the calendar year in which the holidays were built up. Holiday granted during the 2012 calendar year will therefore expire on July 1, 2013. The six-month expiry period does not apply: (i) to holiday granted prior to January 1, 2012; (ii) to non-statutory holiday; or (iii) where the employee "was not reasonably able to take holiday" (which will be a question of individual circumstances, for example, due to a very high workload). In these three situations untaken holiday will continue to lapse after five years.

Employers should review their individual and collective labour contracts and employee handbooks to ensure that they are in line with the new legislation.

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PEOPLE'S REPUBLIC OF CHINA

First comprehensive social insurance legislation introduced

The PRC Social Insurance Law, which is the first comprehensive social insurance law in China, came into force on July 1, 2011.

The PRC Social Insurance Law applies to five basic social security insurances: basic pension, basic medical insurance, unemployment insurance, work-related injury insurance and maternity insurance. Both employees and employers should make contributions for the first three kinds of social insurance, but only employers should contribute to work-related injury insurance and maternity insurance.

If an employer fails to pay its contributions, it will be obliged to pay interest on outstanding contributions at the rate of 0.05% per day and may also have to pay a fine of between one to three times the total amount of contributions due.

Migrant employees will be allowed to transfer the pension, medical and unemployment insurance contributions in their social insurance accounts from one location to another.

For the first time, foreign nationals working in China are included in the social insurance system. A detailed regulation was promulgated by the Ministry of Human Resources and Social Security on September 6, 2011, which requires an employer to make social insurance registration for a foreign employee within 30 days after such employee receives his/her work permit. The employer and employee should contribute to the five basic social security insurances pursuant to the Social Insurance Law.

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RUSSIA

New procedure for collective employment disputes

A new procedure for handling collective employment disputes became effective on December 5, 2011 (introduced by Federal Law dd. 22.11.2011 No 334-FZ). The new procedure introduces shorter time periods for several key aspects of the consultation process, namely: (i) handling collective employment disputes within the legal entity: (ii) arranging for the collective employment dispute to be adjudicated: and (iii) informing employees of the decision adopted following the adjudication. Additional rules for arbitration of collective employment disputes were also introduced.

Expansion of social protections

The following changes, introduced during 2011, have resulted in increased rights and protections for many of Russia's employees, including some of the most vulnerable categories of worker:

- The national minimum wage to be paid to employees was increased;
- Unemployed persons now have the right to obtain professional training in regional employment centres;
- State pension contributions were increased;
- Special centres were established providing free legal assistance to vulnerable sectors of society;
- The rules for calculating maternity pay were amended as from January 1, 2011. The calculation is now based on the average earnings of the employee for the two years preceding maternity leave. The previous calculation was based on the employee's average earnings for the preceding 12 months.

Changes to immigration rules

- Foreign highly qualified specialist workers working in Russia are now allowed to engage in educational work without a work permit or work visa;
- Family members accompanying a foreign highly qualified specialist worker are now entitled to obtain a work visa via a simplified procedure;
- The simplified procedure for obtaining a work permit and work visa was finalised for citizens of France and South Korea who wish to work (or already work) in Russia.

Draft bill imposing restrictions on hiring contract workers

A draft bill has been published with the aim of increasing the authority of the Russian labour supervisory body to scrutinise civil law contracts with individual workers and impose a fine if it decides that the contract is in fact an employment relationship. The draft bill would also prohibit the provision of staff under agreements for the hire of temporary workers. The bill was initially considered and adopted by the State Duma at its first reading in May 2011. However, following widespread criticism the bill is being revised further and an amended version will be presented to the State Duma's second reading.

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SPAIN

Employment Measures to Reduce the Public Deficit

Several pieces of new legislation were enacted in 2011 aimed at reducing the public deficit and tackling the economic crisis. The most important measures are:

- The ordinary retirement age has been increased from 65 to 67 years old. Transitional measures are in place, which depend not only on age but also on the number of years that the employee has contributed to the public social security system.
- The Collective Redundancies Regulations have been modified, in particular by requiring a company that belongs to a group of companies and carries out a collective redundancy process for economic reasons to also file supporting documents evidencing the economic situation of the group, and by reinforcing the need for the company to have a social plan.
- New legislation on procedural employment laws provides that the employment courts rather than the administrative courts will hear appeals or challenges to decisions authorizing a collective redundancy process. This change is expected to increase the number of appeals of decisions authorizing a collective redundancy process.
- A reform of the collective bargaining regulations has been approved with a view to facilitating company-level collective agreements as compared to collective agreements at a sectoral level.
- Finally, the new Spanish Government elected in November 2011 is currently considering implementing employment measures designed to improve the employability of the workforce population in Spain. A new bill setting out these employment reforms is expected in the coming weeks.

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UNITED ARAB EMIRATES

Summary of key changes in 2011

The UAE continues to operate a dual employment jurisdiction determined by whether an employer is established in the federal jurisdiction or the Dubai International Financial Centre (DIFC). The main laws governing employment relationships are the UAE Federal Law No. 8 of 1980 (as amended) and the DIFC Employment Law 2005.

A number of amendments were made to various rules governing employment matters in the UAE in 2011, although no actual changes to employment legislation were enacted.

Dubai International Financial Centre

- The DIFC Court Rules were amended to allow cases of up to AED 200,000 (approx. US$ 55,000) to be heard by the DIFC Small Claims Tribunal (SCT) instead of the DIFC Court of First Instance. Additionally, employment claims in excess of that amount may now also be heard by the SCT, subject to the consent of the parties involved. The Rules now allow the Chief Justice of the DIFC Courts to order or direct that a matter is heard by the SCT, irrespective of the value of the claim.
- A pro-bono fund was established to improve access to justice. The fund involves a strict assessment of a litigant's financial means and is expected to be largely utilised for employment claims.
- The DIFC Employment Law 2005 is widely expected to undergo changes in 2012 but at the time of writing the nature of these changes are uncertain.

Federal

- Automatic labour bans were abolished effective 1 January 2011. These labour bans had previously prevented employees from changing employment in the UAE. However the changes to the rules are not as wide-ranging as initially reported and the avoidance of a labour ban is still subject to an employee meeting certain strict criteria. The changes are largely viewed as a move to liberalise the movement of professional and educated employees.
- New categories of work permit have been introduced to address certain short comings in the existing immigration system. The new rules governing work permits will apply only to existing UAE residents and establish work permits for part-time work, temporary work, juvenile persons, persons sponsored by family and transfer permits.
- The residency visa period for employees outside the free zones was reduced from three to two years (with a pro rated reduction in costs) in an attempt to reduce costs borne by an employer at the outset of employment.
- The classification of employers was revamped to allow for a broader range of type of employer taking into account, among other things, UAE national employment, cultural diversity and compliance with labour legislation. Employers categorised as "first class" are charged lower transaction fees and are exempt from submitting bank guarantees for employees; "third class" category employers are placed in this category as a result of serious violations and breaches of labour law.

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UNITED KINGDOM

Introduction of additional paternity leave rights for fathers

The Additional Paternity Leave Regulations 2010 were introduced to encourage greater equality in parenting by increasing the amount of paternity leave available for fathers from two weeks to up to 26 weeks. The new right applies to employees with children born or matched for adoption on or after 3 April 2011.

Parents will be entitled to receive additional statutory paternity pay if the mother has at least two weeks' statutory maternity pay remaining when she returns to work. Additional statutory paternity pay is paid at the lesser of the standard statutory maternity pay rate (currently £128.73 a week) or 90 per cent of the employee's average earnings.

At the end of additional paternity leave, the father or partner of the child's mother/adopter will have the same rights as mothers who return from maternity leave, i.e. the right to return to work in the same job and on same conditions (unless it is not reasonably practicable for the employee to return to the same job, in which case they are entitled to return to a similar job on the same terms and conditions).

Abolition of default national retirement age

UK employers historically have had the right lawfully to dismiss an employee who had reached the age of 65 years. Since 2006 this right has been subject to the requirement that the employer consider any request by the employee to continue working beyond their 65th birthday.

However, the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 abolished the default retirement age of 65 and came into force on 6 April 2011. The result of the Regulations is that it is now unlawful for an employer to dismiss an employee who reaches the age of 65 for that reason alone.

The Regulations contain transitional provisions so that the last date on which an employer could give notice of retirement under the default retirement age procedure was 5 April 2011 for staff who would be 65 years old before 1 October 2011, meaning that the latest possible forced retirement date using the procedure is 5 October 2012. As a result, although the default retirement age has been abolished, there will still be individuals in employment who may be lawfully retired up to the 5 October 2012 deadline provided the employer has properly complied with the notice requirements.

New legislation on bribery comes into force

The Bribery Act 2010 came into force on 1 July 2011. In addition to making the act of bribery unlawful the Act introduces a new corporate offence of failing to prevent bribery by an 'associated person', which is likely to capture acts of bribery by any employee, director, contractor, or agent of the corporation, whether acting within or outside the UK.

An organisation can benefit from a defence to the corporate offence if it can show that it had 'adequate procedures' in place to prevent bribery. The determination of what is 'adequate' is assessed on the basis of the level of bribery risk faced by the organisation and the nature, size and complexity of the business. Guidance published by the Ministry of Justice identifies six principles to assist businesses in identifying and implementing adequate procedures, broadly: proportionality; top level commitment; risk assessment; due diligence; communication; monitoring and review.

The consequences of an offence under the Bribery Act 2010 are very serious and include up to 10 years' imprisonment and/or an unlimited fine for individuals; and an unlimited fine for commercial entities.

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UNITED STATES

The Hey-day of Employment Class Action Litigation Is Over

A unique characteristic of employment law in the United States has been the risk posed by lawsuits asserting class action claims for race, sex or age discrimination.

The largest of such employment claims -- a class of 1.5 million women asserting sex discrimination against Walmart -- came to an abrupt halt in June when the Supreme Court overturned lower court decisions and ruled that the class did not satisfy the requirements for such suits. The Court held that under the "commonality" requirement of Federal Rule of Procedure 23(a), it is not enough to identify questions of fact or law common to the class. Instead, the Court explained, there must be "convincing proof" that the claims are susceptible to a "common answer" as to why class members were disfavored. This higher standard for establishing commonality, which "frequently" will "overlap" with the ultimate merits issue, would have precluded many of the employment class actions in the last several decades from going forward.

The Court also ruled that most employment class actions seeking back wages, as nearly all do, will involve "individualized relief" and therefore must satisfy the more difficult requirements of Rule 23(b)(3), rather than the simplified requirements of Rule 23(b)(2). A major hurdle to employment class actions under Rule 23(b)(3) will be the requirement that common questions of fact or law "predominate" over individualized issues.

This double-barreled holding, coupled with the Court's obvious discomfort with the class action device ("an exception to the general rule" that litigation is conducted on behalf of the named parties only), will substantially lessen the number of employment class actions in future years and will embolden employers to resist early settlements of such claims.

Arbitration Re-Affirmed

In a case with clear implications for employers, the Supreme Court considered a mandatory arbitration provision in a standard AT&T cell phone agreement that precluded class claims. A lower court had ruled that such a provision was unconscionable under state law. The Court reversed the ruling on the ground that it conflicted with the federal law authorizing arbitration. The Court reasoned that the advantages of arbitration as a quick and inexpensive mechanism to resolve disputes would be undercut by a rule allowing arbitration agreements only if they permitted class claims.

The Supreme Court in Walmart thus raised the bar for assertion of employment class actions in court, while also ruling in AT&T Mobility that mandatory arbitration provisions may simply preclude the assertion of class claims. For sure, we will see fewer class actions in the future.

To date, many employers have hesitated to adopt arbitration provisions, reasoning that the current system of court litigation serves them well, because the formality of the system discourages the assertion of small or frivolous claims, and the procedures of the court process ensure sounder outcomes. For some employers, the possibility of a mandatory arbitration process that excludes class claims may require re-consideration of the arbitration option.

Encouraging Whistle-Blowers

Many federal employment statutes have protected employees from retaliation for exercising rights or opposing unlawful conduct under the statute, including Title VII (employment discrimination), OSHA (safety and health), ERISA (benefits) and the NLRA (collective bargaining). The Supreme Court has put teeth in these statutory provisions in several decisions in recent years.

Legislators and regulators have also strengthened protections for whistle-blowers. Although the Sarbanes-Oxley Act has protected employees of publicly-traded companies for reporting fraudulent financial conduct, the 2010 Dodd-Frank Act extended this protection to employees of all companies who report a wide variety of financial irregularities by their companies. It also prohibited employers from entering into agreements with employees waiving the right to bring such claims in the future. The Securities and Exchange Commission in August 2011 established a whistle-blower program that pays monetary rewards to persons who provide the Commission with significant information about financial wrong-doing. The 2010 Patient Protection and Affordable Care Act and the 2011 Food Safety and Modernization Act included whistleblower protections for employees in the area of food safety and health care.

The result of all this activity is a hodge-podge of protections for whistle-blowers, and an emerging consensus that the whistle-blower plays an important role in the fight against corporate abuse.

Enforceability of Non-compete Covenants (New York)

To be enforceable under New York law a non-compete must be "no greater than required for the protection of the legitimate interest of the employer". In 2011, a federal court in New York City denied IBM's application for a preliminary injunction to enforce a one-year non-compete against a high-level executive who took a position at a direct competitor, HP, on the grounds that pricing data, marketing strategies, and knowledge of “the intricacies of [a] business operation” were not protected trade secrets. Int’l Bus. Machines v. Visentin, 2011 U.S. Dist. LEXIS (S.D.N.Y. Feb. 16, 2011), aff’d, 2011 U.S. App. LEXIS 22414 (2d Cir. Nov. 3, 2011). A clawback clause designed to prevent employees from leaving by allowing IBM to cancel equity grants for violation of the non-compete was found to be further evidence that the restraint was greater than necessary to protect any legitimate interest of IBM.

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