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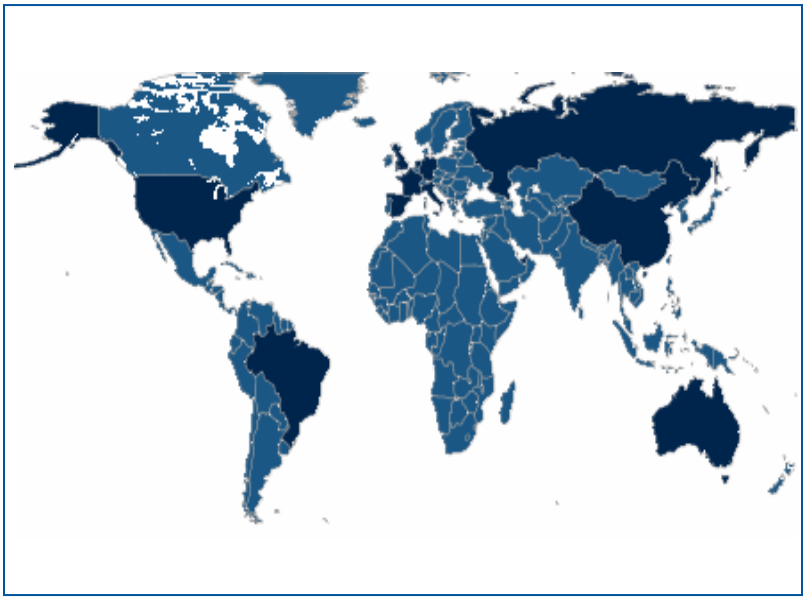
ADVISORY | International Employment Law Update

December 13, 2012

A summary of significant recent and forthcoming labour law developments across the globe, including in:

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



This edition of the International Employment Law Update summarises recent and upcoming key employment and employee benefits developments in the countries listed above. Deregulation certainly remains the theme across the Eurozone, presumably with the objective of improving competitiveness and attracting foreign investment. Remedies for unfair dismissal and severance indemnities have been reduced in Italy and Spain, for example; Dutch employers no longer need to obtain the approval of the Labour Office before being able fairly to dismiss employees; and the UK government is rushing through Parliament proposals to introduce 'employee shareholders', who may receive tax-favoured share awards in return for reduced employment protection. In China and Russia, by contrast, significant new family leave rights are being introduced - and the Singaporean government has implemented measures to protect older workers.

Meantime, at the pan-European level, Viviane Reding, Vice-President of the EU Commission and EU Commissioner for Justice, Fundamental Rights and Citizenship has been leading efforts to address gender inequality on the boards of European publicly listed companies. In March 2011 the EU Commission launched the "Women on the Board Pledge for Europe", calling for publicly-listed companies to increase the representation of women on corporate boards to 30% by 2015, and to 40% by 2020 (current figures are at around 14%, with most women holding non-executive roles). Since then, the European Parliament has repeatedly called for legislation on equality between women and men in business leadership. Continued pressure has resulted in the Commission's publication, on 14 November 2012, of a draft Directive setting an "objective" of appointing 40% of women to non-executive positions on the boards of public companies in Europe by 2020. European companies will need to tackle significant new compliance obligations over the next two years.

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AUSTRALIA

The Rise of Mutual Trust and Confidence

Two decisions handed down in 2012 by intermediate courts support the view that damages might be available for breach of the implied contractual term of mutual trust and confidence.

In April, the New South Wales Court of Appeal reversed the decision of a lower court to strike out pleadings on the basis that, as damages for breach of the implied term could not be awarded, pursuit of the claims was futile. The Court of Appeal held that a pleading based on the implied term of trust and confidence was a triable issue.

In September, the Federal Court awarded damages finding that an employer had breached the implied term by failing to take reasonable steps to redeploy one of its employees before making him redundant in accordance with the employer's published but non-contractual policy. The case is being appealed to the Full Court of the Federal Court and is likely to be heard in 2013.

Uniform Health and Safety Legislation Introduced

On 1 January 2012 uniform work health and safety legislation commenced in New South Wales, Queensland, the Australian Capital Territory, the Northern Territory and the Commonwealth. The South Australian and Tasmanian parliaments have since passed the uniform health and safety legislation, with minor amendments, which will be implemented in January 2013. Victoria and Western Australia (WA) are now the only jurisdictions not to have adopted the uniform legislation. The WA Government intends to adopt an amended version of the legislation with draft legislation expected before the end of 2012 and separate legislation for the mining sector. The Victorian Government has confirmed that it will not adopt the uniform legislation in its current form and will retain its existing health and safety legislation.

First High Court Decision on "Adverse Action" Under the Fair Work Act

In September 2012, the High Court handed down its first ruling on "adverse action". Under the *Fair Work Act 2009*, employers must not take "adverse action" against employees who belong to a trade union or engage in industrial activity, among other prohibited reasons. Adverse action includes dismissing an employee or altering the position of the employee to the employee's detriment. The High Court's decision confirms that reliable evidence of a decision maker's reasoning will be accepted and the court is not required to look behind those reasons for evidence of subconscious bias, even if the recipient of adverse action is a union official or member.

Proposed New Federal Discrimination Laws

In November 2012, the Federal Government released *Human Rights and Anti-Discrimination Draft Bill 2012* for public consultation. The Draft Bill is intended to replace the five pieces of existing federal Anti-discrimination law. Some of the changes proposed include a new single test for discrimination which focuses on *unfavourable* treatment, rather than *less favourable* treatment, making it broader than the current test; a new defence of *justifiable conduct*; new grounds of discrimination, including sexual orientation; and broader remedies, including reinstatement.

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BRAZIL

Brazilian Superior Labour Court Modifies Labour Law Precedents

In November 2012, the Brazilian Superior Labour Court reviewed its non-binding guidance for labour judges on key Brazilian labour laws. The most important changes resulting from the review are:

- pregnant women and employees who are injured at work will have guaranteed future indefinite-term employment, even if the employment agreement was for a fixed-term;
- union leaders who do not comply with the requirement to notify their employers that they plan to run for election will still be guaranteed employment;
- the new and extended prior notice period only applies to terminations that occur after 13 October 2011;
- employees working outdoors will be entitled to allowances for health hazards if limits on exposure to sun and heat under the regulations are exceeded;
- employers are no longer permitted to suspend healthcare for employees who are receiving a sickness allowance or permanent disability pension as a result of a work-related accident;
- if an employee is not able to take his/her full meal break, then the break will be treated as not having been taken and must be accounted for in overtime payments;
- benefits granted under a collective bargaining agreement cannot be modified or removed other than by a new collective bargaining agreement;
- dismissals of employees with HIV or other serious illnesses are now presumed to be discriminatory. Unless an employer can prove a dismissal was not discriminatory, it will have to reinstate the employee; and
- employees who are not at the workplace, but subject to the control of their employer by means of computerised or other technology, and who can be called upon to perform work during their rest periods, are considered to be on "on-call". The review of this particular precedent may result in the need to pay on-call allowances to employees who are provided with mobile phones and laptops.

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FRANCE

New French Harassment Law

A new law enacted in August 2012 has implemented stronger protection against harassment. The law provides that internal policies ("Règlement intérieur"), which are mandatory for companies with

at least 20 employees, shall include applicable rules and regulations relating to moral and sexual harassment.

The law prohibiting moral harassment states that no employee, trainee or intern should be sanctioned, dismissed or subjected to discrimination (in terms of compensation, training, redeployment, assignment, qualification, classification, promotions, transfers or contract renewal) for having been, or having refused to be, subject to repeated moral harassment or for having witnessed and/or reported it.

The law protecting against sexual harassment states that no employee, trainee, intern or job applicant should be punished, dismissed or subjected to discrimination for having been or having refused to be subjected to sexual harassment. Any employee who harasses another shall be subject to disciplinary measures, even in the case of a one-off act.

Failure to comply with such amendments will trigger payment of a fine of € 750, following review by the Labour Inspector. Internal regulations and policies should be prepared by companies and submitted to their Health and Safety Committee and the Works Council who will each give an opinion on the regulations. The amended internal regulations must then be sent to the Labour Inspector (two copies, together with the staff representatives' opinion); filed with the Clerk's office of the Labour Court; and posted in an area in the workplace that is easily accessible to employees. The law now requires that the provisions of the French Criminal Code relating to sexual harassment and moral harassment shall be posted in the workplace.

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GERMANY

Collective dismissal notifications

A recent ruling by the Federal Labor Court held that a "collective dismissal notification", which must be filed by an employer in a redundancy situation, may be overturned if not correctly drafted, even where the notification has been accepted by the Federal Labour Agency. This case highlights the importance of employers carefully drafting such notifications and not being overly reliant on the information provided by the Federal Labor Agency.

Developments in staff leasing sector

Until recently, there has been a concern for both companies who hire leased staff and the agencies who lease staff to ensure that an employment relationship is not created between the hirer and the leased staff. Pursuant to German labour law, employees can only be leased to a hirer on a "temporary" basis. However, the meaning of a temporary assignment and the consequences of breaching this rule, were previously unclear. The Labor Court of Appeal Berlin-Brandenburg recently ruled that no employment relationship will be established, even if courts regard a leasing agreement as non-temporary. This decision provides some comfort for staff leasing companies and hirers, although it is likely to be appealed to the Federal Labour Court.

Another important change in the area of staff leasing is the introduction of sectoral bonuses for the metal, electrical engineering, chemical and plastics industry. As of 1 November 2012, temporary

workers will be entitled to bonuses of between 15-50% of their salary, depending on the length of the worker's assignment to a specific hirer. The bonuses will increase in stages, from a 15% bonus after 6 weeks of service, up to a 50% bonus after 9 months of service. The new bonuses add considerably to the cost of engaging temporary staff in these sectors. It is also likely that unions in other sectors will try to follow suit. Hirers are therefore opting to hire staff as contractors, although this model is already being challenged by the unions.

Overtime compensation

There have been several recent decisions on whether highly-qualified employees can claim overtime compensation on termination of their employment contracts. Blanket compensation clauses for overtime have long been standard in employment contracts. However, in 2010 the German Federal Labour Court held that such clauses were legally invalid because an employee does not know how many hours he must work for his monthly salary. Employees have since brought claims for retroactive payment of overtime worked. A claim by a young attorney earning a salary of € 80,000 failed on the basis that an employee in his position knows that he is to work overtime hours without additional payment. Conversely, a claim by a storehouse manager succeeded on the basis that, due to his low salary, the employee had a reasonable expectation that overtime work would be compensated.

"Work-life balance"

Due to ongoing discussions in the media surrounding 'work life balance', more employers and works councils are reviewing working hours. Under German law, most employees are subject to a maximum eight hour working day (ten hours in exceptional cases), with a 30 or 45 minute rest break. The German automobile company, *Volkswagen* recently introduced a ban on emails being forwarded to mobile devices after working hours. Another company that entered into a similar agreement with its works council, was fined € 10,000 for each day an employee violated the agreement. We expect to see more works councils tackling the issue of working hours in the future.

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ITALY

New Regulation for Unfair Dismissal

Law no. 92/2012 has amended the remedies for unfair dismissal, within the framework of a structural reform aimed at increasing competitiveness and attracting foreign investment in Italy.

Under the previous regime, unfair dismissal automatically led to an order of reinstatement with back-paid salary and social security contributions, regardless of the reason for dismissal. The new rules are as follows:

- reinstatement with full back pay and social security is limited to discriminatory dismissals;
- reinstatement can be ordered by a Tribunal if the reasons for the dismissal are non-existent, for example, if the tribunal finds that redundancy is not the true reason for the dismissal. In these cases back pay is capped at a maximum of 12 months' salary. Social security, however, is guaranteed for the whole period between the dismissal and the reinstatement;
- an award ranging from 12 to 24 months' salary can now be awarded by a Tribunal in all other cases where the dismissal is found to be unfair; and
- in all cases, employers must, set out the reasons for the termination in the termination letter. In the absence of written reasons or where a dismissal procedure is not followed, employees may be entitled to an indemnity payment, ranging from 6 to 12 months' salary.

A simplified and accelerated Court proceeding has been introduced for cases involving dismissal of an employee by a company with more than 15 employees per production unit.

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NETHERLANDS

On 5 November 2012, the new Dutch cabinet announced proposed reforms to labour law which, if implemented, will have a major impact on employee dismissal protection and an employed person's entitlement to state unemployment benefits.

Dismissal: from Prior Approval to Non-Binding Advice

Currently under Dutch law, an employer can only dismiss an employee with prior approval from the Labour Office or, if Labour Office approval cannot be obtained, the employer can ask the court to terminate the employment contract. The new proposals would require an employer wishing to dismiss an employee only to seek prior advice from the Labour Office. The Labour Office's advice would not be binding, meaning the decision to terminate the employment contract rests with the employer. However, employees could initiate court proceedings to claim compensation for unfair termination or request that the court annul the dismissal. Alternative dismissal procedures can be agreed in a collective bargaining agreement.

The proposed system would greatly reduce the role of the court in proceedings for unfair dismissal. The court would only be able to award compensation for termination if it found the dismissal was unfair, and could annul the termination if the employer proceeded contrary to the advice of the Labour Office.

Transitional Budget and Termination Compensation

An employer unilaterally terminating an employee's contract, or choosing not to extend a temporary employment contract which has a duration of at least one year, must provide a "transitional budget" to the employee. This budget is to be used for training purposes, in order to improve the employee's employment prospects. The transitional budget will amount to a quarter of an employee's monthly

salary for each year of service, subject to a maximum of four months' salary. An employer will not be required to pay the transitional budget if the dismissal was due to the employer's financial situation and the employer would go bankrupt if it were made to pay.

The severance payment which may be awarded by the court is capped at half a month's salary per service year, up to a maximum of €75,000 gross.

State Unemployment Benefits

The Government is proposing to shorten the maximum period during which an unemployed person can receive state unemployment benefits pursuant to the Unemployment Act (*Werkloosheidswet*). This period will be shortened from 38 months to 24 months. The benefit will initially be a percentage of the employee's salary. After 12 months, the benefit will be a percentage of the statutory minimum wage.

The period during which an employee is entitled to state unemployment benefits depends on the length of his/her service. For each year during the first 10 years of service, the employee will be entitled to one month of unemployment benefits. After the first 10 years of service, half a month of unemployment benefits is granted for each year. Years of service accrued prior to these changes will count towards an employee's total number of years' service with an employer. Employees aged 55 years and over may be eligible for additional benefits.

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PEOPLE'S REPUBLIC OF CHINA

Further Protection of Employees

The Chinese government has passed a number of laws and regulations that increase employment protection for employees, including:

- **Regulation on the Democratic Management of Enterprises.** This Regulation provides that all enterprises in China shall establish employee representative councils. The main power of the representative councils will be to receive information on the development and operation of the enterprise and propose suggestions, review employment policies that may affect employees' rights and review the collective employment contract. However, the regulation does not provide for any penalty for an enterprise's failure to establish an employee representative council.
- **Amendment to the Special Regulation on Protection of Women Employees**. The Amendment extends statutory maternity leave from 90 days to 98 days. The statutory miscarriage leave is 15 days for a miscarriage which occurs within four months of pregnancy, or 42 days for miscarriages after four months.
- **Amendment to the Occupational Diseases Prevention and Control Law.** The Law now requires employers to monitor occupational health issues and release occupational health records to

employees. In addition, the State Administration of Work Safety has issued a series of new rules, which require employers to: designate person(s) or establish a department to monitor occupational diseases; conduct medical examinations on employees prior to and during employment and before termination; conduct medical examinations on employees on the merger, division, dissolution or bankruptcy of the employer; and report on projects which give rise to potential risk of occupational diseases.

New Rules on the Horizon

Several draft rules have been published for consultation, including:

- new rules on flexible working arrangements, which may affect overtime payments to employees;
- amendments to the Labour Contract Law affecting temporary work agencies (known as "labour dispatch" companies), including licensing and minimum registered capital requirements, and more stringent penalties for non-compliance with the law relating to temporary agency work; and
- new judicial interpretation on a number of labour law issues, such as non-compete covenants and compensation, and procedures to introduce new employment policies and rules.

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RUSSIA

Fathers get Equal Rights with Mothers

A new amendment to the Labour Code of the Russian Federation became effective on 24 November 2012. As a result, termination of an employment contract by an employer is prohibited in relation to fathers who are the sole breadwinners in a large family, where the mother of their children is unemployed and has primary responsibility for childcare. Previously, only working mothers had this right, but this discrepancy was challenged and held to be unconstitutional.

Compensation to Foreign Citizens is Subject to Mandatory Pension Insurance Contributions

As of 1 January 2012, mandatory pension insurance was introduced for foreign citizens who are temporarily based in Russia and who have entered into an employment contract for either an indefinite term or for a fixed-term of no less than 6 months. Employers in Russia must now remit contributions to the Pension Fund of the Russian Federation from the compensation paid to such foreign citizens. The new rules do not apply to foreign citizens who are hired as highly-qualified specialists.

Workers Involved in Underground Work

A new chapter introduced into the Labour Code on 31 March 2012 regulates the work of employees who are involved in underground work; including those who work in mining operations, underground construction and emergency rescue work at underground construction sites. The new provisions mainly cover the recruitment process, medical examinations and suspension from work.

Prospective Amendments for 2013

It is anticipated that, as of 2013, statutory sick leave allowances will be paid by the Social Insurance Fund of the Russian Federation. At present, allowances are paid by employers and are counted towards mandatory employer social security contributions.

A draft bill imposing restrictions on hiring agency workers is being considered by the State Duma of the Russian Federation. The future of agency workers in Russia will depend on whether next year's draft bill is passed.

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SINGAPORE

New Law Governing Re-employment of Retired Workers

The Retirement and Re-employment Act (the "Act") came into force in Singapore on 1 January 2012. Under the Act, no employer shall be entitled to terminate the contract of an employee solely on the grounds that he has attained the statutory minimum retirement age of 62. Instead, employers are legally obliged to offer re-employment to those employees who are medically fit and who have performed their job satisfactorily. Employers are at liberty to offer re-employment for a different role and/or under different terms and conditions. These need to be agreed with the employee, taking into account reasonable factors including the employee's productivity, performance, duties and the wage system applicable to the employee.

The obligation to offer re-employment is for a period of up to three years (i.e. 65 years) or on a yearly renewable basis if the eligibility criteria are met. The Act also obliges employers to compensate employees under the Employment Assistance Payment Scheme who are not eligible to be re-employed or where there is no role for the employee. There are also exemptions from the re-employment obligations, which are set out under the Retirement and Re-employment (Exemption) Notification 2011.

Other Developments

Other significant statutory changes in 2012 include:

- amendments to the Work Injury Compensation Act came into force on 1 June 2012. The amendments increase the compensation limits that may be claimed for medical expenses and work-related deaths; and
- amendments to the Employment of Foreign Manpower Act came into operation on 9 November 2012. The amendments increase the Singaporean government's supervisory powers in relation

to the work pass framework of the Ministry of Manpower and also strengthen the Ministry's enforcement capabilities.

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SPAIN

On 11 February 2012, the Spanish government published a Royal Decree to reform the country's labour law aimed at tackling the economic crisis and reducing the unemployment rate. The most significant features are:

Reduced Severance Payments for Termination

Severance payments for termination without cause have been reduced from 45 days of salary for each service year, with a maximum cap of 42 months' pay, to 33 days of salary for each year of service, with a maximum cap of 24 months' pay. This reduction applies to employees hired after 12 February 2012. Employees hired before this date are entitled to a severance payment equal to 45 days of salary for each year of service up to 12 February 2012, plus 33 days of salary for each year of service as from 12 February 2012.

Collective Redundancy Process Simplified

The Collective Redundancies Regulation has been simplified by removing the need for an employer to obtain labour authority authorisation before implementing a collective redundancy process, even where there is no agreement with workers' representatives within the consultation period. However, redundancies remain subject to a potential judicial challenge by employees.

Changes to Grounds Justifying a Redundancy

The Labour Reform has also modified the objective grounds (economic, productive, technical and organisational) that may justify a redundancy. Under the new law, 'economic reasons' mean the company must be in a negative economic situation. In most cases, a company will need to be able to show current or foreseen losses and a 'persistent' decrease in income (i.e. a decrease in income over three consecutive quarters). In addition, the law no longer requires a company to prove that the dismissal was a reasonable response in order to prevent negative financial performance by the company (previously a requirement for dismissals for economic, productive, technical and organisational grounds).

Companies whose annual accounts show a profit and who carry out a collective redundancy process affecting employees who are over 50 years old may be required to pay the Public Administration a sum equal to the unemployment benefits that those employees would have been entitled to receive.

Additional Flexibility Measures

Finally, additional flexibility measures have been approved. The reformed law offers financial inducements to employers to encourage hiring, such as lowering social security contributions for

employees hired under a new form of permanent contract for companies with fewer than 50 staff. It also eliminates reference to the "professional categories" (as established in previous collective bargaining agreements) to facilitate functional mobility. One of the most significant changes is the power of employers to modify terms and conditions of employment, such as working hours and salary.

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UNITED ARAB EMIRATES

The End of Service Gratuity under Review

The end of service gratuity ("ESG") benefit is currently stirring much debate in the UAE. At present, the ESG scheme requires employers to pay employees a sum of money on termination, subject to the employee satisfying certain conditions. However, the Government is now considering alternatives to the current system, such as the World Bank's recent recommendation that a pension fund for expatriate employees should replace the existing ESG. This would introduce a Government-led pension fund requiring employers to pay approximately 8% of basic salary into the fund. Employees would then receive pension payments following the termination of their employment. Whether the pension benefit would mature at the date of termination or the date of retirement is currently unclear.

Other Developments

Other key labour law developments in 2012 include:

- **DIFC - Visa application**: Employers based in the DIFC applying to the DIFC Authority for visas on behalf of their employees are now required to submit a copy of the employment contract with an application. In other free zone areas and onshore, employers are only required to submit a copy of the basic, prescribed form employment contract with visa applications.
- **DIFC - Amendments to the Employment Law**: A consultation on proposed amendments to the DIFC Employment Law has now concluded. The proposed amendments seek to develop and clarify certain issues, such as to whom the law applies, and address the rules governing the carrying forward of annual leave. We anticipate that the changes will be implemented in 2013.
- **New multiple entry visa**: A multiple entry visa has been introduced for individuals who wish to travel in and out of the UAE on a regular basis. The multiple entry visa allows business visitors to enter the UAE on various occasions during a six-month period immediately following the date that the visa is issued. Each visit must not exceed 30 days.
- **UAE Onshore – Fines**: As of August 2012, the Ministry of Labour made changes to certain fines:
    - a monthly fine of AED 1,000 will be imposed for delays to renewal of labour cards that occur beyond the 60 day period from expiry or date of entry, as applicable;
    - a daily fine of AED 100 will apply to delays on issuing or renewing mission labour cards;
    - a penalty of AED 20,000 will also apply in each case where incorrect information is provided to the Wage Protection System;

- a fine of up to AED 5,000 per employee will be payable where payment of an employee's wages has been delayed for more than 60 days, with a maximum fine of AED 50,000 per company; and
- a fine of AED 5,000 per employee will be payable where employees' signatures have been forged on receipts declaring receipt of wages, with a cap of AED 50,000 per company involved in multiple violations.

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UNITED KINGDOM

Change of Qualifying Period for Unfair Dismissal

On 6 April 2012, the length of service that an employee must attain in order to be eligible to bring an unfair dismissal claim increased from one to two years, bringing it in line with the qualifying period for statutory redundancy pay. The new two-year qualifying period for unfair dismissal will only apply to employees whose employment begins on or after 6 April 2012. Those who are already in employment before that date will retain the current one-year qualifying period.

Employee Shareholders

The Government has announced its intention to amend the Employment Rights Act 1996 to create a new type of employee, the 'employee shareholder'. The aim is to lighten the burden of UK employment regulation by allowing employers to offer employees tax-favoured shares in the employer company (or its parent) in return for surrendering a number of their employment rights, including the rights to claim unfair dismissal and to receive a statutory redundancy payment.

The shares should have a minimum unrestricted market value of £2,000 at the time that they are awarded. The award of shares will be subject to income tax and National Insurance Contributions as usual. However, employee shareholders will not have to pay Capital Gains Tax on gains in the value of the shares up to £50,000. Employers may also include a clause in contracts requiring the employee to sell back the shares on leaving employment.

Pension Scheme Auto-enrolment

Unless employees are already active members of an employer scheme, qualifying employees will be automatically enrolled in suitable defined contribution or defined benefit pension schemes. Importantly, employers will in future be required to make mandatory contributions to such schemes. The basic rules are as follows:

- an employer must enroll jobholders aged between age 22 and the state pension age who earn at least £8,105 per annum (for tax year 2012/13) in a pension scheme. Those earning

less than the qualifying earning band will still be entitled to join, but they have no right to receive employer contributions;

- "staging dates" have been set for compliance, depending on the size of the employer;
- contributions to defined contribution schemes will be phased in over two transitional periods spanning six years. From October 2018, employers will be required to contribute 3% of band earnings each year, while the jobholder will contribute 5%;
- a National Employment Savings Trust has been established by the Government to enable employers without qualifying pension schemes to meet their statutory auto-enrolment duties;
- jobholders who are automatically enrolled into the scheme have a statutory right to opt out. However, they will be automatically re-enrolled every three years;
- employers are required to tell jobholders about the scheme; and
- the Pensions Regulator will deal with compliance. Failure to comply could result in escalating fines and criminal sanctions.

The Enterprise and Regulatory Reform Bill

The Bill, which is expected to come into force next year, includes a number of proposed reforms to UK employment law, including:

- the Secretary of State will have power to lower the statutory limit on the compensatory award in unfair dismissal claims to either: (i) a specified amount between one and three times median annual full-time earnings; (ii) a specified number of weeks' pay, which must not be less than 52; or (iii) the lower of the two amounts;
- employers will be able to have 'protected' discussions with employees about proposed terms of settlement before any dispute has arisen. Under current rules, such conversations are not legally privileged outside the context of a formal dispute;
- the amount that a Tribunal can award a successful party in costs will increase from £10,000 to £20,000. The Bill also gives Tribunals the power to impose a financial penalty on employers that lose at a Tribunal - of up to 50% of any financial award, capped at £5,000.

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UNITED STATES

Employer cannot make ERISA plan severance benefits conditional on Employee's Post-Termination agreement to Non-Compete Obligations

On 1 November 2012, a federal district court in Illinois awarded severance benefits to an employee who refused to sign a severance agreement containing a non-compete as a condition of obtaining

benefits provided for in an ERISA-covered benefit plan, where neither the plan nor any pre-termination agreement imposed non-compete obligations.

This decision fits within mainstream U.S. law (other than Californian state law, which prohibits employee non-competes) in holding that, while sometimes enforceable, non-competes are disfavoured, strictly construed and require special justification (such as the protection of trade secrets or the services of a "unique employee". Drafters of non-competes intended to be enforceable in the U.S. are well advised to address each of these criteria directly in the language of the contract. Moreover, it is helpful to identify the consideration provided for the non-compete to make it very clear that the parties deliberately bargained for the restrictions on the employee's future employment.

Changing Landscape for Retirement Plans

The past decade has seen employers moving away from traditional defined benefit pension plans and toward defined contribution plans, such as "401(k) plans", and re-designed defined benefit pension plans. In 2012, there were significant developments in these areas:

- many employers have frozen their traditional defined benefit pension plans and are now considering ways to eliminate the financial volatility of these frozen plans. For example, Verizon is transferring U.S. $7.5 billion in pension liabilities to an insurance company to pay pensions to 41,000 retirees; and General Motors is offering lump sum payments to certain retirees and transferring U.S. $25 billion in other pension liabilities to an insurance company;

- the U.S. Congress passed pension funding relief as part of the "Moving Ahead for Progress in the 21st Century Act" (MAP-21). This provides some funding relief for employers who continue to sponsor defined benefit plans. However, MAP-21 also raised pension insurance premiums, thus increasing the cost to employers who hold on to their pension liabilities;

- the U.S. Treasury Department and the U.S. Internal Revenue Service issued guidance intended to encourage defined contribution plans to offer lifetime income payment options. This is intended to make it easier and more attractive for employers to offer, and employees to elect, annuity payment options from defined contribution plans; and

- policy-makers and practitioners in the US are examining new types of defined benefit plans that share risk among employees and employers. A legislative proposal for a shared-risk plan has been introduced in the United States Senate - the proposal draws heavily on ideas developed in a conference co-sponsored earlier this year by Covington & Burling LLP.

Health Care Reform

With the Health Care Reform almost certainly going forward, large employers who do not provide health coverage to full-time employees will be required to pay tax penalties starting in 2014. Employers also will be required to pay new taxes intended to fund programmes under the new legislation and the associated administrative costs of implementing new benefit mandates that will become effective over the next few years. The legislation requires states to establish, by 2014, health insurance exchanges to facilitate the comparison and purchase of health insurance in the individual and small group markets. If a state fails to establish an exchange, the federal government will establish an exchange in the state. For some employers the tax penalties may be less than the cost of establishing or maintaining health plans for their employees, and employers may view the exchanges as a viable alternative for providing health coverage to their employees.

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