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International Employment Law Update

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International Employment

Europe

Right to Private Life v. Right to Monitor

On January 12, 2016, the European Court of Human Rights published its judgment in another case concerning an employee's use of company information systems, once again highlighting the challenge of balancing an employee's right to a private life against the right of an employer to monitor employees at work.

In *Barbulescu v. Romania* the employee had been using a Yahoo! instant messenger account set up specifically for work purposes to communicate with his fiancée and brother, despite this being in breach of company policy. Agreeing with the national court, the Court distinguished this case from previous cases where employees had a reasonable expectation of privacy in the workplace, and held that the employer had acted reasonably in monitoring the employee's use of the Yahoo! instant messenger account, and ultimately terminating his employment.

The scope of this decision is more limited than legal commentators initially suggested. However, it does not give employers the right to snoop on their employees, nor does it suggest monitoring of an employee's activity in this way will always be reasonable or proportionate, as required by European data protection laws. In addition, local laws such as the UK's Regulation of Investigatory Powers Act 2000 may limit the circumstances in which communications may be lawfully intercepted.

The decision nevertheless serves as a useful reminder of the importance of having in place clear and comprehensive policies concerning the use of company information systems.

China

Is the Labour Contract Law to Blame for China's Economic Woes?

The current Labour Contract Law, and whether it should be amended in light of current economic conditions, will be one of the central topics at this year's plenary sessions of the National People's Congress (NPC) and the annual meeting of the National Committee of the Chinese People's Political Consultative Conference.

Pro-employer groups maintain that the Labour Contract Law has not achieved balance in its protection of enterprises and employees, and that excessive protection of employees has hindered enterprise and contributed to the recent economic downturn. A frequently cited example of this "imbalance" is the ease with which an employee can resign, in contrast to the difficulty employers face in terminating indefinite-term contracts.

Against this backdrop, a number of changes to the Labour Contract Law have been proposed, including: (i) allowing restrictions to be placed on the employee's right to resign;

(ii) abolishing the indefinite labour contract requirement; and (iii) placing fewer restrictions on the use of alternative working arrangements (for example, temporary contracts, hourly paid roles, and labour dispatch arrangements).

Other proposals to reduce the pressure on employers include lightening the tax obligations on enterprises and reducing employer social insurance contributions. It is clear that Chinese society is starting to recognize the pressures faced by many employers, and that something must be done to foster economic growth.

United States of America

U.S. EEOC Seeks Additional Data about Wages in EEO-1 Report

In an effort to identify possible discrimination in pay based on sex, race and ethnicity, the US Equal Employment Opportunity Commission (EEOC) published a proposed revision to the Employer Information Report (EEO-1) in February 2016. If approved, the revision would require employers to collect and report data about employees' W-2 earnings (the amount on the W-2 Form that an employer provides to the Internal Revenue Service in respect of each employee, showing annual taxable income) and hours worked, in addition to the data that EEO-1 filers with 100 or more employees (including private industry and federal contractors) are already required to collect.

Employers would also need to report the number of employees—by race, sex, and ethnicity—that fall within one of 12 pay bands. These pay bands would be calculated using employees' total W-2 earnings over a 12-month period preceding any pay period between July 1 and September 30 of the reporting year.

While the EEOC maintains that W-2 data is the most useful measure of pay because it reflects many forms of taxable income, critics of the proposal note that W-2 data may also include information that does not indicate compensation rates (such as settlement or severance payments), and therefore will not be a useful measure of comparison through which to discern any discrimination. The public comment period is open until April 1, 2016, and the revision comes into effect in 2017, if approved.

United Kingdom

Calculating Holiday Pay

In a highly-anticipated decision, the Employment Appeal Tribunal confirmed, in *Lock v. British Gas Trading,* that commission pay should be included in holiday pay. It still leaves a number of questions unresolved, most notably what the appropriate period should be for calculating holiday pay for workers who earn commission.

The case concerned a British Gas salesman who, in 2012, complained to an employment tribunal that his employer's methods for calculating his holiday pay based solely on non-variable elements of the remuneration package breached the Working Time Regulations 1998 (WTR).

The EAT dismissed British Gas's appeal and held that the WTR should be interpreted in line with the European Working Time Directive (EWTD) and that holiday pay should reflect 'normal remuneration', including non-guaranteed overtime and commission pay.

Norway

New Law on Restrictive Covenants

The Norwegian Parliament has approved new rules on restrictive covenants that are designed to enhance mobility in the labour market, promote competition and innovation, and increase overall employment.

The new rules, which mirror recent developments in Denmark, introduce further restrictions on the use of non-competition and non-solicitation clauses following termination of employment. In particular:

- non-compete clauses will only be enforceable if: (i) the employer has a special need for protection (a requirement that will not be met where the employee has less than six months' service); (ii) the duration of the non-compete is less than 12 months; and iii) the employee receives compensation for the period of the non-compete calculated using prescribed formulas; and
- non-solicitation clauses will only be enforceable if: (i) they apply for no more than 12 months; and (ii) they relate to customers with which the employee had contact or for which he/she had been responsible during the 12 months preceding termination. Employers are not, however, required to compensate employees during the period of non-solicitation.

The new rules also prohibit the non-solicitation of employees between two or more undertakings, although exemptions apply in the case of business transfers.

The new rules apply to all employees, although managing directors of companies may be subject to more stringent restrictions if on termination they agree such restrictions in writing, in return for a severance payment. The rules will apply to all employment contracts entered into from January 1, 2017.

In light of this new legislation, companies with Norwegian operations should consider whether amendments need to be made to their template employment contracts.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Employment practice group:

United Kingdom
Christopher Walter +44 20 7067 2061 cwalter@cov.com
Christopher Bracebridge +44 20 7067 2063 cbracebridge@cov.com

United States
Jeffrey Huvelle +1 202 662 5526 jhuvelle@cov.com
Lindsay Burke +1 202 662 5859 lburke@cov.com

People's Republic of China
Grace Chen +86 10 5910 0517 gchen@cov.com