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International Employment Law Update

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International Employment

United Kingdom

Implementation of the EU-U.S. Privacy Shield

Following the ruling by the European Court of Justice on October 6, 2015 that the old “Safe Harbour” framework was invalid, the EU-U.S. Privacy Shield came into force on August 1, 2016 to provide an adequate level of protection to personal data transferred from the EU to the U.S.

Companies signed up to the EU-U.S. Privacy Shield must display their privacy policy online so that the U.S. Department of Commerce (DoC) can verify that the policies comply with the principles of the Privacy Shield. Companies must also annually self-certify that they meet Privacy Shield requirements. Personal data must not be stored once it no longer serves the purpose for which it was collected and companies must ensure that third party recipients of data are contractually bound to provide Privacy Shield levels of protection. The DoC has authority to impose sanctions or remove from the Privacy Shield list companies in breach of the rules.

The new framework also provides Europeans with greater protection regarding transfers of their personal data. Under the Privacy Shield, individuals can, at various stages: (1) lodge complaints directly with a company, which must respond within 45 days and provide alternative dispute resolution solutions free of charge; (2) submit complaints to their national Data Protection Authority who, together with the U.S. Federal Trade Commission, will ensure that complaints are investigated and resolved; and (3) as a last resort, submit the complaint to arbitration.

Gender Pay Gap Reporting Regulations Delayed

The Gender Pay Gap Regulations were due to come into force on October 1, 2016. The Government Equalities Office (GEO) has now estimated that the regulations will be laid before Parliament later this year, with the expectation that that they will come into force in April 2017.

The GEO expects the first “relevant date”—that is the date on which a snapshot is taken of pay data for the preceding period—will remain April 30, 2017 as originally planned, meaning the first gender pay gap reports will still be due by the end of April 2018.

The Trade Union Act 2016

The Trade Union Act 2016 (Act) came into force in May and introduces significant reforms in relation to industrial action. Most notably, a successful ballot for industrial action will now require 50 percent of eligible voters to participate in the vote. This prerequisite applies in addition to the existing condition that a majority of those voters vote in favour of the action.

The full practical significance of the amendments to the industrial action framework introduced by the Act will become clearer once the UK Government has introduced the secondary legislation necessary to give effect to many of the Act's provisions.

France

French Labour Reforms Prove Contentious

Following months of violent protests, political division, and failure to reach a compromise on the proposed labour reforms, the French Prime Minister, Manuel Valls, used a constitutional tool to push the legislation through Parliament in July without a vote. Valls argued that the new legislation will reduce unemployment levels (currently stuck at 10 percent) by fostering a more flexible job market.

Key measures include:

- treating the current 35-hour week as an average and allowing employers to negotiate with local trade unions over a reduction or increase in the hours, up to a maximum of 46 hours per week;
- granting employers greater freedom to set tailor-made salary arrangements; and
- relaxing the conditions for laying off workers when firms are suffering from a decline in economic performance.

These reforms have faced substantial opposition from the General Confederation of Labour (a national trade union centre) and a group of rebel Socialist MPs who believe that the legislation is designed to weaken the power of the workers' unions and reduce sector-based labour arrangements.

Poland

Rights of Posted Employees Brought in Line with Polish Labour Code

On June 18, 2016, Poland implemented new legislation on posting employees within the Framework of the Provision of Services, thereby transposing EU Directive 2014/67/EC into Polish law. Member states were required to introduce this legislation within two years of June 2014, meaning Poland has introduced this law just in time.

The legislation will assist in improving working conditions for posted employees, i.e. those who are sent by their employer to carry out a service in another EU Member State on a temporary basis. It ensures they are subject to at least the same standards required under the Polish Labour Code regarding standard working hours, rest periods, holiday leave, minimum wage, overtime, health and safety and protection from discrimination.

The legislation places fairly onerous obligations on employers, in particular in relation to record keeping, and the disclosure of certain information to the State Labour Inspectorate. Individuals (and not the employing entity) who fail to comply may be subjected to a fine of up to PLN 30,000 (approximately USD 8,000).

China

Draft Regulations Published on Controlling External HR Market Activities

The Ministry of Human Resources and Social Security published a draft of the Human Resources Market Regulations (Draft HR Regulations) in August 2016. The consultation period closed on September 8, 2016.

The Draft HR Regulations seek to control external HR market activities (recruiting, job-seeking and HR services, etc.) in the same manner that internal HR market activities (labour contracts, wages, work hours, etc.) have traditionally been regulated under the labour law regime. To achieve this objective, the Draft HR Regulations expressly set out the rights and obligations of all relevant stakeholders that engage in these HR market activities, and provide specific guidelines applicable to such activities.

The Draft HR Regulations also provide a comprehensive system for overseeing HR organisations, including those which provide services online, requiring these entities to obtain licenses prior to conducting HR service activities. The Draft HR Regulations also state that foreign investment is permitted in HR service organisations, but only in the form of joint ventures where the Chinese party holds the majority stake; wholly-invested entities are not allowed. While this restriction is consistent with current regulations applicable to foreign-invested talent joint ventures in the HR industry, it is more expansive and encompasses all HR services. The Draft HR Regulations call for projects in the free trade zones to be exempted from these restrictions but do not indicate whether Hong Kong and Macau companies, eligible for special treatment under the Closer Economic Partnership Agreement, will also enjoy such exemptions.

Issuance of these Draft HR Regulations suggests the development of a regulatory regime that will be implemented in conjunction with the current labour law system to encompass the regulation of all aspects of HR activities. How these developments will impact foreign investors inside and outside of the HR industry remains to be seen.

United States of America

Continued Uncertainty in Enforcing Class Waivers in Arbitration Agreements

In *Morris v. Ernst & Young*, a divided Ninth Circuit Court of Appeals ruled that a pre-dispute employment arbitration agreement which contains a class or collective action waiver violates the National Labor Relations Act (NLRA). Though in the minority, the Ninth Circuit has joined the Seventh Circuit in what is now a widening split amongst federal appellate courts on the issue. In contrast, several other appellate courts, led by the Fifth Circuit, have held that class and collective action waivers do not run afoul of the NLRA.

Like many other employers, Ernst & Young required employees to sign pre-dispute arbitration agreements as a condition of employment. The agreement contained a waiver requiring employees to pursue legal claims against Ernst & Young through arbitration only and solely on an individual basis. When two employees brought class and collective actions, the federal district court dismissed the lawsuit, ordering the claims to arbitration on an individual basis.

The Ninth Circuit reversed and held that under the NLRA, employees have a substantive right to pursue legal claims on a class or collective basis and that by preventing this, Ernst &

Young's arbitration agreement interfered with employees' NLRA rights. However, the Ninth Circuit did suggest in a footnote that allowing employees an option to opt-out could render an agreement with a class and collective action waiver lawful.

With this latest decision by the Ninth Circuit, it is almost certain that the U.S. Supreme Court will need to weigh in on what is a rapidly changing area of law. While the Supreme Court has issued several decisions in the last few years that have heavily favoured arbitration, many of these decisions were divided along ideological lines. With Justice Scalia's passing and the Supreme Court's ideological make-up up for grabs in the upcoming Presidential election, future rulings by the Court in this area are anything but certain.

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

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