COVINGTON

International Employment Law Update

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International Employment

Austria:

Supreme Court Declares Retirement Policy Discriminatory

The Austrian Supreme Court recently declared a retirement policy to be discriminatory as it allowed the employer to make redundant those employees who had reached the statutory age of entitlement to an early retirement pension.

The employer had made financial losses until it was awarded a federal grant, which was conditional upon reduction of its personnel costs. In Austria, employers must consider the social hardship caused by redundancy measures and terminate only those employees who are least affected by them. The company therefore adopted a general policy allowing it to dismiss those employees who were entitled to early retirement. However, the court held that the company's policy aimed to make the most expensive employees redundant without considering whether younger employees would be in a better position to find alternative employment. Redundancies under the policy were therefore age discriminatory. The court further concluded that the policy failed to achieve a social objective sufficient to justify the age discrimination.

China:

Relaxation of the Rules Concerning Foreign Workers

On January 6, 2017, the Ministry of Human Resources and Social Security, together with the Ministry of Foreign Affairs and the Ministry of Education issued a joint notice allowing each Chinese province a quota to hire a specified number of newly minted foreign national college and university graduates. This represents a departure from the position taken in the regulations governing the employment of foreigners, which only allowed the hiring of foreign nationals if the position could not be filled by local talent. In fact, the authorities have tended to enforce these regulations very strictly in the past, with some officials asking for evidence that a foreign national was being hired for a senior position as a condition for granting a work permit and visa. How this change will affect attitudes to the hiring of foreign nationals remains to be seen.

France:

The New "Right to Disconnect"

On January 1, 2017, a new law entered into force requiring French companies with more than 50 employees to negotiate with their employees their right to switch off and/or reduce the intrusion of work into their private lives. Suggested measures include setting a cut-off time in the evening after which employees will not be expected to reply to emails, or cutting email connections for those who are on holiday. Where agreement cannot be reached, companies must publish a charter setting out the demands on, and rights of, employees out-of-hours. It is

hoped that the new law will tackle the so-called “always-on” work culture caused by the rise in smart phones and help to reduce stress among the workforce.

Italy:

Employers Allowed to Offer Lower-level Roles as an Alternative to Dismissal

The Italian Supreme Court recently ruled that, where employers plan to dismiss employees for economic reasons, they must first offer those employees any other available roles within the company. Notably, the court confirmed that those alternative roles can be of a lower level to that held by affected employees.

The ruling affirms the precedent set by an earlier case that the maintenance of the employment relationship must be prioritised over other employment protections, such as the safeguarding of employees’ professional development.

United Arab Emirates:

Promoting Women in the Workplace

On August 6, 2016, the Gender Balance Council was formed in the UAE and tasked with reviewing and revising the maternity provisions in the UAE Labour Law. Currently, a woman with at least one year’s continuous service is entitled to 45 days’ maternity leave with full pay. A woman with less than one year’s service is entitled to 45 days’ leave at half pay. A nursing mother is entitled to two 30-minute paid breaks each working day in which to nurse the child. However, there are no statutory paternity, adoption, or surrogacy rights under the Labour Law.

Although deadlines for implementing any proposed changes have yet to be set, the council’s intention is to increase the number of working mothers, to narrow the gender gap and to increase diversity in the work place. Recent measures introduced at the local government level may provide some guidance for the council’s initiative. Over the last few months, new laws have been implemented to increase paid maternity leave for Abu Dhabi and Dubai government employees from 45 days to three months. The new policies also extend the nursing break period to a total of two hours per day for the year following the birth of the child.

United Kingdom:

An Employment Tribunal Rules That Uber Drivers Are Workers

In a test case involving two drivers backed by the GMB Union, a London employment tribunal has ruled that Uber drivers are “workers” (as defined in the UK Employment Rights Act 1996) who, unlike the self-employed, are entitled to the national minimum wage, holiday pay, and whistleblower protection.

Uber argued that its business merely provides a technology platform that connects drivers with customers through the company’s app; its drivers are self-employed since they can choose when to log onto the app and accept rides. The tribunal disagreed and ruled that the drivers undertake to work personally under a contract for Uber when: (i) the app is switched on; (ii) they are within the working territory in which they are licensed to use the app; and (iii) they are willing and able to accept rides. Uber intends to appeal the decision.

In another recent case with similarities to the Uber ruling, a tribunal found that a CitySprint bicycle courier was a "worker" when she was logged into the company's system.

The above cases illustrate the skepticism with which labour courts will approach claims by "gig economy" businesses that they act only as independent intermediaries linking supply and demand via technology platforms, and not as employers.

Court of Appeal Confirms That Holiday Pay Includes Commission

The EU Working Time Directive ("Directive"), implemented in the UK through the Working Time Regulations 1998 ("WTR"), requires employers to provide 20 days' paid holiday to all full-time workers.

British Gas Trading Ltd v Lock concerned an employee who earned commission in addition to basic pay. When he went on holiday, the company awarded him his basic pay, but did not compensate him for the lost opportunity to earn commission during that period. He argued that his holiday pay should have been calculated to include a commission element to reflect his normal remuneration.

Decisions of the European Court of Justice confirm that holiday pay should be awarded at a rate reflecting normal remuneration. However, under the WTR, holiday pay is calculated by reference to one week's basic pay, excluding commission. To interpret the WTR compatibly with the Directive, the UK Court of Appeal held that a worker with normal working hours whose remuneration included commission would be considered to have remuneration which varied depending on the amount of work done. For such workers, the court found it necessary to calculate their holiday pay by taking the average of their remuneration, including commission, over a 12-week period. Having departed from a natural reading of the WTR, the court reasoned that it must be presumed that Parliament's intention was to fulfill the obligations of the Directive.

Simplification of the Tax Treatment of Termination Payments

Following a consultation published in August 2016, the government has confirmed that, with effect from April 6, 2018:

- all payments in lieu of notice ("PILONs") will be fully subject to tax and National Insurance Contributions ("NICs"), regardless of whether they are contractual or not;
- PILONs will not benefit from the £30,000 tax exemption;
- any amount of a termination payment in excess of the £30,000 tax exemption will be subject to income tax and employer's NICs; and
- the existing exemption with regard to *employee's* NICs will remain, even where the termination payment exceeds £30,000.

The government has scrapped its bid to charge income tax on any commission or bonuses that an employee might have expected to receive if they had worked their notice period. Employers can nevertheless expect an increased NIC cost in providing termination packages that include PILONs or that are in excess of £30,000.

United States:

Federal Court Grants Injunction Blocking New Overtime Rule

On November 22, 2016, a Texas federal judge granted a nationwide injunction in a lawsuit filed by 21 states seeking to block the U.S. Department of Labor ("DOL") from implementing its new overtime rules (the "Rules")—which would have raised the minimum salary threshold for exempt employees under the so-called white collar exemptions from overtime pay under the Fair Labor Standards Act (the "FLSA").

The Rules, which were issued in May 2016, would require employers to pay employees at least $913 weekly ($47,476 annually) for the overtime exemptions to apply. The Rules also raise the relevant base salary threshold to $134,004 annually and establish automatic adjustments to the minimum salary every three years. The states sued the DOL, arguing that the Rules are unconstitutional because they mandate how state employees are to be paid, in violation of the Tenth Amendment and sought a preliminary injunction to bar the Rules from taking effect on December 1, 2016. In granting the injunction, the court determined that the Rules created a de facto salary test for determining which workers qualify for the exemptions, without regard for whether the employee is performing exempt duties, as required under the text of the FLSA.

Two lawsuits are now proceeding simultaneously:

1. the DOL's expedited appeal to the U.S. Court of Appeals for the Fifth Circuit; and
2. the states' motion for summary judgment before the Texas district court.

However, the Rules—issued under the Obama Administration—now face an uncertain future. Under the Trump Administration, the DOL may drop its opposition to the states' lawsuit or withdraw the Rules.

Texas Judge Blocks Implementation of the DOL Persuader Rule

On November 16, 2016, a federal district judge in Texas permanently blocked enforcement of the so-called persuader rule, a DOL regulation that would have required attorneys and consultants to publicly disclose advice related to union opposition efforts. The rule would have imposed on employers and their advisors (including lawyers) an obligation to file public reports with the DOL disclosing any advice or services directed at persuading employees regarding union organizing or collective bargaining. The court concluded that the rule exceeded the agency's authority by effectively eliminating an exemption to statutory reporting requirements for matters subject to attorney-client privilege.

The DOL has appealed to the Fifth Circuit Court of Appeals, but the new administration could choose not to pursue the appeal.

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