

International Employment Law Update

February 2019

International Employment

United Kingdom

Government Consults on Mandatory Ethnicity Pay Gap Reporting

On October 11, 2018, the UK Government launched a [consultation](#) on ethnicity pay reporting. The consultation, which closed on January 11, 2019, sets out a commitment to tackle inequality of opportunity for ethnic minorities in the workplace. In the One Year On Review of the Baroness McGregor-Smith 2017 report, it was observed that only 11% of employers surveyed were collecting data on ethnicity pay. The government feels that it is time to move to mandatory ethnicity pay reporting.

The consultation addresses a number of issues, including:

- What ethnicity pay information should be reported and by which employers.
- What contextual information should be reported or available.
- Whether employers that identify disparities should be required to publish an action plan for addressing the disparities.
- How to collect, analyze and report ethnicity pay information.
- How to improve ethnicity self-reporting and declaration rates by individuals.
- Whether a standardized approach to classifications of ethnicity should be used.
- How to preserve confidentiality when undertaking the pay reporting exercise.
- What support measures would be useful for employers.

Executive Pay Gap Reporting

In furtherance of the UK Government's reform of UK corporate governance practices, a set of [new reporting obligations](#) were published in June 2018. [The Companies \(Miscellaneous Reporting\) Regulations 2018](#) will apply in relation to the financial years of companies beginning on or after January 1, 2019. They require large companies with more than 250 employees and which (following the definition of 'quoted companies' in the Companies Act 2006) are quoted on the UK Official List, the New York Stock Exchange, NASDAQ or a recognized stock exchange in the European Economic Area, to reveal the ratio of chief executive pay to the salaries of employees in the lower, middle and upper quartiles of remuneration. Directors will also have to prepare reports setting out the effect of share price movements on executive pay, as well as how employees have been engaged with in order to take account of their interests when decisions have been made about the company.

In July 2018 the Financial Reporting Council also published a new [Corporate Governance Code](#), which includes a section on remuneration and ties in with the themes of the new regulations.

United States of America

Rulings Question the Enforceability of Employee Non-Solicitation Covenants in California

Two recent cases in California have called into question the validity of employee non-solicitation covenants. In November 2018, a California Court of Appeal decided *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, 28 Cal.App.5th 923 (2018). Healthcare company AMN provided travel nurses on a temporary basis to medical facilities. AMN required its employee-recruiters to sign a confidentiality agreement that prevented them for one year following employment from soliciting any AMN employees, including the travel nurses. When AMN attempted to enforce the non-solicitation provision against several recruiters who jumped ship to another healthcare staffing company, the recruiters and their new employer claimed that the non-solicitation provision operated as an unlawful non-compete by restraining the recruiters from engaging in their profession, i.e. recruiting travel nurses. Disagreeing with precedent, the AMN court found that non-solicitation agreements operate as an unlawful restraint on trade in violation of section 16600 of the California Business & Professions Code, even though such agreements do not entirely prevent employees from moving to a competing employer. The court pointed out that section 16600 expressly bans “restraints” on trade rather than “prohibitions” on trade. In January 2019, a federal district court in California ruled in *Barker v. Insight Global, LLC*, 2019 WL 176260 (N.D. Cal. Jan. 11, 2019), that it was “convinced by the reasoning in *AMN*” that California law is properly interpreted to invalidate employee non-solicitation provisions.

These developments only underscore the difficulty of enforcing employee non-solicitation provisions in California.

Federal Court Strikes Down Affordable Care Act But it Remains in Effect for Now

On December 14, 2018, a Texas federal district judge surprised many by holding in *Texas v. United States* that the Affordable Care Act (“ACA”) is invalid. Two weeks later, the same judge stayed his ruling, allowing the law to remain in effect pending appeal.

The ACA requires individuals to maintain health insurance or pay an additional tax referred to as a “shared responsibility payment” — the so-called individual mandate. In 2012, the U.S. Supreme Court upheld the ACA in *NFIB v. Sebelius*. In the final weeks of 2017, the Tax Cuts and Jobs Act (“TCJA”) was passed, and reduced the shared responsibility payment to zero.

Then, in early 2018, Republican state attorneys general and governors from 20 states filed a new challenge to the ACA (the Texas case), arguing that elimination of the shared responsibility payment removed the constitutional justification for the individual mandate and, by extension, the ACA.

The federal district judge sided with the plaintiffs, concluding that the individual mandate was inseparable from the rest of the ACA and that the entire ACA was therefore invalid. However, on December 30, 2018, the judge granted a request made by attorneys general from 16 States to stay the order pending appeal, citing the “great uncertainty” that would be experienced by “everyday Americans” if his initial decision were to be made immediately effective. The case will

likely be eventually appealed to the U.S. Supreme Court — a process that could take several years.

France

Stronger Legislation to Tackle Sexual Harassment and Pay Inequity in the Workplace

A new French law, published in the official journal in early September 2018, “*For the Freedom to Choose One’s Professional Future*”, shows a tougher line being taken on sexual harassment in the workplace. Employers with 250 or more employees must appoint a person to whom employees can go for guidance and support in relation to sexual harassment issues. Employers must also inform their employees about laws regarding sexual harassment, and undertake effective investigations when incidents arise.

In addition, the new law introduces new gender pay gap reporting for employers with more than 50 employees, as well as penalties for non-compliance. A points scoring system based on four or five criteria will be used. Not reporting as required, or not complying with the requirements to close any gaps identified, can result in a penalty of up to 1% of total payroll. The reporting obligation will begin for companies with over 1,000 employees on March 1, 2019, for those with over 250 employees on September 1, 2019, and for those with between 50 and 250 employees on March 1, 2020.

Germany

New Law on Temporary Part-Time Work

New so-called “bridge part-time” laws came into force on January 1, 2019 and allow employees to apply for a reduction of their working time, for a minimum of one year and a maximum of five years, following which they are entitled to resume full-time work. This entitlement applies to establishments with at least 45 employees, and to employees with a minimum term of employment of six months. Employers are entitled to decline applications if bridge part-time is not possible for operational reasons or if certain quotas of bridge part-timers are reached.

Provisions of the Part-Time and Fixed Term Contracts Act (*Teilzeit- und Befristungsgesetz*) so far only provide for an entitlement to work part-time on the basis of a permanent reduction of the employees’ working time, with only very limited opportunity to return to full time work. The new law provides greater flexibility to employees that do not wish to remain employed part-time on a long-term basis. However, employees already working part-time are outside the scope of the Act.

Employers are well-advised to respond expediently to applications for bridge part-time: if an employer intends to decline an application, the response must be in writing and the employer’s decision has to reach the employee one month before the envisaged part-time work, at the latest. If the employee does not receive a response in good time, the working time is reduced within the scope of the application, by virtue of statutory law.

Russia

Retirement Age Changes

As of January 1, 2019 the retirement age in Russia will increase by one year every year until it reaches 65 for men and 60 for women. Men who are 60 or over and have worked for 42 years, and women who are 55 or over and have worked for 37 years, are entitled to retire two years prior to reaching the standard retirement age. There are some further categories of people who are also entitled to retire early under the new law.

Tax for the Self-employed

As of January 1, 2019 a new system of taxation on “self-employed” individuals (i.e. without an employer and who do not have employees) is being trialled in Moscow, Moscow Region, Kaluga Region and Tatarstan. The Federal Tax Service is concerned with the unlawful re-hiring of individuals as self-employed in order to assist with taxes and social contributions; and, employers found to be doing so will be held liable for additional taxes and fees.

China

China Launches Various Measures to Assist Hong Kong, Macau and Taiwan Residents Working on the Mainland

On August 23, 2018, the People’s Republic of China (“PRC”) Ministry of Human Resources and Social Security (“MOHRSS”) issued a [Notice](#) confirming that:

- From July 28, 2018, Hong Kong, Macau and Taiwan residents working on the mainland are no longer required to apply for a work permit, and no further applications for such permits would be accepted from August 23, 2018 onwards.
- Hong Kong, Macau and Taiwan residents working on the mainland may use their local resident permit, Hong Kong (or Macau) Home-Return permit, or Taiwan-Mainland Travel Pass to conduct social insurance registration; and, they may use their employer’s business license, their own employment contract and payroll voucher (or social insurance contribution records), to prove their legitimate working status on the mainland.
- Work permits for Hong Kong, Macau and Taiwan residents were valid up to December 31, 2018, and will no longer be used after that date.

In addition, the PRC State Council introduced regulations to allow Hong Kong, Macau and Taiwan residents to apply for a five-year residence permit on the mainland if they have stayed on the mainland for more than six months, and have a stable job, domicile or school. Permit holders will enjoy the same mandatory education, public employment, hygiene, cultural and sport services, legal aid, and other public fundamental services as mainland citizens.

MOHRSS also invited public comments (until November 25, 2018) on [draft measures](#) whereby both the PRC employer and the Hong Kong, Macau or Taiwan originating employee are obligated to contribute to five types of social insurance on the mainland (i.e., pension insurance, medical insurance, work injury insurance, unemployment insurance, and maternity insurance). However, if the Hong Kong, Macau or Taiwan resident is also contributing to social insurance in their home region, the employer and employee may be exempted from contributing to pension and unemployment insurance on the mainland, as long as supporting documents are provided.

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Lastly, MOHRSS issued a [Notice](#) on July 4, 2018, requiring local MOHRSS to provide human resources policy consultations, job introductions, and other services to Hong Kong, Macau and Taiwan residents working on the mainland. Local MOHRSS are also required to upgrade public employment service platforms and social insurance databases.

The above measures symbolize China's attitude to creating an equal employment environment between mainland citizens and Hong Kong, Macau and Taiwan residents, which will also facilitate easier talent flow.

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

Christopher Walter

+44 20 7067 2061

cwalter@cov.com

Chris Bracebridge

+44 20 7067 2063

cbracebridge@cov.com

Lindsay Burke

+1 202 662 5859

lburke@cov.com

Carolyn Rashby

+1 415 591 7095

crashby@cov.com

Walter Born

+49 69 768063 382

wborn@cov.com

Susanne Lüddecke

+49 69 7680 63 25

slueddecke@cov.com