COVINGTON

International Employment Law Update

August 2019

International Employment

European Union

European Court of Justice ("ECJ") confirms employer obligation to record working hours

The ECJ ruled on 14 May 2019 (C-55/18) that Member States must take measures to ensure that employers comply with the minimum rest periods and prevent workers from working in excess of the weekly maximum working hours, including introducing an "objective, reliable and accessible system" to measure daily working time.

It is still unclear when, whether and in what form various national legislators will implement the ruling. In the absence of concrete requirements from the ECJ, Member States have a certain amount of leeway when designing the required system and many, of course, already require employers to record working time.

In Germany, for example, recording obligations already exist for overtime. However, the ECJ decision may mean that some German employers need to establish more formal systems in order to record what is currently "trust-based" recording of working time. German works councils are already entitled to be informed about the beginning and end of the working day. On the basis of this decision, works councils are likely to have a right to propose new measures to employers (a "right of initiative") for the introduction of future working time recording systems and, if an employer intends to introduce and use digital time recording systems, works councils may also have a co-determination right. We expect that the German legislator will take certain legislative action in order to clarify employer obligations.

France

Capping of damages for abusive termination

The French Supreme Court has recently validated "Macron's ordinances" containing a schedule of damages in labour disputes.

In a move to make French labour-law more employer-friendly, President Macron introduced regulations to cap damages awarded by French courts in labour disputes (with effect from September 2017). Under those regulations, labour courts are required to award damages for unfair dismissal within certain limitations (except in certain disputes affecting certain fundamental rights, such as discrimination). Awards vary depending on the size of an employer's workforce and the employee's length of service. This new approach effectively

reduced possible awards of damages to a minimum award of around 3 months' gross salary and a maximum of 20 months' gross salary.

Since their introduction, certain labour courts have refused to apply the new damages provisions, arguing for example, that the schedule breached France's commitments under International Labour Organisation and other international conventions. (The ILO Convention number 158 requires, for example that judges must be able to order payment of adequate compensation or other appropriate relief.) Following a referral by the Louviers labour courts, in an opinion handed down on 17 July 2019, the Supreme Court has confirmed that the damages provisions are valid and compatible with France's international commitments.

Greece

Data Protection Authority fines company €150,000 for GDPR breaches relating to processing of employee data

The Greek Data Protection Authority has fined PwC $150,000 for breach of the General Data Protection Regulation ("GDPR"), in particular for relying on consent as its legal basis for the processing of employee personal data (Decision No 26/2019).

The GDPR tightened rules on consent and employers are unlikely to be able to rely generally on consent as a legitimate basis for processing employee data. Relying upon a data subject's consent to processing personal data in the context of an employment relationship is problematic, as the recitals to the GDPR state that consent should not provide a valid legal ground where there is a clear imbalance between the data subject and the controller. European regulators have expressed concerns previously that, due to an imbalance of power between the employer and employee, an employee's consent may not be "freely given" as is required by the GDPR.

The Greek DPA decision confirms that consent of data subjects in the context of employment relationships will rarely be regarded as freely given due to the clear power imbalance between employers and employees. Employers are reminded to consider other lawful grounds for processing personal data under the GDPR, including: (i) for the performance of employment contracts; and (ii) compliance with legal obligations.

South Korea

Employer obligations designed to prevent workplace bullying and harassment

The South Korean National Assembly has passed legislation (in force since 29 May 2019) designed to address workplace bullying and harassment. Most employers (with ten or more employees) are required to address workplace bullying and harassment in their Work Rules. The new rules also require employers to investigate all allegations of bullying and harassment and protect victims through measures such as paid leave. Demotion or dismissal of workers who have alleged harassment in the workplace is now a criminal offence.

Penalties for non-compliance include:

- Imprisonment of up to three years or a fine of up to approximately $28,500 for retaliation against an employee for reporting workplace bullying and harassment; and
- Corrective orders (or fines) from the Ministry of Employment and Labor for failure to comply with the requirements to address relevant issues in their Work Rules.

Spain

Equal treatment reforms

Royal Decree Law 6/2019 (largely in force since March 2019), introduced significant reform including:

- Equality plans: Relevant companies must prepare, negotiate and register equality plans with the new Companies' Equality Plan Registry. The plans should include measures aimed at removing obstacles hindering equality in certain areas, including in employee selection, recruitment and promotion processes and remuneration. Previous obligations applied only to companies with over 250 employees. Implementation dates for the new provisions are staggered depending on employee headcount. By March 2022, all companies with more than 50 employees will be required to comply. Companies that fail to meet their obligations may be fined up to around €6,250.
- Equal remuneration and transparency: A new provision establishes the right for employees to claim remuneration for "work of equal value" in the event of salary discrimination. Companies must keep an internal salary registry detailing certain information, including average salary values (disaggregated by gender) and including explanations where the average remuneration of employees of either gender is higher than that of the other gender by 25% or more.
- Right to request adjustment of working hours: employees may request adjustments (that are reasonable and proportionate to their needs) to the length, distribution of their working hours and form of work (e.g. remote work).

United Arab Emirates

An overhaul of DIFC employment regulations

New employment regulations come into force in the Dubai International Finance Centre ("DIFC") on 28 August 2019. Changes include new regimes relating to working arrangements (e.g. part-time and secondment arrangements), changes to employee leave entitlements, strengthening of employee termination protections and expansions of anti-discrimination provisions.

For a more detailed review of these changes, please see our alert here.

United Kingdom

Use of confidentiality clauses in NDAs and settlement agreements

The Women and Equalities Committee recently consulted on and published a report addressing concerns around the use of NDAs to cover up allegations of unlawful discrimination and

harassment in the workplace. The government has announced plans for new legislation that will prohibit Non-Disclosure Agreements (NDAs) and confidentiality clauses in employment contracts from being used to prevent individuals disclosing information regarding allegations of unlawful discrimination to certain third parties. The legislation is also expected to:

- require that employers make clear the limitations of a confidentiality clause in plain English (in both the settlement agreement and in a written employee statement), so that individuals fully understand what they are signing;
- extend requirements that individuals get independent legal advice before signing NDAs to expressly include advice on any confidentiality clause; and
- introduce enforcement measures dealing with non-compliant clauses (e.g. legally voiding settlement agreements that do not meet the requirements).

The government has not yet provided an implementation date for this new legislation.

Revised tax rules for companies engaging intermediaries

Extending obligations currently only applicable to public sector organisations, from 6 April 2020, large and medium-sized private sector organisations will be required to determine the employment status of certain contractors. Contractors who supply their services via their own personal service company or partnership ("intermediary") are currently responsible for self-assessing their "IR35" status.

In broad terms, IR35 applies where an individual personally provides services to a client (the "end-user") and, ignoring the existence of the intermediary, the individual would be an employee or office-holder of the business. IR35 also applies where the individual is an office-holder and the services he provides through the intermediary relate to that office.

The new rules will shift the current burden to assess employment status from the contractor to the end-user client. Where IR35 applies, organisations will be responsible for accounting for and paying the related tax and national insurance contributions to HMRC (effectively operating PAYE in the same way as for other employees).

Even before the government reveals the final form of the legislation, there are certain steps that companies should take now, including determining what intermediary engagements it has in place. For further details of this new regime, please see our alert here.

United States of America

New York strengthens law on sexual harassment

On 19 June 2019, New York state passed a bill aimed at ensuring that employers take a robust approach to addressing workplace sexual harassment. Among other changes, the Bill:

- alters a previously very high evidentiary threshold for claimants (that workplace harassment was "so severe or pervasive" as to alter the conditions of employment and create an abusive working environment), requiring only that an individual be subjected to "inferior terms… of employment" because of their membership in a protected category;

- prohibits employers from including non-disclosure provisions in settlement agreements for all claims of discrimination (not just sexual harassment claims). An exception allows for inclusion if: (i) the condition of confidentiality is the complainant's preference; and (ii) certain procedural safeguards apply (e.g. that any such terms are provided to all parties in writing in plain English and, if applicable, the primary language of the complainant).

The Bill is expected to be signed by Governor Cuomo in the near future.

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