COVINGTON

International Employment Law Update

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International Employment

This International Employment Update summarises recent international employment law developments in the European Union, Germany, Spain, the United Arab Emirates, the United Kingdom and the United States.

European Union

European Court of Justice ("ECJ"): redundancy process selection criteria may indirectly discriminate against disabled employees

The decision of the ECJ in *DW v Nobel Plastiques Ibérica SA* (C-397/18, 11 September 2019) serves as a reminder of the importance of applying fair selection criteria when making redundancies in the context of the pandemic.

The ECJ ruled that elements of a selection matrix used by an employer in the redundancy process may be indirectly discriminatory in the context of the Equality Directive, where a criterion is particularly disadvantageous to an employee by virtue of their disability.

In this case, the criterion of "absenteeism" was found to indirectly discriminate against an employee whose specific disability resulted in long periods of absence. The ECJ held that selection criteria that are otherwise neutral could be deemed indirectly discriminatory where they have the effect of disadvantaging a disabled employee within the redundancy process. However, where an employer has made reasonable accommodation for the employee's disability, the disadvantage may be negated.

Employers should proceed with caution when choosing selection criteria, particularly in the current climate, to avoid instances of indirect discrimination in redundancy processes.

EU Whistleblower Directive

On 16 April 2019, the European Parliament adopted the "Directive on the protection of persons reporting infringements of Union law", which was formally adopted by the Council of the EU on 23 October 2019 and published in the Official Journal on 26 November 2019. Member States have two years to transpose the provisions of the Directive into national law.

The Directive provides for the first time a uniform legal framework for the protection of whistleblowers throughout the EU. The aim of the Directive is to strengthen the protection of persons who report infringements of EU law internally or externally. In concrete terms, the Directive includes the obligation to introduce uniform minimum standards to protect whistleblowers from retaliation when reporting violations of EU law.

The Directive protects employees (both current and former), civil servants, self-employed persons, board members of legal entities, shareholders, applicants, trainees, subcontractors,

volunteers, suppliers and temporary workers. The Directive further extends to relatives and other third parties who are in contact with the whistleblower and could suffer professional reprisals as a result of a whistleblower's report, such as a spouse.

Under the Directive, whistleblowers are protected against suspension, dismissal, downgrading or refusal of promotion, as well as non-renewal of a temporary employment contract, provided that these measures are due to the whistleblower's disclosure. In order to make the protection of whistleblowers effective, the Directive provides for a reversal of the burden of proof in favour of the whistleblower.

Implications of the Directive will vary between Member States, depending on the protections already in place in each jurisdiction.

For example, under existing **German** law, whistleblowers only benefit from indirect protection under certain legal regulations, such as the general prohibition of detrimental measures against an employee in § 612a of the German Civil Code for actions taken by the employee in accordance with the law. As a result, whistleblowers are afforded limited protection since they have to prove that a disadvantage is causally related to the fact that they have exercised their legal rights, such as reporting a violation of the law to the employer.

Once in force in Germany, the Directive will result in extensive protection for whistleblowers there. A whistleblower will no longer have to prove that an action under labour law was taken as a result of the whistleblowing, as is currently the case under German law. In addition, companies that have not yet established an internal reporting system will be under a proactive duty to set one up. Any existing reporting systems will need to be reviewed to ensure conformity with the Directive. Works councils have a right of co-determination in relation to the introduction of internal reporting systems and must therefore be involved in the introduction of any system.

By contrast, due to the impact of Brexit, the Directive will have less impact in the **United Kingdom ("UK")**. Having abstained from the Council's vote on implementation of the Whistleblower Directive, the UK confirmed in its letter to the European Scrutiny Committee (4 October 2019) that it does not intend to transpose the Directive into national law in light of its departure from the EU. The UK's current legislation in place for the protection of whistleblowers (namely, the Public Interest Disclosure Act 1998) has already been recognised by the EU as being comprehensive. However, the Directive may still be relevant to UK companies with operations in the EU and the Directive may also be regarded as best practice.

United Arab Emirates

New paid parental leave rights implemented in the United Arab Emirates ("UAE")

Employees of businesses in the UAE are now entitled to five paid working days of parental leave, following the implementation of Federal Decree Law. No (6) of 2020. The decree amends the current leave provisions of Labour Law no. 8 of 1980 and allows leave to be taken within the first six months following birth. Crucially, this change operates to introduce paternity leave.

The decree is part of an ongoing drive towards parity between the public and private sector in the UAE. The change applies to the private sector onshore and Free Zones other than the Dubai International Financial Centre and Abu Dhabi Global Market Free Zones, which both introduced paternity entitlements into their applicable employment laws/regulations previously.

United Kingdom

Finance Act 2020 expands application of IR35 rules

Obligations on large and medium businesses to determine a contractor's employment status from April 2021 have widened in scope since the UK's IR35 rules mandating this determination were set out in their final form in the Finance Act 2020, which received royal assent on 22 July 2020. For background on this topic, our previous alert is available here: https://www.cov.com/en/news-and-insights/insights/2020/03/organisations-engaging-contractors-in-the-uk-to-prepare-for-the-new-off-payroll-working-legislation.

Whilst the draft legislation would have required end user businesses to consider IR35's application only where the company through which a contractor supplied its labour was a personal services company ("PSC") (i.e. where the contractor holds more than five per cent of the ordinary share capital of the company), the definition of a 'company intermediary' has now been significantly extended. A 'company intermediary' will now include any company from which the contractor has received, or has the right to receive, a payment which can reasonably be taken to be a reward for the contractor's services to the end user.

The change will operate to prevent schemes designed to avoid the reach of the IR35 rules via removal of PSCs from their supply chains, instead increasing the responsibility of end user businesses to review the employment status of supplied contractors. Businesses should now review previous structures in the light of IR35's wider scope.

Employment Appeal Tribunal's ("EAT") constructive dismissal decision emphasises importance of proper redundancy procedure

The EAT's finding of constructive dismissal following an employee's resignation during a business restructuring serves as a reminder to employers to follow fair and reasonable processes, even when purporting to offer a comparable job as an alternative to redundancy.

In *Argos Ltd v Kuldo (UKEAT/0225/19/BA)*, an employee resigned following her employer's attempt to 'map' her into a new role, on the same terms and conditions, without proper consultation. Although the difference between her former and newly-offered job was found to be less than 30 per cent based on the employer's mapping metric, the employee considered the new role to be of lower status and distinguishable in job content.

The EAT accepted the Employment Tribunal's finding that a sufficiently serious repudiatory breach of implied trust and confidence had occurred as a result of: the employer's failure to consult the employee; an absence of proper assessment between the employee's former and proposed role; and its failure to adequately deal with the employee's appeal. Although the EAT sent the case back to the Employment Tribunal to assess the issue of fairness, this case reinforces the importance of following a fair redundancy procedure, even where an employer offers to the employee a comparable job on the same terms.

Spain

Gender equality reform deadlines approach

As the second phase of Royal Decree-Law 6/2019 (1 March, 2019) approaches, companies in Spain with more than 100 and up to 150 workers must prepare and implement a gender equality plan by March 2021.

The requirement is the second of three distinct phases in Spain's workplace gender equality plan, the first of which took place in March 2020. Whilst Phase 1 imposed the obligation on companies with more than 150 and up to 250 workers, Phase 2 continues the Decree's gradual implementation by requiring companies with 101-150 workers to implement and register their gender equality plan. Spain's initiative will culminate in the smallest companies (those with 51-100 workers) having to prepare and implement gender equality plans by March 2022. The objective of these measures is in furtherance of Spain's wider goal to increase equality of opportunity between genders, and the incremental implementation of the Decree affords more time to smaller companies to formulate their plans.

Failure to meet these deadlines will constitute a "serious infringement" of the Labour Infringement and Penalties Law (August 2000). Non-compliant companies may be faced with fines.

The plans must be negotiated, finalised and registered with the Companies' Equality Plan Registry. The content of equality plans must cover, as a minimum:

- Hiring processes;
- Professional classification;
- Training;
- Promotions;
- Working conditions, including wage auditing between women and men;
- Co-responsible exercise of personal, family and working life rights;
- Under-representation of women;
- Remuneration; and
- Prevention of sexual and gender-based harassment.

Although understandably the focus of Spanish companies will have shifted as a result of COVID-19, it is imperative that companies ensure these deadlines are met when planning ahead.

United States ("U.S.")

United States Department of Labor ("DOL") revises Families First Coronavirus Response Act ("FFCRA") in response to court ruling

In response to a 3 August 2020 U.S. District Court for the Southern District of New York ("SDNY") decision that vacated various FFCRA requirements, the DOL has issued emergency regulations amending provisions of the FFCRA. The revised regulations became effective on 16 September 2020 and will expire on 31 December 2020 in line with the expiration of the FFCRA.

The FFCRA, which became effective on 1 April 2020, comprises two programmes that require certain employers to grant their employees paid sick leave or expanded family and medical leave under specified circumstances. The Emergency Paid Sick Leave Act ("EPSLA") requires private sector employers with fewer than 500 employees and public agencies to provide employees with 80 hours (two weeks) of paid sick leave (up to a maximum of $511 per day). The Emergency Family and Medical Leave Expansion Act ("EFMLEA") requires private sector employers with fewer than 500 employees and public-sector employers to provide up to 12 weeks of job-protected leave for circumstances where an employee is unable to work or telework due to a need to care for their minor child if their school or place of care has been

closed, or the child's care provider is unavailable as a result of a COVID-19 public health emergency.

In the regulations, the DOL has sought to address ambiguities surrounding EPSLA and EFMLEA leave highlighted by the SDNY decision. The regulations clarify, for example, that employers must have work available for the employee to perform to be eligible under FFCRA.

Employer approval is not required for an employee to take FFCRA intermittent leave to care for children whose schools operate on an alternate day basis, and the required documentation about qualifying reason for leave under EPSLA and EFMLEA should be provided to the employer "as soon as practicable", which need not be in advance.

FFCRA leave is set to expire at the end of the year, but companies should pay close attention to existing and new state and local COVID-19 sick leave requirements that may be effective in 2021. For example, New York State's sick leave law is expected to expire at the end of the pandemic, which means it will almost certainly be applicable in 2021. Importantly, unlike FFCRA, New York State's sick leave law applies to employers of any size. Companies should also monitor applicable state and local COVID-19 paid sick leave laws that are set to expire at the end of the year - including in California, Colorado, Los Angeles County, and Philadelphia - because those laws may be extended or otherwise revised.

Employer considerations in the workplace post-*Bostock*

Many practical considerations have arisen for employers following the Supreme Court's landmark decision in *Bostock v. Clayton County, Georgia* to extend protections under Title VII of the Civil Rights Act 1964 to discrimination on the grounds of sexual orientation and gender identity. Under Title VII it is unlawful for an employer "to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." The Supreme Court in *Bostock* interpreted the term "sex" to include sexual orientation and gender identity.

Employers may now wish to consider:

- Applicability: At the time the *Bostock* decision was issued, 28 states and numerous municipalities had already enacted workplace anti-discrimination protections related to sexual orientation and/or gender identity. Employers outside those locations who are subject to Title VII should assess whether the *Bostock* decision requires them to make changes to any applicable workplace policies or practices, such as explicitly referencing LGBTQ+ individuals in EEO statements and anti-discrimination/anti-harassment policies. Title VII applies to employers in the U.S. with 15 or more employees.
- Pronouns: While the *Bostock* decision does not address pronoun usage, employers may consider utilising the preferred names and pronouns of their employees if they do not have a policy to this effect already. Any such policies should consider both individuals who would like to change their personal use of binary pronouns and honorifics (e.g., "he", "she", etc.), as well as those who identify as non-binary and use neutral terms, such as "they." Employers should also determine whether they are subject to local laws that impose further protections regarding pronoun use in the workplace.
- Facilities: Although *Bostock* leaves some practical questions unanswered, employers may wish to reference guidance from the federal government, including

the Equal Employment Opportunity Commission and the Occupational Safety and Health Administration, regarding non-discriminatory practices in "sex-segregated" facilities. This guidance sets forth rules and best practices as it relates to allowing employees to choose locker rooms and restrooms in accordance with their gender identities, rather than their birth-assigned gender. Companies may also look to examples from cities that have already implemented their own gender-neutral restroom laws, including: Austin; Berkeley; Denver; Evanston; New York City; Philadelphia; Portland; Santa Fe; Seattle; Washington, D.C. and West Hollywood.

- Dress codes: Employers may also consider implementing gender-neutral dress codes, as well as using terminology specific to articles of clothing themselves (rather than the identity of the wearer), in their professional attire, grooming, or dress code policies. Employers should also consider whether state or local laws impose additional dress-related requirements, such as New York City's Human Rights Law, which specifies that employers may not implement dress codes that impose different requirements based on gender.

Although *Bostock* leaves some questions open-ended, employers should ensure their workplace policies are compliant with the standards set forth in the Supreme Court's decision, as well as all interpreting guidance, including from federal administrative bodies, subsequent Supreme Court or lower court decisions, and applicable state and local laws.

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