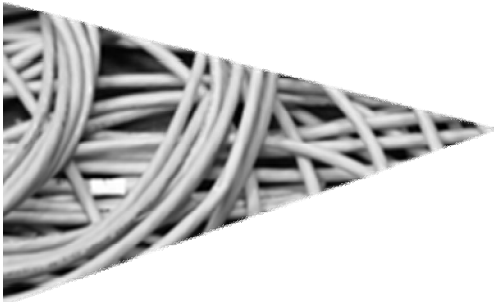


January 2012

Labor and
Employment Law
in EMEIA



Multi-jurisdictional Labor and Employment Law update

International legal developments

This publication is intended to highlight a variety of international labor and employment law matters and also to indicate recent developments in specific countries on a quarterly basis.

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France

The French “days per year” system (*forfait jours*) is upheld in France, subject to certain conditions

France is well known for its 35-hour working week. However, less well known is that managerial employees (*cadres*) and some non-managerial employees (*non cadres*) under certain conditions may work on the basis of a number of days per year instead (usually 218 days per year).

Under French law, employees under the days per year system are entitled to some additional days off, which may range from 0 to 10 days. In addition, the compulsory daily rest (11 hours), as well as the weekly rest (35 hours), needs to be complied with.

However, the law has never restricted the number of hours worked. As a result, the days per year system was challenged by an employee on the grounds that it violated the European Social Charter, as employees could be required to work as many as 45 hours per week.

The employee was hired in 2001 as a managerial employee according to the days per year system (217 days per year) pursuant to the applicable Collective Bargaining Agreement (CBA) of the metallurgical industry.

Following his resignation in 2006, the employee challenged his working time before the French Labor Court, claiming for overtime payments. He claimed that the employer had failed to limit the number of days worked or to control his workload.

A long-awaited decision on the validity of the days per year system was made by the French Supreme Court on 29 June 2011.

The French Supreme Court did not dismiss the validity of the system; however it ruled that the system must be subjected to certain conditions in order to be considered valid.

It ruled that the days per year system must be collectively bargained to ensure compliance with the general principles relating to the protection of health and safety of employees, i.e., to guarantee compliance with maximum working hours restrictions and mandatory provisions on daily and weekly rest.

As a consequence, employers should verify that their days per year system complies with the recent French Supreme Court ruling. Companies must not only ensure that the CBA provisions allow them to have employees working on the basis of a number of days per year, but also that such conditions are complied with from a practical standpoint. Employment contracts should also be reviewed.

If employers do not comply with these conditions, concerned employees might be in a position to challenge the working time duration and seek overtime payment. This decision potentially increases a company's exposure to claims.

It is anticipated that collective bargaining at an industry-wide or a company-wide level will increase in order to reduce this risk.

Increased dividend payments may trigger a mandatory employee bonus payment

A recent law dated 28 July 2011, requires the payment of bonuses to employees where the employer decides to distribute dividends and where the dividend per share, distributed to the shareholders, is higher than the average of the dividends per

share distributed in the two previous fiscal years.

When a company belongs to a group, the amount of dividends that triggers the bonus payment will be the one distributed by the controlling company.

The new rules apply to employers:

- ▶ With 50 employees or more on a mandatory basis
- ▶ With under 50 employees on a voluntary basis
- ▶ Whose share capital is owned at least 50% by the State or its public establishments

The new rules apply to distributions that were decided by the ordinary general meeting of shareholders (the agreement is subject to the procedures applicable to the signing of a profit-sharing agreement) or that were granted at the employer's own will.

The bonus can neither replace any remuneration increase nor bonuses agreed or paid on a voluntary or mandatory basis.

The bonus is exempt from social security contributions if it is not more than €1,200 per employee per year (except the general supplementary social contribution (CSG), the French contribution to the reimbursement of the social security debt (CRDS) and the flat social contribution *forfait social*).

The payment of the bonus must be negotiated through collective bargaining between employer and union representatives at the company or group level. Such a collective bargaining agreement must be concluded within three months of the dividend distribution and before 31 October 2011 for dividend distribution made prior to the publication of the law, i.e., 29 July 2011.

If the parties cannot agree on the bonus modality or amount, the employer may take a unilateral decision, subject to prior information and consultation of the works council.

Failure to start the negotiations would expose employers to criminal sanctions, although the law provides for exemptions.

New French law further restricts the “lending” of employees even if not for profit (*prêt de main d’oeuvre à titre gratuit*)

In France, the lending of employees to another company with the intention or result of making a profit on these services is prohibited except in very limited cases (temporary work agency, etc.).

However, the lending of employees with no gain or profit has been accepted by French case law.

The lending of employees (with no profit purpose) is a common and frequent practice, especially within companies of the same group.

A recent decision of the French Supreme Court dated 18 May 2011, unexpectedly modified this long-standing practice by significantly restricting it.

On 28 July 2011, a new law was passed expressly providing for a definition of “lending with no profit purpose.” According to the new law, the lending of employees has no profit purpose when the “loaning” company only charges the “borrowing” company the paid salary, the related social security contributions and the business expenses relating thereto.

The law also adds new requirements for the validity of the lending of employees with no profit purpose:

- ▶ Prior written consent of the employee concerned and amendment to their employment contract (mentioning the place of work, the working time and the job position); the employee must also be re-instated within the loaning company with the same functions and remuneration at the end of the loan
- ▶ A written agreement between the loaning and the borrowing companies with specific details of the arrangement
- ▶ Information and consultation of employee’s representatives (works council or staff delegates and health and safety committee) of both companies concerned, prior to the implementation of the loan system
- ▶ A probationary period may be contemplated and is mandatory if the lending results in a significant modification of the employee’s terms and conditions of employment

Even though this new legislation secures the common practice of the lending of employees for no profit purpose, companies must comply with the new restrictive conditions to reduce risk, such as criminal sanctions, with respect to the works council information and consultation process.

Reinforcement and reconfirmation that French is the official language in France

In March 2011, the French Supreme Court introduced significant flexibility regarding variable remuneration based on the objectives to be reached by an employee.

It adopted a favorable decision for employers considering that, under certain conditions, an employer may unilaterally modify the objectives determining an employee’s variable remuneration. Earlier case law required an em-

ployee’s written consent for any changes to the remuneration of the employee (even those which are more favorable to him/her).

However, in a recent decision of June 2011, the French Supreme Court decided that any document providing for the objectives to be reached by an employee must be in French; otherwise it is not binding on the employee concerned. In this case, the employee’s remuneration included a fixed part and a variable part, subject to the employee’s individual objectives, which were determined annually.

Following his termination, the employee filed a claim before the French Labor Court claiming that the documents fixing his individual objectives were not binding on him given that they were written in English.

The French Supreme Court recalled that, pursuant to the French Labor Code, “any document including obligations for the employee or provisions, knowledge of which is necessary for the performance of their work, must be written in French.”

As a consequence, it decided that the documents were not enforceable against the employee. It is quite common for multinationals to communicate in English by email or on the intranet with their employee, either for basic information or to provide for enforceable policies within the company or bonus plan.

Employers should, therefore, review employee documentation drafted in English to reduce the risk of non-enforceability.

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Germany

Job advertisement for a managing director position without gender-neutral wording discriminates against women

The decision of the court

On 13 September 2011, the Higher Regional Court in Karlsruhe ruled on the claim of a female candidate who was applying for a managing director position (OLG Karlsruhe, 13.9.2011 – 17 U 99/10). She claimed for compensation for a “discriminatory job advertisement.” Based on the job advertisement, the claimant had applied for the job as a managing director and was not considered by the employer.

For a violation against German and European anti-discrimination law, the court awarded the claimant with a compensation payment equivalent to one month’s gross salary (€13,257).

German anti-discrimination law – applicable also for managing directors

At first view, this decision might be surprising, because the claimant in this case was not an employee. According to German law, a managing director is a representative of the employer but is not considered to be an employee. Nevertheless, the German anti-discrimination regulations are applicable to managing directors as well, especially in the case of hiring.

The case history

In 2007, the company placed a job advertisement with the wording “*Geschäftsführer gesucht*.” In German, the word “*Geschäftsführer*” is the term for a male managing director. The German word for a female managing director is “*Geschäftsführerin*.” It is quite

usual to offer a position with an addendum according to which both genders are invited to apply for the job. So, for example, the correct wording of the advertisement should have been “*Geschäftsführer gesucht (männlich/ weiblich)*,” which is the German wording for “looking for a managing director (male/female).”

After the candidate had applied for the position without success, she took action against the company on the grounds that the advertisement was not gender-neutral. Based on the wording of the advertisement, it would have to be assumed that she was discriminated against based on her gender.

The company countered this argument with the point of view that the wording of a job advertisement cannot be an indication for gender-discrimination. Furthermore, the facts of the application procedure demonstrate that the company did not aim to discriminate against women (only 4 of the 85 candidates were women and the company had invited 13 persons to an interview of whom one was a woman).

The decision

In the reasons for the judgment, the court discussed and dealt in detail with the different legal opinions in Germany about the discriminatory impact of the wording of job advertisements.

According to the court decision, the wording of the advertisement is a violation of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, the AGG), which is the German Transformation Act of different European anti-discrimination directives, e.g., Directive 2000/78/EC. Such a violation can be disproved if the general content of the job advertisement clearly shows that the employer

is looking for candidates without preferring a gender.

However, the disputed job advertisement did not include such indications. Therefore, the court had to assume a violation against German (and European) anti-discrimination law with the consequence that the company had to prove the non-existence of discrimination according to section 22 of the AGG. The fact that the company had invited one female candidate to an interview was not adequate counter evidence.

The court also analyzed whether the application of the claimant was a simulated application (i.e. not a serious application but to test if there was gender discrimination) or whether it was genuine. If the application is simulated, the applicant has no right to compensation. In the decision, the court argued that the claimant was well qualified for the job as managing director of the defendant company. Furthermore, in the opinion of the court, the claimant had a real interest to become managing director of the defendant company, so her application was considered to be genuine.

Finally, the Higher Regional Court had to decide about the amount of compensation. The compensation for discrimination has to be “adequate” according to section 15 paragraph 2 of the AGG. The court needs to consider the qualification of the applicant, the seriousness of the application of the candidate, the gravity of the violation against the anti-discrimination law and the deterrent effect of the compensation.

The court decided that the violation against the AGG was serious. The crucial issue was deciding the amount of compensation that would have a deterrent effect. The claimant had applied for compensation of approximately €25,000. Because

the monthly gross salary for the position of the managing director was €13,257, the court assumed that compensation amounting to one monthly gross salary was adequate.

What is the result?

On the one hand, the claimant received half of the amount she had originally requested; however, on the other hand, this compensation is one of the highest that German courts have imposed for violations against the anti-discrimination rules of the AGG.

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Greece

Termination of employment

According to article 74 paragraph 2 of Law 3863/2010, the notification period prior to dismissing an employee has been reduced. This especially applies to employees with many years of service. For example, an employee with 20 years of service is subject to 6 months notice under the new law, as opposed to 16 months under the previous law.

If the employer notifies the employee within the timeframe provided by the law, the employee is entitled to only half of the termination indemnity.

For example, an employee who has completed eight years of employment is entitled to a termination indemnity of five months' salary. However, if the employer gives the employee a three-month notice period before the termination of employment, the employer only needs to pay half of the termination indemnity,

i.e., two-and-a-half months' salary.

According to the law, an employee may be on probation for the first year of employment, in which case, their employment might be terminated without receiving a termination indemnity.

New limits on collective redundancies

Law 1387/1983, as amended by article 74 of Law 3863/2010, provides for collective redundancies in enterprises with more than 20 employees. More specifically, the law sets the limits on the number of collective redundancies. The limits are over a period of 30 days and are as follows:

- ▶ Up to 6 employees for companies or businesses employing 20 to 150 employees
- ▶ Five percent of the staff and up to 30 employees for companies or businesses employing more than 150 employees

If this limitation is exceeded, an administrative procedure needs to be followed. The involvement of the Greek authorities adds complexities to the dismissal procedure.

New reduced salary policies for young employees

Article 43 of Law 3986/2011 provides for fixed-term employment for young employees (aged 18 to 25).

- ▶ Employees between the age of 18 and 25 may enter into fixed-term employment agreements (with a maximum duration of 24 months) in order to acquire professional experience. The remuneration may be 20% less than the minimum remuneration provided by the National Collective Labor Agreement.

Article 74 paragraph 8 of Law 3863/2010 provides for employment of new employees.

- ▶ Employers who hire young employees (under 25 years of age and entering the employment market for the first time) may remunerate them at 84% of the basic salary provided by the National Collective Labor Agreement. The National Manpower Organization (OAED) subsidizes the social security contributions that should be paid by the employees, on condition that the employers provide the subsidy to the employees as part of their net salary.

New provision on supersession of the sectoral or professional collective labor agreement

A company's collective labor agreement supersedes the sectoral or professional collective labor agreement.

Under the new law provisions, a body of employees may act on behalf of the whole workforce and execute a company's collective labor agreement.

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Italy

The *Collegato Lavoro* (Law no. 183 of 4 November 2010)

The *Collegato Lavoro* introduced some new provisions in relation to the procedure to follow in case of judicial and extra-judicial labor-related disputes.

Attempt to settle a dispute before filing a lawsuit in front of the Labor Court

The Collegato Lavoro removed the obligation for the parties to attempt to settle a dispute before the Provincial Labor Office (Direzione Provinciale del Lavoro) before filing a lawsuit in front of the Labor Court.

At the moment, the parties may, but are not obliged to, attempt to settle a dispute before the Provincial Labor Office. There is a special procedure that they must comply with or, alternatively, they may immediately file a lawsuit before the Labor Judge.

The settlement attempt before the Provincial Labor Office is still mandatory only in the event the dispute concerns employment contracts that have been certified by the authorities. In this regard, the settlement attempt is still a compulsory requirement and, in the event the parties do not carry it out before filing the lawsuit before the judge, the latter shall dismiss the lawsuit.

Timing and procedure for appeal against unlawful dismissal or fixed-term contracts

Article 32 of the *Collegato Lavoro* provides rules concerning (a) procedures and timing of an individual objection to unlawful dismissal, and (b) criteria for the payment of damages in the event that a fixed-term employment contract becomes an open-term employment contract.

a) The employee must object to the dismissal within 60 days from the receipt of the relevant written communication. After that, the employee, within 270 days from the date of the objection letter, must:

- ▶ File a statement of claims before the labor judge

Or

- ▶ Send to the counterparty (the employer) a request to attempt to settle the dispute before the provincial labor office. In the event the parties do not settle the dispute before such office, or in the event the counterparty (the employer) is not available for the attempt, the statement of claims must be filed before the labor judge within 60 days from the failure of the attempt or from the employer's refusal.

The objection of the dismissal is ineffective if the employee does not comply with the foregoing procedure and timing of such procedure.

The procedure and timing of such procedure are also applicable in case of objection concerning the following matters:

- ▶ Dismissals concerning qualification of the employer-employee relationship
- ▶ Insertion of a term into an employment contract
- ▶ Termination of contracts based on a project (*contratti a progetto*)
- ▶ Transfer of employees
- ▶ Request to make void a term inserted into an employment contract

b) In the event that a fixed-term employment contract becomes an open-term employment contract, the labor judge can order the employer to pay damages to the employee. The total amount of damages ranges from a minimum of 2.5 months' to a maximum of 12 months' salary.

The *Manovra Finanziaria* (Law Decree no. 138 of 13 August 2011, as converted into Law no. 148 of 14 September 2011)

Collective agreement at company or local level

Article 8 of the *Manovra Finanziaria* provides that collective agreements bargained at company or local level with trade unions or works council may contain specific agreements and provisions that:

- ▶ Promote employment and the quality of employment contracts
- ▶ Increase productivity and salaries
- ▶ Manage occupational, employment and company crises
- ▶ Promote investments and new activities

The agreements and provisions may also concern the organization of work and production matters, including:

- ▶ Adoption of audiovisual systems and new technologies
- ▶ Duties and activities of employees and classification and qualification of personnel
- ▶ Fixed-term contracts, part-time contracts, staff supply contracts and provisions concerning joint and several liability of the principal and the contractor in the case of independent or supply contracts
- ▶ Working time matters
- ▶ Procedures of hiring and management of the working relationship, including contracts based on a project (*contratti a progetto*) and self-employed relationships
- ▶ Reassessment of the working relationships and consequences in case of dismissal, except for discriminatory dismissal and dismissal of engaged women and working mothers

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The Netherlands

The Management and Supervision Act

On 31 May 2011, the upper house of the Dutch parliament passed the Management and Supervision Act relating to public limited liability companies and private limited liability companies. The new Act will come into force on 1 January 2012.

This Act enables the companies to choose between:

- ▶ A two-tier board model, with a board of directors and a separate board of supervisory directors
- ▶ A one-tier board model, where the single board is made up of executive and non-executive directors. Within this model, the supervisory role is fulfilled by the non-executive directors

The Act also provides that the legal relationship between the director and a public limited liability company that is listed on the stock exchange may no longer be regarded under civil law as an employment contract. It is expected that the listed company and the director will conclude a "contract for services." The fact that the director can no longer be regarded as an employee means that the director cannot derive any rights from the legal protection given to employees by Dutch employment law.

Listed companies must therefore take account of the fact that, from 1 January 2012, they will no longer be able to conclude employment contracts with directors.

Amendment to the holiday legislation

On 1 January 2012, the amendments of the law regarding

the accrual and taking of vacation days will take effect.

These are the most important changes:

- ▶ Sick employees fully retain their right to the minimum number of vacation days (twenty days' vacation per year based on full-time hours) with full retention of salary. In the present situation, a disabled employee will only accrue a vacation day over the last six months of their sickness.
- ▶ To encourage employees to take their minimum number of vacation days each year, the vacation days will expire within six months of the end of the calendar year in which they accrued vacation, unless the employee has been unable to take their days' vacation. Employers and employees can make alternative arrangements that deviate from this rule, provided that they are favorable for the employee.

Legislative proposal regarding the Collective Redundancy (Notification) Act

When an employer intends to dismiss 20 or more employees within three months by means of a procedure at the *UWV WERKbedrijf* (the work placement branch of the Employee Insurance Agency) or through the subdistrict court system, the employer will have to report this to the *UWV WERKbedrijf* and to the trade unions.

Currently, with the approval of the employee, the employer does not have to report its intention to terminate the employment of the employee by means of a termination agreement.

The legislator considered this to be undesirable and therefore submitted a legislative proposal.

Irrespective as to whether the employment is terminated by means of a termination agreement or otherwise, the employer will have to report the termination, if it concerns a total of 20 or more employees in a three-month period. If the employer fails to report it, the employee can have the termination or the termination agreement annulled within a period of six months.

The legislative proposal is now pending and it is unclear on which date the Act will be amended.

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Poland

Employment contracts for a limited term after 1 January 2012

With effect from 1 January 2012, the liberalized rules governing employment contracts for a limited term will be canceled. These rules were implemented by the Act on Mitigating the Impact of the Economic Crisis on Employees and Entrepreneurs of 1 July 2009 (the Statute).

Under the Statute, the applicability of Article 25(1) of the Labor Code was precluded throughout the effective term of the Statute (from 22 August 2009 until 31 December 2011). Article 25(1) states that an employer's third consecutive limited-term employment contract with an employee becomes an unlimited-term employment contract if the intervals between the contracts are shorter than one month.

The Statute replaced Article 25(1) with an aggregate time limit applicable to limited-term contracts. As a result, under the Statute, an employer can enter

into any number of consecutive limited-term employment contracts with his employees, provided that the aggregate period of employment does not exceed 24 months. A contract made three months from the date when the latest limited-term contract was terminated or expired is deemed to be another limited-term contract.

As 1 January 2012 approaches, employers should be alerted to their mechanical approach of counting and classifying limited-term employment contracts. Reverting back to the old rules (applicability of Article 25(1)) may result in many practical problems, e.g., how to count the previous limited-term contracts, or which limited-term contracts will be transformed into unlimited-term contracts.

- ▶ Limited-term employment contracts made in the effective period of the Statute whose termination or expiry falls after 1 January 2012, will be taken to be the first limited-term contracts in the sequence of contracts under Article 25(1).
- ▶ Employers should also remember to include any limited-term contracts made and terminated before the effective date of the Statute in the sequence of contracts under Article 25(1).

This requirement will apply if, for example, the parties made and terminated their first limited-term contract before the effective date of the Statute (the first limited-term contract) and made, also before that date, another limited-term contract that is due to expire after the effective period of the Statute, i.e., after 1 January 2012 (the second limited-term contract).

In this case, another limited-term contract with the same employee made after an interval not longer than one

month will automatically become an employment contract for an unlimited term.

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Russia

Staff reduction procedures in Russia

The recent economic downturn has forced many organizations to consider downsizing their operations. In many cases, this has led to reductions in headcount.

Based on the recent 2011–12 Ernst & Young Compensation and Benefits Survey, conducted among 185 employers (Russian and multinational companies operating in Russia), the overall outlook on headcount plans is positive. Only 5% of the respondents are planning to reduce headcount. However, the employers now place a much greater focus on employees' performance.

Historically poor performers have been given "second chances." However, the level of tolerance to weak performance is now much lower. In Russia, labor legislation is very prescriptive in relation to termination of employment. It makes termination of employment for poor performance almost impossible. Therefore, in many cases, employers tend to choose other options for termination.

The official staff redundancy procedure

This procedure is also quite restrictive and includes multiple requirements in respect of a number of obligatory actions that need to be strictly followed by employers. Various documents also need to be in place to

support termination of employment.

When the employer makes a decision to initiate the staff redundancy procedure, it is necessary to define the list of redundant employees first. Russian labor law foresees that staff reduction is performed based on the official change of the staffing schedule (a mandatory document stating a list of jobs, number of jobholders and salaries).

In Russia, employers have to bear in mind that certain employees are treated as "protected." For example, it is generally prohibited to terminate the employment of pregnant women and women who have children under the age of three.

Also, the legislation states that higher-performing employees have preferential rights to retain their employment with the company. However, the legislation does not specify any procedure for assessing performance, thus it comes down to the accuracy of the employer policies and job descriptions.

Sometimes, it is not possible to identify all protected employees at the preparatory stage, since the HR department does not always possess all necessary information on the employees' current personal status. This may lead to the planned course of action going wrong at some point in time, resulting in the need for a revision of the overall approach to the staff redundancy procedure.

After the preparatory stage, the employer must notify employees of impending staff redundancy. In Russia, the employer must give two months' advance notice. Alternatively, upon the employee's consent, this may be replaced with extra monetary compensation of two months of the employee's average salary.

In the case of mass staff redundancies, the local employment center must be notified as well. The unions (if they exist in the company) also play an important role in the process and must be consulted when the procedure is launched.

During the notice period, the employer is obliged to offer an employee any vacant jobs in the organization that correspond to the employee's qualification, or any other vacant jobs that are suitable.

Some employers tend to forget about this rule and retain vacancies, or even continue recruiting. This may cause significant issues for the employer. In the worst case, an employee can apply to the court claiming unlawful termination and would have a chance to be reinstated at work.

Upon termination of the employment agreement with an employee under the staff redundancy procedure, the employer must pay to the employee a severance pay equivalent to up to three (in certain cases, up to four) monthly average earnings that are paid in the course of three to four months.

The peculiarity of the severance package in Russia is that it is calculated based on the employee's monthly average earnings, which include not only the monthly base salary, but also other payments (e.g., bonuses, cash allowances, markups). Therefore, if the pay system involves numerous additional payments, the total amount of severance payment could be much higher than the amount of the base salary.

Termination of employment under the mutual consent agreement

Since most other options for termination of employment are

rather complicated, require the preparation of a large number of HR documents and are associated with a certain level of risk, many organizations turn to the most commonly used option, which is termination of employment under the mutual consent agreement.

This allows terminating employment with an employee at any time as a result of mutual agreement between the employer and the employee.

The main advantage of this ground for termination is that it typically does not trigger risks that can be subsequently challenged in court, since the essence of this agreement is ultimately a mutual declaration of intention of both parties to terminate employment.

The mutual consent agreement between the employer and the employee envisages that the employee acknowledges and warrants that they do not have any property or non-property complaints or claims against the employer in connection with the employment agreement, employment relations or termination of the employment agreement. Further, the employee does not have any grounds for making any such complaints or claims in the future, with the exception of any complaints or claims that might arise in connection with non-fulfillment or improper fulfillment by the employer of the terms and conditions of the mutual consent agreement.

This option does not entail significant HR paperwork for the employer, but is rather supported by a signed mutual consent agreement.

In most cases, reciprocal agreement between the employer and the employee is achieved through offering an attractive termination payment to the employee.

As a general rule, in the case of mutual consent agreements, Russian labor legislation does not establish any specific requirements that additional compensation payments be provided. In practice, most employers offer additional termination packages, the amount of which is defined depending on the actual circumstances.

The average amount of compensation offered varies from three to four months' salary for mid-management employees, to six to twelve months' salary for top-management employees.

Practice shows that termination of employment under the mutual consent agreement is preferred by most employees, since it does not have any negative impact on their employment track record (as may be the case for termination due to the staff redundancy procedure). Termination of employment under the mutual consent agreement also provides for immediate receipt of payment, rather than the deferred compensation provided under the staff redundancy procedure.

Nevertheless, termination of employment under the mutual consent agreement is not always achievable as an employee may refuse to accept termination.

Any of the above options require accurate planning and documentation. The key to success is careful communication with employees to ensure that they understand that their labor rights are not being jeopardized and the required procedures are being followed.

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Spain

Latest legislative changes in Spanish labor regulations

Since the outbreak of the world financial crisis in 2008, Spain has been one of the European countries that suffered the worst increase of unemployment: from 8.7% in 2007 (still the highest in the OECD) up to 22.8% in November 2011 (compared to 9.8% in the EU).

An abrupt and rapid contraction of economic trade took place, which affected the whole of the nation's economy and jeopardized the growth achieved within the last decade. This was mainly due to a credit shortage, which caused the collapse of the formerly dynamic construction industry and has resulted in a steady and fast growth of unemployment.

Aiming to encourage employers to hire new employees, the Spanish Government has issued legislative actions that intend to increase the flexibility of Spanish labor regulations. Unfortunately these measures have achieved little success, and unemployment currently ranges between 4.5 million and 5 million.

In line with EU requirements, complementary laws have been passed in order to reduce the increasing public debt and deficit.

The laws specifically affect social security expenses, intending to align the higher life expectancy in Spain (81.5 years) with the retirement age, as well as to rationalize the criteria used to calculate retirement benefits.

Following the latest "labor reform" issued in September 2011 we shall briefly mention the main regulations recently passed and the practical changes that the regulations have implied for employers and employees in Spain:

Royal Decree-Law 7/2011, 10 June 2011 on urgent measures for the reform of collective negotiation

- ▶ The reform focuses on three core components: the collective bargaining structure and the coexistence of more than one collective labor agreement; new rules on the content and validity of these agreements; and the rules on legitimacy to negotiate collective labor agreements.
- ▶ The regulations also intend to establish effective non-judiciary means to resolve conflicts affecting labor agreements (regarding not only their negotiation but also their application or interpretation) as well as implementation of internal company flexibility measures.

Law 27/2011, 1 August 2011, on the update, adaptation and modernization of the Social Security system

The main changes, among others, can be summarized as follows:

- ▶ Progressive increase in the retirement age from the current 65 years to 67 years based on the periods contributed by each employee (to be fully applicable in 2027).
- ▶ Progressive increase of the term to be taken into account in order to calculate retirement benefits (from the current 15 years to 25 years)
- ▶ Restrictions to advanced retirement from the current 61 years to 63 years, except in the event of employees made redundant by companies facing economical crisis and being required to suppress their job positions
- ▶ Hardening of the access to partial retirement

- ▶ Establishment of a company payment to the Public Treasury when carrying out collective layoffs.

Royal Decree-Law 10/2011, 26 August 2011, on urgent measures for the promotion of youth employment and employment stability

- ▶ The main development is the two-year suppression of the legal rule introduced in 2006 (and extended in its effects in 2010) by virtue of which, employees hired by means of two temporary employment contracts for a 24-month period in a 30-month term (continuous or discontinuous) will be regarded as indefinite employees.
- ▶ Application of this rule can still be complicated for most companies, since different transitional regimes apply for contracts executed prior to or after the law came into force.

Finally, as a result of legislative elections on 20 November 2011, a new Government has been elected, coming into power in mid-December. An intense change of Spanish labor regulations is expected among the new Government's promised agenda reforms.

Trade unions and employers' representatives have been initially contacted and are already engaged. Therefore, we can expect new amendments to basic labor codes, which should provide companies with simpler and lighter employment regulations in Spain.

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Switzerland

Recent Swiss case law on non-compete clauses

The Swiss Supreme Court recently reached a decision about the limitations applicable to the prohibition of competition after the end of the employment relationship.

Facts

A natural stone salesman, active in the construction sector, signed an employment agreement with a restrictive non-compete clause with his employer (Company A) that contained the following limitations:

- ▶ The prohibition was for three years from the end of the employment agreement.
- ▶ Any activity for any competitor of the employer, either as an employee or as an independent worker, was forbidden.
- ▶ The area of prohibition was for the eastern territory of Switzerland.
- ▶ In case of violation of the non-compete clause, the employer was entitled to liquidated damages of CHF100,000.

The salesman terminated his employment contract, respecting the applicable notice period of two months. The contract ended and the salesman started to work for a competitor (Company B) eight months later. Thereafter, the previous employer (Company A) sued its former employee for damages.

Decision

The decision of the Swiss Supreme Court dealt with the limitation of the scope of the non-compete clause. The court started by indicating that, under Swiss law, a non-compete clause is binding only where the

employment relationship allows the employee (1) to have knowledge of the employer's clientele or (2) manufacturing and trade secrets and (3) where the use of such knowledge might cause the employer substantial harm.

In addition, the prohibition must be appropriately restricted with regard to geographic location, time and scope such that it does not unfairly compromise the employee's future economic activity and it may exceed three years only in special circumstances.

The court may, at its sole discretion, reduce an excessive non-compete clause, taking into account all the circumstances. In particular, it will have due regard to any consideration given by the employer.

Balance of interests

In the present case, there was no specific compensation granted to the employee by the employer in connection with the application of the non-compete clause. The consequence of the non-compete clause must not be that the employee is forced to change profession or has to move to another country.

The prohibition was not limited to a specific activity, but it prevented any kind of employment with a competitor. The employer's objective was to prevent the former employee from using his contacts with the employer's customers for the benefit of a competitor. Both the manufacturing and trade secrets knowledge would justify a longer protection period compared to merely having a look at the employer's list of customers. In such cases, a non-compete protection period of six months is usually sufficient.

Here, the employer did not hire a successor to replace the ex-salesman. The court noted that the employer could have hired someone to retain its loyal customers.

The prohibition was intended for a broad territory, i.e., all of eastern Switzerland. There is a link between the duration and the geographical scope of the non-compete clause: in a small territory, the prohibition may be agreed for a longer period, whereas in a broad territory, the prohibition duration shall be shorter.

For these reasons, the Swiss Supreme Court upheld a decision of the lower court to reduce the duration of the prohibition. Three years was considered to be excessive in the circumstances of the case. The prohibition was therefore reduced to six months and since the employee had started a new employment with Company B eight months after the end of the employment with Company A, he did not have to pay any damages to the previous employer.

Comment

The Swiss Supreme Court confirmed in this case that the courts will intervene and use their discretionary power to reduce excessive non-compete clauses. All circumstances must be considered to determine if the non-compete clause is valid and enforceable.

A non-compete clause should be reviewed by a labor law specialist.

The scope of the prohibited activities should also be updated regularly and adapted to the changing career and responsibilities of the employee.

In the balance of interests made by the judge, the consideration may play a significant role and increase the chances of the courts finding the non-compete clause enforceable.

In practice, we regularly see an option for the employer to opt out, i.e., the employer may waive the non-compete clause in ex-

change for no longer being obliged to pay the compensation.

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Ukraine

Ukrainian labor law in 2011 has been marked by two major discussions: the legalization of salaries and the new draft Labor Code. Currently, neither of these discussions has been finalized.

The issue of legalization of salaries

The issue of legalization of salaries in Ukraine arises from the fact that employers that wish to evade burdensome social security contributions and personal income tax withholdings often choose to pay “grey” salaries at the legally established minimum wage level or not to formalize relations with their employees at all.

The key concept behind the suggested salary legalization campaign is to introduce differentiated minimum wage levels for different employee qualification levels.

This campaign aims at preventing and disclosing cases of illegal employment and protecting highly qualified employees from grey salaries. The emphasis is thus on establishing differentiated minimum wages, formalizing relations between employer and employee, strengthening employer responsibility for labor law violations, as well as introducing penalties for the employees for performing work without official employment agreements.

The new draft Labor Code of Ukraine

The new draft Labor Code of Ukraine, which has been prepared for the second reading in the Parliament of Ukraine, has also generated discussion.

Overall, in contrast to the current Labor Code of Ukraine, which was adopted in 1971, the new draft Labor Code is more progressive and corresponds to the current needs of the labor market.

In particular, the new draft Labor Code clearly stipulates the procedure of working at home, gives more opportunities to terminate employment on the grounds of an employee’s incompetence, and provides for terms and conditions of an employer’s investments in the professional education of an employee.

At the moment, social dialogue between state representatives, labor unions and employers is taking place to clarify and agree on new labor regulations. As soon as discussions are finalized, the new draft Labor Code is expected to be adopted.

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