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Inside

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Message from the Chair

Hello, my name is Howard S. Shafer and I am proud to be the 2013 Chair of the Corporate Counsel Section. The Section sponsors CLE, networking, and other events, and offers LinkedIn and Facebook pages where members can reach out to each other with questions or advice. One focus for 2013 is to grow our six committees to create opportunities for our more than 1,700 members to participate in the creation and operation of the Section's activities. The Corporate Counsel Section's committees consist of: Publications, including *Inside*; CLE and Meetings; Diversity, including the Kenneth G. Standard Diversity Internship Program; Membership; Pro Bono and Technology and New Media.

The Publications Committee produces our publication, *Inside*, which addresses timely issues important to in-house counsel. The CLE and Meetings Committee presents such important programs as our annual Ethics for Corporate Counsel program and our bi-annual Corporate Counsel Institute, coming this November.

The Diversity Committee promotes diversity in the profession and organizes the Kenneth G. Standard Diversity Internship Program, which places diverse interns at New York companies. Our former interns will be mentoring new interns and we will be seeking mentors for our Alumni interns. If you wish to host a student for 2014 or if you are interested in being a mentor, please contact me.

Our Membership Committee has been instrumental in growing our Section over the last few years. Our Pro Bono Committee focuses on issues important to the not-for-profit community and takes the lead in making certain that Pro Bono remains an important focus of our Section. Finally, the Technology and New Media Committee supports our efforts in that area, including our website, LinkedIn and Facebook pages.

We welcome your feedback at any time, and participation, so please contact me or any our executive committee members to give us your thoughts or volunteer.

Howard S. Shafer
Chair

Inside

Editors: Janice Handler and Allison B. Tomlinson

Inside *Inside*

We are so excited to present this first issue of 2013.

Our focus in this edition is on Employment and Labor Law, in particular, what's new in this practice area that our in-house counsel members should know about. We have a great article on new developments in U.S. law, and then detailed pieces on what's happening in the UK, Canada, France, Australia, China and the Czech Republic.

By taking this quick trip around the world with us, we hope that our readers will get a snapshot of the hottest topics facing the companies that we advise today.

As always, if you would like to contribute an article to a future issue of the *Inside*, feel free to reach out to us. Our contact information is at the back of this issue.

Enjoy!
Allison

Allison B. Tomlinson is Regional Counsel at Gensler, a global architecture and design firm, where she is lead counsel for the Northeast and Latin America regions. She is also a member of the Executive Committees of the Corporate Counsel and International Sections of the New York State Bar Association.

2013: What's New in U.S. Employment Law

By Jeanine Conley and Ana S. Salper

Several key rulings from the U.S. Supreme Court, and increasingly active administrative agencies like the U.S. Department of Labor ("DOL"), the National Labor Relations Board ("NLRB or the "Board") and the Equal Employment Opportunity Commission ("EEOC"), made 2012 a watershed year in the area of employment law. These government agencies, currently strapped for resources but not lacking in zeal, have tilted the playing field even more pointedly toward employees. As President Obama settles into his second term in 2013, we expect to see even greater enforcement, litigation, and penalties for employers in the area of employment law. In what has become one of the hottest areas of employment law, social media policies and employer regulation of employee social media activity, are increasingly being scrutinized. In the courts, the explosion of wage-hour litigation, especially in the class action context, continues to grow by leaps and bounds. Labor management relations have seen a strengthening of unionized workforces, and even in the non-union workforces, the NLRB has imposed even more restrictions on employer actions in the workplace. Likewise, the EEOC is doing its utmost to make the cases it files count, by initiating its own investigations of systemic discrimination claims and by relentlessly publicizing suit filings and settlements.

This article provides a brief overview of what employers should expect in employment law in 2013, and will provide tips on how to prepare to navigate the increasingly employee-friendly landscape of President Obama's second administration.

I. PPACA's Impact on Employers

Among the most anticipated Supreme Court decisions of 2012 (and arguably of the decade) was the U.S. Supreme Court's ruling upholding the Patient Protection and Affordable Care Act ("PPACA" or the "Act") as constitutional.[1] Although the ruling expands far beyond the employment context, the holding will significantly impact employers for years to come. PPACA will go into effect on January 1, 2014. As of that date, businesses employing more than 50 full-time workers will be subject to the Employer Shared Responsibility provisions under section 4980H of the Internal Revenue Code (added to the Code by PPACA).[2] These provisions require the employer to provide adequate health insurance, or face a stiff per-employee penalty of $2,000 per full time employee beyond the company's first 30 workers.[3] These payments are used to offset part of the cost of the tax credits. Many employers have already begun to make preparations for how to tackle insurance coverage for their employees. Beginning in October 2013, millions of Americans will be able to shop for health insurance through newly created State-based Affordable Insurance Exchanges ("Exchanges"). Employees can receive premium tax credits to assist them with purchasing coverage through Exchanges.

Employers also could be subject to penalties for sponsoring an insured group health plan that discriminates in favor of highly compensated individuals. Previously, insured group health plans could provide non-taxable benefits to such individuals even if they discriminated in favor of those individuals in terms of benefits provided and eligibility. If self-funded group health plans discriminated in favor of these individuals, however, those highly compensated individuals were subject to taxes pursuant to Internal Revenue Code 105(h). PPACA now subjects insured group health plans to similar rules as those contained in 105(h) unless those plans have been grandfathered in by PPACA. PPACA also appears to subject an employer that sponsors a plan that discriminates in favor of highly compensated individual to penalties of $100 per day multiplied by the number of those individuals "discriminated against."[4] The ambiguity of such phrase could lead to limitless penalties for the company.

PPACA also added Section 18A of the Fair Labor Standards Act ("FLSA") which directs an employer to which the FLSA applies, and that has more than 200 full-time employees, to automatically enroll new full-time employees and continue the enrollment of current employees in one of the employer's health benefit plans. The employer must, however, give the employee adequate notice and the opportunity to opt out. Employers must comply with this provision once the Secretary of Labor promulgates regulations, which the Department of Labor estimates will be in 2014.[5]

The provisions of PPACA are far from simplistic. Companies will have to reevaluate where they have purchased insurance in the past, such as business league-sponsored plans, as many of those plans have been disrupted by the new coverage rules. Self- insurance may be a viable option for many companies, as it will provide the opportunity to avoid increased costs and coverage mandates, but that too will have to be balanced against various hidden costs, such as tax penalties for not self-insuring correctly. Companies with 51-101 employees will face particular challenges, as it is difficult to self-insure at that size, and if they buy insurance on the health care exchanges, they will be subject to community rating (i.e.,

they will be required to buy a health insurance policy at the same price as it is offered to other companies in the same territory, regardless of their health status). Employers who currently provide adequate coverage to their employees should be mindful not to overreact, as 2014 is likely to be a scramble to clarify the many remaining ambiguities in the law. Employers with coverage deficiencies, however, should be prepared to move fast and make radical changes to achieve maximum value and not be saddled with unsustainable costs.

II. Social Media: Brave New Landscape

Facebook, Twitter, and other social media sites are the virtual "water cooler" of the workplace today. Sixty-six percent of companies in the United States monitor their employees' web activity, and the scope and extent of such monitoring has been heavily policed. Hiring decisions informed in part by social media have been increasingly scrutinized by the EEOC, as there is a significant danger in obtaining information that may not legally be considered in the hiring process, such as an applicant's disability, age, sexual orientation, or religion. No government agency, however—not even the Courts—has been more active in policing social media's impact on the workplace than the NLRB. The NLRB has been particularly aggressive in scrutinizing employers' social media policies—striking down clauses governing anti-defamation, non-disparagement, poor work performance, confidentiality and proprietary information, brand logos, and retaliation.

The Board's rulings, which apply to most private sector employers, caution that it is illegal to adopt broad social media policies such as bans on "disrespectful" comments or posts that criticize the employer, particularly if those policies discourage workers from exercising their right to engage in "protected concerted activity" under Section 7 of the National Labor Relations Act ("NLRA")— activity that is the logical outgrowth of concerns expressed by the employees collectively, and engaged in for the mutual aid or protection of employees, such as the aim of improving wages, benefits or working conditions. In addition, employers who subject their employees to discipline, including termination, based on their social media use continue to see their decisions being challenged by the NLRB as attempts to "chill" protected concerted activity. Traditionally, any discussions of wages, hours, work conditions or other terms of employment were considered protected activity, but the Board has now expanded that to encompass, in certain circumstances, employee criticism and disparagement of employers, use of company logos on social media sites, and use of certain confidential information, as that activity has the potential to infringe upon employees' rights under the NLRA. A few years from now, Facebook will probably be as obsolete as a rotary phone. Amidst this landscape, employers should use caution prior to issuing discipline, and should ensure that their social media policies are narrowly worded and tailored enough to pass legal muster.

III. Labor-Management Relations: The Pro-Labor NLRB

The NLRB has issued a number of reports and rulings that, for the most part, have had a negative impact on employers. Many of the NLRB's rulings have reversed decades-long pro-employer precedent. Some of the most noteworthy cases include:

- *WKYC-TV, Inc.*, holding that an employer's duty to collect union dues from its employees continues after the expiration of a collective bargaining agreement. Historically, one of the leverage points an employer would have in collective bargaining was to cease deducting dues automatically post-expiration of the contract, to encourage the parties to reach a new deal expeditiously. This decision tilts in favor of unions, as it ensures that unions will be able to continue their collection of dues, irrespective of the expiration of the contract, or of whether the parties are working efficiently toward reaching a new deal.[6]

- *D.R. Horton, Inc.*, holding that it is an unfair labor practice in violation of the NLRA when a company requires its employees as a condition of employment to sign an agreement waiving their right to file joint, class or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.[7]

- *Alan Ritchey, Inc.*, holding that unionized employers must in some cases give the union notice and an opportunity to bargain before imposing discretionary discipline. Here, in another pro-union decision, the Board has severely lessened the employer's ability to impose discipline on its employees at its discretion, and has increased the union's power to involve itself in a traditional management right.[8]

Many of the NLRB's recent rulings, however, have been called into question because of the *Noel Canning v. NLRB*[9] decision that was recently decided by the U.S. Court of Appeals for the D.C. Circuit. The Court ruled that President Obama did not have authority on Jan. 4, 2012 to fill three recess appointments to the NLRB while the Senate was on break. The court held that the appointments were unconstitutional. A number of litigants have now used the ruling to delay Board proceedings. The *Noel Canning* decision, which the Supreme Court will likely review, has the potential, if it is upheld, to invalidate all

NLRB decisions since at least August 27, 2011, which will bring about a new wave of uncertainty about the status of labor-management relations in the U.S.

IV. The Equal Employment Opportunity Commission: A New Strategic Enforcement Plan

Due to a smaller budget and leaner investigative staff, the EEOC has been doing its best to raise its profile and make the cases it files count—by focusing on specific priorities. In its latest Strategic Enforcement Plan,[10] in which the EEOC spelled out its priorities for 2013-2016, the EEOC said that it would focus on, among other priorities: (1) indiscriminate use of credit and criminal background checks; (2) systemic discrimination claims, and (3) Lesbian, Gay, Bisexual, Transgender ("LGBT") and Pregnancy discrimination claims, as well as violations under the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), particularly with regard to leave policies. The EEOC has stated that although criminal background checks did not *per se* violate Title VII of the 1964 Civil Rights Act, such checks could be used as evidence of discrimination under either a disparate treatment or a disparate impact theory. Thus, businesses seeking to use criminal background checks to screen potential candidates must be able to show that the screening is "job related for the position in question and consistent with business necessity."[11] The EEOC's guidance further advises employers to document the steps they have taken to make an individualized assessment based on the nature of the crime, the time elapsed and the nature of the job.[12] Failure to do so could subject the employer to Title VII liability if the evidence demonstrates that an "employer's criminal record screening policy or practice disproportionately screens out a Title VII-protected group."[13] An individual who has a past arrest or conviction is not within a protected class under Title VII; however, studies show that Blacks and Hispanics are more likely to be arrested or incarcerated than whites.[14] Therefore, even a facially neutral policy against excluding those who have been arrested or convicted, could disproportionately impact individuals protected under Title VII, a violation for which the EEOC has the authority to investigate and sue.

The EEOC is also focusing on systemic discrimination cases—those that indicate widespread violations in a particular industry, geographic area, or single company—rather than devoting its limited resources to individualized complaints. In addition, the EEOC recently issued a decision that intentionally discriminating against an individual based on "gender identity, change of sex, and/or transgender status" is cognizable under Title VII with respect to federal employees. Furthermore, the EEOC has focused on claims of "sex stereotyping," i.e., a circumstance where, for example, a male heterosexual employee is harassed by colleagues for not being "macho" enough and being "effeminate." This type of claim, in addition to claims of disability discrimination based on "inflexible" leave policies, where the EEOC has emphasized the need for flexibility to allow for additional leave time even after already generous policy limits have been exhausted, along with pregnancy discrimination claims, will continue to increasingly be on the EEOC's radar.

V. Rise in Fair Labor Standards Act Lawsuits

The number of FLSA cases continues to soar. Like the NLRB and the EEOC, the DOL has been more aggressive on behalf of employees than any DOL in a generation. In 2012, the Wage and Hour Division recovered $280 million for 300,000 workers, up $55 million from the prior year.[15] In addition, there has been a staggering 485% increase in FLSA cases filed in federal court since 1993.[16] The majority of the cases alleged employee misclassification, uncompensated work performed off the clock and miscalculation of overtime pay for non-exempt workers.[17]

The main allegations in these cases were generally that: 1) they were forced to work off the clock, 2) they were misclassified as exempt from overtime requirements, and 3) because of smartphones and other technology, work bled into their personal time.[18] Most alarmingly is that many of these claims are not being initiated by a single employee; rather, the DOL is initiating its own investigations into alleged employer wage and hour violations. Moreover, most courts have adopted a lenient standard for conditional class certification, leading to an increase in class actions and the opportunity for enormous recoveries for the plaintiffs' bar. Employers should be particularly mindful of how they classify employees, and of how they calculate "working time" for which employees must be paid. The presumption in these wage and hour cases has shifted from one where employers were presumed to have been acting in good faith, to a presumption of employer willfulness in failing to comply with the law. A good way for employers to be prepared in the event the DOL comes knocking, therefore, is to conduct an internal wage and hour audit of all payroll policies to ensure there are no unidentified violations.

VI. What's Next?

The tide has clearly turned against employers as administrative agencies and courts continue to issue rulings and guidance reinforcing employees' rights in the workplace. One particular area to watch is what the Supreme Court will do with respect to class action waivers. On February 27, 2013, the Supreme Court heard the long-awaited oral argument in *American Express Co. v. Italian Colors Restaurant*.[19] Recently, some federal courts

have distinguished the Supreme Court's prior decisions in *AT&T Mobility v. Concepcion*[20] and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,[21] which both stood for the proposition that class arbitration cannot be imposed on a party, and have held class action waivers unenforceable. A decision by the Supreme Court in *American Express* that is contrary to *Concepcion* and *Stolt-Nielsen* could be another major reversal in what has been defendant-friendly jurisprudence in this area to date. There are many "unknown unknowns" that will continually present challenges for employers. Employers should hunker down for another seemingly pro-employee year and continue to stay abreast of the flurry of state and federal employment law rulings that could affect them. Stay tuned for the next chapter of this dynamic and fluid future of U.S. labor and employment law.

Endnotes

1. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012).
2. This includes employers whose employees constitute the equivalent of at least 50 full-time employees. For example, 100 half-time employees equals 50 full-time employees.
3. Healthcare.gov: Health Insurance Basics, http://www.healthcare.gov/using-insurance/employers/large-business/index.html.
4. Aetna: Nondiscrimination (Executive Medical), http://www.aetna.com/health-reform-connection/reform-explained/non-discrimination-executive-medical.html.
5. United States Department of Labor: Technical Release No.2012-01: Frequently Asked Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods, http://www.dol.gov/ebsa/newsroom/tr12-01.html.
6. 359 N.L.R.B. No. 30, 2012-2013 NLRB Dec. ¶ 15653 (Dec. 12, 2012).
7. 357 N.L.R.B. No. 184 (Jan. 3, 2012).
8. 359 N.L.R.B. No. 40 (Dec. 14, 2012).
9. 705 F.3d 490 (D.C. Cir. 2013). Noel Canning, a Yakima, Washington, soft drink distributor, initially brought the suit that challenged an NLRB's decision that it had to enter into a collective bargaining agreement with a labor union.
10. Strategic Enforcement Plan FY 2013-2013, EEOC, http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited Mar. 18. 2013).
11. Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, EEOC (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_ conviction.cfm.
12. *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977).
13. Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions, *supra* note 11.
14. *Id*.
15. Hilda Solis, Outgoing Labor Secretary, Reflects on Economic Recovery, Right Wing Attacks, http://inthesetimes.com/working/entry/14508/five_key_tasks_for_the_new_secretary_of_labor/.
16. Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take, http://www.adp.com/workforce-management/docs/whitepaper/trendsinwageandhourlitigation_05292012.pdf.
17. Labor & Employment: Swimming Against the Tide of Weak Demand, http://hildebrandtblog.com/2012/09/06/labor-employment-swimming-against-the-tide-of-weak-demand/.
18. *Id.*
19. *In re American Exp. Merchants' Litigation*, 681 F.3d 139 (2d Cir. 2012), *cert. granted* (No. 133, 2012 Term).
20. 131 S.Ct. 1740 (2011).
21. 130 S.Ct. 1758 (2010).

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An Overview of Employment Law Reforms in the UK; the "Silent Revolution"

By Anna Birtwistle

In his speech to the Conservative party conference in October of last year, Chancellor of the Exchequer George Osborne stated:

> Beneath the sound and fury of the daily debate a silent revolution is taking place. Some of the biggest issues in British politics, so big people thought them too controversial to fix, we have been prepared to tackle… We speak for those who want to work hard and get on. This is the mission of the modern Conservative Party.

This so-called "silent revolution" is nowhere more apparent than in the on-going reforms to the employment law system, arguably the most radical reform in decades. Like any revolution, however, change is being met with a mixed response that is certainly far from silent. Whilst the stated objective of the reforms—to reposition the UK economy and promote economic growth—are no doubt supported by the vast majority of the UK public, some query whether de-regulation in the employment sphere will have the Government's intended effect.

The general focus of the reforms is on deregulation, in particular making it easier for employers to fire employees, and discouraging employment litigation. Whilst these aims may be welcomed by businesses who perceive the changes to signify a move away from the over-protection of employees in the UK, some are sceptical about whether deregulation will ultimately lead to economic growth. Given that the UK is already one of the least regulated countries in respect of employment legislation (as judged by the OECD's Employment Protection Index), it is questionable whether further deregulation is indeed the elixir needed to turn the economy around.

Background

Shortly after coming into power in May 2010, the Coalition Government published a 'Coalition Agreement' under which it agreed to review employment law to provide "the competitive environment required for enterprise to thrive." As part of that review, a consultation on wide-ranging reforms to the employment tribunal system was initiated with the aim of encouraging early resolution of disputes, speeding up the tribunal system and boosting economic growth.

The employment law review must be seen within the overall context of the self-titled "Red Tape challenge" under which the Government has committed to carrying out a review of over 21,000 statutory instruments (across various strands of law). The overarching aim of this challenge is to boost economic growth through a "one in, one out" approach to new laws and regulations. The employment law phase of the Red Tape challenge was launched towards the end of October 2011.

Reform in 2012

Throughout 2012 it was rare for a month to pass without a new proposal, consultation or initiative being announced to improve business confidence and boost economic growth. One of the key changes to be implemented to employment law in 2012 was to the law of unfair dismissal.

Qualifying Period for Unfair Dismissal

In the UK, subject to having the necessary length of service, employees are entitled not to be "unfairly dismissed" (an anathema to the concept of employment at will in the U.S.). On termination this requires that employers have a "fair reason" to dismiss the employee and follow a "fair process." There is a statutory list of fair reasons for dismissal, which are as follows: Conduct (e.g., theft, persistent lateness); Capability (e.g., underperformance); Redundancy; Illegality; and "some other substantial reason."

There are also procedural steps which must be followed by the employer when terminating an employee. These steps are set out in the ACAS Code of Practice which applies in most cases of dismissal and are supplemented by the procedure in the employer's Staff Handbook or employee's contract of employment.

The reform to unfair dismissal law implemented in April 2012 has seen the qualifying period required to bring a claim for unfair dismissal increased from one to two years. This two-year qualifying period applies to employees whose employment began on or after 6 April 2012. Those who are already in employment before that date retain the previous one-year qualifying period.

It is intended that by providing employers with greater leeway to terminate employees without the potential

risk of an unfair dismissal complaint this will in turn aid economic recovery. Notably, however, there are no length of service requirements in respect of discrimination and whistleblowing complaints and it has been suggested that the increased service requirement in respect of unfair dismissal will simply lead to an increase in discrimination and whistleblowing claims. The key issue here being that unlike unfair dismissal complaints, compensation in discrimination and whistleblowing cases is uncapped (albeit loss-based) and therefore an increase in such claims could in fact lead to greater costs for employers both in terms of potential compensation and the legal costs associated with defending those more complex claims.

Looking Forward; 2013 and Beyond

Historically major changes in UK employment law have been brought into force either on 6 April or 1 October of each year. The Government has, however, recently announced that going forward legislative changes will be made throughout the year.

Set out below are some of the key changes due to be implemented over the next three years. In addition to these, the Government continues to consult on other major potential changes, including reform of the Transfer of Undertakings Regulations 2006 ("TUPE") which deals with the protection of employment rights in the context of business/asset sales or outsourcing scenarios.

Collective Redundancy Consultation

Under current law, where an employer proposes to make large-scale redundancies of 100 or more employees within a period of 90 days or less, it must consult collectively with the appropriate representatives. Currently, this consultation must begin at least 90 days before the first dismissal takes effect. However, from April 2013, this consultation period will be reduced to 45 days. The Government has emphasised that the 45-day period is a minimum and employers should continue consulting beyond that minimum period where it is necessary to do so.

The Government believes that the shorter consultation period will give businesses the flexibility to respond to changing market conditions and to restructure more effectively. Many employers have welcomed the proposed change for those reasons and because of the potential savings in administrative and salary costs. It should also help retain key workers who otherwise may be tempted to find work elsewhere during a lengthy period of uncertainty and low morale. However, the shorter consultation period is seen as another blow for employees.

At the same time, it is anticipated that the Government will enact legislation to specifically exclude employees on fixed-term contracts "which have reached their agreed termination point" from collective redundancy consultation obligations. This change may be useful for employers who regularly rely on fixed-term employees, such as for project work or to provide cover for those on maternity leave.

Employment Tribunal Fees

Whilst to date claimants have not been required to pay a fee when issuing a claim in the employment tribunal (unlike in the civil courts), this is set to change this summer. The rationale behind this decision is to deter weak and vexatious claims and to encourage parties to resolve claims informally through mediation or conciliation and ensure that the tribunal is viewed as the last resort.

Under the new system, claimants will pay an initial fee to issue a claim and a further fee if the claim proceeds to a hearing. The fee will depend on the type of claim pursued, for example, less complex claims (such as unlawful deduction from wages, holiday pay, and redundancy payment claims) will have an issue fee of £160 and a hearing fee of £230 whereas more complex claims (e.g., discrimination, equal pay, unfair dismissal claims and the vast majority of other claims) will have an issue fee of £250 and hearing fee of £950. Hearing fees will become payable around 4-6 weeks prior to the hearing.

There will also be fees for appeals to the employment appeal tribunal, with an issue fee of £400 and a hearing fee of £1,200.

This reform has been extremely controversial; the key criticism being that low income workers or those who have lost their jobs are unlikely to be able to afford the fees and will therefore be denied access to justice. Whilst it is anticipated that those on low incomes will be able to seek exemption from the fees under the same system used in the civil courts, practitioners remain concerned about how this will work in practice. Only time will tell whether the introduction of fees will discourage unscrupulous employees (or former employees) from bringing speculative claims or encourage parties to explore other ways of resolving disputes, such as conciliation and mediation. Unfortunately, the fees system will impact all claims, not just those that are unmeritorious.

Capping Unfair Dismissal Compensation to 12 Months' Pay

At present, the compensatory award for a successful unfair dismissal claim is capped at £74,200 (this is a loss-based award and the employee is under a duty to mitigate his or her losses by finding another job). The Government

confirmed in January 2013 that, subject to parliamentary approval, it plans a cap of 12 months' pay for an unfair dismissal claim (subject always to the upper limit of £74,200). It is hoped that this will give employers more certainty about the maximum award that could be made by a Tribunal. Once this change comes into force, employees earning below £74,200 annually, and who expect to be unemployed for over a year after their dismissal, will lose out.

"Early Conciliation" Process

The Government is now consulting on an "early conciliation" process. If this goes ahead, it will require prospective claimants to send information about their claim to ACAS (the Advisory, Conciliation and Arbitration Service) before lodging a claim at an employment tribunal. It is proposed that, on receipt of the information, ACAS will attempt to conciliate the dispute. By introducing this step, the Government hopes to promote settlement of employment disputes without recourse to an employment tribunal.

In addition to early conciliation the procedural rules regarding employment tribunal claims were due to come into force in April 2013. The intention is to provide greater clarity and certainty to all parties participating in the employment tribunal process, along with a simpler, quicker and more efficient process.

Employee Shareholder Contracts

Under the Growth and Infrastructure Bill 2012-13 the concept of employee shareholder status will be introduced. This new status would be in addition to the two existing statutory statuses of employee and worker. Under this arrangement employees would give up some of their employment rights (e.g., unfair dismissal, redundancy pay, the right to request flexible working and time off in relation to study or training) and would be required to give 16 weeks' notice of a firm date of return from maternity leave, instead of the usual eight required of employees.

This loss of rights is to be exchanged for shares in the business they work for, with a minimum value of £2,000. The shares will be exempt from capital gains tax, up to a maximum threshold of £50,000.

Notably, in the consultation towards the end of last year on employee shareholders, only 3% of respondents viewed the new employee shareholder plans in a positive way. Nevertheless, the Government intends to press ahead. It is feared that the costs of introducing employee shareholder contracts will outweigh their benefits. The Law Society, too, has expressed concern that small businesses will be put off by the complex tax, company law requirements and extra costs. It is feared that this new status will cause confusion for employers, particularly on the termination of an employee's contract, and lead to costly litigation. Until there is more certainty about how employee shareholding schemes will work, it seems likely that few companies will introduce these arrangements.

Abolition of Discrimination Questionnaires

There is currently a questionnaire procedure in discrimination cases that enables an individual who thinks that he/she has been discriminated against to gather information from his or her employer; a form of early disclosure. By way of example, in an age discrimination case, the employee might ask questions regarding the age make-up of the workforce, as well as questions targeted at understanding his/her own position.

Under current law, failure to answer any questions and/or an employer providing evasive or equivocal answers to a statutory questionnaire may lead an Employment Tribunal to make an inference of discrimination (although it does not give rise to an automatic presumption of discrimination).

The Government believes that the procedure has not had the intended effect of encouraging settlement of claims or increasing the efficiency of the claim process and has announced its intention to abolish the statutory system.

However, it is questionable how much difference this will make in practice to discrimination litigation; it is unlikely that the repealing of the statutory questionnaire process will stop prospective claimants from asking questions of employers. Employers will still need to be prepared for claimants to request information informally through correspondence (indeed the Government's consultation response envisages such informal enquiries being made). The response notes that businesses are then "free to decide how and whether they respond to enquiries of this sort, with any attendant balance of risk that may be involved." The Tribunals will thereafter have to consider, in accordance with case law, whether the failure to provide requested information or documents is capable of constituting evidence supporting the inference that the employer acted in a discriminatory manner and whether any explanation provided by the employer justifies that inference.

Employers may face increased requests for further information as part of the litigation process, with applications being sought from the Tribunal to order such information be provided. This option is available to both claimants and also to respondent employers.

In reality the removal of the questionnaire process is a major blow for employees with potential discrimination claims—and also potentially a disadvantage for employers. True, revocation of the questionnaire process removes an upfront administrative burden for employers, but it means that litigation may end up continuing for longer than at present. Claimants potentially will have to start claims and pursue them much further down the litigation track before they get access to sufficient information from the employer to form a clear view as to whether or not they have a sustainable discrimination claim.

Flexible Working

Currently only certain employees have the right to request flexible working arrangements (e.g., employees who are parents of children under 17, parents of disabled children under 18, and some caregivers) provided that they have at least 26 weeks' continuous employment. It is proposed that in 2014 the right to request flexible working will be extended to all employees with 26 weeks' continuous employment.

Flexible Parental Leave

In 2015 the Government proposes to introduce a new system of flexible parental leave allowing parents to share between them 50 weeks of leave (that is, everything other than the two-week compulsory maternity leave period). Parents will be able to choose how to divide up the leave, which they will be able to take consecutively or concurrently, provided that they have the agreement of their respective employers. The combined amount of leave taken must not exceed the amount which is jointly available to the couple. A new concept of flexible parental pay will also be introduced.

Conclusion

It is clear in the UK that there has been a shift in approach to employment law in the UK, with a particular emphasis on less regulation, less litigation and a speedier process if matters do reach a Tribunal. Although the changes proposed for 2014-2015 are "employee friendly" the focus to date has been on changes favouring the employer and with the ultimate aim of helping UK businesses to recover and thereby create growth in the economy.

Whilst the Government is firmly committed to deregulation in the employment law sphere, it is worth noting that the UK labour market is already one of the least regulated and most flexible in the developed world. The perception therefore that making it easier for employers to terminate employees will lead to businesses increasing recruitment (and encouraging economic growth) exists without any basis in empirical evidence. It is therefore unclear whether much of the "de-regulation" proposed by the government will have a significant impact on economic growth, and it will be a case of waiting to see what, if any, impact the reforms will ultimately have.

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Employment Review 2012— What's on the Horizon in Australia

By Jan Dransfield and Andrea Sun

2012 was a busy year in employment law and workplace relations in Australia. With a Federal election to be held in September 2013, developments are only set to continue.

In this article, we outline our top ten employment law developments from last year and consider what 2013 will bring for employers in Australia.

	Issue	2012 Developments	Implications
1	Work health and safety (WHS) laws	Harmonised WHS laws commenced in four Australian states and territories on 1 January 2012, as well as at the Commonwealth level. Harmonised WHS laws commenced in the States of South Australia and Tasmania on 1 January 2013. Western Australia and Victoria are yet to enact WHS laws based on the model Act.	Policies and processes in workplaces in Australia should be reviewed to ensure they comply with the new harmonised laws. Steps should be taken by employers in Western Australia to prepare for the new legislation. In other States and territories where the harmonised laws have now been in place for over 12 months, organisations and their officers should audit the operation of systems to comply with ongoing obligations.
2	Adverse action	The High Court decision in *Bendigo Regional Institute of TAFE v Barclay* [2012] HCA 32 endorsed a subjective test for determining whether adverse action had been taken for a prohibited reason.	Adverse action claims are becoming increasingly common in Australia. The High Court decision in *Barclay* means that employers may rely on evidence of their reasons for taking, for example, disciplinary action against an employee, to show that the action was not taken for a prohibited reason. We suggest employers keep records of reasons for taking action to assist defending any adverse action claim.
3	Implied duty of trust and confidence as an emerging executive remedy	The NSW Court of Appeal decision in *Shaw v State of NSW* [2012] NSWCA 102 found that the existence of an implied term of trust and confidence was arguable. In the Federal Court decision in *Barker v Commonwealth Bank of Australia* [2012] FCA 942, the Court found that the employer's serious breach of its redeployment policy gave rise to a breach of the implied term of trust and confidence.	Employers in Australia should be aware that the courts are increasingly implying terms into employment contracts. A duty of trust and confidence may now be implied into the contract in matters where applicants claim breach of contract during employment. This is an area being increasingly relied on by executives in pursuing claims against their employer.
4	Fair Work Act Review	In June 2012, the Fair Work Act Review Panel recommended 53 amendments to the *Fair Work Act 2009* (FW Act), which is the main piece of legislation regulating employment relations in Australia, in its report of June 2012. About one third of the recommended amendments were adopted in the *Fair Work Amendment Act 2012*, which commenced on 1 January 2013.	It is important for employers in Australia to understand the impact of the changes to the FW Act on their business. The changes impact key areas, including unfair dismissal and adverse action claims, and collective bargaining. There will be more changes to the FW Act in 2013.
5	Restraining former employees	A two-year restraint period was upheld against a former director by the Full Court of the Federal Court in *Pearson v HRX Holdings Pty Ltd* [2012] FCAFC 111. In *Birdanco Nominees Pty Ltd v Money* [2012] VSCA 64, the Victorian Supreme Court upheld a three year non solicitation clause against a former employee.	Employers in Australia should review and update restraints and non-solicitation clauses in employment contracts in light of recent decisions in this area.

	Issue	2012 Developments	Implications
6	Managing redundancies	A number of recent cases in Australia describe the steps necessary before a final decision is made to make an employee's position redundant. Of particular importance was the Full Court of the Federal Court decision in *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150, which found that the employer must consult under an industrial instrument before accepting expressions of interest in a voluntary redundancy process. In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2012] FWA 3945, Fair Work Australia (as it was then named) set out what is required under the FW Act for consultation with unions where 15 or more employees are to be made redundant.	Implementing redundancies in Australia can be a complex exercise requiring careful consideration and appropriate consultation. Employers should allow adequate time to consult and to seek advice before starting any redundancy process.
7	Social media	A Full Bench of Fair Work Australia reinstated a truck driver who had been dismissed for posting derogatory and offensive comments about his managers on Facebook in *Linfox Australia Pty Limited v Glen Stutsel* [2012] FWAFB 7097. The decision is on appeal to the Federal Court.	An important feature of this case was the absence of a social media policy at the workplace as well as inconsistent treatment of involved parties. We recommend that employers in Australia develop and maintain an up-to-date social media policy.
8	Sexual harassment	The Federal Court ordered a former employee who alleged that she had been sexually harassed at work to pay over $5 million in costs after finding that the allegations were made without any factual foundation (see *Dye v Commonwealth Securities Limited (No 2)* [2012] FCA 407).	This case showed that in Australia costs are available to employers in limited circumstances. However, the impact of such cases on an employer's reputation and resources means that it is a difficult area to manage. It is important for employers in Australia to have appropriately drafted policies (consistent with Australian law) to prevent and deal with sexual harassment claims.
9	Bullying	A House of Representatives Committee tabled a report entitled "Workplace Bullying: 'We just want it to Stop'" on 26 November 2012. The Minister for Employment Relations has announced changes to the FW Act to introduce a mechanism for dealing with bullying disputes. Safe Work Australia is due to release a model Code of Practice for Preventing and Responding to Workplace Bullying in March/April 2013, following public comment sought on a draft in September 2011.	Employers should update their anti-harassment and bullying policies in light of developments which flow from the release of the model Code of Practice. There will also be further changes to the FW Act dealing with bullying.
10	Independent contractors	The Fair Work Ombudsman, an independent body with the power to investigate alleged breaches of Australian workplace laws in Australia, has indicated that it is targeting sham contracting in a number of industries. This has resulted in several prosecutions.	Employers in Australia should review arrangements they have for engaging independent contractors. This is particularly important in light of the Full Court of the Federal Court's decision in *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3, which upheld a finding that five insurance agents were employees, not independent contractors. The consequence of the decision is that the company has significant liabilities for accrued leave entitlements.

What to Look Out for in Australia in 2013

Against the background of developments in 2012, we outline below four areas in which employment-related changes have happened or are expected in Australia in 2013.

Paid Parental Leave for Dads and Partners

In Australia, the *Paid Parental Leave Act 2010* (Cth) was amended in October 2012 to provide for two weeks' paid dad and partner's leave. Dad and partner's pay is available to a father (including same or different sex partner or an adoptive parent) of a child that is born or adopted on or after 1 January 2013.

The recipient of dad and partner's pay must satisfy the same minimum period of work test, maximum income test and Australian residency requirements that apply to parental leave pay. The payment will be made by the Federal Government at the national minimum weekly wage (currently $606.40 per week).

Further Amendments to the Fair Work Act

In 2013 there will be further changes to the FW Act to reflect the remaining recommendations from the Fair Work Act Review Panel. The form and extent of the changes remain subject to consultation between the Federal Government, industry stakeholders and members of the National Workplace Relations Consultative Council.

On 11 February 2013, Minister Shorten announced that the FW Act will be amended to extend the right to request flexible working arrangements to a wider range of workers with caring responsibilities. Minister Shorten also announced that model consultation clauses in awards and agreements will be amended to require employers to genuinely consult about the impact of changes to rosters and working hours on an employee's family life.

Minister Shorten has also recently announced further changes to the FW Act to deal with bullying claims.

New Workplace Gender Equality Agency

The main piece of equal opportunity legislation in Australia, the *Equal Opportunity for Women in the Workplace Act 1999,* has been replaced by the *Workplace Gender Equality Act 2012,* which commenced on 6 December 2012. Some of the changes brought in by the Act include:

- a new object to promote and improve gender equality in employment and in the workplace;
- new reporting obligations which will be gradually introduced, to be fully operational from the 2013-14 reporting period;
- the introduction of standardised gender equality indicators as benchmarks for reporting from the 2013-14 reporting period;
- the introduction of minimum standards which will apply from the 2014-15 reporting period. An employer that submits a report that does not meet a minimum standard and does not improve against it for two further reporting periods may be non-compliant; and
- the introduction of a requirement on employers to inform a union that a public report has been lodged, and to advise unions and employees that comments on the report may be given to the employer or to the Workplace Gender Equality Agency.

Proposed Consolidation of Federal Anti-Discrimination Legislation

In Australia there are proposed new laws dealing with Anti-Discrimination laws at a federal level. An exposure draft of the Human Rights and Anti-Discrimination Bill 2012 has been before a Senate Committee for inquiry and report, and the Committee's report was handed down on 21 February 2013.

The exposure draft Bill aimed to consolidate five existing pieces of Federal anti-discrimination legislation into a single Act. Other changes included:

- new definitions of discrimination by replacing "direct" and "indirect" discrimination with a new test of "unfavourable treatment";
- new protected grounds of discrimination, including sexual orientation and gender identity in public life;
- new general exceptions and compliance exemptions; and
- changes to the vicarious liability test for employers.

The Senate report contains 12 recommendations in relation to the draft Bill, including:

- an amendment to the definition of "gender identity";
- the inclusion of "intersex status," "domestic violence" and "irrelevant criminal record" as protected attributes;
- an amendment to the definition of "discrimination" to remove the reference to "conduct which offends, insults or intimidates" another person;

- the inclusion of "voluntary or unpaid work" as an area of public life in which discrimination is prohibited;
- amendments to the general exception of "justifiable conduct"; and
- the removal of exceptions allowing religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful.

When the updated Bill is available, employers in Australia should consider what impact the proposed changes will have on their anti-discrimination and harassment policies in Australia.

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Employment Law Developments in Canada: Shutting Down the Workplace Bully

By Anneli LeGault

Scope of Article

There is currently relatively little general legislative activity under way in Canada with respect to employment or labour laws, although a provincial election and a change of governing party often leads to immediate changes in labour relations legislation. (In Canada employment law is primarily a provincial matter, although there is also federal legislation which covers about ten per cent of the workforce and is limited to certain industries such as interprovincial trucking, railways, shipping, broadcasting and banking.)

However, there have been significant developments in combatting workplace bullying, both through legislative change and through litigation. This article reports on anti-bullying initiatives in Canada.

Background

I remember being contacted by a potential new client when I was a junior associate. My excitement at bringing in a real live plaintiff soon ebbed away when I conducted the initial interview. His problem was his supervisor and the unfair and abusive manner in which he was being treated. Once I determined that my putative plaintiff did not fit into any of the protected groups under anti-discrimination law, I had to tell him that if he resigned he had no cause of action. The law did not require fairness or good treatment in the workplace.

And thus it was for the following decade, until our Courts slowly started expanding the grounds for constructive dismissal claims to include workplace harassment, bullying and generally toxic workplaces.

By way of brief background, Canadian law (both common law and Quebec's civil law) does not recognize the concept of employment at will. All employer-initiated terminations of employment are either for cause (in which case there is nothing payable), or not for cause. Cause is limited to egregious behaviour such as fraud, embezzlement, serious dishonesty, harassment and gross insubordination. In all other cases the termination is treated as not for cause and the dismissed employee has a legislated entitlement to notice of termination or termination pay, as well as generous severance entitlements under the common law and civil law.

Constructive Dismissal

Canadian law has recognized the concept of constructive dismissal for many decades, but until recently such cases typically involved a unilateral adverse change to fundamental terms of employment, such as a demotion, wage decrease, loss of subordinates and the like. The measure of damages is identical to the severance package to which the employee would have been entitled had he or she been directly dismissed.

However, gradually the Courts began to accept that certain workplaces were so toxic that an employee had the right to quit and receive full severance pay. Early examples included a right to claim constructive dismissal damages when an employee was sexually or racially harassed or discriminated against on a ground prohibited under discrimination legislation.

This concept grew to recognize that employees may quit due to harassment, bullying, being shouted at, or being belittled, even when the treatment is unrelated to age, race, sex, ethnicity or other similar grounds.

A key decision is that of the Ontario Court of Appeal in *Piresferreira v. Ayotte* (2010). The manager involved was known to frequently yell at and swear at employees. He became increasingly angry at one particular employee because of performance issues and at one point he shoved her and yelled at her to get the hell out of his office. The manager received a written disciplinary warning and was ordered to attend counseling on conflict management and effective communication.

However, the employee went on sick leave and was eventually sent a letter by the employer advising her that she was deemed to have resigned. The employee successfully sued for damages for constructive dismissal in a total of almost $150,000, which included twelve months of termination pay, $15,000 in damages for battery and $45,000 in damages for mental suffering relating to the manner of her dismissal.

Unemployment Insurance

Interestingly, the legislation governing the federal unemployment insurance benefits program, the *Employment Insurance Act*, has been amended to recognize quitting for

good cause. Generally, employees who resign are disentitled from obtaining unemployment insurance benefits. However, the legislation was amended to provide that employees who quit for one of the enumerated reasons will be treated as if dismissed by the employer and will be able to receive unemployment insurance benefits. Included among these reasons are leaving because of sexual or "other harassment" (in other words it appears this can be broader than the definition in discrimination laws), working conditions that endanger the employee's health or safety, or antagonism with a supervisor if the employee was not primarily responsible for the antagonism. In summary, it appears that the federal Government also recognizes that some workplaces or some working relationships are so toxic that employees have the right to leave without penalty.

Legislation—The Quebec Model

In 2004 the province of Quebec startled Canada and garnered considerable international publicity by passing an amendment to its *Labour Standards Act* that recognized the concept of "psychological harassment." Psychological harassment in the workplace is defined as vexatious behaviour in the form of repeated conduct, verbal comments, actions or gestures that are hostile or unwanted, that affect the employee's dignity, or psychological or physical integrity and that make the work environment harmful. Even a single serious incident of such behaviour may constitute psychological harassment if it produces a lasting harmful effect on the employee. The definition of psychological harassment includes sexual harassment at work and harassment based on any of the grounds set out in Quebec's *Charter of Human Rights and Freedoms*, which include prohibited grounds such as race, colour, sex, sexual orientation, age, religion, handicap and ethnic or national origin. The legislation provides that every employee has a right to a work environment free from psychological harassment. It also requires employers to take reasonable action to prevent psychological harassment and to put a stop to it whenever they become aware of such activity.

In other words, the legislation does not require employers to provide a harassment-free workplace, but where employers have tried to prevent the harassment (often through education and policies) and have dealt diligently with an incident of harassment that occurs notwithstanding such efforts, the employer's liability will be very limited. This is a familiar principle under Canadian law since the 1987 ruling of the Supreme Court of Canada in *Robichaud v. Treasury Board*. In that case, the Supreme Court of Canada recognized that, while an employer is liable under the law for any sexual harassment that may occur in the workplace, it will not be liable for the remedial consequences to the same extent if it took steps to prevent sexual harassment in the workplace and acted diligently in the event that harassment has occurred in order to put a stop to it.

Employers in other provinces watched with interest as the Quebec Government hired additional inspectors following passage of the legislation. Statistics confirm that the legislation has been used a great deal. Bearing in mind that the Quebec provincial workforce is about four million people, in the first three years of the legislation the Quebec Labour Standards Board received close to 7,000 complaints of psychological harassment, but only approximately three percent were actually transferred to a full hearing, with the remainder being resolved without a hearing. The cases have generally held that employers are only liable if reasonable measures were not taken to stop workplace harassment from occurring or continuing. An employer's obligation is to use all reasonable measures to prevent the harassment.

Post Quebec—The Reaction

After Quebec passed its groundbreaking legislation, Canadian national employers faced a dilemma. Intrusive and unnecessary as the Quebec legislation may first have appeared, how could one employer protect its employees differently in different provinces? Many national employers revised their anti-discrimination and sexual harassment policies to also prohibit general workplace harassment and to provide access to the company's complaint and investigation process for such complaints as well.

The other provincial governments watched the Quebec experience with interest and by 2007 the province of Saskatchewan amended its Occupational Safety and Health legislation to address workplace harassment.

Since then, a number of other provinces have passed similar legislation, typically by amending their occupational safety and health statutes.

The Ontario Experience

As the most populous province, the Ontario experience will be looked at here. Ontario's *Occupational Health and Safety Act* was amended in 2010 and, once again, did not outlaw workplace harassment. Instead, the Ontario legislation requires employers to prepare a workplace harassment policy and to create a workplace harassment program to prevent workplace harassment. Workplace harassment is defined as a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome. Ontario's workplace harassment law does not prohibit harassment and does not provide a complaint process. If

an employee files a complaint, a provincial Ministry of Labour Inspector (the same inspectors who investigate work refusals and unsafe workplace) can come to the workplace and investigate. Reprisal complaints can be forwarded to the Ontario Labour Relations Board.

The legislation is relatively new and employers are still adapting. Employers often fail to recognize that a complaint they are hearing is legally a workplace harassment complaint that needs to be investigated and resolved. The existence of the legislation will also undoubtedly provide support for constructive dismissal claims in the courts based on a toxic work environment or based on bullying.

In many cases where a complaint against a supervisor or performance manager is treated as a formal workplace harassment matter, an employer is left with an uncomfortable post-investigation situation.

One relatively small employer's experience will illustrate the possible aftermath of a complaint investigation. This Ontario employer received three workplace harassment complaints in the space of ten months shortly after the legislation was passed. Because one was lodged by a senior level manager against the CEO, it was recognized that any internal investigation would be subject to attack as lacking in credibility. The organization, therefore, retained an experienced outside arm's-length investigator who found no evidence at all of workplace harassment. The senior manager went on sick leave and never returned to the workplace—possibly recognizing the difficulty of working on a daily basis with a boss he had just accused of illegal harassment.

A second employee went on sick leave and then filed his harassment complaint against the head of human resources while on leave of absence. Once again, the complaint was deemed to be groundless and the employee resigned from employment.

A third employee was a probationary employee who was being managed by his performance manager. He also went on sick leave at the time of filing the harassment complaint against his manager but a mutual agreement was negotiated to have him depart before the probationary period came to an end.

The employer dedicated significant resources in one year to the three complaints, including management time, legal fees and investigation fees. None of the complainants felt comfortable returning to the workplace once their complaints were dismissed, but one wonders whether they would have felt any more comfortable returning to work if their bosses were reprimanded or sent off for coaching. There is an onus on an employer to smooth the way for a complainant and alleged bully to continue to work together collegially. This is particularly the case where the complaint was filed against a manager instead of a peer.

Some good does come out of such experiences, however. Such complaints, which now are treated seriously, will provide an opportunity for an organization to revisit the supervisory skills of their supervisory and managerial employees. Far too often, the best widget maker gets promoted to become the manager of all of the widget makers. Being a good widget maker does not in any way lead to the conclusion that one has good people skills or is an effective supervisor or manager. There is even more of a disconnect, in my experience, when the top sales person is promoted to be the manager of the sales representatives. Far too often, the skills required to be an effective sales person are not the same as the skills required to be an effective manager.

Under the *Occupational Health and Safety Act* of Ontario, complaints about a violation of the Act are heard by the Ontario Labour Relations Board. Possibly fearing a flood of workplace harassment complaints, the very busy Labour Board very early on established strict and clear parameters.

An early case, *Conforti v. Investia Financial Services*, arose when an employee complained of being harassed by colleagues by way of email. However, the employee's own emails grew increasingly abusive and unprofessional and the employer refused to investigate the employee's harassment allegations. The employee's employment was terminated and the employee filed a complaint with the Labour Board alleging that his dismissal was actually a reprisal for making a harassment complaint in the workplace. The Labour Board dismissed the complaint and noted that under the *Occupational Health and Safety Act* employers do not have an obligation to keep the workplace harassment free. The Labour Board went on to state that the statutory obligation is that an employer needs to have a policy for dealing with harassment complaints. In fact, the Labour Board went on to state:

> The legislature could very easily have said that an employer has an obligation to provide a harassment free workplace but it did not.… The Act does not dictate how an employer will actually investigate a harassment complaint and protect a worker who complains about that practical task not being performed properly. The Act just does not give us the authority to deal with this situation.

A very welcome decision, *Amodeo v. Craiglee Nursing Home*, distinguished between normal performance management and workplace harassment by a supervisor. In this case, an employee at a nursing home alleged that she had been harassed through written warnings and oral warnings from her performance manager. After she was eventually dismissed, she alleged that she had suffered a reprisal for raising a harassment issue. The Labour Board stated that "the workplace harassment provisions do not normally apply to the conduct of a manager that falls within his or her normal work function, even if in the course of carrying out that function a worker suffers unpleasant consequences." Even where a manager's conduct can be characterized as blunt and unflattering, it does not constitute harassment. This is an important decision and some employers have sought to clarify in their workplace harassment policies and complaint processes what is and is not harassment. In other words, normal progressive discipline, corrective action, performance management and performance improvement plans, where conducted properly, do not constitute workplace harassment.

So How Bad Is It?

Analyzing statistics about workplace bullying is difficult because the responses of workers will vary greatly depending on the definition of harassment or bullying that is put to them. In the United States, 37% of workers reported being bullied at work and 45% of bullied employees reported that it affected their health [U.S. Workplace Bullying Survey: September, 2007, reported in Public Services Health and Safety Association, "Bullying in the Workplace: A Hand Book for the Workplace," 2d edition, 2010]. Forty percent of Canadian workers have reported experiencing bullying on a weekly basis [Lee and Brotheridge, "When Prey Turns Predatory: Workplace Bullying as Predictor of Counter Aggression/Bullying, Coping and Wellbeing," European Journal of Work and Organizational Psychology, 2006]. The Canada Safety Council has indicated that bullied employees waste up to 52% of their time at work because they spend time defending themselves, networking for support, thinking about the situation, being demotivated and stressed and taking sick leave due to stress-related illnesses.

Conclusion

As you can see, when anti-bullying legislation is passed there are initial growing pains. However, Canadian employers have, by and large, not found the legislation to be obtrusive, and the tribunals administering the legislation have been pragmatic and cautious so as not to interfere in the management of employee performance. The creation of a workplace in which an employee experiences respect and dignity and is not belittled, harassed, bullied or insulted is a laudable goal. In fact, Canada comes late to the party, as the United Kingdom, Australia and a number of the Scandinavian countries passed such legislation many years ago. These countries have also dealt with workplace bullying and harassment through health and safety legislation, and related initiatives to address the health effects of bullying. After all, bullied employees have been shown to suffer more from absenteeism and lowered productivity. While the Canadian legislation may appear dramatic, in effect it is simply reflecting the constructive dismissal concept which evolved in the courts and allowed employees to quit when facing workplace bullying and harassment.

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Anneli's employment law practice is focused on Canadian human resources policy issues, including employment agreements, human rights, pay equity, employment equity, reorganizations, outsourcing, secondments, business acquisitions, personal data protection and terms and conditions of employment. More recently she has been advising clients on the province of Ontario's new workplace harassment, workplace violence and accessibility regulations. Anneli co-authored *Your Employment Standards Questions Answered—Federal and Provincial Guidance, 4th Edition* and is the author of *Fairness in the Workplace*, as well as numerous articles and papers.

The New Impact of Employees' Health on EU and French Employment Law

By François Berbinau

For more than a decade now French employment law on working hours has considerably changed through legislative measures and case law. It all started in 1998, when French lawmakers decided to reduce the 39-hour work week to 35 hours per week.[1] The then Socialist government thought this reform would be regarded as a significant milestone. The endless political controversy it has generated has led to numerous amendments of this pillar of French Socialists' ideology with majorities coming and going. But from a purely legal standpoint, and sometimes under the influence of the EU, French employment law on working hours has suffered from multiple changes, adjustments and "clarifications," which have led to a very complex and much criticized system, hardly secure and practicable for most mid-sized and small companies. Now, while everything in that system was revolving around the working time, for a couple of years, under the influence of both European and French courts, players have started considering it from another angle: the protection of employees against undue influence of their work on their private life and general health. The safeguard of employees' health and private sphere has become a key issue in recent developments in European and French employment law on work time and other topics. Below are some topical examples of the practical consequences of this recent trend.

Limitation to the Use of the "*Cadre Dirigeant*" Status

The "*Cadre Dirigeant*" (executive manager) status sets an exception to the general French employment law principles on work time. Thus, the executive managers are not subject to the work time regulations; in particular they are not affected by (i) the 35-hour act and payments of overtime hours, (ii) nor by any limitation on daily or weekly work time, nor (iii) the obligation to benefit from a daily and weekly rest period.

Pursuant to article L.3111-2 of the French Labor code the executive manager status can be defined based on a combination of three criteria: (i) they bear many responsibilities so important that they need considerable independence in their time schedule, (ii) they are able to make decisions in the most autonomous way, and (iii) their remunerations are within the highest levels of the remuneration rankings of the company.

This status potentially allows employers to expect unlimited working hours from their executive managers. Therefore, judges consider that it can only apply to a very limited number of executives who are the real managers of their company. And they are concerned that other executives lower in the hierarchy, because they are bound by this status, be led to give priority to their work to the detriment of their health and private life.

By two recent decisions the *Cour de cassation*[2] has thus restricted the use this status. In the first decision the French Supreme Court held that the status of executive managers is not strictly dependent on certain fixed criteria such as the existence or lack of "an express agreement between the employer and the employee," or the ranking of the employee in the applicable collective bargaining agreement job classification.[3] Therefore, the French Supreme Court called upon courts addressing the issue on the merits to determine in concreto the employee's real position in the company.

In the second decision the *Cour de cassation* has recalled the test for the status to apply and it has come to the conclusion that "these cumulative criteria imply that executive managers are only those who participate in the company's management."[4]

Therefore an executive manager is an employee who participates in the creation of the company's financial, economic and social policy.

This case law raises serious concerns for employers who are used to applying the status of executive managers to avoid paying overtime hours to certain of their executives, though they are not necessarily involved in the management of the company. In case these employees, abusively branded as "executive managers," would successfully challenge their status, they would be entitled to the payment of all the overtime above 35 hours per week over a period of five years. Since the burden of proof lies both on the employee and the employer, the latter will need to bring to the court a clear proof of the hours effectively done by its employee. And there is the catch, because employers typically do not keep track of the time spent by their executive managers.

Concerns about the impact of work time on employees' general health also impacted another executives' status used to avoid paying overtime hours: the "*forfait-jours*."

Recent Evolutions of the French "*Forfait-jours*" System Prompted by the EU

The "*forfait-jours*" system (annual number of working days remunerated by a lump sum on a monthly basis) is an innovative way to organize work time for executives. It applies to a certain category of executives, those who are independent enough in the organization of their daily work. Their work time is not recorded in hours but in days. This system was put in place in 2000[5] and has been amended since. Practically, the employer and the employee conclude a "*forfait-jours*" agreement which provides for a maximum number of days that the employee can work per year. This derogating way of organizing and counting work time exempts the company from most of the regulations relating to the 35-hour work week, with the exception of those concerning minimum rest time provisions. In case of litigation, the employer must show that (i) the employee's position can justify the use of a "*forfait-jours*" system, (ii) the employee has given his/her consent at the time of the signature of the employment contract or at the time where an amendment to his/her contract was signed and (iii) a labor collective bargaining agreement applicable within the company allows for a "*forfait-jours*" system to be implemented.

Ever since it has been enacted in France this system has been criticized by EU bodies and in particular by the European Committee of Social Rights,[6] whose role is to judge whether States party are in conformity in law and in practice with the provisions of the European Social Charter. This Charter sets out social and economic human rights and establishes a supervisory mechanism guaranteeing their respect by the Member States.[7]

In 2010, the European Committee of Social Rights confirmed its previous decisions and declared that the French "*forfait-jours*" system violated the Charter and in particular its provisions endorsing the employee's right to a reasonable daily and weekly working hours and his/her right to an increased rate of the remuneration for overtime work.[8]

As the legal implementation status of the European Social Charter and of the European Committee of Social Rights decisions is unclear in France, the legislature did not deem it appropriate to amend the law.

But unlike lawmakers, French courts have decided to uphold the decisions of the European Committee of Social Rights. By a reversal of its then-established case law the *Cour de cassation* held that the "*forfait-jours*" system in general was valid but that the enforceability of the collective bargaining agreement allowing the conclusion of "*forfait-jours*" contracts was subject to the incorporation in the said collective bargaining agreement of adequate provisions concerning the monitoring of workload and the intensity of the employees' work days.[9] The concerned collective bargaining agreements shall provide for maximum working hours as well as compulsory daily and weekly minimum rest periods.

Failure to meet these conditions thus results in the "*forfait-jours*" agreement being null and void. This means that the 35-hour work week rule will apply to the employment contract and that every hour above this cap will have to be recorded and paid as overtime work. The financial consequences for the employer can be rather significant as most executives work more than forty-five hours per week. Moreover, as mentioned hereinabove, in case of litigation, it will be for the employer to prove the effective number of hours worked by its employee, which hours it thought it did not have to monitor thanks to the "*forfait-jours*" agreement.

In September last year, the *Cour de cassation* went a step further towards protecting employees against the undue influence of work time on their health and personal life.[10] Beyond the mere requirement for maximum daily working hours and minimum rest time, the French Supreme Court has significantly reinforced the employers' related monitoring obligations.

Article L.3121-46 of the French Labor code provides that when a "*forfait-jours*" agreement has been concluded between an employer and its employee, an individual annual meeting must be held in order to discuss the workload of the employee, the work organization in the company, the employee's remuneration, as well as the balance between the employee's personal and professional life. In its September 26, 2012 decision, the *Cour de cassation* declared that the said statutory requirement was merely a minimum and that collective bargaining agreements shall provide for a constant monitoring of employees' workload under pain of nullity of the "*forfait-jours*" agreements. This decision, which answers a French union's persistent claim,[11] clearly imposes that the "*forfait-jours*" agreements be more strictly controlled since it may negatively impact the employees' general health and personal life.

The Supreme Court does not specify what exactly is required from employers, but one thing is certain, a mere respect of the minimum standard set by the law is not enough and may ultimately lead to a forced payment of overtime hours to employees who the employer thought were working under a "*forfait-jours*."

As of today, this decision has raised many questions, which remain unanswered: it is not clear (i) who should be conducting the meeting with the employee (the HR manager? or an independent party?), (ii) whether a confidentiality agreement should be signed to cover such meetings, (iii) what the employer should do with the in-

formation collected and whether it should be considered personal or professional data, and (iv) whether the employer should thus seek the authorization of the "CNIL" (the French Data Protection Agency)[12] to collect these data?

The new focus brought on the balance between the employee's workload and personal life forms part of a larger effort towards the protection of harmful consequences of work and the working environment in general on the employee's personal life, including his/her health. The following recent examples give a taste of what courts and lawmakers are trying to achieve.

Geo-tracking

Another work time control and personal life's protection related issue is the geo-tracking of employees' vehicles. It concerns employees whose office hours cannot be controlled, mainly the traveling sales representatives. A little over a year ago, the *Cour de cassation* handed down a ruling concerning the possibility to control the work time of the employees by geo-tracking their vehicles.[13] The French Supreme Court held that the use of a geo-tracking system to control the employee's work time is not valid when he/she has an extensive discretion in organizing his/her work. This decision does not prohibit the use of a geo-tracking system per se but it limits its scope in order to avoid any abusive venture into the employees' personal life.

In issuing this decision the *Cour de cassation* came in line with the *CNIL*'s recommendation on the conditions necessary for a geo-tracking system to be valid: (i) it should comply with the *CNIL* regulations, (ii) it should be used for specific purposes and (iii) it should be subject to pre-requirements before its implementation (e.g.: a declaration of compliance).

A New Statutory Definition of Sexual Harassment

Sexual and moral harassments are both civil wrongdoings under the French Labor code and criminal offenses under the French Penal code. In the past ten years, France a experienced a tremendous evolution towards the protection of employees against both types of harassment in the workplace and the employer is now under a strict obligation to protect both the physical and psychological health of its employees and thus to secure that no harassment will occur in the company and to take action when necessary. But in the early days of May 2012, a decision by the *Conseil Constitutionnel* (the French Constitutional Court) threw everybody off balance when it decided, following a priority preliminary ruling on the constitutionality of then-article 222-33 of the French Penal code.[14] that this statutory provision defining sexual harassment was in breach of the French constitution as it was not precise enough on the elements constituting the offence.[15] As a direct consequence, perpetrators could no longer be sued and convicted for sexual harassment until a new act was adopted. Three months later a new law was adopted by the French Parliament at the initiative of the government.[16]

The new statutory definition distinguishes two kinds of offenses.

The first one is "sexual harassment" per se: the perpetrator imposes on another person repeated sexual remarks or behaviors which will either affect his/her dignity because they are degrading or humiliating, or create an intimidating, hostile or offensive situation.

The second offense is assimilated to sexual harassment but it is rather "sexual blackmail." It was never covered as such by any statutory provision before. It is defined as the use of any kind of pressure, whether repeatedly or not, really or apparently aiming at obtaining an act of a sexual nature, to the benefit of the offender or of a third party.

They are both punished by possible imprisonment of 2 to 3 years maximum and fines of 30,000 Euros to 45,000 Euros maximum.

Under this new act the employer's obligations have been reinforced. Since it must prevent any such harassment, the employer must alert his/her employees to sexual and moral harassment possible situations. Therefore, it must display within the workplace a copy of the new article 222-33 of the French Penal code and of article 222-33-2 of the same code related to moral harassment, and it may also set up training sessions in order to improve the prevention and identification of harassment situations, and take appropriate measures to easily identify harassment offences.

Worth mentioning are the latest episodes of the French saga on harassment in the workplace. By a combination of two decisions of February 7, 2012 and June 6, 2012 the *Cour de cassation* held that an employee who wrongfully denounces an alleged harassment within the company cannot be dismissed for this reason[17] unless he/she has acted in bad faith, in which case he/she may be dismissed for gross misconduct.[18]

All the above-mentioned issues illustrate a wind of change blowing on employment law which is likely to bring more changes to European and French employment law, thus impacting the ways and organization of companies doing business in Europe and especially in France, including subsidiaries of foreign groups.

Endnotes

1. Act N°98-461 of June 13, 1998 is one of the acts known as the "Aubry Acts."
2. French Supreme Court.
3. French Supreme Court (Labor Section) Decision N° 09-67.798 of November 30, 2011.
4. French Supreme Court (Labor Section) Decision N° 10-24.412 of January 31, 2012.
5. Act N°2000-37 of January 19, 2000.
6. In respect of national reports the Committee adopts conclusions and in respect of collective complaints the Committee adopts decisions. The Committee is composed of 15 independent, impartial experts, elected by the Committee of Ministers for a 6-year term of office, renewable once.
7. It was adopted in 1961, then revised in 1996 and came into force in 1999.
8. European Committee of Social Rights decisions: CGT v. France, complaint No. 55/2009 and CFE-CGC v. France, complaint No. 56/2009 of June 23, 2010.
9. French Supreme Court (Labor Section) Decision N°09-71107 of June 29, 2011.
10. French Supreme Court (Labor Section) Decision N°11-14.540 of September 26, 2012.
11. *Revue du droit du travail* 2011, p. 474.
12. The *Commission Nationale de l'Informatique et des Libertés* ("CNIL") is an independent administrative authority set up in January 6, 1978. It is responsible for ensuring that information technology remains at the service of citizens and does not jeopardize human identity or breach human rights, privacy or civil liberties. The CNIL's missions include the information and assistance of individuals in the exercise of their rights relating to data protection. It receives complaints and claims from individuals. The CNIL also ensures that the methods used to implement an individual's statutory right to access his/her data on files do not impair the free exercise of that right. All "sensitive" data processing is subject to the CNIL's prior authorization. Therefore, an employer has to notify any employee data file and its characteristics to the CNIL in order to ensure that each employee is in a position to exercise his/her rights; it must ensure the security of these data and their confidentiality and accept on-site inspections by the CNIL.
13. French Supreme Court (Labor Section) Decision N°10-18.036 of November 3, 2011.
14. The priority ruling on constitutionality has been created by the Act n°2008-724 of July 23, 2008. It allows any party to a litigation to challenge during the proceedings the constitutionality of any French legal provision referred to by another party.
15. French Supreme Court (Labor Section) Decision N°2012-240 QPC of May 4, 2012.
16. Act N°2012-954 of August 6, 2012.
17. French Supreme Court (Labor Section) Decision N°10-18.035 of February 7, 2012.
18. French Supreme Court (Labor Section) Decision N°10-28.345 of June 6, 2012.

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Things to Think About When Sending Your U.S. Employee to China

By Junlu Jiang, Fang Cao, Philip M. Berkowitz, Trent M. Sutton and Huan Xiong

The explosion of global commerce in the People's Republic of China ("PRC") is leading more and more U.S. companies—large and small—to increase their presence in China and consider sending U.S.-based employees there to work with affiliated companies, such as a wholly owned foreign enterprise or joint venture. These assignments may be long- or short-term, but longer term assignments present especially acute immigration and employment law challenges.

Relevant questions include: what options are available for the U.S. company to structure the assignment of U.S. employees to China? Is a work permit required for legitimate employment in China? Which entity should pay the salary and provide benefits to the assigned employee? How does the employer deal with the tax issues associated with the income generated by the assignment in China?

This article aims to provide helpful guidance on these issues.

Options for Structuring the Assignment

There are a few options available for the U.S. company to structure the assignment of U.S. employees to work in China. The most common way is through "expatriation," where the U.S. employee remains employed by the U.S. entity while assigned to provide services temporarily to the affiliated company in China. In this case, there is usually no employment agreement entered into between the expatriate employee and the affiliated company in China. Moreover, the expatriate employee will stay on the payroll of the U.S. entity, but the actual payments may be made directly by the Chinese affiliate or the U.S. entity, depending on the circumstances of the expatriation and the relevant tax and employment risks.

Another option is the "local employment" or "local hire." This refers to the situation where the assigned U.S. employee signs an employment contract directly with the affiliated company in China and his or her salary is paid by the Chinese affiliate. The U.S. employee is treated like the Chinese employees and is subject to the protections of Chinese law. The U.S. employee also typically ends his or her employment with the U.S. company, cutting off his or her eligibility for U.S. benefits and, in many cases, his eligibility to contribute to the U.S. social security scheme.

According to the local rules of certain regions in China, the assigned employee in the expatriation situation is also required to sign a *pro forma* employment contract with the Chinese affiliate in order to be eligible to receive the work permit and visa required for legitimate employment in China. Although controversy exists as to whether a substantive employment relation is created by the *pro forma* employment contract and practice varies from region to region, the mainstream view is that this pro forma employment contract is generally part of the litany of paperwork necessary to support an expatriate's eligibility for a visa or work permit, and it does not typically affect the direct employment relationship between the U.S. company and its assigned employee.

Immigration Documents and Work Authorizations

Once the U.S. company has decided on the preferred assignment structure, it must consider what kind of travel documents or work authorizations the U.S. employee needs to obtain from relevant PRC authorities in order to legally enter into and perform work in China. The requirements for visas and work permits in different assignment structures will vary under PRC laws and regulations. A work permit is not required for a foreign employee who enters China with a business visa and works there for less than three months. However, in the expatriation situation, where the U.S. employee is expected to work in China for three months or longer, a work permit is almost always required. In the event the U.S. employee is locally hired, the employee will need a work permit regardless of the length of time the employee intends to work in China.

In order for the U.S. employee to obtain a work visa to enter and perform work in China, the affiliated company in China for which the U.S. employee renders services must first apply for an employment license and a visa notification. The PRC authority responsible for approval of employment license is the relevant local labor department where the affiliated Chinese company is located. The processing time usually does not exceed 15 business days. Once the employment license is issued, the affiliated Chinese company may apply for the visa notification. The U.S. employee can only begin to apply for a work visa after receiving both the employment license and the visa notification. After the U.S. employee has arrived in China with the work visa, the affiliated Chinese company will

need to assist him or her to obtain the work permit and residence permit.

Payment of Compensation and Benefits

In many cases, U.S. companies prefer to keep the expatriate U.S. employee on the U.S. company's payroll during the temporary foreign assignment. This is generally to facilitate the U.S. employee's continued participation in the company's retirement/pension plans, the social security system of the United States, and other U.S.-based compensation and benefit programs. However, as noted above, which company actually pays the U.S. individual is often a balancing test between the employment risks associated with having the Chinese entity pay the employee directly and the tax risks associated with the U.S. entity paying the employee directly. In other words, to the extent the Chinese entity pays the U.S. employee directly, the U.S. employee looks more like a full-fledged employee of the Chinese entity and, therefore, is potentially subject to all benefits and programs offered by the Chinese entity to its own employees.

On the other hand, in the event the U.S. company pays the employee directly in China, the U.S. company may unnecessarily increase the risks of a permanent establishment in China, which means that the U.S. company may be deemed to be doing business in China and, therefore, subject to corporate income tax and filings. Moreover, there are currency exchange concerns and intra-company chargebacks associated with this arrangement. This article cannot thoroughly address these issues, but the decision of who pays is one that should be carefully considered with appropriate tax and employment professionals.

In the situation of a local hire, the U.S. employee will receive compensation and benefits from the affiliated Chinese company like any other Chinese employee. In both situations, though, the affiliated Chinese company is always responsible for withholding and paying social security contributions in accordance with Chinese social security law, discussed below.

China's Social Security Regime

Prior to the implementation of the Social Insurance Law of the People's Republic of China, which became effective on July 1, 2011, foreign employees in China were not mandatorily required to participate in China's social security regime. However, the newly enacted Social Insurance Law, along with the Interim Measures on Participation of Foreign Nationals Working in China in Social Insurance ("Interim Measures"), issued by the Ministry of Human Resources and Social Security, require all foreign nationals, either employed locally by entities within China or seconded by foreign companies to work in China as expatriate employees, to participate in all five basic social security schemes, namely, basic pension insurance, basic medical insurance, unemployment insurance, maternity insurance and work-related injury insurance.

Under the Interim Measures, only foreign nationals whose countries have already executed bilateral or multilateral social security treaties with China are exempt from participation, provided they can prove that they are continuing to make contributions in their home countries. No such treaty has been signed between China and the United States. Therefore, the affiliated company in China for which the U.S. employee renders services is obligated to withhold and pay social security contributions for the foreign employee, regardless of whether the U.S. employee is localized or expatriated.

Under China's social security regime, the specific contribution percentages are determined by local governments and vary by location. Employees generally contribute 9-12% of their gross monthly income up to specified maximums (*i.e.*, capped at three times the local average monthly wage) towards basic pension, basic medical insurance and unemployment insurance, while employers contribute to all five categories of social insurance.

Although the new Social Insurance Law aims at providing foreign employees with the same level of benefits as Chinese employees, many employers deem the additional costs of providing coverage of social insurance for foreign employees an unwelcome burden. Given the heavy penalties for non-compliance, employers should take necessary steps to ensure that they do not fall afoul of the new regime.

Individual Income Tax

According to Chinese tax laws and the Income Tax Convention between the United States and China, a U.S. citizen with no residence in China who lives continuously or for an accumulated period of no more than 183 days in China, whose compensation is paid by the employer outside China, is exempt from declaration for payment of individual income tax in China. However, if the U.S. citizen lives continuously or for an accumulated period *exceeding* 183 days in China, he or she must pay income tax on the income gained during the working period in China regardless of whether the wages were paid by the local Chinese or U.S. company.

The above-mentioned income tax regulation does not apply to a U.S. citizen who is appointed as a director or senior officer of an entity in China and receives his or her director's fees or salary directly from the Chinese

entity. In this situation, the U.S. citizen is obligated to pay income tax on the income gained from the first day of his or her appointment as a director or senior officer, no matter whether his or her duties are actually performed within China. The above income tax regulation only applies when the salary and compensation the U.S. citizen receives as a director or senior officer are paid by a company outside of China. The tax obligations of U.S. employees who are assigned to work in China for a period longer than 183 days, therefore, will vary depending on the source of their income. If the U.S. employees are paid exclusively by the U.S. company, their obligation to declare and pay individual income tax under Chinese law will not be triggered until they stay longer than 183 days. However, if the U.S. employees are locally paid by the affiliated Chinese company, they will have the same tax obligation as local Chinese employees from day one of their work in China.

In China, the employer is obligated to withhold the individual income tax on behalf of the employee. Therefore, regardless of whether an individual is locally hired or expatriated to the Chinese entity, the Chinese entity will generally be obliged to withhold and pay the individual income tax on behalf of the U.S. employee. In the event the U.S. employee has been expatriated to the Chinese entity, the Chinese entity will often charge-back such amounts to the U.S. company. However, regardless of the structure used, such taxes must be withheld and paid.

Conclusion

China is a country with a wealth of opportunities for business and entrepreneurship. Of course, while this article is intended to touch on the more common aspects of such a transfer, a thorough analysis of each employment, tax, or immigration risk inherently part of cross-border transfers is beyond the scope of this article. Accordingly, U.S. companies should ensure that they have obtained the appropriate advice and counsel of legal and tax professionals to ensure compliance with the various regulatory regimes.

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A Brief Note on U.S. and EU Businesses Implementing Collective Redundancy in the Czech Republic

By Michal Kašpárek and Jiří Horník

Company groups based in the U.S. or EU that also run part of their businesses in the Czech Republic may face administrative obstacles when dismissing employees in more than one EU jurisdiction, including in the Czech Republic. Due to interpretation difficulties regarding Czech and EU laws, it may not always be clear whether such dismissals are subject to the Czech regulation on collective redundancy or not. In this article we would like to look at the problem and its major consequences.

The Nature of Collective Redundancy

Collective redundancies (also called *layoffs* or *collective dismissals*) are becoming more frequent these days and are often a hot topic of discussion. Especially now, during the economic downturn, companies consider collective redundancy a suitable way to minimize losses and avoid bankruptcy as it can reduce their salary and other mandatory labor costs.

The concept of collective redundancies as regulated by law does not contain any special grounds for employee termination. It is merely a regulated procedure during which an employer terminates the employment of a certain number of employees for certain reasons in a time regulated by law. Therefore, collective redundancy does not represent a different or new approach to terminating an employment relationship, but is rather a procedure that prevents unscrupulous releases of large numbers of employees, as well as the related rapid increase in unemployment, without any prior information from the employer or consultation with employee representatives or public authorities. The number of employees and time frame during which a dismissed employee can be added to a group of other dismissed employees so that the dismissal may constitute collective redundancy are determined by national legal systems.

U.S. Federal and New York State Regulation—Brief Insight

It may be useful to begin by briefly summarizing the regulation of collective redundancies set forth in the New York State Worker Adjustment and Retraining Notification (WARN) Act, which strengthens the provisions of the Federal WARN Act of 1989. Under the Act, private sector employers who employ more than 50 employees are required to issue a WARN notice 90 days before closing a plant. Employers are also required to issue a notice when there is a collective redundancy that affects more than 33% of their entire workforce (at least 25 workers) or 250 workers from a single worksite. Under a State WARN Act, failure to issue a WARN notice may result in a penalty imposed by the Commissioner of Labor.

Czech Regulation—Brief Overview

If an employer decides to shut down its undertaking or to downsize for economic or similar reasons, specific rules for collective redundancy apply when certain thresholds are met. Before notifying the employees, the employer must notify the employee representatives (trade unions or works council) in writing of its intentions and hold consultations with them, in particular regarding the consequences of the collective redundancy.

The employer also has a duty to provide the relevant labor office with details of the collective redundancy in writing, and to submit a specific written report on its decision to bring about mass redundancies and the result of its consultation with the trade unions or works council.

More importantly, specific rules also apply to the notice period, which can be extended above the standard 2-month period so that it would not end before 30 days after the notification is submitted to the labor office. Therefore, unlike when dismissing a single employee, the effective termination of employment in the case of collective redundancies is not under the employer's sole control and could take longer than the employer first expected.

Multinational Businesses—Interpretation Problems

As regards the number of employees to whom notification should be given (during a period of 30 consecutive days) in order to bring about a collective redundancy, under Czech law the following minimal thresholds have to be met:

(a) 10 employees, for an employer employing 20–100 employees

(b) 10% of the workforce in companies employing 101–300 employees

(c) 30 employees, for an employer employing more than 300 employees

And this is where we run into the problem. Many of our clients decide to reorganize their businesses in more than one country simultaneously, with the Czech Republic being only one of the affected jurisdictions. If a U.S.- or EU-based client has a *branch office in the Czech Republic*, it may not always be easy to determine whether the Czech thresholds are met. In other words, it may be disputable whether the Czech part of the reorganization should be subject to the Czech collective redundancy regulation or not.

Czech Labor Code vs. EU Directive

The Czech regulation on collective redundancy is fully harmonized with EU law and reflects the requirements of the EU Council Directive 98/59/EC on collective redundancies (*the Directive*). Further, the EU frame regulation must always be considered when applying the Czech law.

Under the Czech collective redundancy regulation (the Labor Code), it is the *employer* who is subject to certain duties. Czech law refers to an *employer* as a particular entity, i.e., a legal or natural person who has employees. As regards *branch offices*, it must be understood that under Czech law a branch does not constitute a separate legal entity. Therefore, under the Czech Labor Code a foreign entity with a branch office established in the Czech Republic is always the legal employer of the individuals working for the Czech branch.

The Directive, however, refers to an *establishment*, which is not exactly the same as an *employer* as referred to in the Czech Labor Code. The concept of an *establishment* was more or less precisely defined within EU case law[1] as "*a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organizational structure allowing for the accomplishment of those tasks.*" And, further, "*…Given that the objective pursued by the Directive concerns, in particular, the socio-economic effects which collective redundancies may have in a given local context and social environment,* ***the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an 'establishment'…"***

It thus follows that purely in the sense and within the meaning of the Directive, a Czech *branch office* of a U.S.- or EU-based employer could fall under the definition of an *establishment*, and thus be treated separately as a sole subject with certain duties without reflecting the parent company as a whole.

On the other hand, the *employer* referred to in and defined by the Czech Labor Code is broader than the concept of an *establishment* under the Directive and would always involve not only the Czech branch itself, but also (and primarily) the parent company as the sole legal entity recognized by Czech law.

Practical Consequences

There is therefore a risk that the Czech collective redundancy rules would be applied not only with respect to what is happening with the *establishment* as it exists more or less independently within the country, i.e., the *branch office* itself, but also in respect of a restructuring within a parent company domiciled in the U.S. or EU, including all the other branch offices the parent company may have in other countries.

In the case of a company restructuring that would result in redundancy(ies) in a Czech branch office, U.S.- and EU-based parent companies have the following options:

(a) Apply solely Czech law without taking into account the Directive and thus follow the collective redundancy regulation with respect to the legal *employer* as a whole—the thresholds would therefore be linked to the total number of all employees being made redundant at the employer and all its branches;

(b) Interpret and apply Czech law in line with the true purpose of the Directive as further specified in the EU case-law, which would make it possible to incorporate the principle of an *establishment*, thus including the Czech branch office numbers only, without taking into consideration what is happening at the parent company and the other branch offices in other jurisdictions.

The first method is a rather cautious and safe solution for foreign businesses. The latter seems to be more aligned to a company's particular business needs and, after all, more in accordance with the logic of labor law protection against mass redundancies; however, it would take some courage to rely on and potentially also enforce the broad EU interpretation and application of the Czech law.

Learning by Example

Let us look at an EU-based limited liability company with several branch offices located in several EU countries and with 500 employees in total, i.e., in the parent

company and all the branches, of which 30 employees work in the Czech Republic for the Czech branch. As a result of internal restructuring, the company intends to dismiss 40 employees in the French branch and 1 employee in the Czech Republic.

Relying fully on the *establishment* principle set out by the EU Directive, there would clearly be no collective redundancy in the case of the Czech Republic. The Czech regulation would not apply as the Czech branch with 1 redundant employee would be far below the threshold of 10 out of 20–100 employees—all calculated solely for the Czech branch numbers, disregarding the parent company and the other branches.

If we take a cautious approach and apply solely the Czech Labor Code, our primary concern is the *employer* as a whole, i.e., the parent company and all its branches. The Czech collective redundancy procedure would apply in full even if there is a single employee made redundant in the Czech Republic, because the numbers would be met globally (the limited liability company in question makes redundant 41 employees, which is above the 30-employee limit of 500 employees in total).

Is All This Logical?

We understand quite well our clients' objections that the redundancies made in the parent company and other branch offices in other jurisdictions should not be taken into account for the purposes of Czech labor law, as they clearly do not affect the position of the Czech employees. In the language of the EU case law, for the Czech branch there are no "*socio-economic effects…in a given local context and social environment*" connected with the dismissals in the other jurisdictions, and the operation of the Czech branch is usually not "*affected by that of the other units*."

Unfortunately, the Czech Labor Code is marked by rather rigorous formalism. Therefore, we strongly suggest evaluating the potential losses and gains in each particular case before choosing to follow the sober text of the Czech Labor Code rather than the more logical EU-line. Employees of a Czech branch will never have a veto right and cannot block the termination process even if the collective redundancy regime applies. Therefore, eventually it could be just a matter of properly managing the restructuring process in order to reflect the extended time frame of the termination.

Endnote

1. E.g., the Judgment of the Court of Justice of the EU of 15 February 2007, Athinaïki Chartopoïïa AE v L. Panagiotidis and Others, Case C-270/05.

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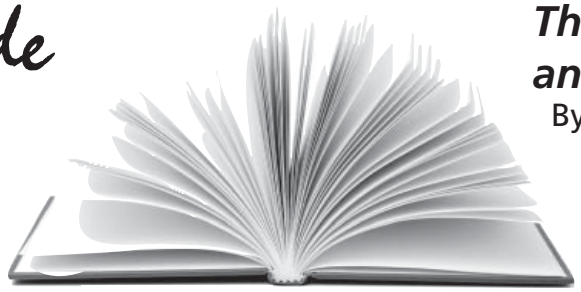


The Oath: The Obama White House and the Supreme Court

By Jeffrey Toobin

(Doubleday, 2012, 283 pages)

Reviewed by Janice Handler

"So let me ask you this…does anyone out there think he's not the President?" Well, a lot of people actually. But in opening *The Oath* with these words of Greg Craig, Chief Counsel to the President, Jeffrey Toobin is not referring to the birther controversy, but the misadministration of the Presidential Oath by Chief Justice John Roberts on Inauguration Day. And in setting up that conflict—however unintentional—Toobin frames a book about many conflicts and contrasts, those between advocates of change and older visions of the Court, those between Constitutional originalists and living constitutionalists, and those between Republican centrists formerly on the Court and the current conservative lineup.

In his previous book, *The Nine*, 2007 (which I reviewed in the Fall 2008 issue of *Inside*), Toobin's theme was the changing balance on the Court from decades of liberal activism to potential conservative control. In the present volume, he depicts the Roberts court as pushing aggressively to advance a conservative Republican agenda and Roberts himself as being far from the impartial umpire he purported to be at his confirmation hearings, but rather an apostle of change who wants to usher in a new understanding of the Constitution. Toobin describes the Republican judicial agenda to: expand executive power, end racial preferences designed to assist African Americans, speed up executions, prohibit all forms of gun control, welcome religion into the public sphere, deregulate political campaigns, and reverse *Roe v. Wade*, allowing states to ban abortion. And he depicts the Roberts Court as moving with unprecedented speed, aggressiveness, and disregard for *stare decisis* to further that agenda.

Toobin begins his narrative by reversing the popular stereotypes of Obama as a misty eyed progressive reformer and Roberts as a restraining judicial conservative. Actually, he says, based on their varying political and life experiences, it is Obama who believes that the legislative process trumps the judiciary as a vehicle for change (so *laissez faire* in fact that in 2012 he failed to even submit nominations for 43 unfilled judicial vacancies), while Roberts, leading an alliance of Anthony M. Kennedy, Antonin Scalia, Clarence Thomas, and Samuel A. Alito Jr., nudges the Court toward the priorities of the Conservative Republican Party. He depicts Obama and Roberts as embodying the larger conflicts between Originalism—the interpretation of the Constitution supposedly as its framers understood it—and "Living Constitution"—the idea that the meaning of the Constitution changes with the times.

As he did in *The Nine*, Toobin then discusses the cases that make his point, such as *Gonzales v. Carhart*, a 2006 case which upheld 5-4 a federal ban on partial birth abortions. Since the Court had struck down a similar Nebraska statute in 2000, Toobin concludes that only the arrival of Justice Alito accounted for the switch. In *District of Columbia v. Heller*, the case which upheld the individual right to own guns, Toobin claims that the Court overlooked much historical data on the intent of the framers to reach its conclusion. And in cases ranging from antitrust to civil procedure to women's and civil rights, Toobin seems to agree with a Breyer dissent which said, "It is not often in the law that so few have so quickly changed so much."

Toobin devotes the greatest attention to the Citizens United (*Citizens United v. Federal Election Commission*) and Affordable Care Act (*National Federation of Independent Business v. Sebelius*) cases, concluding with respect to the latter that the view of many that Roberts cast his deciding vote to uphold the Act in accordance with judicial restraint is wrong: in fact, his narrow interpretation of the Commerce Clause (finding the law valid under the taxing authority but not the Commerce clause) is a long-term gain for the conservative movement (while protecting the right flank of the Court politically for years to come). As to *Citizens United*, Toobin contends that the Court rejected an opportunity to construct a narrow holding that the provisions of the McCain-Feingold campaign finance law did not apply to a not-for-profit corporation distributing a political documentary. Instead the Court ruled broadly, gutting the provisions restricting corporate financing of campaigns—and for the deliberate purpose (at least for Chief Justice Roberts) of helping the Republican Party in

fighting restrictions on corporate or individual participation in elections.

As in *The Nine*, Toobin weaves telling, and often charming, anecdotes about the Justices into his legal discussion of the selected Supreme Court cases. Our hearts go out to Justices Sandra Day O'Connor and Ruth Bader Ginsburg mourning beloved husbands; we exhale with Justice David Souter as he retires and resumes running in the New Hampshire woods; we share the frustration of liberal justices at the disregard of what they view as settled legal doctrine. (But can Toobin really know which Justices "had little patience" for one another—who talked to him anyway?)

The Oath is as readable a book as was *The Nine*, but I wonder if it is entirely fair in advancing its own agenda and legal theories. Without substantial study (as well as knowledge of the cases that were *not* highlighted in this book), it is hard to know if the historical record really supports Toobin's claims of virtually unprecedented judicial over-reaching. Moreover, while Toobin has interviewed "the justices (all? some? who?) and more than 40 of their law clerks," the interviews were on a not-for-attribution basis. Though it is understandable why that would be the case, it can undermine his sources and conclusions. So is Toobin any more of a neutral umpire than Roberts is? Are there, in fact, any neutral umpires out there? Both the way this book works and Toobin's description of the way the Roberts Court works bring to mind the 3 umpires who were asked how they called balls and strikes:

Umpire #1: I call them as they are.

Umpire #2: I call them as I see them.

Umpire #3: They ain't nothin' til I call 'em.

Janice Handler is co-editor of *Inside*. She is the former General Counsel of Elizabeth Arden Cosmetics Co. and currently teaches Corporate Counseling at Fordham Law School.

Pryor Cashman LLP to Host 8th Annual Kenneth G. Standard Diversity Internship Reception on July 22, 2013

Since 2006 the Section will have placed almost 50 summer interns in house after this summer. We will have 6 interns this year. Host entities are ACE, hosting two interns, Alliance Bernstein, NYSTEC and Pitney Bowes.

Our Corporate Counsel Section Fellowship Fund, with the New York Bar Foundation, selected Visiting Nurse Service of New York (VNSNY) to place a student this year in-house in a public interest legal or charitable organization. Interested hosts in 2014 should apply for a grant before October 1 at www.tnybf.org. Corporations and individuals interested in making a donation to the New York Bar Foundation should visit the website or contact david.rothenberg@gs.com.

Each year our Section provides $3,000 for two students toward the compensation of a student at a corporation in addition to providing support to fully fund a public interest student. We are often able to place more than three students each year as many organizations like ACE, Alliance Bernstein and NYSTEC fully support the student's compensation. For the two students we ask the corporation to provide at least another $3,000, for a minimum compensation of $6,000 for the student for the summer. Many corporations will provide the student more than the minimum. If you are interested in hosting for 2014, please contact david.rothenberg@gs.com.

Last year Kaplan Bar Review helped sponsor the reception and provided one student, randomly drawn, a free bar review course and the other students a reduced rate. Please contact david.rothenberg@gs.com if interested in helping support the reception.

Yamicha Stephenson, a past intern and a member of the executive committee, now heads our mentoring program for current and past interns. If you want to help mentor, please contact yamicha.stephenson@gmail.com.

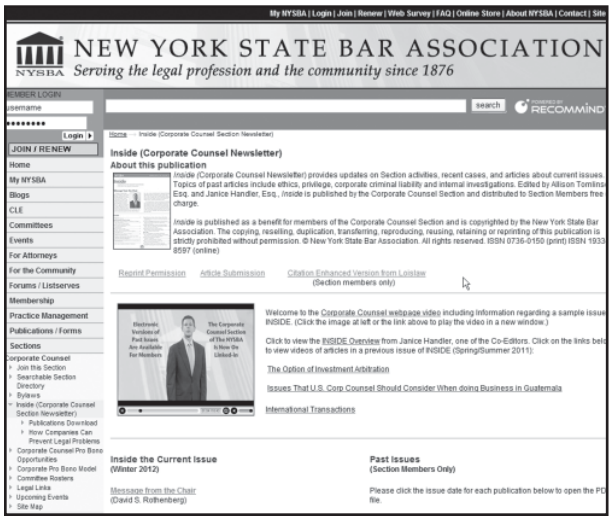
Richard Kim, a past intern, has also join our executive committee as our intern alumni member.

It is a great testament to the program that our alumni are giving back by participating in the future leadership of the Section and many are going to mentor our new interns.

Ken Standard, the program's namesake and a past chair of the Section, along with the current and past leadership of NYSBA, are actively involved in supporting the program. Stephen Younger, a past NYSBA president, introduced ACE to the program this year.

Special thanks goes to the Kenneth G. Standard Diversity Internship Program Committee and Pat Johnson, our NYSBA liaison. The program is a great success due to the support of hundreds of unnamed volunteers over the years at the law schools, NYSBA and corporations. We hope to continue to build on their past efforts.

Inside (the Corporate Counsel Newsletter) is also available online



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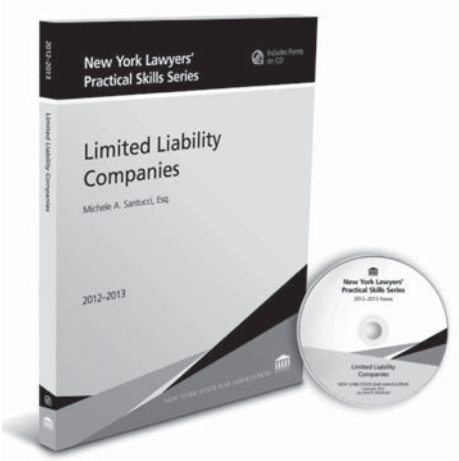

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