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Your World First

Newsletter Employment & Pensions Practice Group

Dear Ladies and Gentlemen,

We are proud to present to you the second issue of our CMS-wide Employment Law Newsletter, covering new developments and trends in various jurisdictions covered by CMS.

Our employment law specialists in 59 international offices help clients thrive in changing times with regard to all kind of employment issues. Through our regular CMS-wide Employment Law Newsletter we would like to draw your attention to new developments and trends in these jurisdiction that may be of importance to you.

You are welcome to forward this newsletter to any of your contacts. Anyone interested may subscribe to our CMS-wide Employment Law Newsletter (**pascal.aarden@cms-dsb.com**). If you no longer wish to receive our CMS-wide Employment Law Newsletter, simply send a short e-mail to this effect to the aforementioned address.

Our CMS employment law specialists are happy to assist you and to answer your questions!

With kind regards

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Focus

In this issue:

Austria: The Reform of the Act on Wage and Social Dumping – High Risk for Employers

Austria's central location in the heart of Europe and its many borders to Eastern European Countries provide for many business opportunities, but also pose challenges in the field of labour law: cheap labour costs across the eastern (and sometimes southern) borders and high labour costs in Austria make it difficult for Austrian companies, especially in the building industry, to compete on prices. Often the fear that competition from low-wage countries will lead to wage dumping in Austria has been expressed.

The notion that the competition of high wage countries with low wage countries will lead to wage dumping in the former is not a new one. In 1996 it prompted the EU to issue the so-called Posted Workers Directive (PWD). It concerns workers who are sent to another Member State by their employers to do a certain job (posted workers) and establishes that while in general the labour law of their country of origin applies, a core of mandatory rules of the host state have to be applied. Most notably, the minimum wage according to the laws or universally applicable collective agreements has to be paid to posted workers. The idea was that this "compromise" would ban the risk of wage dumping while at the same time allow for fair competition in the common market.

It turned out that the Act on Posted Workers was good on paper, but difficult to enforce in practice: the main reason was that the Austrian enforcement system relies on action by the workers themselves who enjoy as members of the Austrian Chamber of Workers free legal counselling and representation in court. Posted workers do not enjoy these rights, and even though trade unions offer free counselling and representation, they are often unaware of their rights. Additionally, they often have little incentive to enforce their rights: even though Austrian wages would be higher than their earnings, they tend to earn more than they would back home.

The Austrian legislator soon realised that the "usual" enforcement system does not function when it comes to posted workers. In 2011, it introduced the Act on Wage and Social Dumping. The underlying notion of the Act was to put enforcement of the Act on Posted Workers in the hands of public authorities rather than to leave it to the posted workers themselves. The Act equipped the administrative authorities with vast competences in controlling the Act on Posted Workers, raiding office and building sites unannounced. Heavy administrative fines can be issued if employers don't have the required documentation on their posted workers ready at hand or if the posted workers aren't paid according to the basic/general rate of pay in the applicable collective agreement.

The Act on Wage and Social Dumping has now been amended, the amendment entering into force on 1st January 2015. This amendment brought not only significant changes to the Act itself, but also for Austrian labour law in general as the two most notable amendments show:

- Until now, employers who paid less than the basic rate of pay were subject to fines. Now, the relevant level of pay is the one required by the respective collective agreement. This change is not a mere play with words but has significant consequences: collective agreements often contain a vast number of allowances and regulations on overtime etc. Any mistake in the difficult calculation of pay can potentially lead to hefty administrative fines.

- Administrative fines now not only concern foreign employers posting workers to Austria, but every Austrian employer. They too are now potentially subject to the above mentioned administrative fines if they do not pay according to the collective agreement.

These amendments effectively mean that administrative authorities and their courts are now in charge when it comes to assessing whether or not a collective agreement has been applied correctly. This was, until now, a task for the civil courts who took on the often rather difficult challenge of assessing whether or not a collective agreement was applied correctly. As many collective agreements define their "occupation groups" in open and broad terms, the outcomes of these court cases were often not easy to predict for employers. However, in case the courts found that they had not paid accordingly, the consequence was merely to pay the difference in pay to the respective workers (and, if further court cases were to be avoided, pay all workers the higher level of pay in the future). Now, employers are faced with heavy administrative fines on top of having to pay the difference. But what is most concerning is that now two Courts – administrative and civil courts – with potentially conflicting jurisdictions are in charge of assessing whether collective agreements have been applied correctly. The risks for employers navigating through the often extensive provisions in collective agreements have increased significantly.

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China: Updates on Amendments to the PRC Work Safety Law

On 1 December 2014 significant amendments to the PRC Work Safety Law (the "Work Safety Law") came into effect. The amendments of the Work Safety Law further improve the standard of work safety in the PCR which is now comparable to that under the respective national laws and European Union directives in Europe. However, the main issue is how the laws are implemented and enforced in practice.
The amendments mainly focus on companies' responsibilities, safety management and supervision of the safety measures implementation.

1. In the past, a company was required to establish and improve a work safety responsibility system. However, no clear guidelines were provided. The amendments to the law clarify the obligations of a company.

a) A company should now specify the persons in charge and determine their duties and assessment standards when setting up a work safety responsibility system. Such personal responsibility – which may lead to personal liability in turn – aims to ensure that safety issues are really assessed and dealt with. A company will also have to establish a supervision and evaluation system to ensure the implementation of the work safety responsibility system.

b) In order to ensure sufficient investment in the prescribed work safety conditions, a company is required to actually allocate a certain amount for work safety expenses and use such funds solely to improve work safety conditions.

c) For certain industries, such as companies engaged in mining, metal smelting, building construction or road transportation as well as all companies which have to deal with hazardous substances, a work safety management department will have to be established or full-time work safety personnel engaged. Such requirements apply to companies with business other than the above-mentioned industries only if they have more than 100 employees.

In addition, companies engaged in mining, metal smelting or manufacturing or storing of hazardous substances will have to employ certified safety engineers to conduct the work safety management.

d) In practice, work safety issues sometimes arise merely because existing safety mechanisms are not applied or not used in the correct way. Therefore, the newly amended law requires that all employees, including not only the regular employees but also seconded employees and interns, should be provided with work safety education and training. Files will have to be kept to record such trainings.

e) A company is required to set up rules for the screening and elimination of potential work accident risks. Again, files will have to be kept to record the implementation of such rules.

2. The amended law also enforces the supervision of the government over work safety in companies.

a) In addition to checking and approving matters involving work safety in accordance with the law, the competent authority is required to prepare annual supervision and inspection plans in accordance with the requirements for different categories and ratings, and to conduct supervision and inspection in accordance with the plan.

b) The government will also set up a database of violations and disclose serious violations to the public and other relevant authorities.

c) The authorities may also interfere directly by suspending production, business or construction, seizing or impounding facilities and equipment or hazardous substances which are not properly produced, stored or used in a company. In extreme cases, the authority even has the right to order utility providers to cut a company's electricity supply.

3. Further, the administrative fines for companies and persons responsible for work safety tasks who infringe work

safety provisions have been increased.

a) According to the amended law, in severe cases, a company may be fined up to 20 million RMB. The minimum fine is RMB 200,000. The amount of the fine will be determined according to the severity of the accident, taking into account the number of deaths and severe injuries as well as the amount of economic losses.

b) The fines applicable to individuals responsible for work safety tasks have been significantly increased compared to the old law. In the past, such fines were limited to only RMB 200,000 maximum. Now such fines are calculated as a percentage of the individual's annual income with the applicable percentage ranging from 30% to 80%. As with fines for companies, the exact amount of the penalty imposed on the individual will depend on the severity of the accident.

Conclusion

Work safety is not practiced for its own sake, but to achieve a healthy business environment where healthy employees can create profits. A company should now set up a work safety management system and clearly define the responsibilities within the company. Further, rules for the screening and elimination of hidden risks will be set up and implemented. Companies are well advised to review their existing work safety policies and their implementation in the light of the amended Work Safety Law.

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Croatia: Limited outsourcing possibilities for health and safety tasks

A new act on health and safety (the "Act") limits outsourcing possibilities for health and safety tasks.

Agreements with external professionals for performing occupational health and safety tasks (either natural or legal persons authorised by the Institute for Improving Occupational Health and Safety) should, according to the new Act, become an exception. Only in cases when the employer due to objective and justified reasons is not able to perform occupational health and safety tasks himself or is not able to consign these tasks to one of his employees, can the employer mandate an external person to perform occupational health and safety tasks (outsourcing).

When the new Act came into force in June 2014 it caused uncertainty regarding the proper application of the provisions regulating when an employer was not obliged to perform occupational health and safety tasks within its organisation (by itself or by consignment to one of his employees) and was authorised to mandate external professionals. Due to unclear provisions there is a big number of employers, especially small employers (who have up to 49 employees), who have mandated external professionals to perform occupational health and safety tasks. Such course of action is beneficial for employers since on the one hand the tasks are performed by persons specifically educated to perform occupational health and safety tasks and who are experienced in this area, and on the other hand their employees can fully concentrate on their primary tasks and assignments. Another consequence of outsourcing health and safety tasks was an increase in the business activity of persons authorised to perform occupational health and safety tasks.

A new regulatory provision which came into force on 25 April 2015 clarifies this ambiguity. The new provision defines in detail the meaning of the term "objective and justified reasons" and lists four cases where the employer is allowed to mandate an external professional to perform occupational health and safety tasks. The four cases are the following:

1. the employer has just started operating or has not been operating for more than 3 months since the day when its occupational health and safety obligations commenced,

2. due to unexpected reasons (death, termination of employment agreement etc.) the employer is temporarily, but in any case no more than up to three months from the day such unexpected reason occurred, without the employee who acted as an occupational health and safety specialist,

3. the employer has up to 249 employees and none of the employees has the necessary professional qualification for taking the exam to become an occupational health and safety specialist,

4. due to a temporary increase in the number of employees the burden of occupational health and safety obligations has also temporarily increased.

If this provision is not changed, there is a possibility that professionals performing health and safety tasks for third persons will lose a great part of their business. What is more, employers will have to educate one or more of their employees to become an occupational health and safety specialist (or employ a new employee who already has the title) and this will reduce the relevant employee's capacity to perform primary work tasks and assignments as existing obligations are increased by occupational health and safety tasks.

In light of the above, the Croatian Employers Association (HUP) together with professionals performing occupational health and safety tasks has suggested amendments to the mentioned provision. The suggested amendments propose to expand circumstances when employers (especially small employers performing low risk work) are authorised to mandate external professionals to perform occupational health and safety tasks.

As many employers have already outsourced health and safety tasks to external professionals employers (other than in the four cases listed above) will have to keep an eye on the subject of discussion. If the new provision is not changed by 25 January 2016 when it is due to come into force, employers will have to terminate such agreements with external professionals and engage an internal health and safety expert.

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Czech Republic: Concerns over non-compete agreements grow

Under Czech law, employers may conclude non-compete agreements with their employees in order to protect their business against competition from an "insider" after they quit the company. Such non-compete agreements may remain in force for up to 1 year following termination of employment and compensation of at least 50% of the individual's average monthly earnings must be provided to the former employee during the term of the non-compete obligation. The obligations of the former employee can be further secured by a penalty.

Right to withdraw

The Czech Labour Code stipulates that the employer can withdraw from the non-compete agreement prior to termination of the employment relationship. This has been widely interpreted as a general authorisation for employers to freely decide whether or not to enforce the agreement, as long as any withdrawal is delivered to the employee before the employment relationship comes to an end.

Contradictory interpretation

In 2012 the Czech Supreme Court issued a decision which surprised a vast number of employers who used to rely on the interpretation outlined above. In the court's opinion, the provision must be interpreted in a much narrower way. An employer may only withdraw from a non-compete agreement if entitlement to such withdrawal was included in the agreement. In addition, the withdrawal must be based on a justified reason defined in the non-compete agreement.

Under Czech law a decision of the Supreme Court is not formally binding for third parties. However, as lower courts should follow the opinions expressed by the Supreme Court, in reality these decisions play a significant role. The only court which can repeal a judgement of the Supreme Court and express a different judgement is the Czech Constitutional Court.

Final say of the Constitutional Court

Czech legal practitioners have therefore been waiting for the decision of the Constitutional Court on the review of the judgement of the Supreme Court. Such a decision was published recently.

The Constitutional Court held that the interpretation of the Supreme Court is not contrary to the Czech Constitution, and therefore, an extraordinary appeal against the relevant decision was dismissed.

Conclusion

As a result, the position of an employer at the point of termination of employment has weakened. Many non-compete agreements concluded prior to the case law discussed above do not contain appropriate language regarding the withdrawal rights of the employer. This results in a situation where a non-compete agreement can only be terminated based on a supplementary agreement between the employer and the employee.

Such agreement may be difficult to achieve, especially in situations where the employee finds it easy to find a job which does not interfere with its non-compete undertakings. Most employees will welcome the option to be provided with non-compete compensation while concurrently having a different source of income.

In cases where the non-compete agreement already contains a withdrawal right, it is unclear which reasons for withdrawal will be considered valid. Relevant case law is silent on this. Valid reasons for withdrawal might include, inter alia, change of business of the employer as well as the fact that the employment relationship was terminated for certain reasons pertaining to the employee (e.g. poor performance). The employer, however, always bears the risk that the reason for the withdrawal will be held unsatisfactory, and that the employee will be able to claim full non-compete compensation.

Due to the court rulings described above, non-compete agreements have become less popular among employers in the last few years. As they represent an important means of protecting the interests of the company, employers hope that the legislator will adopt more favourable rules for them in the future. In any case, companies should be aware of the above rulings and amend the wording of their non-compete agreements accordingly.

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France: A French quiet revolution: the development of collective bargaining

Since Colbert, France is known as the country of all kinds of regulations: statutes, decrees, directives and norms which have to be respected by companies whatever their size.

Collective bargaining in France was generalised by law only in 1950, establishing the industry as the main level for bargaining. Because collective bargaining at the industry level is the only way for small companies to benefit from collective agreements, this level of negotiation has traditionally been the most important level for collective bargaining in terms of both, the number of employees covered and the number of agreements reached (about 1300 industry-level agreements are signed each year). Today, almost 98% of employees are covered by such collective bargaining agreements due to the extension of the applicability of collective bargaining agreements by the Ministry of Labor.

Since 1982 a quiet revolution has been taking place: regulations increasingly leave the floor to collective agreements. This is a 3-step revolution.

First, in 1982, the "Auroux laws" imposed an obligation on the employer to negotiate annually on pay and working time at the workplace or at company level where there is a trade union delegate – essentially companies with more than 50 employees – and this obligation is backed up by penalties in case of non-compliance. However, there is no obligation to actually reach an agreement.

In the past, company level agreements could not provide for terms and conditions less favorable than those set by the appropriate industry agreements. However, this has changed over time. Legislation introduced in 2004 now

allows company level agreements to diverge from an industry agreement in areas where this is not specifically prohibited by the industry agreement. Furthermore, legislation introduced in 2008 gave primacy to company level agreements over industry level agreements in the area of working time.

As a result of all of these reforms there are about 40 000 company level agreements signed each year in France.

In 2007 the position of national level bargaining was strengthened by a law passed by the minister of labor Gérard Larcher, which gave Unions and employers a much greater role in the development of legislation in areas of industrial relations, employment and training. According to article L. 1 of the labor code, directly inspired by the European Social Protocol of 1991 which has been integrated into the Maastricht treaty, when the government wishes to introduce changes in these areas, it must first consult with employers and Unions on the basis of a document setting out its analysis of the situation, the purpose behind the changes and the potential options. The government has to allow them to agree to the suggested changes, if they wish to do so. Should Unions and employers decide to negotiate the suggested changes, the government has to leave them sufficient time for that purpose. If Unions and employers approve the changes, the government has a political, if not a legal, obligation to transpose the suggested changes into law in the existing form.

This new procedure led to major recent reforms in French labor law:

- The National Inter-professional (i.e. cross-industry) Agreement of 11 January 2008 on the modernization of the labor market which provided for the termination of labor contracts by mutual agreement, taking labor conflicts out of courts;
- The National Inter-professional Agreement of 9 April 2008 on social democracy which reformed the rules on Union representation.
- The National Inter-professional Agreement of 11 January 2013, on employment security which fully reformed the rules and procedures governing collective dismissals.

As a result, several national inter-professional agreements are negotiated each year (5 in 2013).

Finally, the law adopted in 2008, based on the National Inter-professional Agreement of April 2008, introduced new criteria for determining whether a Union is representative or not and therefore allowed to participate in collective bargaining at national, industry and company level. The new law requires a Union to win at least 10 per cent of the votes at the workplace level, 8 per cent of the votes at industry level and 8 per cent of the votes at national inter-professional level to be considered as being representative. In order to be valid, collective bargaining agreements at national, industry and company level need to be signed by Unions having at least a 30 per cent support of works council and similar elections, and not be opposed by Unions with majority (more than 50 per cent) support.

As if all this was not enough, Prime Minister Manuel Valls has recently asked the former Director of Industrial Relations Jean-Denis Combrexelle to propose "new and bold prospects in order to deeply modernize our social relations". He will be assisted in this task by a commission of 16 experts which includes two European experts, Mr. Andreas Botsch, special adviser of the president of the German DGB, and Mr. Tiziano Treu, a former Italian minister of labor.

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Germany: Time to check international contracts for sub-contracting of services
Minimum wage claims by German employees do not stop at German borders

Even companies with their registered seat outside of Germany and without any employees in Germany may face claims based on the newly introduced German Minimum Wage Act.

German Minimum Wage Act since 1 January 2015

The new German Minimum Wage Act (the "Act") entered into force on 1 January 2015. It sets the minimum wage to EUR 8.50 per hour. Companies registered in Germany and abroad are responsible for the payment of minimum wage to their own employees working in Germany. They are also liable for the payment of the statutory minimum wage by their sub-contractor (and its sub-contractors) to its employees, as if they were a guarantor (the "sub-contractor-liability") (section 13 of the Act). It is therefore vital to select any sub-contractor carefully and obtain at

least contractual assurances that they do pay the minimum wage. Further contractual obligations are recommended depending on the specific risks linked to the individual contract. Failure to do so could carry a fine of up to EUR 500,000.00.

Sub-contractor-liability in case of companies registered outside of Germany

While the Act explicitly mentions that both, employers registered in Germany as well as those registered abroad are responsible for the payment of minimum wage to their employees, the Act is not as explicit in this respect with regard to the sub-contractor-liability. There has not yet been a court decision on this question nor has any legal commentary dealt with it.

Since this is a situation involving a conflict of laws, the rules and regulations of private international law will decide upon the sub-contractor-liability for foreign companies.

In the European Union the Rome I Regulation (EC No 593/2008 of 17 June 2008 on the law applicable to contractual obligations) applies. The parties' freedom to choose the applicable law is one of the cornerstones of the system of conflict-of-laws – not without limitations, though. Regardless of the choice of law, effect must be given to the so-called overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed. Rome I Regulation (Article 9) defines such overriding mandatory provisions as provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization.

Generally speaking, there are not many "overriding mandatory provisions" in German employment law (e.g. protection against dismissals under the Maternity Protection Act is regarded as mandatory). There are some arguments against the characterisation of section 13 of the Act as an overriding mandatory provision, e.g., the Act mentions companies registered outside of Germany explicitly only in the context of the employer's responsibility for the payment of minimum wage, but not in the context of the sub-contractor-liability, and the sub-contractor-liability, therefore, only covers net-wages.

However, in our opinion there are more arguments in favor of the characterisation of section 13 of the Act as an overriding mandatory provision, such as:

- section 21 of the Act provides for an administrative offence for working together with a contractor being aware or negligently failing to be aware that such contractor fails to pay the minimum wage;
- the minimum wage will be guaranteed even if the employer becomes insolvent;
- all companies profiting from the employees' work will be held responsible for the payment of minimum wage;
- companies with a registered seat in Germany would be disadvantaged in comparison to companies registered abroad;
- companies could easily circumvent sub-contractor-liability by contracting via companies with a registered seat outside of Germany.

There is much to suggest that such claims fall under the jurisdiction of German employment courts (Articles 20 et seqq. of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

Besides the legal arguments, there are factual considerations which give reason to believe that employees who do not receive the minimum wage from their employer, e.g. due to its insolvency, will claim the minimum wage from their employer's contractors, regardless of the contractor’s registered seat. This is even more true due to the high visibility and political impact of the Act in Germany.

Outlook

In this light, it is recommended to examine any respective international service contracts to see whether they contain general clauses that already cover the risks linked to the broad sub-contractor-liability for German minimum wages. If not, such contracts should be amended accordingly on the basis of a risk-assessment exercise taking into account the industry sector, the number of employees and sub-contractors, and the reputation of the sub-contractors involved.

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Hungary: A Short Guide to Employment Contracts

In this article we set out to provide some useful guidance on how to prepare legally and commercially feasible employment contracts under the new Hungarian Labour Code. The actual terms and conditions of an employment contract depend extensively on the employer's operations, structure, the given position and the parties' negotiations.

As a general rule, in an employment contract parties may deviate from most of the provisions of the Labour Code (or from a collective bargaining agreement) as long as the change is beneficial to the employee. However, certain provisions of the Labour Code expressly prohibit deviation from the relevant provision. It is also important to keep in mind that an amendment of contractual terms is only possible with the consent of both parties.

To be valid, an employment contract has to be concluded in writing and specify certain mandatory terms. These terms are the parties to the employment agreement, the employee's gross base salary (not less than the statutory minimum salary) and position. There are also certain optional terms that need to be expressly stipulated in the contract in order to bind the parties. The most important examples are the following:

If the parties intend to agree to part-time employment, this must be expressed in the contract, otherwise the contract will be deemed to be concluded for full-time employment. Similarly, if the contract is concluded for a fixed-term (maximum 5 years) this must also be stated in the contract. Further, the parties might want to agree on a probationary period (not exceeding 3 months) which is quite common in practice and also needs to be stipulated in the contract.

For a senior executive employed on a contractual basis his/her status as a senior executive, established on the basis of relevant statutory terms and conditions, must be specifically stated in the employment contract. As a consequence, different rules will apply to the employee in relation to termination of the employment contract, conflict of interest and liability. It is also worth noting that the provisions of the employment contract of a senior executive may deviate from many rules of the Labour Code even to the detriment of the employee and there is, therefore, more room for negotiations.

Although the place of work is not an essential term, it is advisable to specify it in the contract to minimise any risk of dispute. It can be determined as one or more specific places or by way of reference to a bigger geographical area. Otherwise, the place where work is normally carried out is deemed to be the place of work.

In terms of salary, the parties may agree that the employee's base salary includes certain allowances (e.g. shift allowance, night work allowance). It is also possible to agree in the contract that instead of allowances a monthly lump sum is provided to the employee.

The employer can determine the schedule of the employee's working time, but it is important to note that both parties' agreement is required to schedule a break longer than 20 minutes but in any case not more than 60 minutes (e.g. a one-hour lunch break).

Regarding annual leave, the parties may provide for certain terms and conditions to make the allocation of annual leave more flexible or to allow a certain part of annual leave to be allocated to the next calendar year.

If the employer wants to have the option to apply disciplinary sanctions, they need to be stipulated in the contract if no collective bargaining agreement applies. For the termination of an employment contract, the general rule applies (i.e. deviation in favour of the employee), but the parties can include in the contract a longer notice period (maximum 6 months) which would apply even in the case of the employee's regular notice (which would otherwise be 30 days regardless of the employee's seniority.

It might be practical to include in the contract terms and conditions the purpose of which is to clarify the general principles of employment. Examples of such principles include protecting the employer's economic interests and reputation, the rules on conflict of interest and confidentiality.

Finally, certain terms and conditions may need to be agreed on in an employment contract in the case of atypical employment relationships (e.g. telework, job sharing and employment with multiple employers).

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Netherlands: Dutch employment rules change drastically: are you prepared?

As of 1 July 2015, the legal landscape for employers in the Netherlands will change drastically with the introduction of new dismissal rules. Some of the most important changes are outlined in this article.

Timely notification prevents payment of penalty to employee

Employers in the Netherlands were already faced with some changes as of 1 January 2015, one of which was the obligation to inform an employee with a temporary contract in a timely manner that the employer does not intend to continue the employment relationship or in case the employer intends to continue the employment relationship, of the applicable terms and conditions. Recent case law has provided more clarity on the topic. The employer must ensure that it is able to prove that the employee has been notified in writing and that such notification has reached the employee.

New dismissal rules: preparation is key

Although the Dutch Government is claiming that the changes will provide for more flexibility and lower costs for employers, lawyers and judges all expect the opposite effect. Contrary to the situation before 1 July 2015, employees will be able to challenge termination decisions in appeal procedures in court and with more and more employees taking out insurance coverage for legal assistance, employers fear an increase of legal procedures and legal costs. One thing which all sides agree on is that as of 1 July 2015, employers must ensure that they are well prepared before presenting a case for the termination of an employment agreement to the Cantonal Court or the UWV (a governmental body). The employer is also obliged to substantiate that it has offered sufficient training to the employee and that there is no alternative position for the individual within the group of companies. With our schooling- and replacement tool CMS Netherlands can determine for you whether these obligations are implemented sufficiently in your organisation.

In the case of a reorganisation the employer can no longer choose to file a dismissal case with the Cantonal Court since only the UWV will be competent to decide in that case whether the employment agreement can be terminated or not. However, in the case of unsatisfactory performance of the part of an employee or conflict with him/her the case may only be presented to the Cantonal Court.

Introduction of transition payment

The current non-statutory Cantonal Court Formula which determines the amount of a severance payment in the case of a termination of an employment agreement will be replaced by a statutory transition payment. An employee whose employment agreement has been terminated by the court or by notice following the permission of the UWV is entitled to a transition payment capped at EUR 75,000 gross (or at the yearly income should this exceed EUR 75,000). The latter change seems to be the only upside for employers to the new legislation since it lowers the amount of a severance payment by two-thirds compared to the amount payable under the Cantonal Court Formula.

Be aware of good and bad leaver references

Another thing to bear in mind is that with the introduction of the new legislation, some of the current articles in the Dutch Civil Code ("DCC") change as well. Article 7:685 DCC for example is cancelled and article 7:669 is introduced. This change is important because in some employment or shareholder agreements reference is made in good and bad leaver terms to the applicability of article 7:685 DCC. We recommend reviewing these terms and, if necessary, amending them to ensure that the current wording is aligned with the new legislation.

Possible improvement for the managing director

The new dismissal rules seem to provide the (appointed) managing director some comfort since failure by the shareholder or the supervisory board to comply with the new dismissal rules could lead to an obligation to pay the managing director damages in addition to the transition payment. Although the position of the managing director is the 'easiest' position to terminate due to the fact that if the corporate procedural steps are followed the employment relationship ends automatically, one needs to bear this in mind when considering such a termination

after 1 July 2015.

Website new Employment Rules

You will find all topics set out on our website specifically designed to provide you with practical information on the changes to employment law. For more information on the changes, please visit Changes to employment law and contact us for any questions you may have.

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Russia: Further changes in law that may increase employers' costs

1. New rules on processing and storage of Russian citizens' personal data

On 1 September 2015 Federal Law No. 242-FZ "On Amendments to Certain Laws of the Russian Federation in Order to Clarify the Procedure for Personal Data Processing in Information and Telecommunications Networks" (the "Law") comes into force.

The Law seeks to change the regulation of personal data processing in information and telecommunications networks, as well as personal data processing in databases.

Importantly, according to the Law the processing of Russian citizens' personal data can only take place in Russian databases.

This means that a personal data operator will have to ensure that databases which process Russian citizens' personal data are located within Russia.

However, the Law also provides for some exceptions to this rule that relate to certain goals of personal data processing. The exceptions include achieving the objectives of international treaties or laws, the implementation of an operator's statutory powers and duties, the administration of justice, the acts of public law entities and organisations that provide state and municipal services, the professional activities of journalists and/or the lawful activities of mass media, or scientific, literary or other creative activities provided that this does not violate a data subject's rights and legitimate interests.

According to guidance issued by Russian state authorities in response to various enquiries, employers processing employees' personal data may benefit from the first exemption: in collecting such data employers are fulfilling their statutory duties under the provisions of the Labour Code (i.e. employees' data will be excluded from the scope of the Law). However, the operator acting as an employer cannot abuse its right not to locate databases in Russia by attempting to bring within the exemption personal data processing otherwise covered by the Law.

We note that the above guidance does not form part of official legislation and therefore, the application of the mentioned exception to employers processing personal data of their employees is still being discussed.

It should also be noted that the Law does not prohibit accessing databases located within Russia from abroad, or impose any special restrictions on the transfer (including cross-border transfers) of personal data from a database located in Russia.

In this regard, the general principles and rules of cross-border transfer of personal data remain unchanged. In many instances the consent of an employee is required for the transfer of his/her personal data abroad, including for a transfer to companies in the same group with the employer.

2. Cancellation of the requirement for commercial legal entities to have a stamp

According to Federal Law No. 82-FZ dated 6 April 2015 "On Introduction of Changes to Certain Legislative Acts of the Russian Federation due to the Cancellation of the Stamp Requirement for Commercial Legal Entities" commercial legal entities (i.e. joint stock companies, limited liability companies, etc.) are no longer required to

have a stamp.

However, commercial legal entities can have a stamp at their discretion (in this case, the fact that the legal entity has a stamp must be stated in its charter).

In view of the above, respective changes were made to the Russian Labour Code pursuant to which employers are now obliged to stamp the internal documents on accidents at work only if the company has a stamp.

Still, an issue arises with regard to stamping other labour documentation. For instance, the Rules on Maintenance of Labour Books dated 16 April 2003 were not changed in this regard and still contain a requirement to stamp entries made by the employer to the employee's personal labour book.

Officially, the above Rules should apply only to the extent that they do not contradict the federal laws. Therefore, it appears that an employer is allowed not to use a stamp if it does not have one. However, from a practical perspective, given the very conservative approach usually taken by the Russian labour authorities it is still advisable to use a stamp for labour books and other forms of labour documentation established by law and containing a corresponding "stamp area". In this situation, guidance provided by the Russian Federal Service on Labour and Employment may be followed, according to which the employer may have a separate stamp that is used solely for stamping relevant HR documentation.

3. Change to salary requirement for highly qualified foreign specialists

As of 24 April 2015 minor changes were introduced to the rules applicable to foreign citizens employed as Highly Qualified Foreign Specialists (the "HQFS"). In particular, the requirement to pay HQFS a certain minimum salary was changed as follows:

- Previous rule: salary should not be less than 2 million Roubles (approx. EUR 33,500) per year;
- New rule: salary should not be less than 167,000 Roubles (approx. EUR 2,800) per month;
- New rule: even if a HQFS is on sick leave, unpaid leave or is not paid (is underpaid) for any other reasons, the employer is to ensure that the HQFS's quarter remuneration is not less than three times of 167,000 Roubles (approx. EUR 2,800). In other words, if an employer would like to keep HQFS status of an employee, it is required to compensate him/her at the above minimum level even within the periods when the employee does not actually perform his/her job function.

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Spain: The Court of Justice of the European Union declares the workplace and not the company as the point of reference when determining Collective Dismissals

A judgment delivered by the Court of Justice of the European Union on 13 May 2015 (case C-392-13) as a result of a preliminary issue raised by the Labour Court no. 33 of Barcelona relating to the fact that Spanish regulation (article 51 of the Workers' Statute) highlights the "company" as the sole reference point for collective redundancies, whereas the Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States refers to the "affected workplace", has been published recently.

In essence, article 1.1 (a) of the Directive sets forth that collective dismissal means, according to the choice of the Member States, those which within a period of 30 (thirty) days affect:

- at least 10 individuals in establishments normally employing more than 20 and less than 100 workers;
- at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers, and
- at least 30 individuals in establishments normally employing 300 workers or more.

Or, moreover, for a period of 90 days, at least 20 dismissals, regardless of the number of workers usually employed in the affected workplaces.

The Court of Justice's judgment sets forth that when a company is comprised of several entities, the "workplace" in the sense of the Directive is the entity to which the employees affected by the dismissal are registered to carry out

their duties. Consequently, it is essential to consider the number of dismissals executed at each workplace belonging to the same company.

The Court of Justice declares that the Directive infringes a domestic regulation which uses the company as the single point of reference as opposed to the workplace, when the application of said criteria entails the obstruction of the process of information and consultation established in the Directive. Thus, having used the workplace as the point of reference, the dismissals would have to be classified as a "collective dismissal".

Thus, the replacement of the term "workplace" with "company" may only be deemed favourable to the employees as an additional element and does not imply the renouncing or reduction of the protection offered to employees in cases where, upon application of the workplace concept, the number of dismissals required by the Directive to qualify as a "collective dismissal" would be reached.

Impact of the Court of the European Union judgment:

1. The Directive's thresholds refer to workplaces which employ more than 20 workers. Consequently, workplaces with less than 20 employees are not affected by the thresholds prescribed by EU law, although the employees may be affected by a collective dismissal if the thresholds referred to in article 51 of the Workers' Statute are exceeded.

2. By way of example: up to now, a company with 400 employees which dismisses 20 workers at the same workplace within a period of 90 days, pursuant to the provisions of the Workers' Statute, would not exceed the thresholds set for collective dismissals. Nevertheless, following the judgment delivered by the Court of Justice of the European Union, the collective dismissal process and not simple individual termination letters would be of equal application without following the process regulated in article 51 of the Workers' Statute and Royal Decree 1483/2012.

Consequences of the Court of the European Union judgment:

1. Spain must align its regulation to that of the EC Directive which, according to the European Court, has been breached. Such amendment would comprise the replacement of the "company" concept with that of "workplace" in order to analyse the exceeding of the thresholds set.

2. According to the Court, by taking into account the workplace and "regionalising" the point of reference, it would be much easier to reach the minimum threshold to consider the dismissals carried out at a workplace as collective.

3. Without waiting for an amendment to the Workers' Statute, we must consider the judgment when executing contractual, individual or collective terminations based on economic, technical, organisational and production grounds. A total of 20 dismissals or more within a period of 90 days at a single workplace, regardless of events in the rest of the company, may assume the existence of a collective dismissal.

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Switzerland: Paternity leave

Paternity Leave in Switzerland - Current Discussions and Developments

In 2005, sixty years after maternity benefits were anchored in the Swiss constitution and after four consecutive failures in popular votes, statutory maternity leave was introduced in Switzerland, granting women a minimum of 14 weeks' maternity leave at 80% of their normal salary. Ever since, a discussion has ensued regarding gender equality in parental leave.

In Switzerland, there are no statutory provisions for parental or paternity leave. The Swiss Code of Obligations, for example, merely provides for that the employer must allow the employee, by mutual consultation, the "customary hours and days off work" with full pay during normal working hours for special occasions such as the birth of a child (article 329 para 3 CO). The length of paternity leave is at the discretion of the employer. Usually male employees get one to three days of paid time-off for the birth of a child. Some companies and public administrations already allow longer paternity leaves on a voluntary basis; they are, however, a minority.

In the past few years a growing interest in parental and paternity leave, and in particular the inadequacy of existing legislation and company policies in this respect, has led to a huge number of sometimes far-reaching motions and

initiatives filed by parliamentarians and government commissions, calling on the Federal Council to implement generally applicable policies at the federal level. To date, 26 motions have been rejected. Currently, there are several motions on parental and paternity leave pending in the parliament, and Switzerland's Green Party has plans to launch a popular initiative.

However, in the last few weeks at least a consensus with regard to a (higher) minimum standard seems to have been reached in the Swiss parliament and a proposal was approved by the Committee for Social Security and Health of the National Council. The proposal will now in turn be reviewed by the Committee for Social Security and Health of the Council of States, whose approval is required for the preparation of a respective bill.

This proposal suggests a model in which fathers, in analogy with maternity leave, would be granted a two-week (i.e. ten working days) paternity leave after the birth of a child at 80% of their normal salary. This paternity leave could be taken at a time or over a six-month period from the birth. As with maternity leave, this paternity leave would be financed via the Income Compensation Scheme (EO), i.e. on a parity basis between employers and employees. The administrative burden and subsequent costs for the companies would thus be moderate, regardless of the size of the workforce.

However, it is foreseeable that this compromise will only be an intermediary step and that paternity leave will remain one of the hot topics on the agenda for changes in Swiss employment law in the next few years.

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UK: Collective Consultation in the spotlight

The scope and effectiveness of collective consultation, particularly in redundancy situations, has been in the spotlight recently both in the UK and across the EU.

The impact of collective consultation in the UK is generally not as broad reaching as in other EU countries. This is on the basis that the UK does not have works councils and that private sector UK employers are often not unionised or have standing committees of employee representatives. Further, the legal requirements of collective consultation are only triggered in particular situations, notably on large scale redundancy exercises, business transfers and outsourcings and changes to pension arrangements.

However, for the past two years UK employers have faced a state of uncertainty with regard to collective redundancy consultation. This is due to the progress of the combined cases of USDAW v Ethel Austin Ltd and USDAW v Unite the Union and WW Realisation 1 Limited, the facts of which arose from the insolvency of one of the UK's largest retail chains, Woolworths. The issue at the heart of this case was when the duty to consult was triggered and, in particular, what the wording 'at one establishment' meant in the UK legislation. The outcome of these cases had significant implications for employers, both in terms of the practical aspects of carrying out multi-site redundancies and the costs implications of getting it wrong.

Article 1 of the Collective Redundancies Directive gives member states 2 options for what triggers collective consultation. The option chosen by the UK states that the duty arises where the number of redundancies is 'over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question'. The UK implementing law states that 'where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals'. There has been debate over whether the UK legislation properly implements the Directive as well as the meaning of the term "establishment", which is the issue that came to a head in the Woolworths case.

Historically UK courts have interpreted 'establishment' as being the business unit to which an employee is assigned. However, in a bold decision in 2013 the UK Employment Appeal Tribunal concluded that the words "at one establishment" should be deleted in order to comply with the Directive. This widened the scope and led to a situation where employers would be required to collectively consult if dismissing 20 or more employees regardless of the part of the business for which they worked. This decision was appealed and in April the CJEU held that there was nothing in the Directive which stopped the UK legislating that collective consultation obligations were only triggered when 20 or more redundancies were proposed at a single establishment, being the local unit where they

are assigned to work, rather than across the whole undertaking of the employer. Whilst the CJEU's decision has been welcomed by multi-site UK employers it is seen as a blow to employees and the unions.

Separately, two public consultations have been reviewing collective consultation requirements. In the first the UK government is seeking views from stakeholders on how suitable the UK law on collective consultation is for insolvency situations. Following discussions with clients CMS has submitted a response to the government in which it highlighted the conflict between the collective consultation requirements and the need of insolvent businesses to reduce staffing levels without delay. Whilst reform in this area is desperately needed our research found there are differing opinions on how this could be achieved. Views expressed included that whilst a system based on minimum requirements may lack flexibility, a more liberal approach may be open to abuse. There was greater support for widening the scope of the defence for failing to comply with the collective redundancy consultation requirements and, in particular, for making insolvency a "special circumstance" in which it is recognised employers may not be able to comply. However there are concerns about how this would be achieved whilst still adhering to European law.

Secondly on 10th April the European Commission launched a public consultation with the Social Partners (representatives of employers and employees) on the consolidation of the three key directives covering collective consultation – the collective redundancy directive (98/59/EC), the transfer of undertakings directive (2001/23/EC) and the general framework for informing and consulting employees directive (2002/14/EC). The aim of the consultation is to strengthen the coherence and effectiveness of existing EU legislation on worker information and consultation at national level. The public consultation concludes on 30th June 2015.

In conclusion, whilst the general position on collective consultation requirements in the UK seems to have settled for the time being it is an area ripe for further change.

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UK: Employee Shareholder Status – Opting out of UK Statutory Employment Rights

It is a general principle that employees cannot opt out of their statutory employment rights. In the UK, this has been eroded by the concept of 'employee shareholder' status (or 'ESS'), introduced into legislation in September 2013.

ESS involves an employee giving up rights to receive specified amounts on any future termination of employment. In exchange, the employee receives free shares in their employer with special tax advantages.

Policy intention

ESS represented an attempt by the UK government to address two separate issues. The first aim was to encourage the increased ownership of shares by employees, allowing them to participate in the success and growth of their employer. The second was to address broader concerns that the UK's employment regime was too restrictive, and that reducing the statutory costs of dismissing employees would make employers keener to hire in the first place.

ESS was (and remains) controversial for understandable reasons. The legislation introducing ESS was twice rejected by the House of Lords (the UK's second parliamentary chamber). It only became law following the 'ping pong' procedure, when legislative amendments are passed between the two Houses at the last minute until a resolution is reached, which is used relatively rarely for issues of this size.

ESS – what the employee loses

Where a valid agreement is entered into, the employee shareholder will be treated as an employee but loses key rights to:

- a redundancy payment; and
- a payment if unfairly dismissed (unless there is discrimination).

Together, these could otherwise lead to payments approaching £100,000, depending on service and age (though few receive such high payments), which can therefore make it attractive to employers for employees to waive their

rights.
However, ESS just affects statutory rights. Contractual rights can be what the employer and employee agree.

ESS – what the employee gains

A minimum £2,000 of free shares must be received for waiving these future rights (although up to £50,000 of shares can be provided, but tax would be due on any value above £2,000). Any gains on these shares will also be free from tax when the shares are sold.

Formalities

Employees of any company and at any level of seniority qualify for ESS (except those who (broadly) already have a 25% interest in the company). ESS can be made compulsory for new employees, which is where it has been most used. An existing employee can choose to give up his rights, but cannot be forced to accept this status.

Other ESS terms are:

- there must be a written agreement between the employee and employer, with a written statement setting out what employment rights are being given up and the rights of the shares
- no payment is permitted from the employee for the shares (which has raised difficult company law issues because companies in the UK cannot normally issue shares for free). The employee can be forced to sell shares on leaving employment, including at below market value
- independent legal advice must be given to the employee at the cost of the employer
- there must be a seven-day 'cooling off' period between the advice and the agreement being entered into.

ESS in practice

ESS has (so far) not proved popular in practice, although we as a firm have implemented this for various clients.

For most employees, the security provided by the rights not to be unfairly dismissed and to receive redundancy pay is probably worth more than the £2,000 in tax-free shares, which is all that has to be offered.

For most employers, the mechanics involved are relatively cumbersome and the implementation costs are high. Furthermore, many employers do not want large numbers of small shareholdings.

Where ESS has (perhaps unintentionally on the part of the government but as widely forecast by critics) proved popular is with private equity and venture capital firms. The senior management of a company with private equity backing are less likely to be concerned about giving up their statutory employment rights, as they will often be protected by more generous contractual rights. In addition, the tax advantages are extremely useful in protecting the gains they realise, as special classes of share with a low initial value but which can significantly increase on a sale of the company, can be devised. The UK Revenue has also been keen to show the success of the policy and has been agreeing relatively favourable share valuations. Indeed, concerns exist that this is becoming a major source of tax loss/abuse and that ESS may be withdrawn or have its tax benefits capped.

Nonetheless, it remains an interesting development in UK employment law. With growing concern across Europe in achieving increased employment flexibility, ESS will be of interest to other jurisdictions as an example of how taking away statutory rights can help realise this. This is likely to be an increasing cross-European trend over the next few years.

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