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A legal update from Dechert's Labor and Employment Group

In this Issue

2011 Employment Law Review

Welcome to the inaugural issue of *Employment Law Review*, which will be a regular report from Dechert's Labor and Employment Practice. In this edition, we examine some of the most important employment law developments of the past year in Belgium, England and Wales, France, Germany, Luxembourg, Russia and the United States, focusing on both new legislation and case law developments.

BELGIUM

Change to notice periods for workers

With effect from 12 April 2011, new legislation modified the length of the notice periods for workers whose employment began after 31 December 2011.

The minimum notice periods for terminating the employment of blue collar workers have been increased by 15%:

BLUE COLLAR		
Seniority	**Old notice period**	**New notice period**
< 6 months	28 days	28 days (unchanged)
> 6 m and < 5 yrs	35 days	40 days
> 5 yrs and < 10 yrs	42 days	48 days
> 10 yrs and < 15 yrs	56 days	64 days
> 15 yrs and < 20 yrs	84 days	97 days
> 20 yrs	112 days	129 days

The notice period for terminating the employment of white collar workers whose gross annual remuneration exceeds 31,467 EUR (anno 2012) has now been reduced by 3% to 30 days per year of seniority:

WHITE COLLAR	
Seniority	**New notice period**
< 3 yrs	91 days (legal minimum)
> 3 yrs and < 4 yrs	120 days
> 4 yrs and < 5 yrs	150 days
> 5 yrs and < 6 yrs	182 days (legal minimum)
> 6 yrs	30 days per begun year of seniority

Notice periods to be given by a resigning employee have also been increased:

WHITE COLLAR	
Seniority	**New notice period**
< 5 yrs	45 days
> 5 yrs and < 10 yrs	90 days
> 10 yrs	135 days
> 15 yrs + salary exceeding 62.934 EUR	180 days

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New employer's contribution to the Fund of Closing of Undertakings

From 1 January 2012, when terminating the employment agreement of a white collar worker whose gross annual remuneration exceeds 62.934 EUR, employers must contribute a sum equal to 3% of the termination cost to the Fund of Closing of Undertakings. A Royal Decree must still provide for the specific modalities and terms of payment of this new contribution.

New (limited) tax exemption

Upon termination of an employment agreement after 1 January 2012, salary paid during the notice period or the termination indemnity will be exempt from taxes up to an amount of 615 EUR (for the 2012 year). This amount will be updated annually in accordance with the consumer index and from 1 January 2014, the amount will be doubled.

New method for valuation of the taxable benefit in kind from the use of a company car

From 1 January 2012, the taxable value of a company car will be determined by application of a formula based on the catalogue value of the car. This is calculated based on the price invoiced including VAT, the cost of any and all options without taking into consideration the eventually awarded price reduction(s) as well as the CO^2 value of the exhaust gasses produced by the car.

Cars using gasoline, LPG or gas:	catalogue value x [5,5 + ((CO^2exhaust-115) x 0,1)] % x 6/7
Cars using diesel:	catalogue value x [5,5 + ((CO^2exhaust-95) x 0,1)] % x 6/7
Electric cars:	catalogue value x 4 % x 6/7

Measures to keep older workers at work

The new government has decided to amend the pension rules in an effort to keep older workers at work.

Among these amendments, for early retirement pension allowances claimed after 1 January 2013, the minimum age for early retirement (currently at 60) will be increased by 6 months each year, so that it is 62 by the year 2016. Also, the minimum length of a professional career needed to claim the benefit of early retirement (currently 35) will be increased to 38 in 2013, 39 in 2014 and to 40 from 2015.

Conventional bridge pension is renamed "Unemployment with extra company allowance"

This new name more closely reflects what it is — i.e. a system of unemployment benefit whereby after termination of their employment, older employees who meet conditions of age and length of professional career are entitled to receive an extra allowance from their previous employer in addition to the legal unemployment benefits paid out to them by the state. Recipients of this payment will now be encouraged actively to continue to look for a new job while retaining the benefit of the extra allowance payable by the former employer.

ENGLAND AND WALES

LEGISLATION

Increase in compensation limits

The maximum compensation that the Employment Tribunal can award for unfair dismissal (save in exceptional cases) and the basis upon which statutory redundancy payments are calculated will increase from 1 February 2012. A week's pay (for the purposes of calculating the basic award in unfair dismissal cases and statutory redundancy payment entitlements) will be capped at £430 (the current limit is £400). The basic award is calculated by applying a formula based on age, length of service and a week's pay. As a result of this increase in a week's pay, the maximum total basic award for unfair dismissal will from February be capped at £12,900. The maximum compensatory award (save in the prescribed exceptional cases) will be capped at £72,300 (the current limit is £68,400). As a result of these increases, the maximum amount which a successful claimant for unfair dismissal can recover (i.e. the basic and compensatory awards) will be capped at £85,200.

Agency Workers Regulations 2010

The Agency Workers Regulations came into force on 1 October 2011 and apply to workers offered temporary work through an employment agency. The objective of the European Temporary Agency Workers Directive 2008 (which is imported into UK law by the Regulations) is to harmonise certain basic working and employment conditions for temporary workers supplied through employment

agencies such that they are in no worse position than if they had been recruited directly by the end user organisation for which they carry out work (the "hirer").

Under the Regulations, temporary agency workers now enjoy the same basic working and employment conditions as if they had been employed directly by the hirer to perform the same or a similar role. This right will accrue after the agency worker has worked for the hirer for 12 weeks.

In addition, temporary agency workers now enjoy the right to access information about a hirer's comparable permanent employment vacancies and the use of a hirer's facilities and amenities. These rights will apply immediately from the outset of a temporary assignment.

Abolition of the default retirement age

The statutory ability to retire employees at the "default retirement age" of 65 was an exception to the age discrimination legislation implemented in 2006 which provides that employees should not be treated less favourably because of their age unless the treatment can be objectively justified.

Following the abolition of the default retirement age on 6 April 2011, employers are no longer able to instigate retirement at the default retirement age. They now have two options available to them - to cease compulsorily to retire employees or to adopt a compulsory retirement age for part or all of the workforce.

Given the uncertainty associated with justifying a compulsory retirement age, the majority of employers are likely to abolish compulsory retirement. This will undoubtedly require a change of mindset such that older workers are managed according to the same principles as others. Dismissals will only be fair if effected for one of the five potentially fair reasons (capability, conduct, redundancy, illegality or some other substantial reason) coupled with a fair procedure.

The abolition of the default retirement age does not close the door entirely to employers introducing or maintaining a compulsory retirement age for all or part of the workforce. Since compulsory retirement is age related, to maintain compulsory retirement risks age discrimination claims unless in the particular circumstances the compulsory retirement age adopted by the employer can be justified. To avoid successful claims of unlawful age discrimination, employers will need to be able to objectively justify a compulsory retirement age by showing that it is a proportionate means of achieving a legitimate aim.

Termination payments

The Income Tax (Pay As You Earn) (Amendment) Regulations 2011 now require a post-termination payment that is made to a departed employee to be taxed using the 0T tax code (which utilises the 20%, 40% and 50% rates) rather than only the 20% basic tax rate previously used.

Paternity leave

The Additional Paternity Leave Regulations 2010 and the Additional Statutory Paternity Pay (General) Regulations 2010 came into force last year and extend paternity leave for employees who are expecting a baby or matched for adoption by up to an additional 26 weeks.

Bribery Act 2010

The Bribery Act 2010 created four new criminal offences with broad extra-territorial effect, including a strict liability offence where a commercial organisation fails to prevent bribery. The Act also requires adequate procedures to be in place to prevent bribery. Therefore an awareness of these offences and an appreciation of their operation are important for commercial organisations, individual executives and employees alike.

CASE LAW

In addition to these legislative changes, there have been a number of interesting cases on various aspects of employment protection in the UK. A selection is as follows:

Consistent treatment: The employer's knowledge

In *Orr v Milton Keynes Council*, it was held that an employer cannot be deemed to know all the facts known to its employees when deciding whether a dismissal is reasonable. Provided that a fair and thorough investigation is carried out, only those facts known to the decision-maker at the time are relevant in determining whether the dismissal was unfair.

Overseas employees

In *British Airways plc v MAK*, it was held that the Employment Tribunal had jurisdiction to hear race and age discrimination complaints bought by employees who were resident in Hong Kong but who performed their duties as cabin crew on flights

between Hong Kong and London. The Court of Appeal found that the employment tribunal had been entitled to find that these relevant staff did their work partly in Great Britain and therefore were to be regarded as employed at an establishment in Great Britain. This enabled them to bring claims under the discrimination legislation as it applied prior to the introduction of the Equality Act 2010.

Redundancy selection and discrimination

In *Eversheds Legal Services Ltd v De Belin*, an employer inflated the score of a female colleague who was on maternity leave in a redundancy selection exercise by way of giving her the notional maximum score in respect of the relevant criterion which was a measurement applied to a period when the female employee was absent on maternity leave. A male colleague who was assessed by reference to his actual score in relation to that criterion successfully claimed unlawful sex discrimination. It was held that pregnant employees and those on maternity leave should only be treated more favourably than male colleagues to the extent that it is reasonably necessary in order to remove any disadvantage suffered by the woman as a consequence of her pregnancy and/or maternity leave. The employer could have used historic data relating to prior periods of time to compare actual performance rather than deem the pregnant employee to have achieved the maximum score in respect of the period when she was on maternity leave.

Self-employed contracts

In *Autoclenz v Belcher*, the Supreme Court, in assessing whether sub-contractors who performed valet services were genuinely self employed or were "workers" for the purposes of UK employment protection legislation, held that it was open to a tribunal to disregard written terms in the relevant contracts if this does not reflect the actual legal obligations of the parties. Despite the fact that the contractual terms of the relevant car valeters provided that they were engaged on a sub-contract basis, could provide substitutes and were not obliged to provide their services on any particular occasions, the tribunal was entitled to hold that they were workers and that the relevant contractual provisions with regard to substitutes, were not genuine.

Apportioning discrimination compensation

In *London Borough of Hackney v Sivanandan*, the Employment Appeal Tribunal held that the Employment Tribunal is not entitled to apportion liability between respondents to a claim of unlawful discrimination. Any award is "joint and several" as against all respondents. An employee respondent in a discrimination case could in theory therefore be liable for all the relevant compensation awarded.

Career long discrimination comparison

In *Wardle v Credit Agricole Corporate & Investment Bank*, the Court of Appeal held that in most cases loss of earnings in a discrimination claim should only be assessed up to the point where the employee is likely to secure an equivalent job. "Career long" compensation should only be awarded when there is no real prospect of the employee ever obtaining an equivalent job.

References

In the *McKie v Swindon College*, an ex-employer was held to be liable for negligent misstatement in respect of a former employee as a result of an email sent to his subsequent employer which led to his dismissal but which was inaccurate and produced carelessly. Even though the communication was some years after the end of the relevant employment, it did communicate information about the previous employment and therefore led to the ex-employer having a duty of care to the ex-employee.

In *Jackson v Liverpool City Council*, the Court of Appeal held that an employer was not in breach of duty when it provided a reference about an ex-employee which referred to allegations which had been made against the former employee in question but had made clear that these allegations had not been investigated. The reference was true, accurate and fair.

FRANCE

LEGISLATION

Entry into force of the regime under Law n°2010-1330 of 9 November 2010 which implements retirement reforms

As of 1 January 2012, businesses with at least 50 employees (or which belong to a group with at least 50 employees), where at least 50% of employees are exposed to professional risks linked to strenuous working conditions, will be required to negotiate a company-level agreement or to establish an action plan to identify strenuous working conditions. If in default, these companies will incur a fine equivalent

to 1% of salaries paid to employees affected by strenuous working conditions.

End of the provisional regime and entry into force of the provisions of Law n°2010-1594 of 20 December 2010 concerning social security financing for 2011

As of 1 January 2012, the threshold for exemption from social security contributions applicable to severance payments (including payments allocated by court decisions) will rise to twice the annual social security threshold (representing €72,744 as of 2012). Where the total value of indemnities granted in the framework of a termination exceeds €1,091,160 the benefit will be subject to social security contributions in full.

Law n°2011-893 of 28 July 2011 for the development of continuing studies and the security of professional careers

Workforce loans for non-profit purposes

This law legalizes the principle of invoicing at cost and introduces a new obligation for employers. The employer must from now on obtain an employee's consent prior to entering into a workforce loan (this consent should be formalized in an amendment agreement defining the key conditions of the assignment contract). Specifically, after seeking the consent of the employee concerned, the contracting company can bill the using company for wages paid to the employee, related social charges and the reimbursement of professional fees to the employee, without risk of it being characterized as a for profit action in the context of the workforce loan.

Contract of professional security ("contrat de sécurisation professionnelle")

On 1 September 2011, the contract of professional security came into force, replacing the personalized redeployment convention *("CRP")* and the contract of professional transience *("CTP")*. It should be offered to all employees who have a year's continuous employment in a company of less than 1,000 employees or belonging to a group of less than 1,000 employees within the European Union, where redundancies for economic reasons are envisaged. The aim is to support employees and facilitate a return to employment by providing a specified indemnity of 80% of the daily reference wage, which cannot be inferior to the amount to which the employee would have been entitled through unemployment benefits.

Law n°2011-894 of 28 July 2001 of corrective social security financing for 2011: Profit-share bonuses

Companies that employ at least 50 employees and which distribute dividends in excess of the average of the two previous distributions, must from now on pay to their employees a profit-share bonus. The amount is to be set by negotiation in each company. If an agreement with the company cannot be reached, the amount shall be set unilaterally by the employer. The bonus is exempt from social contributions, except for the CSG-CRDS and social fees *("forfait social")*, up to a threshold of €1,200 per employer and per year.

Companies with less than 50 employees can voluntarily pay a bonus and benefit from the favorable social security regime, so long as they comply with the aforementioned conditions relating to increases in dividends.

CASE LAW

Reinforcement of the principle of co-employment: Cass. Soc. 18 January 2011, n° 09-69.199 (1st hearing) ; Cass. Soc ; 28 September 2011, n° 10-12.278 to 10-12.325 (2nd hearing)

The principle of co-employment is increasingly present. The French supreme court recently decided that interference by a parent company in the personnel and operational management of one of its subsidiary companies creates confusion in relation to interests, activities and direction. Accordingly, the court determined that the parent company was the co-employer of the employees of such subsidiary (at the 1st and 2nd hearing), imposing heavy obligations on the parent company in relation to economic redundancy, notably for the reclassification obligation (2nd hearing).

Corporate closure decided at a group level and its impact on economic redundancies: Cass. Soc. 1st February 2011, n° 10-30.045 to 10-30.048

The cessation of a subsidiary's activities, decided at a group level in order to make savings, is characteristic of culpable apathy on the part of the subsidiary employer. Consequently, economic redundancies are made without a real, serious cause.

The French Supreme Court has reinforced that if, in the case of a definitive and total closure of a business the judge cannot (without disregarding the independence of the grounds for redundancy), decide upon the fault or culpable apathy of an

employer in the absence of economic difficulties or, conversely, decide that an employer is not at fault upon the lack of such difficulties, the judge is not prohibited from considering the business' economic situation in assessing the employer's actions.

In this case, the French Court of Appeal held that the company had produced good results, and the reduction in activity was in fact attributable to group level decisions. The closure decision had been taken by the group, not to save the group's competitiveness, but to make savings and improve its own profitability.

Cancellation of a PSE for lack of economic motive: CA Paris, Pôle 6, Chambre 2, 12 May 2011, n°11-01547

The Paris Court of Appeal has made an innovative and contested decision. It considers that, in the absence of economic grounds such as those provided in the French Labor/Employment Code, any plan to safeguard employment ("PSE") and subsequent measures (notably redundancies) must be cancelled.

The Court went against legal provisions that specify that a PSE can only be deemed invalid where reclassification measures are insufficient or lacking. The French Supreme Court will soon reach a decision on this subject.

Equality of treatment and occupational categories: Cass. Soc., 8 June 2011, n° 10-11.933 and 10-13.663 **(1st hearing)***; n°10-14.725* **(2nd hearing),** *n°10-30.337 0 10-30.407* **(3rd hearing)**

Through three June 2011 judgments, the French Supreme Court reinforced that employee affiliation to different occupational categories shall not justify different treatment for the award of benefits arising from collective agreements. The French Supreme Court at the same time specified that a difference of treatment can be validly introduced if it aims to consider the specific situation of employees of a certain category. The French Supreme Court has nevertheless not yet provided any detail to allow us to understand precisely which circumstances justify a difference in treatment.

Day package: Cass. Soc., 29 June 2011, n°09-71.107

For flexible earning, working time can be computed by a specific number of days to be worked throughout the year — a means of calculating working time that is commonplace for management-level employees. The French Supreme Court has decided to make the validity of the day packages conditional on particular guarantees in relation to the protection of health and safety for workers, and maximum working hours and daily and weekly rest. Such guarantees should be included in the collective agreement which establishes the possibility of using a daily wage rate. Additionally, the employer must establish a document which tracks the number and dates of days and half-days worked, ensure regular monitoring of the organization of work and arrange an annual meeting to discuss the organization, workload and range of working days. Arrangements in place for annual meetings should therefore be reviewed by certain employers.

The unenforceability of objective clauses drafted in English: Cass. Soc., 29 June 2011, n°09-67.492

French law requires that certain documents should be drafted in French. The French Supreme Court has decided that, if not prepared in French, documents fixing objectives required to determine variable contractual remuneration may be considered unenforceable by employees. The financial consequences are significant, as employees may, under these conditions, request payment of the entirety of their variable remuneration.

GERMANY

LEGISLATION

Entry into effect of the new Family Care Leave Act (Familienpflegezeitgesetz)

As of 1 January 2012, the new Family Care Leave Act (*Familienpflegezeitgesetz*) came into effect. The new law is intended to improve opportunities for employees to take care of their family members while remaining in employment. Under the new Family Care Leave Act employees have the option to reduce their weekly working time by up to 15 hours per week for a period of up to 24 months.

During such period of family care the employee's compensation will not be reduced on a *pro rata* basis taking into account the reduced working time but the employer is called upon to top up 50% of the compensation shortfall caused by the work time reduction. The compensation top-up amount to be paid by the employer is funded either through creating a credit account (*Wertguthaben*) against which future compensation claims of the employee are credited once the employee returns to "full-time" work (but monthly deductions may not exceed the monthly extra payment made during the family care period) or through an interest free loan granted to the employer by the Federal Office of Family

Affairs and Civil Society Functions (*Bundesamt für Familie und zivilgesellschaftliche Aufgaben*).

Employees making use of such a family care period will benefit according to the new law from special protection against dismissal.

Reform of the German Employee Lease Act (Arbeitnehmerüberlassungsgesetz)

Leasing of temporary employees (*Arbeitnehmerüberlassung*) is becoming more and more popular in all business sectors and is a fast growing industry in Germany. Ongoing discussion by trade unions and politicians have led to an initiative to reform part of the German Employee Lease Act. The amendments essentially aim at curtailing the misuse of employee leasing and implementing a minimum wage for temporary employees.

The most important changes to the German Employee Lease Act can be summarized as follows: (i) the permanent use of the same temporary employee is no longer covered by the act; (ii) intra-group leasing, where the employment agency and the employer belong to the same group of companies, is no longer exempted from the regulation; (iii) the "revolving-door effect" has been abolished by requiring a company which hires a temporary worker whom it had previously employed on a permanent basis to pay to such temporary employee the same consideration as before; (iv) the employer is now obliged to notify the temporary worker of any available permanent positions that are vacant at the company and (v), the temporary worker is entitled to equal access to benefits such as cafeteria meals, child care facilities, commuter transport, and similar benefits offered by the company to permanent employees.

Further, collective bargaining agreements (Tarifverträige) negotiated between unions and the Association of Temporary Employment Agencies (BAP) are declared to be legally binding for all employee leasing agencies who operate in Germany, irrespective of whether they have offices in Germany or not. As a result of such a bargaining agreement, from 1 January 2012 onwards, the minimum wage for all agency temporary employees will be 7.01 Euro per hour in the Eastern Federal States and €7.89 in the Western Federal States of the country.

From 1 November 2012 onwards, the minimum wage for all agency temporary employees will rise to €7.50 per hour in the Eastern Federal States and €8.19 in the Western Federal States. New rises in the minimum wage for the period after 31 October 2013 are still to be negotiated between the unions and the BAP. Most of the aforementioned amendments to the German Employee Lease Act took effect as of 1 April 2011. The remaining amendments took effect as of 1 July or 1 December 2011.

CASE LAW

A cross border transfer of business can constitute a transfer of an undertaking within the meaning of § 613a German Civil Code (German Federal Labor Court (BAG) decision 26 May 2011, 8 AZR 37/10)

There have been controversial discussions amongst German legal commentators as to whether the EU Acquired Rights Directive (as implemented in Germany through § 613a German Civil Code) can apply to a cross border transfer of a business. The German Federal Labor Court (*Bundesarbeitsgericht*) partly answered the question in a decision taken on 26 May 2011. The ruling deals with a case where a German employer whose parent company has several subsidiaries in Switzerland, transferred a part of its German business to one of the Swiss subsidiaries. Several German employees, among them the plaintiff, were laid off because of an asserted closure of the German site. The plaintiff rejected the offer to enter into a new employment contract with the Swiss subsidiary. The assets related to the German business were sold and transferred to the Swiss subsidiary and the related equipment and machinery were transferred to the Swiss subsidiary's site, which was located approximately 60 kilometers away from the defendant's German site. The court held that § 613a German Civil Code applied in this case and that therefore the lay-off of the plaintiff was invalid. The fact that the business transfer crossed a European border (even to a non EU country) was not relevant to the court.

No age discrimination if severance payments under a social plan are staggered by age (German Federal Labor Court (BAG), decision by 12 April 2011, 1 AZR 764/09)

The German Federal Labor Court (*Bundesarbeitsgericht*) held in its decision dated 12 April 2011 that severance amounts agreed in a social plan that was concluded in the context of a redundancy can be staggered by age of the affected employees, i.e. older employees receiving a higher severance than younger employees, without such "unequal treatment" triggering a breach of the principle of non-discrimination on grounds of age as given expression by Directive 2000/78. The unequal treatment of employees of different ages shall serve the purpose of compensating older employees for

their worse chances on the job market compared to those of younger employees. This specific purpose justifies the different treatment of employees with different ages with respect to severance payments agreed in a social plan.

Employer can enter into a fixed-term employment contract with ex-employee as long as at least three (3) years have passed since the previous employment of the ex-employee (German Federal Labor Court (BAG) decision 6 April 2011, 7 AZR 716/09)

Under the German Part-time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz*) any previous employment with the same employer prohibits the entering into of a fixed term contract without a substantive reason (*sachlicher Grund*). The German Federal Labor Court (*Bundesarbeitsgericht*) has now stated that this general ban is not backed by the legislator's intention and the purpose of the provisions governing this area of law. Hence, the Federal Labor Court ruled that a company is not prohibited from hiring an ex-employee on a fixed-term basis and that a period of previous employment is irrelevant if the employee has not worked for the company for more than three years. This decision is important as employers now have much greater flexibility to employ ex-employees on fixed term contracts as they do not need to prove a substantive reason for the fixed term employment.

Substantive operational losses may justify a reduction of a bonus that was "preliminarily" determined by the employer at the beginning of the relevant bonus period (German Federal Labor Court (BAG) decision 12 October 2011, 10 AZR 756/10)

In Germany there is a persistent risk that any kind of "bonus promise" given by the employer to an employee triggers an irrevocable legal obligation to pay such bonus irrespective of any unforeseeable change. The Federal Labor Court (*Bundesarbeitsgericht*) has now expressed its opinion on this by ruling that a preliminary promise (*vorläufige Zusage*) of a bonus of a specific amount does not in every circumstance trigger the obligation to pay such a bonus. In the case decided by the German Federal Labor Court the plaintiff's compensation was composed of a monthly fixed gross salary and a bonus which was subject to the employer's discretion. The employer established a bonus pool for employees of EUR 400 million, after which the plaintiff received a bonus letter pursuant to which his preliminary bonus amounted to EUR 172,500. Only two months later the employer decided to reduce the bonus pool by 90 percent because the company generated losses of approximately EUR 6.5 billion and to pay out to the plaintiff a bonus only in the amount of EUR 17,250. The plaintiff's claim for payment of the bonus amount originally envisaged was dismissed by the court, which determined that the high losses constituted a good reason to reduce the bonus which had been communicated to the plaintiff on a preliminary basis only. In addition, the employees of the company could not have expected to receive such high bonuses considering the high losses generated by the company. Despite this decision, which can certainly not be mirrored in all cases where a company generates losses and refuses to pay out announced bonuses, companies should be very careful when drafting bonus letters or bonus promises since they may always be considered to be binding and irrevocable promises to the fullest extent.

LUXEMBOURG

LEGISLATION

Remuneration in the financial sector

A law dated 28 October 2011 implemented the provisions of the EU Directive 2010/76/EU (known as the Capital Requirements Directive III or CRD III) in Luxembourg.

Certain aspects of the CRD III had already been implemented in the Luxembourg financial sector regulations through the issue by the Luxembourg financial supervisory authority (the *Commission de Surveillance du Secteur Financier* or *CSSF*) of circulars (CSSF 10/496, CSSF 10/497 and CSSF 11/505) concerning remuneration policies in banks and investment firms.

According to this law dated 28 October 2011 (which amended the Luxembourg law dated 5 April 1993 on the financial sector), Luxembourg credit institutions and certain investment firms must establish "remuneration policies and practices allowing and promoting a sound and effective risk management".

Various temporary crisis-related measures

Luxembourg has put in place several temporary crisis-related programmes for Luxembourg employers to face the challenges during the financial crisis.

Among others, the following temporary measures (they will terminate on 31 December 2012) have been taken under the law dated 16 December 2011:

Working time organisation

Due to the fact that the standard working time in Luxembourg (i.e. 8 hours per day and 40 hours per week) may not be appropriate to meet the employers specific operational needs in these crisis times, Luxembourg employers have been authorised to set up more flexible organisation working plans (subject to certain legal requirements including that the plan shall not exceed 40 working hours per week over the course of four consecutive weeks).

Short-time working period

In order to support employers during the financial crisis the Luxembourg State exceptionally reimburses 100% of the compensation paid by the employers to the employees during a short-time working period.

Employment of young employees

In order to encourage the employment of young workers, the law of 16 December 2011 provides that a Luxembourg employer who wishes to employ young graduates may take advantage of the initiation employment contract (*contrat d'initiation à l'emploi*), the purpose of which is to offer real practical training to young graduates in order to facilitate their integration into the Luxembourg employment market and which is subject to more flexible conditions than an ordinary employment contract.

Indexation

Luxembourg salaries, pensions and certain social security benefits are adapted in accordance with a certain increase of the consumer price index. They were last adapted on 1 October 2011.

On 26 January 2012, the Luxembourg Parliament enacted a new law, which provides for the change of the current indexation regulations, including less frequent adjustments, until 2014.

The government has further announced its decision to remove tobacco, alcohol and fuel (above a certain reference price) from the index basket.

New Collective Banking Agreement

In March 2011, the trade unions and the Luxembourg banking association (*Association des Banques et Banquiers, Luxembourg* or *ABBL*) agreed on the terms of a new collective banking agreement for the years 2011 to 2013. This collective agreement (the purpose of which is to regulate the general terms of employment used by the banks which are members of the ABBL) has been given general binding effect through its publication in the Luxembourg official gazette (*Mémorial*), meaning that all Luxembourg established banks have to apply the terms of this collective banking agreement, even though they would not be members of the ABBL.

Bill of law 6373 dated 6 June 2011 concerning the EU directive 2009/38/EC on European Works Council

A bill of law was put to the Luxembourg parliament on 23 November 2011 in order to implement the provisions of the 2009/38/EC Directive into Luxembourg law. The aim of the 2009/38/EC Directive is to improve the right to information and to consultation of employees in EU-scale undertakings and EU-scale groups of undertakings and to provide for the establishment of European works councils or procedures for informing and consulting employees in such undertakings and groups of undertakings.

CASE LAW

Temporary workers

In a judgment dated 3 February 2011, the Luxembourg Court of Appeal assessed whether temporary workers who had signed an employment agreement with a temporary work agency (*entrepreneur de travail intérimaire*) were genuinely employed by the temporary work agency or were in fact employed by the client (*utilisateur*) of the temporary work agency.

The Court held that the temporary workers, who worked full time as cleaning staff in the hotel of the client, were instructed and supervised only by the client and not by the temporary work agency and were in fact employed by the client.

The Court determined that the refusal by the client to let the temporary workers enter and work in the hotel, subsequent to the termination letter, which had been issued to the temporary workers by the temporary work agency, constituted a termination with immediate effect of the employment contract between the client and the temporary workers.

Since the client did not comply with the legal rules applicable to such termination with immediate effect, the Court awarded compensation for unfair dismissal to the temporary workers.

Deadline for submitting a medical certificate

The Luxembourg Court of Appeal held on 3 February 2011 that a sick employee, after having notified the employer of his absence on the first day, was allowed to submit the medical certificate until midnight on the third day of his absence.

The Court decided that the dismissal of an employee notified to him before the end of the third day of absence (the termination letter was sent at 7.01 pm on the third day of absence) was made while the employee was still protected against dismissal. For this reason the court awarded compensation to the employee for unfair dismissal.

Requalification of a termination letter

In a decision dated 27 January 2011, the Luxembourg Court of Appeal held that the choice between a dismissal with immediate effect and a dismissal with notice period belongs only to the employer and that the courts can not challenge this choice. The courts' role is limited to ensuring that the employer has complied with the rules that apply to the relevant dismissal.

Transfer of the employees rather than dismissal

In a decision dated 27 October 2011, the Luxembourg Court of Appeal determined that the employer is the only party responsible for the management of its business and that it is free to take any decisions that it considers legitimate to restructure its loss making business. In particular, in case of losses, the employer is free to terminate the employment contracts of certain employees rather than transferring them to another department or to another entity within the group. As a consequence, a claim for damages made by a dismissed employee who argued that the employer had the obligation to transfer him to another entity of the group was rejected by the court.

RUSSIA

Increase to the minimum wage

As of 1 June 2011, the minimum wage in the Russian Federation (the "RF") was raised to RUB 4,611 per month. Constituent units of the RF are entitled to establish their own amount of minimum wage. For example, according to the Agreement on Minimum Wage in Moscow for 2011, entered into between the Government of Moscow, Moscow Trade Union Associations and Unions of Moscow Employers on 2 December 2010, the minimum wage in Moscow was set at RUB 10,900.

Documents to be presented for the purpose of executing an employment agreement

On 7 January 2011, the RF Labor Code was amended to restrict persons with current or past criminal records, or who are or have been under criminal prosecution, from employment in certain activities. The activities in question, include pedagogic activity (Article 331 of the RF Labor Code), as well as activities related to education, mentoring and the development of minors, managing youth recreation and health promotion, medical service, social protection and servicing, youth sports, art and culture activities involving minors (Article 351.1 of the RF Labor Code). Candidates for such positions should present to the employer either a certificate showing the existence or absence of conviction or criminal prosecutions or a certificate of exoneration, confirming termination of the criminal prosecution.

If such restrictions are not imposed by law, the employer does not have the right to require any such certificate to be provided.

Certification of work place conditions

From 1 September 2011, certification of work places with respect to labor conditions will be carried out under the procedure adopted by the RF Ministry of Healthcare and Social Development (the "Healthcare Ministry") Order No. 342н of 26 April 2011.

The employer is responsible for the accuracy and completeness of the information provided to the labor inspection, while the responsibility for the accuracy of the tests and evaluations rests both with the employer and the certifying organization. The RF Code of Administrative Offences determines administrative measures for violations of labor and labor safety laws: fines for officials — from RUB 1,000 to 5,000; for individual entrepreneurs — from RUB 1,000 to 5,000, and suspension of activity for a term of up to 90 days; for legal entities — from RUB 30,000 to 50,000 or a similar term for suspending their activity.

Disability certificate

The Healthcare Ministry has adopted a new form of disability certificate and a new procedure for issuing disability certificates. One of the most important provisions relates to the necessity to approve the disability certificate. The right to approve the

disability certificate belongs to the head of the company-employer and may only be delegated to (i) his/ her deputy responsible for the relevant issues related to social insurance, or (ii) to the head of a branch, provided that the branch is registered with a regional division of the RF Social Insurance Fund.

Calculation of payments under a Disability Certificate for pregnancy and maternity leave

As of 1 January 2011, the Federal Law On Introduction of Amendments into the Federal Law On Mandatory Social Insurance in case of Temporary Disability and Maternity entered into force.

The new law requires compensation payable to employees on maternity leave to be calculated based on a two-year period of work, instead of one year, before the start of the maternity leave.

Before 1 January 2011, average earnings were calculated by dividing the amount of a person's earnings by the number of days worked. The days that were missed due to sick leave were deducted and not accounted for in the formula. After the 2011 amendments, the average earnings are determined by dividing total earnings by 730 (365 days + 365 days).

Under the new law, calculations for compensation to employees on maternity leave may remain at the same level as before it entered into force, only if the employee has worked for two years prior to an insurance event and did not miss any days for sickness etc. If the employment history of a woman is less than six months, the maternity allowance may not exceed minimum wage for a calendar month.

Ratifying the Vacation Convention

Convention No. 132 Concerning Paid Vacations, adopted by the International Labor Organization on 30 June 1973, came into force in Russia on 6 September 2011. However, no material changes are expected to the domestic RF legislation as a result.

One of the most important provisions for Russia is Article 12 of the Convention, which invalidates or prohibits agreements on the waiver of right to a minimal annual paid leave or non-use of such vacation in return for monetary or other compensation. However, vacation exceeding 28 annual calendar days may still be exchanged for monetary compensation during employment and, at dismissal, compensation may be received for all unused vacation days.

COURT PRACTICE

Fathers who are single earners in a large family shall have the same dismissal guarantees as mothers (Resolution of the RF Constitutional Court No. 28-П of 15 December 2011 On Review of the Constitutionality of Article 261 (4) of the RF Labor Code in Respect of a Complaint of Mr. A.E. Ostaev)

The RF Labor Code provides for certain guarantees to mothers with children under the age of 3 years. In particular, an employer may not dismiss such employees unilaterally, except in cases of the liquidation of a company, termination of the activity of an entrepreneur, or an employee's guilty actions. Similar prohibition is also stipulated for other persons who take care of children under the age of 14 years without a mother.

The court judged these provisions unconstitutional, as they exclude the possibility for a father, who is the single earner in a large family, with children under the age of 14 years (including a child under the age of three years), from using the said guarantee in cases where there is a mother who is not employed and stays at home.

The RF Constitutional Court stated that the contested norms provide the guarantee to an employed woman only on the basis her having a child under the age of three years (i.e. irrespective of her family status, joint or separate living with the child's father, availability or absence of income in the family, etc.). As for a father of such a child, the prohibition of such dismissal only refers to him if he takes care of a child without a mother.

The RF Constitutional Court stressed that federal lawmakers may determine the conditions of providing the said guarantee to applicable fathers.

UNITED STATES OF AMERICA

The Supreme Court expands employers' Title VII retaliation liability to third parties

In *Thompson v. North American Stainless*, the Supreme Court unanimously concluded that Title VII prohibits retaliation against third parties who are closely related to the employee exercising his or her statutory rights and that these third parties have standing to sue under the statute. In *Thompson*, the plaintiff's fiancée filed an EEOC charge against the company, and shortly thereafter, the company fired the plaintiff. Reasoning that Title VII's anti-retaliation prohibition is meant to cover any action that might dissuade an employee from making a

charge of discrimination, the Court concluded that firing an employee's fiancée was certainly covered, but left open the question of exactly how close the relationship between the plaintiff and the complaining employee must be in order to be protected.

Defining "Cat's Paw" liability

In *Staub v. Proctor Hospital*, the Court for the first time recognized the so-called "cat's paw" theory of liability. The phrase "cat's paw" is derived from a fable in which a hungry monkey tricks a cat into using its paw to pull roasting chestnuts out of a fire. After the cat gets the nuts, the monkey makes off with them and leaves the cat with nothing except burnt paws. In employment matters, the "cat's paw" typically includes an allegation that an agent of the employer with discriminatory animus (the monkey) influenced an unbiased decision-maker (the cat) to take an adverse employment action against another employee.

In *Staub*, two of the plaintiff's supervisors made discriminatory comments about the plaintiff's military obligations, yet he was ultimately fired by a human resources vice president who had not been hostile to him. The Plaintiff argued that the two lower level supervisors caused an unfavorable record to be placed in his employment record, and that the vice president relied on that in part to terminate his employment. The Court held that "if a supervisor performs an act motivated by an anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA" [the Uniformed Services Employment and Reemployment Rights Act]. Though this holding is about USERRA, it is likely to apply in other contexts — especially Title VII and claims of age, race, and sex discrimination.

Oral complaints are protected activity under FLSA

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the United States Supreme Court determined that oral complaints qualify as protected activity under the anti-retaliation portion of the Fair Labor Standards Act ("FLSA"). The Court of Appeals for the Seventh Circuit determined that oral complaints were not included because the text of the FLSA prohibits discharge of any employee who has "*filed* any complaint" 29 U.S.C. § 215(a)(3) (emphasis added by the Seventh Circuit). The Supreme Court determined that "filing" need not be limited to writing. The Court noted that the FLSA's purpose is to protect the health, efficiency and well-being of workers — and that the FLSA relies on the complaints of workers to facilitate its enforcement. Further, the Court noted that many workers might only complain orally — especially poor or illiterate workers — and that the anti-retaliation provision should ensure that they can do so without fear of retribution.

Federal Arbitration Act pre-empts state law prohibiting Class Action Waivers in arbitration provisions

In *AT&T Mobility LLC v. Conception*, Justice Scalia, writing for a divided court (5-4), decided that, under the Federal Arbitrations Act ("FAA"), contracts requiring plaintiffs to waive their right to form a class in an arbitration proceeding are enforceable because federal law pre-empts California state law disallowing such agreements. Justice Scalia determined that California's rule not permitting waiver of class action rights in adhesion agreements actually disfavored arbitration in a way that was directly contrary to the purpose of the FAA. The Court held that, because California's rule would require arbitration provisions to permit class actions, arbitrations would be more complicated and their use would be discouraged. Notably, Justice Scalia found that the FAA generally preserves other general contract defenses, including unconscionability, when dealing with arbitration agreements.

Expanding remedies available under ERISA

In a unanimous decision, the Court in *Cigna v. Amara* found that a specific section of the Employee Retirement Income Security Act of 1974 ("ERISA") allows plan participants to seek pension plan reformation as a remedy for plan administrators' misrepresentations. While the Court unanimously agreed that section 502(a)(1)(B) only authorizes courts to enforce, not reform, the terms of a pension plan, the Court determined that a second section affords the remedy of plan reformation. Under 502(a)(3), which permits participants to "obtain other appropriate equitable relief," plan reformation may be an appropriate remedy because it resembles the relief traditionally provided in equity. This opens the door for plan participants to seek significant relief if they are mislead by plan administrators mislead participants.

States may regulate immigration through broad licensing provisions

In *Chamber of Commerce of U.S. v. Whiting*, the Court approved regulations that would allow the revocation of business licenses — including articles of incorporation and similar documents — based on

an employer's employment of unauthorized workers. After Arizona passed the Legal Arizona Workers Act, the Chamber of Commerce filed a pre-enforcement suit arguing that the bill was pre-empted by the Immigration Reform and Control Act ("IRCA"). Justice Roberts, writing for the majority, held that the statute was not explicitly pre-empted by federal law because it fell within the statute's "licensing laws" exception. The Court also held that a federal law prohibiting the Secretary of Homeland Security from behaving the way Arizona was behaving did not constrain any other party — including states. In addition, the Court found that this statute did not regulate an area of law that Congress intended federal law exclusively regulate. Arizona's law, according to the Court, was distinct from the federal sphere because it prohibited state actors from making determinations about an employee's immigration status and instead required that states rely on federal determinations.

Court places heavy burden on litigants seeking class certification

In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court made it more difficult for litigants to obtain class certification in federal court. Specifically, the Court emphasized that courts must "rigorus[ly]" analyze a motion for class certification — even if that requires looking at the merits. The Court decided that to meet Federal Rule of Civil Procedure 23(a)(2)'s "commonality" standard, litigants must show proof "in fact" of issues that apply across the entire class. Justice Scalia, in the majority opinion, noted that "Rule 23 does not set forth a mere pleading standard," but rather requires a plaintiff to "prove that there are . . . common questions of law or fact." In this case, the Court rejected a class of approximately 1.5 million current and former Wal-Mart employees who worked at locations all over the United States and found that individualized decisions and management practices at each location undermined any claim of commonality.

The Court also unanimously held that Rule 23(b)(2) does not permit a class with members requesting individual relief. While the Ninth Circuit held that litigants could use the easier standard for injunctive relief under 23(b)(2) when monetary relief is a "nonpredominant" part of the relief sought, the Court determined that where plaintiffs seek individualized monetary relief, they must meet the requirements of 23(b)(3).

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