Multi-jurisdictional legal update

International legal developments

This publication is intended to highlight a variety of international employment law matters (e.g., corporate, contractual, competition, distribution) and also to indicate recent developments in specific countries on a quarterly basis.
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Belgium

New notice periods for blue- and white-collar employees … an insufficient step toward harmonization between both statuses

The difference in treatment between blue- and white-collar employees has been a long-lasting debate in Belgium. Back in 1993, the Constitutional Court ruled that objective reasons could hardly justify such a difference in treatment. The Belgian Legislator enacted new rules on notice periods to reduce this discriminatory gap.

The new rules on notice periods apply to employees who have commenced work on or after 1 January 2012.

Employees who have started to work prior to this date will remain subject to the existing rules on notice periods.

For blue-collar employees, the new rules increase the current notice periods by 15% in the case of a dismissal. Each business sector must discuss and eventually agree on the same 15% increase before the end of 2012. In the absence of such an agreement, determined by the judge based on a case-by-case assessment. The judge will consider the time necessary to find similar employment by taking into account, in particular, the employee’s age, seniority, function and remuneration at the time of employment termination. In the case of a dismissal, notice periods are now equal to a fixed 30-day period per any started year of service (without, however, being less than a three-month notice period per any started five-year period of service). For dismissals taking place on or after 1 January 2014, the fixed 30-day notice period will be reduced to 29 days.

For white-collar employees earning more than €31,467 (2012 amount) gross a year, the new rules continue to make a distinction between employees based on their annual gross remuneration.

For white-collar employees earning more than €31,467 (2012 amount) gross a year, the rules remain the same. In the case of a dismissal, they are entitled to a three-month notice period per any started five-year period of service.

For white-collar employees earning more than €31,467 (2012 amount) gross a year, the new rules bring significant changes. Notice periods are no longer to be agreed upon by the parties after the employment termination or, in the absence of such an agreement, determined by the judge based on a case-by-case assessment. The judge will consider the time necessary to find similar employment by taking into account, in particular, the employee’s age, seniority, function and remuneration at the time of employment termination. In the case of a dismissal, notice periods are now equal to a fixed 30-day period per any started year of service (without, however, being less than a three-month notice period per any started five-year period of service).

When an employment contract is terminated without a (sufficient) notice period, an indemnity in lieu of notice is due, which is equal to the employee’s current remuneration for the remainder of the notice period that had to be observed.

Even before these new rules on notice periods became effective, the Constitutional Court decided that all measures taken by the Belgian Legislator, including the new notice periods for blue- and white-collar employees, are insufficient to reduce the discriminatory gaps between both categories of employees. The Constitutional Court set a deadline of 8 July 2013 for the Belgian Legislator to remove any unlawful difference in treatment. In view of this ruling, it is very doubtful that the new rules on notice periods will have a long life span.

Further salary freeze to apply in 2012

In 2012, wage increases will continue to be strongly limited as a result of the salary freeze measures that have been taken in Belgium. These measures prohibit any individual or collective agreement on wage increases that has the effect of increasing the employer’s global salary costs above a certain margin.

The salary freeze aims to protect the competitiveness of the Belgian labor market. The maximum margin for the increase of salary costs is calculated in view of evolution of salary in Belgium’s neighboring countries, Germany, France and the Netherlands. For 2012, it has been set at 0.3%.

In practical terms, the salary freeze measures mean that wage increases are allowed only if they...
do not increase the employer’s global salary costs by more than 0.3%. The increase of the salary costs is not to be measured at the level of each individual employee, but at the level of the company. Exceeding the 0.3% margin would make any related wage increase unlawful and could expose employers to fines.

Wage increases as a result of cost of living adjustment (i.e., salary indexation) or the application of existing salary scales (e.g., after a change in the employee’s function) remain unaffected by the salary freeze restriction. Also, benefits such as profit-sharing schemes, employee participation schemes, employer’s contributions to “social supplementary pension schemes” and “innovation premiums,” as well as wage increases as a result of a personnel increase, are not taken into account for the purpose of determining whether the margin for the increase of salary costs is exceeded.

Outside the scope of these “allowed” wage increases, the statutory provisions are unclear when it comes to determining whether, and to which extent, employers can grant other wage increases or additional benefits to employees without exceeding the 0.3% margin.

In practice, the salary freeze measures may create important HR challenges for employers in retaining talented employees, who could be tempted to change jobs as their wages have been frozen for more than a year now.

**End-of-career planning under pressure by the new Di Rupo Government**

As part of a sensible budget-making exercise, Belgium’s new Di Rupo Government adopted a set of social measures that clearly restrict employers’ ability to structure end-of-career planning for older employees.

Di Rupo’s social measures continue to follow the same path introduced by the Generation Pact in late December 2005. One of the goals was to promote “active aging,” especially through a series of measures aiming at discouraging the use of early retirement.

In general, eligibility for early retirement will be more complicated for employees, with a minimum retirement age of 60 years old and a career of 40 years minimum. Exceptions only exist for companies in economic difficulties or those that are restructuring, although the age requirement will progressively increase. Moreover, employers’ contributions to early retirement schemes will increase again and statutory pension entitlements of early retirees will shrink.

Besides measures relating to early retirement, the Di Rupo Government also intends to restrict access to different types of career breaks. For employees in a 50% or 20% career break, higher allowances are generally only available to those aged 55 years and over with a career of 25 years. A career break taken at the end of the career may also affect the employee’s statutory pension entitlements.

Furthermore, early retirement pension payments become stricter in terms of calculation methods. The Di Rupo Government introduced the “80% (tax deductibility) rule.” Employer’s contributions to extra statutory pensions will be tax deductible only if the sum of the statutory and extra-statutory pensions does not exceed both thresholds: 80% of the employees’ last normal annual gross salary and the maximum public sector pension.

Di Rupo’s social measures were mainly adopted with a view to yielding profits to compensate for Belgium’s budget deficit. As Belgium’s economic situation, however, continues to deteriorate, other social measures, with the purpose of further reducing the costly social protection offered by the Belgian social security system to older employees, may still come in the near future.

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**Bulgaria**

**New legislation introducing home-based work**

In compliance with the Home Work Convention of the International Labor Organization, Bulgaria has introduced new rules governing home-based work.

The new legislation explicitly provides for an employee to work from home or from a place other than the place of business of the employer.

The new rules set out a number of mandatory requisites for the employment contract with a home employee, such as:

► Precise location of the workplace
► Remuneration and the means of calculating the amount in accordance with the remuneration policy of the employer
► Procedure for assignment of work and reporting
► Means for supply of materials and delivery of products
► Payment of workplace-related expenses

Following the principle of equal treatment set out in the Home Work Convention, the domestic legislation obliges the employer to ensure equal treatment of home-based employees and employees working in the premises of the employer. The employer has the obligation to provide the home-based employees with proper working conditions, opportunities for professional qualification and training. The employer is further obliged to keep a list of its home-based employees available for inspection by the National Employment Agency.

The home-based employee is obliged to provide workplace access, including to the employee’s home, to the employer and the competent authorities.

The home-based employee is free to decide when to take breaks and have rest periods within the limits provided in the labor legislation.

The new rules explicitly prohibit overtime work for the home-based employees.

**New rules regulating distance work**

New provisions lay down comprehensive rules for distance work, where employees perform their duties by means of information technologies at home or other specifically designated places, other than the premises of the employer.

The new rules provide that the employment contract should specify the specific type of distance work, as well as the conditions and the means of performing the work.

According to the newly adopted rules, distance employees enjoy the same rights as the employees working in the premises of the employer.

The working time of distance employees has to be stipulated in the employment contract following the general provisions of the labor law and must correspond to the duration of the working day of the employees based in the employer’s premises.

The law requires that the same standards of workload are applied to both distance employees and employees in the premises of the employer. The actual working time has to be reported in a form approved by the employer. The employees performing distance work are responsible for the accurate reporting of the number of working hours.

In addition, distance employees have the same access to professional qualification and development as the employees working in the premises of the employer.

The employer is also obliged to promote closer social integration of the distance employees by organizing personnel meetings or creating an intranet forum.

**New legislation on temporary agency work**

New legislation, implementing Directive 2008/104/EC on temporary agency work, was recently adopted by the Bulgarian National Assembly.

Under the new rules, only 30% of a company’s personnel may be employed through temporary work agencies. The latter need to undergo a special registration procedure with the National Employment Agency and maintain a group insurance or a bank guarantee of at least BGN200,000, so as to secure their liability toward the employees.

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Recent statements of Labor Council relating to cooperation proceedings

Finnish companies must observe the Finnish Act on Cooperation within Undertakings (334/2007, as amended, later the “Act”), if the company regularly employs at least 20 persons. Should the Act be applied to the company, the rights and obligations arising out of it are quite strict. Failing to observe the stipulations may turn out to be expensive for the company.

Lately, the Finnish Labor Council has given two statements on whether the Act applies to companies in certain situations.

The first statement addressed the issue of the 20-employee threshold in a group of companies. The main question was whether the total number of the employees of all three companies of a group had to be taken into account when considering the applicability of the Act.

According to the Cooperation Ombudsman, the group of companies should be regarded as one if i) the companies have the same managing director; ii) the companies share the same services and personnel strategies; and iii) two of the companies sell each other’s products and provide services at the same store facilities.

The group companies claimed that they were separate and independent business units with their own accounting systems, budgets, organizations, and board of directors. There were also no consolidated financial statements. They also stated that, despite this, each company carried out its business independently and the cooperation between the group companies was based on inter-company agreements.

As a result, the Labor Council stated that only the number of each company’s employees had to be taken into consideration when assessing the applicability of the Act, not the number of employees of the whole group. According to the Labor Council, neither the Act itself nor its legislative history implies that the concept of “a company” would have a broader meaning than the formal and legal employer. Further, the Act does not include any provisions on its applicability to group companies. Thus, the number of employees in the whole group is not decisive, but the number of employees of the single employer company.

Another case statement dealt with the applicability of the Act in a situation where:

- A Finnish company sends employees abroad for job assignment or recruits people from abroad.
- A foreign company establishes a branch office in Finland and the branch itself has less than 20 employees, but together with the other employees of the company, the number of the employees is more than 20. Is the foreign company’s branch in Finland a “company” according to the Act?

The statement of the Labor Council was clear: the Act and its legislative history do not presume that only the employees working in Finland should be taken into account when considering the applicability of the Act. The number of employees is assessed simply by looking at the legal entity that employs them, regardless of where they actually work, even if abroad.

As a result, it seems that a foreign company may carry out business in Finland, in which case, its branch is regarded as part of the legal entity. However, such a branch is not a legal entity, thus it is not “a company” in accordance with the Act, and the Act is not applicable to such branch.

The dismissals in an international group

The Supreme Court of Finland has recently given an interesting preliminary ruling in connection with dismissals of employees of an international group of companies with an affiliated company in Finland on economic and productivity-related grounds.

In the Fujitsu-Siemens-case, the Finnish subsidiary company had terminated all 450 of its Finnish personnel due to the fact that the whole plant situated in Finland was closed down and moved to Germany.

Under Finnish law, before the employer with 20 or more employees in its Finnish subsidiary makes any decisions in connection with dismissals of its personnel, the cooperation procedures with the representatives of the employees must be complied with. The Finnish subsidiary had carried out the mandatory six-week cooperation procedures. However, the unions stated that the actual decision to close down the plant in Finland had been made by the Dutch parent company prior to the commencement of the required cooperation procedures.

In deciding this case, the Finnish Supreme Court, applying both the
Finnish Act on Cooperation within Undertakings (334/2207) and the European Council Directive 98/59/EC (also known as the Collective Redundancies Directive), stated that the evidence of the case showed that the decision regarding the collective redundancies and closing down of the plant in Finland had been made at the board meeting of the parent company prior to the mandatory cooperation procedures, as suggested by the unions. Thus, the Supreme Court obliged the Finnish subsidiary to pay to each of its dismissed employees their six months’ salary. The total amount of the judgment was €2.5 million with added interest.

After this ruling, the Finnish courts have passed similar judgments in situations where the actual decision in connection with the dismissal of employees have been made at the board of the employer, or at the board of the parent company of the employer, before the mandatory cooperation procedures have been carried out.

International groups facing possible employee dismissals should take into account these decisions of the Finnish courts before planning and executing dismissals, as well as before planning the restructuring or closing of their operation in Finland, not only in Finland but also at the parent company, even if it is a foreign company.

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Restructuring a French company may have unexpected financial consequences for other entities of the group

In several recently published decisions, the French Supreme Court has recognized the liability of a French parent company as co-employer of the employees of one of its French subsidiaries.

In one case, the activities of French subsidiary A were transferred to French subsidiary B. Those employees refusing the transfer from A to B were terminated.

Some of those employees challenged the redundancy and claimed damages from both company A, their employer, and also company C, the French parent company.

Based on the theory of “intermingling of interests, activity and management” between companies A and C, the French Supreme Court held that both companies were co-employers and therefore liable.

Such “intermingling of interests, activity and management” were notably shown by:

- The fact that the subsidiary was economically dependent on the parent company that owned the majority of the share capital
- Joint management of the employees of both companies and also of another subsidiary
- The fact that the parent company was taking all strategic decisions for the subsidiary, including the decision to transfer the activity of the subsidiary A to B, which led to the redundancies of employees

Several earlier decisions of French labor courts had already suggested the possible joint liability of companies belonging to the same group, where these companies are considered as co-employers under the “intermingling of interests, activity and management” test.

In this latest decision, the French Supreme Court has confirmed the tendency of the lower courts to extend the liability relating to financial consequences of redundancies to other companies of the same group, in the context of a restructuring.

A slice of flexibility for the employer regarding the modification of the variable part of an employee’s remuneration

It has been established for a long time in France that the modification of an employee’s remuneration requires their prior consent, even if the change is considered as more favorable to the employee.

Many had also considered that, since the modification of an employee’s objectives would likely impact their remuneration, the employer would need the employee’s prior consent for such modification.

Recently, the French Supreme Court adopted a more favorable position for the employer. An employer may unilaterally modify the goals to be reached by an employee to obtain his variable remuneration, if the objectives are unilaterally determined by the employer – unless the employment contract provides otherwise.

In this particular case, an amendment to the employee’s employment contract provided that the determination of the goals relating to variable remuneration was a prerogative of the employer, who had the possibility to modify them unilaterally.

The employee challenged the possibility for the employer to modify the goals unilaterally, considering that such modification should require prior written approval by the employee.

The French Supreme Court recalled that the new goals must be achievable and that the employee must have full knowledge of them at the beginning of the year.

Employers should therefore review the existing employee documentation and consider gaining flexibility on the matters of goal setting and variable remuneration.

Due to changes in the social security tax laws, the cost of termination of an employee in 2012 has significantly increased

As a consequence of the global economic crisis, the Government has decided to limit the potential exemption of social security contributions related to termination indemnities.

Indeed, the Finance Act on Social Security for 2011, applicable as of 2012, lowers the ceiling on the social security exemptions applicable to any termination indemnities, severance and settlement indemnities relating to the termination of an employment contract.
Before the Finance Act of 2011, amounts granted pursuant to a social plan, as well as damages granted by a court, were fully exempted from social security contributions – no matter what the amount was. Now, these payments are treated as any other type of remuneration and thus will also be subject to social security contributions, as per the new law.

Given the high level of social security contributions paid by employers in France (40%–45%), this new reform will significantly impact termination costs and should be taken into account when estimating the cost of termination packages and litigation risk.

The reinforced role of the Health and Safety Committee in France

It is well known that, in France, the Works Council is a key player when implementing any significant project in a company. The information and consultation process of the Works Council may significantly impact the timing of restructuring and reorganization of a project, and, of course, costs.

The role of the Health and Safety Committee was, for a long time, limited to health, safety, working conditions and security. However, more and more, this committee participates not only in the protection of the physical health and security of the employees but also in the protection of their mental health.

In this respect, recent case law shows that employers should inform and consult the Health and Safety Committee in situations that could lead to significant stress for the employees.

Even if there is no definitive decision by the higher courts yet, several lower courts show a tendency for a reinforced role of the Health and Safety Committee.

In two recent decisions in 2011, the reorganization of sales and HR departments and the creation of a shared service center were suspended by the courts, because the employer had failed to inform and consult the Health and Safety Committee.

Moreover, the Health and Safety Committee should also be consulted with respect to the employee evaluation periods, which are considered to be a stressful time.

This trend of an increased role of the Health and Safety Committee should be anticipated by employers.

The French Supreme Court limits the types of employees eligible for "cadre dirigeant-exempt" status under French wage and hour law

In a recent decision of the French Supreme Court dated 31 January 2012, the French Supreme Court has clarified its position, with the practical effect of significantly reducing the employee "exempt" status for wage and hour law purposes.

As many may remember, the "35 hour a week" law voted in 1998 (which created much debate), did not provide that everyone in France would work 35 hours a week. Rather, "cadre" – managers considered to have great flexibility in their schedule and autonomy in the performance of their duties – would not benefit from a reduction in the hours per week worked.

Instead, they would work only 218 days a year. On a practical level, this meant that those persons considered as "cadre" would be entitled to approximately 10 days’ extra floating holiday per year.

Yet, those employees considered as “cadres dirigeants” or managing directors were not impacted by the 35 hour a week law at all, as their working hours and days worked remained intact. Indeed, persons in this category do not benefit from most of the wage and hour law protections, such as overtime pay, limits on the number of daily or weekly hours and the prohibition of work on Sundays. As a result, many employers placed the highest-paid and most autonomous of their managers in this third category.

In a recent case, the High Court intervened and proclaimed that, even if a position satisfies conditions for the "cadre dirigeant" status as set forth in the French Labor Code, only employees actually involved in decision-making and defining the strategy of the company from a social, economic and financial perspective may be deemed as "cadre dirigeant."

In this recent case, the last condition was not fulfilled. As a result, the employee was deemed not to be a “cadre dirigeant” and thus entitled to extra pay for overtime worked. Companies should review whether the employees who are deemed “cadre dirigeant” satisfy the newly defined conditions set forth by the French Supreme Court, in order to avoid legal risk and possibly litigation.

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New German law further restricts the “leasing of employees” (agency work: Arbeitnehmerüberlassung); restriction of intra-group exemption” (Konzernprivileg) for multinational companies

Agency work (also called “leasing of employees”) is quite common in Germany and allows companies to be more flexible with their headcount, e.g., during peaks in production. Agency employees are often provided by professional agency businesses, but may also be provided by employers, e.g., within a global corporate group or joint venture from one group company or joint venture partner to another. Therefore, the actual changes to German law are, in particular, interesting for global multinational employers with worldwide tasks and operating fields and their international mobile employees.

In November 2008, the European Parliament and the European Council passed the EU Directive on Temporary Agency Work (EU-Zeitarbeitsrichtlinie; 2008/104/EC). According to Article 2 of the Directive, its purpose is “to ensure the protection of temporary agency employees and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to temporary agency employees, and by recognizing temporary work agencies as employers while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and development of flexible forms of working.”

Germany has transposed the Directive into national law on 1 December 2011 and several amendments to the AÜG (Act Regulating the Commercial Leasing of Employees/Arbeitnehmerüberlassungsgesetz) have been made in accordance with the requirements of the Directive. Under the Directive, “equal treatment” relates only to basic working and employment conditions of temporary agency employees (e.g., remuneration, working time). The Directive does not affect the employment status of temporary employees.

The German legislator adapted a range of changes applicable to agency work. In particular, the following changes of the AÜG might be of interest for global employers.

► Lessor (in the meaning of the AÜG in the version starting from 1 December 2011) is the employer, who leases out employees (leased employees or temporary agency employees) to third parties (clients). Hence, it is no longer decisive whether the activity pursues a profit-making purpose or not.

► In Germany, in general, a permit is required for agency work (cf. section 1 para. 1 AÜG). Since 1 December 2011, all private and public employers need permission from the federal agency for work, if leasing out of employees takes place “in the context of their economic activities” (engaged in economic activities, whether or not they are making a profit).

According to section 1 para. 3 no. 2 AÜG, an “intra-group exemption” (Konzernprivileg) applies, i.e., no permit is required, if the leasing of employees takes place within a group (in the meaning of section 18 Stock Corporation Act/Aktiengesetz), provided the employees have not been engaged for the purpose of leasing.

► According to this amendment to the law (“that the employees may not have been engaged for the purpose of leasing”), and as an “economic activity” is now crucial, many “temporary work agencies” within a group, (i.e., companies within the group that concluded contracts of employment with “temporary agency employees,” in order to assign them to other companies within the group to work there temporarily under the supervision and direction of the other companies – “global employment companies” within a group), will now require permission.

Companies should therefore carefully review agencies – or within their own company and group structure and global employment companies – if a valid permit for the agency work is necessary and if they have such permission, before taking on agency work.

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Reform of employment law regarding collective labor agreements, mediation and arbitration process.

Law-makers in Greece have approved specific measures in order to ensure a rapid adjustment of the labor market and labor costs aimed at fighting unemployment and restoring cost-competitiveness.

The main amendments shall affect Law 1876/1990 regarding collective labor agreements, mediation and arbitration process.

Main topics of reform:

► The minimum wages established by the National General Collective Agreement (NGCA) will be reduced by 22%, compared with the level of 1 January 2012; for ages below 25, the wages established by the NGCA will be reduced by 32%, without restrictive conditions.

► Laws and existing collective labor agreements that provide for automatic wage increases, including those based on years of service, shall be suspended.

► The Government shall engage with social partners (unions) in order to reform the wage-setting system at the national level. The aim is to replace the wage rates set by the NGCA, with a statutory minimum wage rate legislated by the Government in consultation with social partners.

► Collective agreements that have expired will remain in force for a maximum period of three months. If a new agreement is not reached, remuneration will revert to the base wage and allowances until new collective agreements, or new or amended individual contracts, are in place.

► Legislation shall be revised, in order to provide that arbitration procedure is allowed only when both employees and employers agree on said process. Arbitration applies only to the base wage and not other remuneration.

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The Netherlands

The Dutch legislators have enacted the following new laws:

**Repeal of temporary relaxation of rule on successive fixed-term employment contracts – “chain rule”**

The Temporary Relaxation of Rule on Successive Fixed-Term Employment Contracts Act came into force on 9 July 2010. This act allowed employers with employees under the age of 27 to enter into four successive fixed-term employment contracts – instead of the usual three – before the employment contract would be converted into an open-ended employment contract. The act also made it possible to work for four years – instead of the usual three – on the basis of a fixed-term employment contract. The temporary relaxation of this “chain rule” was repealed as from 1 January 2012.

**Salary savings scheme and life-course savings scheme abolished**

From 1 January 2012, the life-course savings scheme and salary savings scheme can no longer be used. Both of these schemes have been abolished and they will be replaced by a new “vitality savings scheme,” which will be introduced gradually in 2012 and 2013. For employees who are already participating in the life-course savings scheme, the following transitional arrangements apply.

*Employees with a savings balance of less than €3,000*

Employees, who have accrued a savings balance of less than €3,000 on 31 December 2011, are not permitted to make any further deposits in the life-course savings scheme. However, they are permitted to withdraw their savings balance – after tax – in 2012 and 2013, or to transfer the savings balance, tax free, to the vitality savings scheme in 2013. If neither of these options is used, the savings balance on 31 December 2013 will be taxed as salary.

*For all employees, i.e., regardless of the amount of the savings balance, no more tax credit for leave under the life-course savings scheme will be accrued as from 1 January 2012. However, the entitlements that have been accrued up to 1 January 2012 can still be retained.*

**Salary savings scheme**

Transitional arrangements have also been made for the abolition of the salary savings scheme. Its abolition entails that no new deposits can be made and the statutory “blocking” rules have been lifted, so employees who participate in the salary savings scheme can withdraw the savings balance, tax free, from 1 January 2012.

**Old-age pension from 65th birthday**

An important amendment will come into force on 1 April 2012, affecting the commencement date of the state pension under the General Old-Age Pensions Act (AOW).

At present, a distinction is made between the date on which the entitlement to the AOW pension arises and the date of its commencement. The first day of the month in which the person reaches the age of 65 is currently the commencement date of the AOW pension, although the entitlement actually only arises on the 65th birthday. Regardless of whether the 65th birthday is on 1 February or 26 February, the same amount of AOW pension is currently paid.

In the context of the spending cuts, the Government has decided that this must be changed. The AOW pension will only be paid from the 65th birthday of the recipient, so the amount payable for the first month will depend on the date on which the birthday falls. This means that, in the first month, the AOW pension will be lower than under the present system, unless the recipient’s birthday falls on the first day of the month.

For people who receive a disability, unemployment, survivor or social assistance benefit, from 1 April 2012 these benefits will continue to their 65th birthday. For people with a pre-pension, the extent to which the pre-pension does not end on the first day of the month in which they reach the age of 65, but continues to their 65th birthday, will depend on their pre-
pension scheme. It could therefore be the case that the pre-employment pension will end before entitlement to the AOW pension has commenced, and they should be prepared for this eventuality.

In addition to the AOW pension, many people are entitled to a supplementary pension from the age of 65 because, for instance, they participated via their employer in a (company) pension scheme. The commencement date of a supplementary pension of this kind will not be changed by the amendment. Pension schemes usually have three different commencement dates: the first day of the month in which the person reaches the age of 65; the day on which the person reaches the age of 65; or the first day of the month after the person reaches the age of 65.

Pension scheme administrators do not have to change these dates, with the result that employees will only be entitled to the supplementary pension (at most) one month later than the commencement of payment of the AOW pension.

For employees, this new legislation can have the consequence that they will financially experience a void period of almost one month. In practice, employment contracts and collective labor agreements often state that the contract will end on the first day of the month in which the employee reaches the age of 65. This therefore means that an employment contract will end on 1 May, but the employee will only become entitled to an AOW pension on 31 May. As a consequence, the employee is required to arrange financial bridging for almost a month because they are no longer receiving a salary, while not yet receiving a pension.

The legislature has detected this problem and has left it to the parties to make arrangements to circumvent a potential void period. For employers who are not bound by a collective labor agreement, but who have included a stipulation in the individual employment contracts (possibly via a personnel manual) to end on the first day of the month in which the employee reaches pensionable age, the amendment can give cause for reflection.

To redress this situation, it is possible to ensure, by means of a change in the employment contract (or personnel manual), that the employee suffers no financial disadvantage. Consent to the change in the employee’s contract is, however, required.

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Trade unions relationships regarding termination of employment contracts

On 24 January 2012, the Supreme Court issued a new decision, which may have a significant influence on employer-trade unions relationships regarding termination of employment contracts.

Under the Labor Code (Act of 26 June 1974) and the Trade Unions Act (Act of 23 May 1991), employers are required to cooperate with their trade unions and specifically consult them on the planned termination of an employee’s unlimited-term contract. However, this requirement is restricted to employees represented by a given trade union, i.e., those who are members of a trade union, or employees who have approached a trade union with a request for protection and the trade union has agreed to defend their rights.

As a consequence, the employer must ask a trade union whether a given employee enjoys protection before any measures are taken. The trade union is required to provide the requested information. If no information is provided, the employer is no longer required to cooperate with the trade union in matters affecting those employees. In practice, it is not certain whether the requirement to ask a question is a one-off duty, whether employers should update their database of employees enjoying trade union protection or whether they should ask a question to the trade union whenever they plan to terminate an unlimited-term contract.

The above is strictly related to the personal data protection issue. Under the Personal Data Protection Act (Act of 29 August 1997), personal data disclosing a person’s membership in a trade union can be processed without the individual’s consent, only if a special provision of another statute allows that. Furthermore, the administrator of personal data who processes it is required to ensure that the data is adequate for the purposes for which it is processed. This implies that the gathering of data that is unimportant or irrelevant for the intended purpose, or any data more detailed than the intended purpose, is prohibited. Therefore, if an employer seeks to collect an employee’s data “for future” (e.g., to be ready when an employment contract is actually terminated), this has been declared unacceptable under the Personal Data Protection Act.

Given the above concerns, the Supreme Court has been asked whether a trade union’s refusal to provide a list of all employees who enjoy trade union protection releases the employer from the obligation to consult the trade union on the planned termination of employment contracts. In the judgment of 24 January 2012 (no. III PZP 7/11), the Supreme Court held that, if a trade union does not provide the employer with the requested list of employees enjoying trade union protection, this does not imply that the employer is no longer required to notify the trade union of the planned termination of an employment contract, if the trade union’s refusal to provide that information was justified by the protection of personal data.

The Supreme Court’s view is evidence of restricting employers’ rights in Poland. Nobody knows how employers and trade unions will comment on the judgment. Trade unions will probably rely on personal data protection to refuse to provide employers with information on employees enjoying trade union protection. Employers will be forced to notify trade unions of any intended termination of an unlimited-term contract, as this is the only way of ascertaining that a given employee benefits or does not benefit from trade union protection.

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Russia

Potential legislative changes relating to employment matters

Personnel secondment arrangements

Currently, Russian and foreign businesses are attentively focused on the draft law prohibiting the lease of personnel (secondment) in Russia.

The initial draft bill was aimed at encouraging employers to act more responsibly with lease of personnel agreements. However, it is worded in such a way that it would most likely affect the wider Russian legal base (particularly, the Russian Labor Code, the Tax Code and immigration legislation) and may have a significant impact on the personnel secondment practice in general.

Later, another draft bill on this issue was put forward by the Ministry of Health and Social Development, together with the Association of Recruiting Agencies of Russia, proposing that only professional recruiting agencies would be allowed to use secondment arrangements.

As the debates continue, businesses are worried about the extent the new legislation will impact their operational structure, especially with regard to expatriate assignment arrangements (since secondment in its various configurations is still one of the most popular structures for expatriate assignments to Russia).

Changes in the Labor Code

The Russian Union of Manufactures and Entrepreneurs (RUME) is pushing the legislator to consider revising the Russian Labor Code, as some of the provisions of the Labor Code do not correspond to the business realities and current needs of the Russian labor market. Specifically, RUME suggests introducing the following changes:

► To pass legislation regulating distance-working
► To exclude restrictions for use of fixed-term employment agreements
► To exclude limits on the maximum number of working hours per week

All potential changes will be discussed by the legislators in the spring of 2012.

Nuances of dismissal of a father with underage children


This article protects the employment of working women with children under the age of three, and other persons who bring up such children without a mother, from being terminated at the initiative of the employer. At the same time, the existing laws do not provide any restrictions regarding dismissal of a father raising children under the age of three, if such children have a mother. This also applies to cases where a mother actually takes care of the children and, therefore, does not work.

The claimant initiated legal action after he was made redundant despite the fact that he is a father of small children, including a child under the age of three. He believed that the provisions of Article 261 of the Labor Code are discriminatory because working fathers (unlike working mothers) are excluded from the lists of persons who are protected from dismissal.

The Constitutional Court considered that the article is not discriminatory as it provides adequate protection for working mothers, who are more vulnerable. At the same time, the Constitutional Court analyzed the consequences of dismissing a father of a family with children by taking into account that he is a sole provider for the family. The Constitutional Court ruled that Article 261 of the Labor Code does not comply with the provisions of the Constitution of the Russian Federation. Moreover, the Court concluded that the unemployment allowance paid to a person, while searching for a new job, is insufficient for a family with several underage children.

Based on this case, we may expect either changes to the labor legislation aimed at protecting fathers of underage children from dismissal, or the implementation of additional measures to maintain the welfare of such families until a new job is found (e.g., unemployment allowance increase). This is a very rare case, where employment termination was considered unconstitutional based on gender discrimination.

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New reform of Spanish labor regulations

As mentioned in the previous edition of our newsletter, the new Spanish Government has introduced important changes to the regulation of the labor market. Therefore, an in-depth reform of the Spanish Employees’ Statute was passed on 10 February 2012, along with a number of complementary amendments and new regulations. Its main aim is to obtain a more flexible employment framework to reactivate the employment market.

These are the main changes:

Employment

► A new indefinite employment contract for small and medium-sized companies with a one-year trial period has been created. Employers are granted tax and social security contribution reductions as benefits to promote their use. In order for these benefits to apply, the company is required to keep the employee for at least three years.

Flexibility of the employment relationship within the company

► The ability of the employer to reorganize the workforce with greater flexibility by allowing it to modify working time, salary (both structure and amount) and working hours (the employer may distribute 5% of the employees’ working day irregularly throughout the year as it so wishes, and part-time employees can work overtime).

► The work classification scheme has been modified so that employees will now be classified into professional groups, and each employee will carry out all the tasks and duties corresponding to that group. The company’s power to change the employee’s duties within the group will now only be limited by the employee’s specific professional degree.

► Collective labor agreements at company level will have priority over those at industry-level in important issues (such as working time or remuneration rules), and the possibility of not applying the sector collective agreement has been made easier. The validity of a collective labor agreement that has expired or is being renegotiated, is now limited to a maximum of two years.

Termination of employment

► The intervention of the Labor Authority has been limited as to collective dismissals and temporary suspension or working-hour reduction plans. Also, it will no longer be able to stop collective relocations. Formerly in Spain, an administrative authorization was required in order to execute a collective layoff, which was an anomaly compared with most of the other countries in Europe.

The requirement to negotiate with the employees’ representatives for 15–30 days is maintained, but now the final decision belongs exclusively to the employer.

► The possibility of terminating a contract by acknowledging it as an “unfair dismissal” and paying the legally set compensation is no longer possible. The need to argue a cause for the dismissal is back in force.

► Compensation for unfair dismissal has been reduced from 45 days per year of service (up to 42 months’ salary) to 33 days per year of service (up to 24 months’ salary). With regard to the existing employment contracts, compensations accrued until the enforceability of this reform will be respected, but with a maximum cap of 720 days’ salary. For practical reasons, employees with 16 years of seniority (16 x 45 = 720), or beyond, will not generate additional compensation in the event of unfair dismissal to which they were already entitled at the time the reform took place (12 February 2012).
Notwithstanding the above, the “objective reasons” for terminating employment contracts (as well as for executing the aforementioned working condition changes) have been clarified and amplified, including a foreseen decrease in benefits. Note that in such a case, employees are only entitled to 20 days’ salary per year of service with a cap of 12 months’ salary. As a consequence, it is expected that the generally paid compensation, in case of a termination, shall be reduced from 45 to 20 days’ salary per year of service, since 33 days’ salary compensation is intended to be applied only in defective cases and as decided by labor courts (bearing in mind the aforesaid waiver of acknowledging unfairness of terminations).

Companies that execute collective layoffs affecting employees aged 50 (or older), while having benefits or economical profits, will be forced to pay a contribution to the Spanish Treasury, in order to compensate for the received unemployment benefits as a result of their termination.

**Financial sector**

Specific regulations have been included for financial institutions that have received public funds. Compensation in the event of termination of contracts for employees with managerial or high-level administrative duties within these banks has been limited. In addition, specific regulations have been set forth referring to their disciplinary regime in the event of misconduct.

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Ukrainian Parliament ratifies the Convention on Legal Status of Labor Migrants and their Family Members in the Commonwealth of Independent States on 21 December 2011

The recently ratified Convention covers a wide scope of migrant issues. The newly introduced changes protect the rights and guarantees of labor migrants and their families to ensure that they enjoy legal protection to the same extent as Ukrainian nationals. Labor migrants can now benefit from the following legal rights and privileges, among others:

► Protection of personal and family life, including personal property
► Access to the same education as Ukrainian nationals
► Possibility for family members of labor migrants (except for family members of seasonal and near-border foreign employees) to obtain general education and additional professional education
► Protection against illegal labor obligations
► Protection against illegal confiscation of identification and work permit documents under any circumstances, except for authorized confiscations by competent bodies based on official written authorizations
► Social security benefits (except for pension fund benefits)
► Free first aid medical assistance

It should be noted that the Convention stipulates certain labor categories of labor migrants who are not subject to its provisions:

► Employees employed by international organizations
► Employees employed by foreign companies with representative offices in Ukraine
► Individuals performing entrepreneurial activities
► Individuals seeking refugee status
► Sailors
► Individuals arriving for educational purposes

Overall, the Convention improves the working and life conditions of labor migrants in Ukraine.

The Convention is valid for five years after the date it takes effect. It can be prolonged for another five years, upon the mutual consent of the parties to it.

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