May 2011

Worldview

Employment

HAVE YOU SEEN OUR NEW EMPLOYMENT LAW BLOG?

Our **Employment Law Worldview Blog** aims to interest and educate HR and other practitioners around the world, to stimulate discussion, to provoke and sometimes just to amuse. Through contributions from our own specialists in Labor & Employment and related areas and occasional guest writers, it provides an unusual global insight into practical and legal HR issues relevant to employers everywhere.

Recent postings include "Should companies be afraid of employees who tweet?" and "Jokes at work – no laughing matter".

We would welcome your ideas and feedback. Please email david.whincup@ssd.com or your normal Squire Sanders contact.

www.employmentlawworldview.com

POOR PROGNOSIS FOR SPANISH SICKNESS DISMISSALS

In light of recent case law developments, Spanish employers should take extra care when dismissing employees absent from work on sickness grounds. Contrary to popular belief, they may be required to re-instate the employee if the dismissal is found to be unlawful.

Under Spanish law dismissals on discriminatory grounds are void, which means that the employer can be required to re-instate an employee if his dismissal is found to be unlawful. When it comes to sickness, however, the Spanish Supreme Court (the highest Spanish Court) has always taken the view that such dismissals may be unfair, which means that an employer can be forced to pay compensation, but they will not be void, (as rightly or wrongly they are not discriminatory), so re-instatement cannot be compelled.

Recently some of the lower Spanish Courts have shown a willingness to depart from this established position. One has held that the dismissal of an employee with cancer because of his poor attendance record was void. This meant that his employer was required to re-instate him rather than simply paying him a severance payment. The Court concluded that if an employee's sickness constitutes a "social stigma", this constitutes unlawful discrimination because Article 14 of the Spanish Constitution says it is discriminatory to treat somebody less favourably as a result of their "personal or social circumstances". It did not define "social stigma", but said that a dismissal could be discriminatory in this context if a decision to dismiss was based exclusively on the employee's illness. In this case, the employee was unable to rely on the disability discrimination provisions direct, as cancer does not constitute a disability under the Spanish Constitution.

Spanish employers should be alive to these recent developments when handling sickness dismissals, as the consequences of an unfair dismissal may be greater than first thought.

Antonio Elcarte, Lawyer, Madrid

GUIDANCE FOR FRENCH EMPLOYERS ON PREVENTING WORK-RELATED STRESS

French employment law attaches great importance to the prevention of work-related physical and social risks to staff. Harassment or harmful stress levels at work can entitle an employee to claim damages. This places a heavy onus on HR Directors to take active steps to prevent physical and social risks, sometimes in liaison with the employer's Risk Manager.

"Harassment or harmful stress levels at work can entitle an employee to claim damages"

Measures to monitor workplace stress levels are currently in place at many French companies, often assisted by external specialists. Input from Occupational Health, an HR advisor/consultant and a labour law specialist will help HR Directors consider, and be seen to consider, all the issues and to decide on the most appropriate prevention process.

An employer's prevention obligations in France fall under three heads: (a) avoiding, so far as practicable, any risks related to stress caused by work situations; (b) measuring and trying to reduce such stress as cannot be avoided altogether; and (c) handling appropriately any individual cases observed.

In light of the current economic climate, employers need to be aware of the potential for claims based on the physical and social risks created by issues such as redundancy or the cancellation of a collective agreement. There is considerable merit in training in advance any management staff who are to be involved in these exercises and in broaching the matter first through proper channels, usually the Works Council.

In terms of harassment in the workplace, the Inter-Professional National Agreement of 26 March 2010 recommends information posters in the workplace clarifying the forms which harassment can take and reinforcing the relevant company rules. Large employers are additionally obliged to put in place procedures for the investigation and resolution of harassment cases. Harassment for these purposes means "ordinary" bullying, as opposed to less favourable treatment on grounds of one of the protected characteristics such as race or sex, for which separate rules apply.

The cases that have come before the French Supreme Court to date have been quite fact specific and therefore sadly do not permit many general conclusions to be made. As a definite starting point, however, employers should ensure they are seen to address their minds to the sort of measures they could take to reduce these risks.

Sandrine Durieu, Senior Associate, Paris

US HIRING PRACTICES DRAW INCREASED SCRUTINY FROM EEOC

With more US employers hiring, the Equal Employment Opportunity Commission (EEOC), the body responsible for enforcing Federal anti-discrimination laws, has increased scrutiny on two practices which it believes create unfair barriers to equal employment opportunity: pre-employment credit checks and the exclusion of unemployed job candidates. Both practices can seemingly spell trouble for employers in some circumstances.

Many employers use pre-employment background checks when making hiring decisions. In many instances - especially those involving positions that carry financial responsibilities - these include checking a candidate's credit history. Although the Federal Fair Credit Reporting Act (FCRA) imposes certain restrictions on employers who use such credit checks, there is no blanket prohibition under Federal law. There certainly is nothing that makes "personal credit history" a trait protected under Federal anti-discrimination laws.

But that has not shielded this practice from the ire of the EEOC, which for years has maintained that pre-employment credit checks can have an adverse "disparate impact" on certain demographic groups, such as people of color, women, or people with disabilities.

According to EEOC Chair Jacqueline A. Berrien, "an ever increasing number of job applicants and workers are being exposed to employment screening tools, such as credit checks, that could unfairly exclude them from job opportunities."

So what should employers take away from this? Even though pre-employment credit checks may be legal when undertaken in accordance with the FCRA and any State and local credit-check laws, US employers should know that the practice is on the EEOC's radar. Once that happens, test litigation may soon follow. Consequently, it is good employment practice to limit the use of credit checks to positions for which there is a legitimate business necessity, such as a controller or accounts payable clerk.

There is an emerging practice of excluding candidates from consideration just because they are unemployed. Employers engaging in this practice tend to reason that current employment status offers at least some indication of a candidate's skills and performance. "Why else would they have been let go?" one might ask. Or, looking at it from another angle, an employer may think that if a candidate is still employed in a tough job market, it must mean that he is a strong performer. In some cases, employers have explicitly stated in job postings that unemployed candidates will not be considered.

"Employers considering restrictions against hiring unemployed candidates may want to think twice"

As with credit checks, this practice is not illegal per se. Nothing expressly prohibits employers from making hiring decisions based on a candidate's employment status. Although New Jersey has already enacted legislation banning overt discrimination against unemployed candidates in job postings, and several other States have similar Bills under consideration, it remains legal for the most part to discriminate openly against the unemployed when recruiting.

Nevertheless, the EEOC has strongly opposed this practice. Algernon Austin, Director of Economic Policy Institute's Program on Race, Ethnicity and the Economy contends that because unemployment rates for African-Americans, Hispanics, and Native Americans are higher than for whites, the practice of discriminating against unemployed candidates has an unlawful disparate impact against those protected groups. Discrimination against unemployed candidates can also have an adverse disparate impact on women and older or disabled individuals, as they represent a relatively larger proportion of the unemployed population than younger, male or non-disabled people.

Employers considering restrictions against hiring unemployed candidates may therefore want to think twice. Current employment status, on its own, is a poor predictor of performance. In recent years many good employees have been let go or been forced to leave their employment for a variety of reasons that have nothing to do with their work performance. The weak correlation between employment status and work performance simply does not justify the risk of a disparate impact charge, or the potential public relations issues that could result from being labeled as a company that refuses to consider unemployed individuals.

Ryan Sobel, Senior Associate, Cleveland

CZECH COURT RULES THAT DIRECTOR IS NOT ENTITLED TO STATE SICK PAY

The Czech Supreme Administrative Court has rejected the claim of a manager for sick pay under the State's sickness insurance system. In line with previous judgments, it held that because the manager was a director of his company he was not entitled to State benefits, including sick pay, even though he had contributed continuously to the sickness insurance system.

The Czech Courts have consistently held that individuals cannot be both members of a company's statutory body (directors) and employees of the same company at the same time. Under Czech law directors are regulated by the Commercial Code which provides that they are not entitled to benefits such as health insurance and that they have unlimited liability. In practice, however, case law is often ignored and directors frequently do enter into contracts of employment with the intention of gaining the greater protection that is afforded to employees under the Czech Labour Code. Managers rely on the fact that if there is a dispute companies are unlikely to argue that the employment contract is invalid and are more likely to want to do a deal rather than face the prospect of a lengthy Court case.

This latest ruling means that directors who are also employees must arrange for sickness insurance at their own expense to cover them in the event of ill-health - they will not be covered by the State. This might be unattractive, but it is at least an easy thing to do. It does, however, also mean that Board directors could lose out when it comes to calculating their future pension entitlement, as they will not have participated in the pension system which forms part of the social insurance system - this is something that will have to be addressed at a legislative level.

This ruling has sparked significant interest in the Czech media, precisely because managers are so routinely engaged as employees as well as executive directors. This in turn has prompted discussions between non-Governmental organizations (e.g. the American Chamber of Commerce and the Association of Industry and Trade) and certain State authorities, in particular the Ministry of Labor and Social Affairs, in order to resolve this issue. The Ministry of Justice has now put forward amendments to the Czech Commercial Code to allow managers to be directors as well as employees at the same time. It would also mean that the tax, social and health insurance treatment of such individuals would be the same. As discussions have only just started it is likely to be several months before we see any legislative changes and this unusual discrepancy in treatment is finally addressed.

Zdeněk Rosický, Senior Associate, Prague

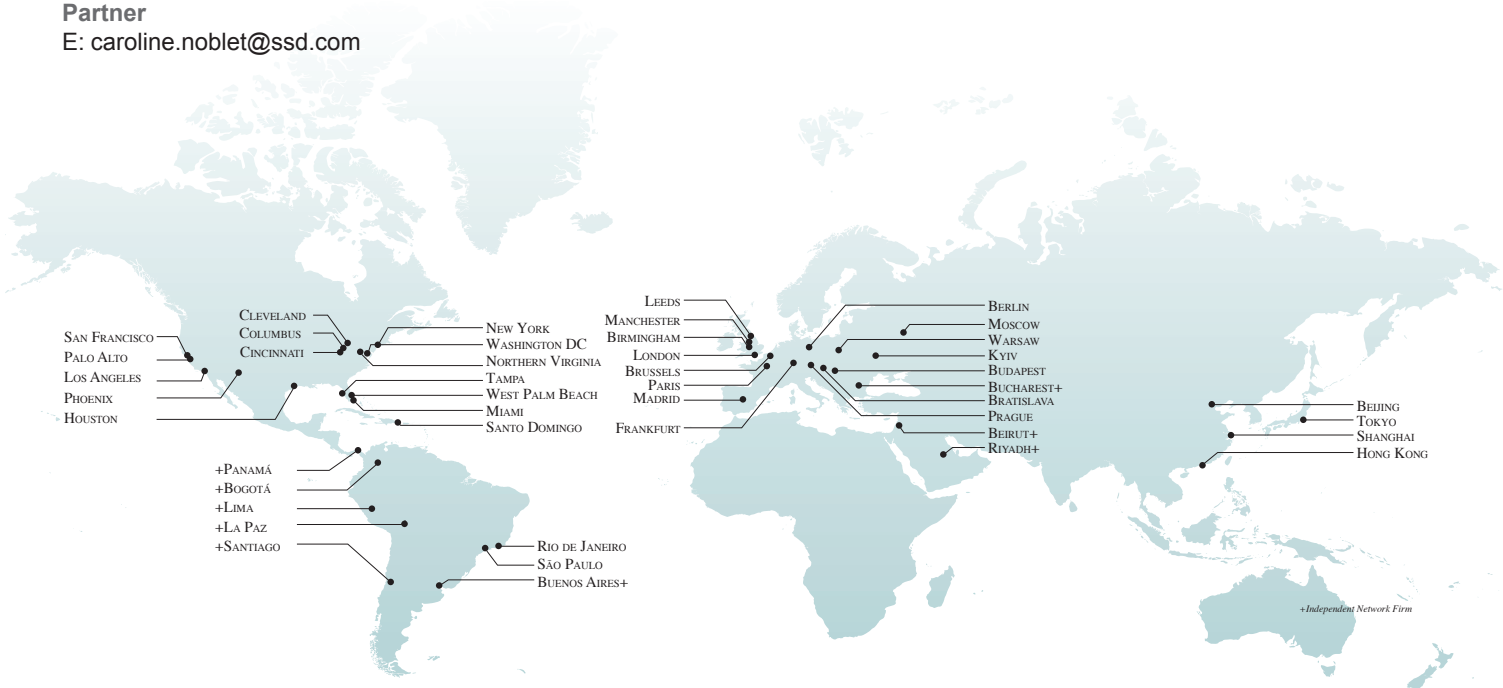
Hana Čekalová, Associate, Prague

FURTHER INFOMATION

We would welcome any feedback you have on this new publication. Please email david.whincup@ssd.com or contact one of the following or your usual Squire Sanders' contact:

Susan DiMickele
Partner
E: susan.dimickele@ssd.com

Caroline Noblet
Partner
E: caroline.noblet@ssd.com



5150/05/11