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Worldview

Employment

COMPULSORY RETIREMENT RISK FOR FRENCH EMPLOYERS

Is compulsory retirement still lawful? Mais oui, says the French Supreme Court, but only if it is objectively justified.

There have been a number of cases in which the French Courts have recently been asked to consider whether an employer's decision to retire an employee constitutes unlawful age discrimination. Two of the most high-profile decisions involved Government-owned (or previously Government-owned) organisations which had previously been allowed under special retirement plans to require retirement at the minimum retirement age, 55.

In a ruling involving SNCF, the railway operator, the French Supreme Court said that the statutory provisions entitling SNCF to retire a particular class of employee compulsorily at 55 were not in themselves discriminatory, but that SNCF was still required to objectively justify its decision to retire a particular employee. It referred to Article L.1133 of the Labour Code which states that: "the difference in treatment based on age does not discriminate when justified by a legitimate aim, including a goal of employment policy". The Court said that the reasons put forward by SNCF, which included enabling the company to adapt its workforce to the changing context in which it operated and to give it greater flexibility, were generic, vague and unconvincing. They did not therefore justify its decision to compulsorily retire the particular employee. The dismissal was therefore discriminatory and so void.

The Court also reached a similar conclusion in a case involving EDF, the electricity supplier.

Even though these cases involved "special status" employees, they still give us an idea of how the French Courts are likely to deal with retirement dismissals, including those by private sector employers. They highlight the risks for all employers if they compulsorily retire employees and make it clear that employers should be in a position to produce evidence to support their decisions in relation to each individual retirement. It will not be sufficient to rely on generalised assumptions. The practical difficulties of obtaining such evidence on an individual-by-individual basis are obvious.

Jean-Marc Sainsard, Partner, Paris

USA: USING TEMPORARY WORKERS WHILE AVOIDING LONG-TERM RISKS

Many US companies turn to temporary or contingent workers when they need additional talent for seasonal or short-term assignments. Other companies running lean from hiring freezes and layoffs are reluctant to commit to hiring regular employees in jittery economic times and are simply more comfortable with the flexibility contingent workers are perceived to provide.

But who will be responsible for any legal liability arising out of contingent worker relationships? Contingent workers are protected under US Federal and State employment laws, including those regarding wage and hour practices, workplace harassment and discrimination, immigration and leaves of absence, provided their employers are of sufficient size. Most end user companies trust that these legal issues are not their problem simply because the workers are not their employees. Under the law, however, companies and their staffing agencies are often found to be joint or co-employers of temporary workers. The legal definition of "employer" is not based solely on who is listed on the paycheck; an employer is the person or entity who has the right to exercise control over the worker's employment. Because the end user companies direct the activities of temporary workers, they can be deemed to have that control over people who are on paper employed only by the staffing agency. That means that they can be held jointly and severally liable for damages including lost wages, future wages as well as pain and suffering in certain employment government agency proceedings and lawsuits filed by contingent workers. As a result, the worker can look to either the end user or the staffing agency alone, or both combined, to pay any award or judgment.

Companies using temporary workers can take steps to anticipate and minimize these risks, including:

(a) keeping an eye on when and for how long temporary workers are engaged. The company might also consider whether a waiting period between assignments to the company is appropriate. If a temporary worker is assigned to one company for an extended period of time, the person may more credibly assert that he is really an employee of that company who has been artificially misclassified as a temporary worker.

(b) training supervisors and managers to prevent and address discrimination and harassment in the workplace. The training should specifically address the complaint reporting procedures for regular employees as opposed to temporary workers. Temporary worker complaints should be elevated to the staffing agency for follow-up as appropriate i.e. specifically not treated the same way as a "normal" employee. The end user should nonetheless cooperate with the staffing agency and involve counsel as appropriate to ensure that complaints are seen to be investigated and that appropriate action against the offending member of its staff is taken when necessary.

(c) expressly leaving disciplinary action, performance evaluations, compensation adjustments and benefits matters to the staffing agency.

(d) making sure that workers record all hours worked, do not work "off the clock" and take meal and rest periods consistent with legal requirements.

(e) remembering that temporary workers will be counted when determining company headcount for Family and Medical Leave Act purposes while understanding that requests for accommodation and leave should be directed to the staffing agency.

(f) ensuring that indemnification provisions in staffing agency agreements cover employment practices such as wage and hour and Immigration Reform and Control Act compliance. While companies are generally not responsible for the I-9 (immigration) form compliance of the staffing agencies they contract with, if the company knows that a worker is not authorized, it is nevertheless subject to liability for knowingly employing him.

Angela O'Rourke, Senior Associate, San Francisco

SPANISH SUPREME COURT UPHOLDS DRESS CODE CHALLENGE

Dress codes have been in the spotlight recently following a ruling in Spain that nurses do not have to wear skirts.

Earlier this year the Spanish Supreme Court upheld a claim brought by female nurses at a Spanish hospital that they should be allowed to wear the same uniform as their male colleagues, i.e. trousers rather than skirts, aprons and caps. The nurses claimed that their employer's uniform policy was discriminatory and also breached health and safety regulations.

The Court said that although Spanish law grants employers the ability to manage and control their own activities, they have to respect basic human rights (including freedom from unlawful discrimination) and should only treat men and women differently if they can objectively justify doing so. The Court said that the customs of current society are key to evaluating the suitability of an employer's practices. In this case the Hospital's uniform policy was "discriminatory" and "belonging to another time" and could not be objectively justified.

This ruling does not mean that employers cannot determine what their staff wear to work. It is still the case that employers can set their own dress codes, provided they do not contravene the discrimination legislation. Employers should be particularly careful not to discriminate on grounds of sex, race, religion or belief etc, as the Spanish Courts are becoming very strict when it comes to enforcing the discrimination legislation.

Antonio Elcarte, Associate, Madrid

CHINA'S NEW SOCIAL INSURANCE LAW

China has introduced its first comprehensive Social Insurance legislation which will apply to both Chinese nationals and foreign nationals working in China.

The new legislation came into force on 1 July and covers basic pension, medical, unemployment, maternity and work-related injury insurance. Both employers and employees will be required to make contributions.

A key aspect of the new legislation is that it provides that non-Chinese nationals working in China should participate in social insurance programmes. It is, however, still unclear precisely how the new law will apply to them. For now "interim measures" have been put in place to deal with foreign employees working in China, but various issues remain to be addressed. Contribution thresholds are, for example, unclear and can vary considerably by region. Further information is required on how the new law will be implemented across China's different provinces and cities.

In the meantime employers should review their Chinese employees' current contribution levels and social insurance registration to see if they may be required to pay more to the country's welfare system and to ensure there are no unexpected liabilities going forward.

Nick Chan, Partner, Hong Kong

GERMANY INTRODUCES NEW ELECTRONIC RESIDENCE PERMITS

Traditionally citizens of countries outside the EU received the residence permits required to enable them to live in Germany in the form of a "sticker" in their passport. This procedure has now been changed – on 1 September 2011 the classic sticker became obsolete. Electronic residence permits in "credit card" form are now being issued instead.

The "old" residence permits are, however, not quite a thing of the past. They will continue to be valid until 30 April 2021. People with an old residence permit will receive a new-form permit as and when their old one expires and they apply for an extension. Holders of permanent residence permits must ensure they apply for the new electronic permit prior to April 2021.

The driver for this change is an EU Directive which seeks to prevent the misuse and forgery of residence permits and to standardize them across the EU. The new permit is therefore equipped with a chip, which contains a photograph of the holder, his fingerprints, personal data and the conditions of his residency. Additionally, the permit can act as a qualified electronic signature. With the integrated online identification function the new permit can be used as a means for secure electronic communication and authentication on the Internet. Registration and trade on the Internet should thereby also become more secure for foreign consumers in Germany.

Employers in Germany should be aware of this new legislation and ensure that a proper residence permit is submitted when employing non-EU citizens. Further information about the new electronic residence permit can be found on the homepage of the Federal Office of Migration and Refugees.

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FURTHER INFOMATION

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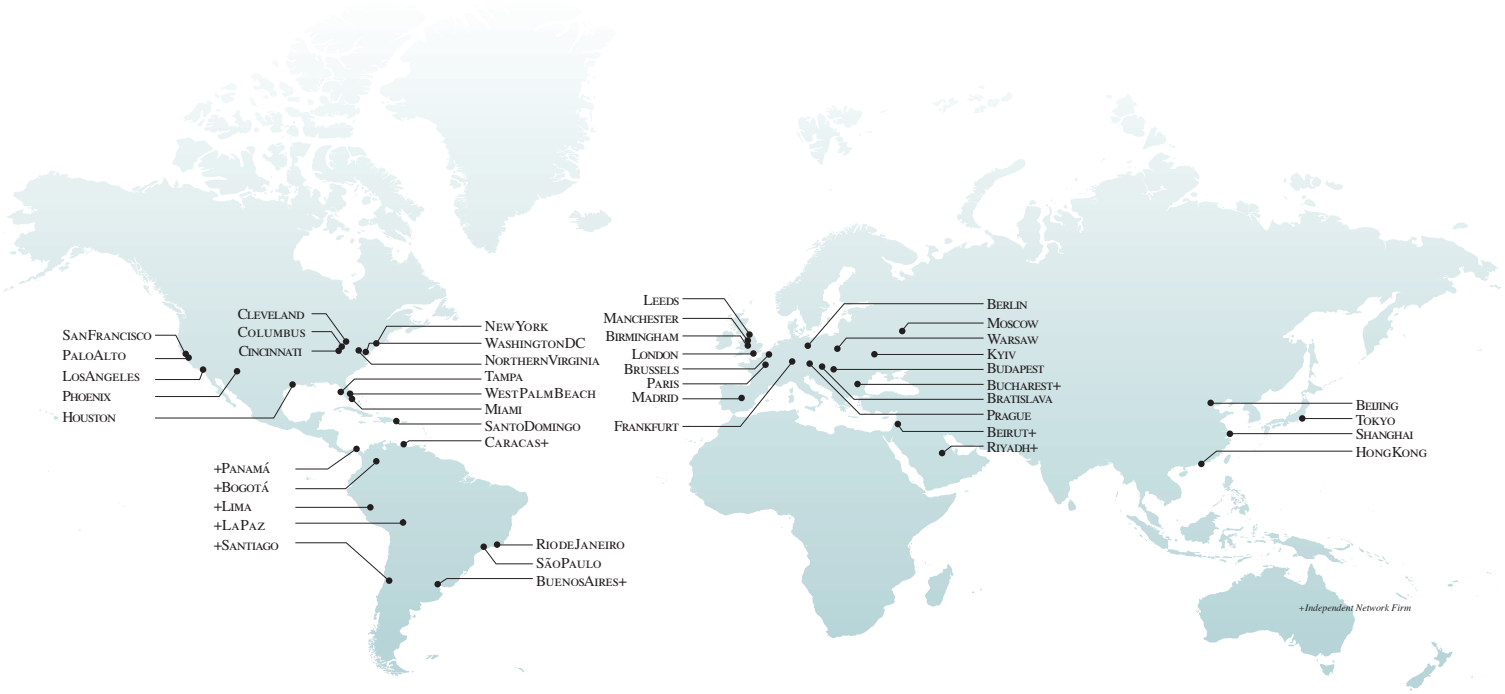

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