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Worldview

Employment

VOLUNTEERS MAY TIP THE SCALES FOR UNSUSPECTING AMERICAN NON-PROFIT "EMPLOYERS"

The current financial crisis has left non-profit organizations turning to volunteers as a means of dealing with technology services, program development, staff training or even fundraising. Such bold use of volunteer support may soon have the unanticipated effect of transforming non-profits into "employers" for the purposes of discrimination claims brought under Title VII of the Civil Rights Act 1964.

Title VII is a Federal anti-discrimination law that covers employers with 15 or more employees and prohibits discrimination on the basis of race, color, religion, sex or national origin. As with other Federal employment discrimination statutes, such as the Age Discrimination in Employment Act and the Pregnancy Discrimination Act, the term "employee" is not clearly defined in the legislation itself. Typically, US courts have looked at whether an "employee" is on the payroll (or is receiving "significant remuneration") as a threshold inquiry; however, at least one court, the Sixth Circuit, recently broke new ground by holding that remuneration is only one factor in establishing an employment relationship. In ***Bryson v Middlefield Volunteer Fire Department*** a volunteer fire-fighter brought a harassment claim after she alleged that she had been subjected to unwanted sexual advances by the Station Fire Chief. The Fire Department, a non-profit organization, argued that she was not an employee for the purposes of Title VII because she received only de minimis benefits for her services. The Sixth Circuit disagreed. It said that remuneration is only a factor, not a controlling factor, in establishing an employment relationship, and that the Courts should also examine the degree of control exercised by the employer over the means and manner in which the work is accomplished.

This issue is most likely to arise when an organization claims that it is not subject to Federal employment discrimination laws because it does not have the minimum number of employees necessary to trigger their application. Although Federal courts have uniformly concluded that uncompensated volunteers are not "employees" and therefore are not entitled to protection, under the Sixth Circuit's new precedent, volunteers and presumably other unpaid workers (e.g. interns, graduate students, co-op participants) may soon be incorporated into the employee tally, bringing an unsuspecting "employer" into the purview of Title VII. Employers should also be aware of any obligations they may have under State law, as most US States have their own anti-discrimination statutes, which typically cover smaller employers too.

In light of this decision and because this area of law is still developing, employers should exercise caution before augmenting their staff with volunteers or other unpaid help.

Kathleen Portman, Associate, Cleveland

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UK AGENCY WORKERS GAIN NEW RIGHTS

Agency workers make up a significant proportion of the UK workforce and are used in many different industries. UK companies regularly take on agency staff to cover for their own permanent employees when they are off sick or on holiday or to cope with increased or sudden demand. The flexibility that agency workers bring is one of the main attractions of using them. However, from the start of this month, new legislation came into effect that will have a significant impact on the way in which UK businesses engage with agency workers.

The Agency Worker Regulations 2010 came into force on 1 October 2011 and are intended to give agency workers – after a 12 week qualifying period - the same basic working and employment conditions, including pay and holidays, as if they had been employed directly by the end-user hirer. Furthermore, from "day one" of each assignment, agency workers will be entitled to be informed of suitable vacancies at the hirer and have access to collective facilities such as a staff canteen and car parking facilities.

For hirers the most significant impact of these changes is likely to be in relation to pay. The AWR gives agency workers not just the right to equal basic pay, but also to overtime and unsocial hours payments and bonuses to the extent that they are linked to individual performance. But it is worth noting that the definition of "pay" does not include company sick pay, pension or enhanced maternity/paternity entitlements.

The AWR impose tough penalties. Hirers will be liable for any failure to offer the "day one" rights mentioned above. With regard to the other AWR rights, agencies will be first in the firing line, but liability could pass to hirers if they supply insufficient or inaccurate information about their basic working and employment conditions.

To the extent they have not already done so, hirers should take the following steps to minimise the scope for claims under the AWR:

- Carry out an audit of how, when and for how long agency workers are currently deployed in their business. Maintain and update this data with the name of the agency worker, the dates of the assignment and the nature of their duties.
- Perform a detailed comparison of what their employees are entitled to in respect of pay, annual leave, rest breaks, night work and duration of working time and how this compares with what an agency worker in the same role receives. This assessment will allow hirers to calculate the potential financial impact of the AWR if they maintain their current arrangements.
- Speak to the agencies they currently work with to determine what additional costs, if any, they might be faced with upon reaching the 12-week qualifying period.
- Ensure the relevant data protection and confidentiality provisions are in their contracts with agencies.
- Consider employing some agency workers directly.

Going forward, all businesses need to be mindful of their new obligations and be ready to accommodate them, minimising any liability whilst at the same time attempting to retain the business flexibility that only agency workers can bring.

Phillippa Canavan, Associate, London

FRENCH FIRMS TO PAY DIVIDEND BONUSES TO EMPLOYEES

Under new legislation certain French companies will now have to pay bonuses to their employees if they declare larger than average dividends to their shareholders.

The new rules came into force on 28 July 2011, but apply retrospectively to all dividends paid since 1 January 2011. They will remain in force until 31 December 2013. They apply to French commercial companies (including SASs, SAs and SARLs) which have more than 50 employees and pay dividends to their shareholders greater than the average dividend paid in the two preceding financial years. To be eligible for a bonus an employee must have a French law employment contract and have been on the payroll for at least six months of the relevant financial year. Such an employee will be eligible to receive a bonus even if he has ceased to be employed when the dividend is finally declared or paid.

The new provisions are in addition to the existing rules in France concerning mandatory profit share plans, which apply to employers of more than 50 employees.

There are complicated rules governing group companies. Where a French parent company of a group declares a dividend then its French subsidiaries will also be required to pay a bonus. This will be the case even if the financial situation of the subsidiaries would not otherwise warrant or allow the payment of a dividend. On the other hand, if the French parent company does not declare a dividend, its subsidiaries will not be required to pay a bonus even if they have paid a dividend. If the parent company is not French, then the position of any subsidiaries will be analysed independently of the parent.

These new rules must be implemented using the same procedure for introducing mandatory and non-mandatory profit-sharing plans i.e. through a collective agreement negotiated and agreed with the relevant Works Council or employee representatives or via an agreement ratified by two thirds of the employees. Any collective agreement should be put in place within three months of the General Meeting at which the shareholders resolve to pay a qualifying dividend. Under transitional provisions, companies which paid above-average dividends in 2011 prior to the new rules coming into force on 28 July 2011 will have until 31 October 2011 to put their agreements in place. If the company is unable to reach agreement on the terms and conditions of the bonus, this disagreement must be recorded in writing and bonuses paid in line with the company's original proposals.

In terms of the amount of any bonus, there is no statutory minimum amount that must be paid. Companies are, however, required to enter into "serious" negotiations in good faith and a failure to do so could result in a fine and/or imprisonment.

Any such bonuses will be exempt from most social security contributions up to €1,200 per employee per annum, provided that they are paid before the end of the financial year in which the dividend is declared. Employers will however be liable to pay 6% social tax on any relevant bonus payments and employees will have to pay employee social contributions and income tax in the normal way.

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FURTHER INFOMATION

We would welcome any feedback you have on this new publication.
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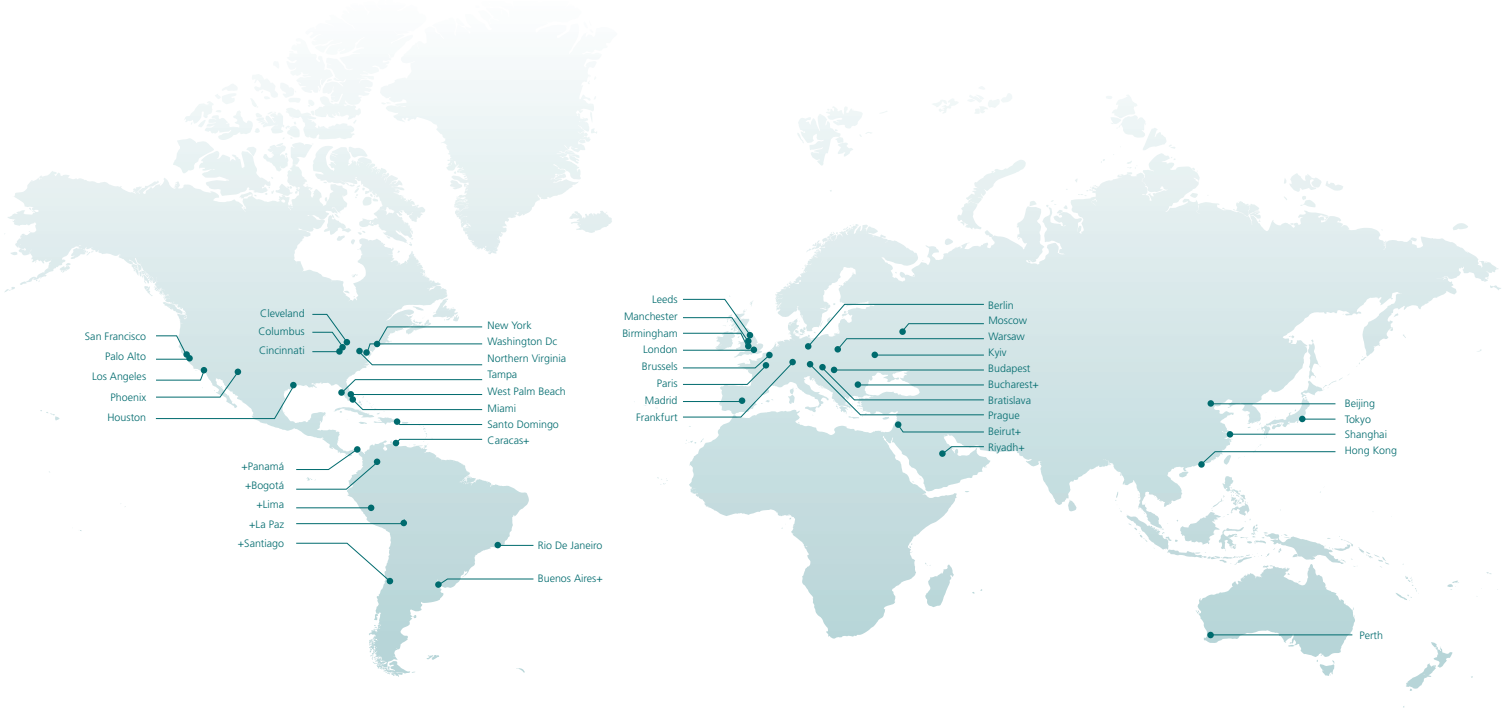

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