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A round-up of Labour and Employment stories from around our global network

June/July 2012

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Germany eases restrictions for highly-skilled workers

Both Chambers of the German Parliament have passed a Bill which will come into force on **1 August 2012**, implementing the provisions of the EU's Directive for Highly Skilled Migrants. This EU Directive contains the terms and conditions under which citizens of non-EU Member States are entitled to enter and reside in the EU in order to exercise a highly skilled occupation. By utilising the scope of this Directive, the new German legislation makes it easier for highly-skilled workers to live and work in Germany in the long term.

The key feature of the Bill is the so-called EU Blue Card. In order to qualify for a Blue Card, migrants must have a university degree as well as an employment contract stipulating a gross annual salary of at least €44,800. Priority reviews (assessing whether preferential applicants are available) as well as reviews of comparable working conditions by the German Employment Authorities will no longer be required in the future, which should significantly speed up the processing of permit applications. In the case of highly-skilled workers in occupations with shortages of skilled labour, the required gross annual salary will be €34,944. This is particularly relevant for engineers, professionals in the field of information and communications technology and medical doctors. A priority review will also no longer be necessary in such cases, but working conditions will be reviewed to ensure they are comparable to those of other employees. If a Blue Card holder is still employed after three years, a settlement permit will be issued. A settlement permit may be issued after only two years if the Blue Card holder can provide evidence that they possess the necessary German language skills.

In addition to implementing the EU Directive, prior restrictions will also be eased in the future. Foreign students studying at German universities will be permitted to work for 120 full days or 240 half days alongside their course of study. In the past, they were only permitted to work 90 full days or 180 half days. University graduates will be entitled to a six-month residence permit if they can secure their livelihood during this time period. Furthermore, foreign graduates of German universities will have 18 months instead of 12 months to find a job that corresponds to their academic qualifications and will be permitted to work without restrictions during this period.

Martin Falke, Partner, Berlin

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US: Controversial “ambush” election rule held to be invalid

America’s National Labor Relations Board (NLRB), the agency responsible for conducting elections for union representation and with investigating and remedying unfair labor practices, faces new opposition in its effort to overhaul the union election process and reduce what it deems are “unnecessary” delays. On May 14, 2012, the controversial “ambush” election rule was deemed invalid by the U.S. District Court for the District of Columbia, which held that “no quorum ever existed for the pivotal vote”. The Judge said that in all but limited circumstances, three NLRB members must be “present” to constitute a quorum necessary to adopt a final rule and in this case only two members voted in favour of the new rule while a third did not cast a vote.

Based on the District Court’s decision, the NLRB has temporarily suspended the changes to its representation case process and election procedures which went into effect on April 30, 2012. Likewise, its Acting General Counsel has withdrawn the 24-page guidance that was issued prior to that date and has advised directors to revert to their previous practices for election petitions starting May 15, 2012.

The ruling follows a setback in April 2012, when the U.S. Senate failed to pass a resolution seeking to overturn the new regulation by a narrow vote of 54 to 45. Parties attribute the result to President Barack Obama’s last minute threat to veto any legislation which attempted to override the rule.

The contested “ambush” election rule “approved” in December 2011 was designed to reduce unnecessary litigation in union representation cases and thereby enable the NLRB to better fulfill its duty to resolve expeditiously questions concerning union representation. In reality, it significantly altered the playing field, “ambushing” employers with faster elections, truncated campaigns and lost appeal rights. Key changes that would have resulted from the NLRB’s election rule include:

- **Pre-Election Hearings:** The new rule virtually eliminates pre-election hearings as a means of resolving issues like the supervisory status of individuals and the composition of the voting unit. For employers, this would have meant that there was little or no means of challenging the make-up of the voting pool until after the election had occurred and the results were publicised.
- **Hearing Officer discretion:** When a pre-election hearing is permitted, the new rule would grant Hearing Officers enormous discretion on the exclusion of evidence at hearings and the ability to file post-hearing briefs. For employers, this would have meant that there was no guarantee that they would have any ability to provide

additional argument or information after the close of the hearing.

- **Timeliness:** Although the new rule did not specify how soon a pre-election hearing should be held, most Regions issue the Notice of Representation Hearing on the day the petition is filed and schedule the initial hearing for 7-10 days thereafter. Employers would therefore only have had a seven-day window under the new rule in which to prepare for a pre-election hearing once they had received notice. This would have given them little time to prepare for an election and next to no time to communicate necessary information to eligible voters in order to ensure that employees were making informed choices.
- **Appeals:** The new rule would limit an employer's right to request special appeals to "extraordinary circumstances" or when the "issue will otherwise evade review." Likewise, parties may not directly appeal the rulings of the Hearing Officer except by special permission of the regional director.

NLRB's first step in challenging the District Court's decision came in the form of a June 11, 2012 Motion to Amend or Alter Judgment, asserting that Member Hayes "abstained" from the vote but was "present and participating in the very same room [electronic voting room] and at the very same time that this vote was held," providing a quorum and giving the Board the authority to pass the new election rules. The Motion also asks that the new election rules be reinstated pending final judgment.

While it remains to be seen whether these new facts will carry the day, the NLRB Chairman confirms, "[w]e continue to believe that the amendments represent a significant improvement in our process and serve the public interest by eliminating unnecessary litigation" and that "we are determined to move forward." This time the NLRB will be composed of five members, likely, three Democrats and two Republicans. However, litigation is currently pending on the constitutionality of President Obama's three Board appointments, which were made in January 2012 while Congress was in recess. Similarly, controversy surrounding the alleged ethical violations of Board Member Terence F. Flynn were resolved on May 26, 2012 when he submitted his resignation, which will become effective July 24, 2012. Interestingly, Flynn previously served as Chief Counsel to former Board Member Brian Hayes, the lone Republican commissioner whose "vote" forms the crux of the District Court's decision to invalidate the controversial rule.

As the fate of the "ambush" election rule continues to unravel, employers should be mindful and educate themselves about the potential impact of the new rule on union election procedures. In addition, employers are best advised to determine who is and is not a supervisor, as defined by Section 2(11) of the National Labor Relations Act, and to adequately train supervisors on how to lawfully respond to employee questions regarding unions in light of the increased media attention.

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Work-life balance in Hong Kong: increasing demands for maximum working week

With the Minimum Wage Ordinance in force (HK$28 per hour), some members of the Hong Kong public are suggesting that greater focus should now be placed on the number of working hours that employees can be required to work.

Employees in Hong Kong are working for increasingly long hours (up to 14 hours per day and 70 hours per week) and are not paid for working overtime. Despite many calls for 'maximum working hours' legislation, Hong Kong law remains unchanged. It has been suggested by some that by prescribing the maximum hours of work, as in the UK and Australia, employees would be able to enjoy a balance between work and relaxation, which in turn would increase productivity and work safety. However, the opposing view is that such legislation would undermine the flexibility of the labour market and business environment, and may increase unemployment rates because businesses would reduce their reliance on manpower. Earlier this year, the gradual implementation of standard working hours in the Republic of Korea was introduced. This, together with experiences from other jurisdictions, should provide valuable insights for Hong Kong.

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New residency restrictions in Spain for European citizens

Spain's public healthcare system is known for the quality of its service. Historically citizens of the European Union and the European Economic Area have been able to enjoy and benefit from free medical services without any special requirement other than being European citizens.

The Spanish Court of Auditors has, however, recently published data which shows that the National Health System (NHS) is providing healthcare for European citizens who already have access to such cover, either from the social security institutions in their own country of origin or via private insurance schemes. This is eroding the financial capacity of the NHS, preventing the improvement of its services and threatening the maintenance even of current standards.

As a consequence, in order to ensure the sustainability of the NHS and to improve its quality, the new Spanish Government amended, on 24 April 2012, Royal Decree 240/2007, to require European citizens who wish to stay in Spain for more than three months to obtain a residence permit. Without this permit they will not be entitled to any healthcare services, other than emergency care for serious illness or accidents.

In order to obtain a residence permit an applicant will have to show that:

- he is either an employee or self-employed in Spain;
- he has sufficient economic resources to provide for himself and his family. There is no established fixed amount, but it will not in any case be over the amount of the minimum Social Security pension.
- he is a registered student at a public or private educational centre and has full health insurance in Spain and sufficient economic resources to provide for himself;
- he is a relative of a European citizen who meets one of the three requirements set out above.

Although the aim of these new restrictions is to prevent foreign visitors without sufficient economic resources taking advantage of Spain's Social Security System, it seems likely that from now on it is going to be much harder for foreigners to obtain a residence permit and thus access to public services, at least until the critical financial situation in Spain is over.

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