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

August/September 2012

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Spanish labour law reforms: the next instalment

Earlier this year we reported on the radical labour law reforms in Spain designed to revive the economy and promote employment. These came into force in February 2012. The Government has now introduced a number of amendments to the original regulations and these changes came into force on 8 July 2012. The key changes are these:

- **Collective redundancies:** In February 2012 the Spanish Government introduced a requirement on companies with 500+ employees to pay financial contributions to the Spanish Treasury if they made collective redundancies involving employees aged 50 or over. This threshold has now been reduced to cover companies with 100+ employees, thus increasing the costs for more employers making large-scale redundancies. A collective redundancy situation will exist if the employer proposes to make the following number of redundancies in a period of 90 days: 10 workers in a company employing less than 100 workers; 10% of the total workforce in a company employing between 100 and 300 workers; and 30 workers in a company employing more than 300 workers. There will also be a collective dismissal if a company ceases its business operations and dismisses all of its employees (assuming there are more than 5). The amount of money to be contributed to the Treasury will depend on a number of factors, including the total number of employees at the company, the percentage of affected employees who are over 50, the company's profits over income and the level of unemployment benefits paid by the State to the affected employees.

- **Clarification on definition of "economic" grounds for redundancy purposes:** In Spain a dismissal will be treated as by reason of redundancy if it is based on "economic, technical, organisational or production" reasons. It has always been difficult for Spanish employers to determine with the necessary certainty whether a redundancy situation exists. In an attempt to clarify the position, the Government has now made it clear that if a business has suffered a reduction in sales for three consecutive quarters compared with the same period in the previous year then this will constitute an "economic" reason for redundancy purposes.

- **Retirement clauses in collective agreements:** Any clause in a collective agreement which provides for a mandatory retirement age of 65 is now void.

- **Collective bargaining:** Historically if an employer was unable to reach agreement on the terms of a new collective agreement, the provisions of the old agreement would remain in force indefinitely even if it were otherwise due to expire. The February reforms changed this position and said that if the parties are unable to reach agreement then the old collective agreement will remain in force for not more than 2 years after its expiration date. This period has now been further reduced to one year. There will then be no binding collective agreement in place, increasing the pressure on staff representatives to agree

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something else instead. This change will be welcomed by employers.

- **Leave for study purposes:** Spanish employees are entitled to 20 hours' paid annual leave for educational purposes associated with their employment. They are currently allowed to carry this leave over for up to 3 years. This has now been extended to 5 years, which means that if an employee chooses to roll over his study leave, he could take all 100 hours in year 5.

Ignacio Regojo, Partner, Madrid

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Hong Kong launches travel subsidy plan to reduce workers' travel expenses

Living in Hong Kong is an expensive business. Over the last five years consumer prices have increased by 15.2%. This substantial rise in living costs is having a significant impact on lower-income households, which are having to deal with surging rents and greatly increased transportation costs.

In an attempt to alleviate the financial burden on the lower-income working class, the Hong Kong Government has introduced the Work Incentive Transport Subsidy Scheme. The Scheme aims to encourage and help low-income earners to stay in employment by helping them to meet part of their commuting expenses.

Under the Scheme, eligible individuals who work at least 72 hours per month are entitled to a monthly allowance of HK$600. Applications are means-tested on a household basis but the subsidy is paid out individually. For a three-person household – the average in Hong Kong– the monthly household and assets limits are HK$14,800 (approximately US$1,900) and HK$148,500 (approximately US$19,000) respectively. For a two-person household the relevant limits are HK$13,400 and HK$99,000.

Some political parties and unions have argued that these limits are unrealistically low, rendering the Scheme ineffective. They claim there are too many people in need who are falling foul of the means test because it is partly evaluated on a household basis. They point out that if one member of a household receives a pay rise, this could mean that other members of the same household become ineligible for their monthly allowances, even if there is no pooling of resources.

Despite calls for a "dual track" approach which would allow applicants to choose to be evaluated either individually or on a household basis, the Government has declined to make any further changes, arguing that it wants to prevent abuses of the Scheme whereby applicants transfer their assets to other household members in order to be eligible for an allowance.

The Scheme will undergo another review in three years.

Nick Chan, Partner and Charles To, Associate, Hong Kong

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French Supreme Court opens floodgates for discrimination claims

The French Supreme Court recently held that an employer had unlawfully discriminated against an employee where it was unable to provide an adequate explanation for the apparent slowdown in his career progression. This case has serious implications for employers in terms of the lengths they will be required to go to in order to prove there has been no discrimination.

Mr Soumaré was employed by Renault for 27 years. He retired in 1997, but some years later he brought a claim of race discrimination arguing that during his employment he had encountered more difficulties than his colleagues in moving up the career ladder and this was because of his skin colour and/or his ethnicity. The Labour Court dismissed his claims, but he lodged an appeal before the Court of Appeal which was successful.

The French Supreme Court has since upheld the Court of Appeal's decision and awarded Mr Soumaré €249,000 by way of compensation. It also ordered Renault to pay €3,000 to the CGT union and to MRAP, an anti-racist organisation. The Court's approach in this case has caused a great deal of alarm and prompted much criticism. Its decision was based on the findings of an expert who was appointed during the appeal proceedings and concluded that, based on a sample group of 51 employees, Mr Soumaré had progressed more quickly than his colleagues at the start of his career, but had later encountered more difficulties than the statistically "average" employee in progressing up the career ladder. As Renault was unable to provide an adequate explanation for the apparent slowdown in Mr Soumaré's career progression, this was sufficient in itself for the Supreme Court to infer discrimination. It said that Renault had not discharged the burden of proof proving that there had been no discrimination. It is worth remembering that in discrimination claims, once a prima facie case has been established, the onus is on the employer to prove that it did not discriminate and if it cannot do this the Courts must find that the employer has committed an act of discrimination. Pretty much a case of guilty until proven innocent.

The Court's approach in this case seems in effect to grant employees the right to an "average career", i.e. all employees should be able to progress up the career ladder (and receive the equivalent salary increases) in the same way. But is this realistic? Surely the whole point of an average anything, career included, is that it is composed of some who do better and some who do worse? This finding appears to ignore this, giving the ethnic minority (or by logical extension, female) employee a right to do better than those forming the below-average population.

And how are employers supposed to provide the evidence necessary to satisfy the burden of proof in discrimination cases such as this? The standard seems to have been set unrealistically high. Would it not have been more appropriate to assess the employee's actual skills and capabilities in order to determine whether his slower advancement was justified, rather than comparing him to a sample group?

Unfortunately this ruling seems to open the door to an unlimited number of claims by those disappointed with the progress of their career relative to their colleagues. We must hope that it is swiftly disapproved.

Jean-Marc Sainsard, Partner, Paris

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Italy passes labour law reforms

In July 2012 the Italian Government introduced a package of labour law reforms in a bid to boost employment and promote growth.

Many aspects of employment law will be affected by this new piece of legislation. As far as access to the labour market is concerned, the key changes for employers are these:

- **Fixed-term contracts**: Substantial changes have been made to the legal requirements that must be satisfied in order to engage fixed-term staff. Prior to the reforms, if an employer wished to offer a fixed-term contract it had to be able to show detailed reasons for doing so, e.g. organisational or production reasons. Going forwards, employers will not have to do this for the first fixed-term contract of 12 months or less entered into with a particular individual. This should give employers more flexibility to hire staff on a short-term basis.

  Fixed-term contracts cannot, however, last for more than 36 months. Furthermore, employers must wait at least 90 days from expiry (or 60 days in the case of fixed-term contracts of up to 6 months) before hiring the same employee on another fixed-term contract. From a tax perspective, employers will be required to pay an additional contribution of 1.4% on top of an employee's salary in order to finance the new unemployment benefit schemes. This requirement will not apply to fixed-term contracts that have been put in place to cover employees on leave or for performing seasonal work.

- **Apprenticeships:** There are tax and social security benefits for those employers which offer apprenticeships. The labour law reforms introduce new rules which are designed to control the balance between permanent employees and apprentices. It means that employers will be entitled to have 3 apprentices for every 2 standard employees (it used to be one apprentice for every employee). In order to hire new apprentices, employers will however be required to have offered permanent roles to at least 50% of their former apprentices.

- **Internships:** Employers will no longer be entitled to offer internships to graduates or those with a masters degree, unless they are fairly remunerated.

- **Self-employed workers**: Self-employed workers must be reclassified as "coordinated and continuous" workers or as permanent employees (where applicable) if at least two of the following conditions are met:

  - there is a "self-employment" relationship between the same parties which lasts more than eight months in a year;

  - more than 80% of the yearly income of the self-employed worker derives from such a relationship;

- the self-employed worker is provided with a permanent workstation at the company's premises.

This provision will not apply to professionals admitted to a professional register, e.g. lawyers, architects, engineers.

- **Project work contracts**: These contracts will only be allowed if the contract explicitly sets out the project assigned to the worker and the result expected from her/him. The lack of a specific project means that if the contract is challenged in the Courts, the Judge must reclassify the contract as a permanent employment contract.

Vittorio Torazzi, Partner, VTCS – Studio Legale *

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China strengthens protection for female employees

Earlier this year China introduced new legislation to strengthen the protection of female employees in the workplace. The Special Labor Protection Regulations for Female Employees came into force on **28 April 2012** and contain numerous requirements on employers. It is essential that companies understand these new Regulations to ensure they avoid potentially substantial financial sanctions.

Under the new Regulations employers must:

- prevent and put a stop to sexual harassment of female employees in the workplace;
- organise training for female employees on labour safety; and
- notify female employees in writing if their work constitutes "prohibited work" under the Regulations.

The new legislation also contains new rights for women on maternity leave or those who have recently given birth, including:

- extending maternity leave from 90 to 98 days;
- giving women who miscarry within the first four months of their pregnancy the right to take 15 days' maternity leave;
- giving women who miscarry after the first four months of their pregnancy the right to take 42 days' maternity leave;
- new provisions to encourage employers to participate in maternity insurance programmes;
- giving pregnant women the right to take paid time off to attend ante-natal appointments during working hours;
- allowing women who are at least 7 months pregnant the right to take a break during the working day and the right not to be asked to work overtime or at night or to engage in certain types of work; and
- the right of women who are breastfeeding to take a one-hour break during working hours to breastfeed. Such women also have the right not to be asked to work overtime or at night or in certain types of work.

There are hefty financial sanctions for any employer breaching these new Regulations. They could be fined between RMB 1,000 and RMB 5,000 (£1-500) for each affected female employee. Employers which ask a pregnant or breastfeeding employee to perform any

prohibited work may be subject to a fine ranging from RMB 50,000 to RMB 300,000 (£5-£30,000). In serious cases, the Government authorities may even order the employer to cease or close its business.

Qian Xiong, Associate, Beijing

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US Supreme Court's decision on healthcare reform: what employers should know

The United States Supreme Court recently upheld the constitutionality of the Patient Protection and Affordable Care Act. Whilst it focused primarily on whether Congress had authority to require individuals to have health insurance, the decision will also have a significant impact on US employers.

- **Requirements already in place:** One provision of the Act, already in force, requires employers to provide reasonable breaks to nursing mothers for up to one year following the birth in order to enable them to express milk. Employers must also provide "a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public" for the nursing mother to express milk.

  This mandate does not require employers to allow nursing mothers to breastfeed while at work; it only requires them to allow nursing mothers reasonable breaks and a place to express milk. Although the new Act does not require employers to pay employees during such breaks, it should be noted that the Fair Labor Standards Act normally requires employers to compensate employees for breaks of under 20 minutes. Also, if the employer pays employees who take other types of short break it may be prudent for employers to pay nursing mothers to ensure that all employees are treated the same.

  Employers with fewer than 50 staff are not required to comply if they can demonstrate that this requirement would cause them significant difficulties or expense.

- **Requirements that become effective January 1, 2014:** Perhaps the most significant issue for employers is the Act's requirement that "large employers" offer a medical plan that provides "minimum essential health benefits" to their full-time employees, or pay a tax. A "large employer" is defined as one with 50 or more full-time staff. Therefore, if such an employer fails to provide an appropriate medical plan to all its full-time staff and their dependents, that employer could be subject to a tax. This will be $2,000 if one employee, who is eligible for a tax credit or cost-sharing benefit, purchases coverage through a State sponsored exchange. This tax will be payable in respect of each full-time employee after the first 30, regardless of the number of employees who purchase medical coverage through an exchange. Employers could also be subject to a $3,000 annual tax even if they do have a medical plan if one or more employees receives a tax credit or cost-sharing benefit by purchasing coverage through a State sponsored exchange. Here, employees could be eligible for a tax credit or cost-sharing benefit if the employer's plan does not offer sufficient coverage or costs the employee too much money. However, unlike the tax for employers without a plan, employers will only be required to pay the $3,000 tax for those employees who actually purchase coverage through an exchange.

- **Employers' choices:** Employers subject to these rules have a few options regarding the new requirement to provide medical coverage to full-time employees. First, they may simply comply with the Act's requirement and provide their full-time employees with a medical plan, ensuring that it provides sufficient coverage in a cost-effective manner. This should prevent them from being required to pay the tax.

Other employers may examine the penalties that could be imposed if they fail and decide that it is simply cheaper to pay the tax. There is however a risk that Congress could increase the penalties if employers start to go down this route too often. Employers should also consider whether their valuable employees or candidates would opt to be employed by competitors who provide health insurance.

Employers may also opt to structure their workforce in ways that will avoid the Act's "employer mandate," or at least mitigate its effects. Employers could seek to use categories of workers other than full-time employees in order to conduct their business. They could seek to outsource positions to foreign markets outside the reach of the Act or use the services of part-time workers who are not entitled to be offered health insurance under the Act.

Another option would be to use independent contractors to provide services normally provided by full-time employees. However, before doing so, employers should consider whether that individual is genuinely an independent contractor. Simply designating an individual as an independent contractor will not be sufficient. A true independent contractor will usually have the ability to control the means and manner in which his assigned task is completed and is not completely economically dependent upon the "employer."

These new reforms contain a number of provisions that will affect the way in which US employers conduct business. Now that the Supreme Court has concluded once and for all that the Act is constitutional, employers should immediately begin developing a plan to implement the proposed changes.

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