December 2011

Worldview

Employment

GERMAN COURT GIVES IMPORTANT RULING ON BUSINESS TRANSFERS

Any business seeking to do an acquisition in Europe needs to be aware of the European Acquired Rights Directive which is designed to protect employees' rights on the transfer of a business or part of one. If the Directive (or in reality the relevant local legislation) applies then it can bring unpleasant surprises for the unwary, both buyers and sellers.

In Germany the Civil Code provides that if a business unit or part of a business unit transfers from one employer to another then the purchaser takes on responsibility for the rights and obligations of the transferring employees. It is always crucial therefore to determine whether there has been the transfer of a business unit. Historically the German Courts have held that there will not be a business transfer for these purposes if a business unit is integrated into the corporate structure of the purchaser in such a way that the original organisational structure is lost. In other words, the business unit must preserve its organisational identity for it to be caught by the transfer provisions.

In 2009, however, the European Court of Justice put a cat amongst the pigeons. In ***Klarenberg v Ferrotron Technologies GmbH***, Mr Klarenberg was employed by ET Electrotechnology GmbH (ET) as Head of its Research and Development Department. ET sold certain product lines developed in K's department, as well as associated contracts, IP rights and patents to Ferrotron. Four of the thirteen employees in K's department also transferred. K brought a claim that his employment should also have transferred to Ferrotron because in his view there had been the transfer of a business unit. After his claim was rejected he appealed to the Düsseldorf Labour Court which in turn referred the matter to the ECJ. The ECJ held (in even more oblique terms than normal) that the Acquired Rights Directive may apply to the transfer of part of a business even if it does not retain its original organisational identity, provided that the "functional link between the various elements of production is preserved, and that that link enables the transferee to use those elements to pursue an identical or analogous economic entity". It then said that this was a matter for the national courts to determine.

When this matter was referred back to the German Courts the Federal Labour Court held that K's employment had not transferred because the product lines, contracts, IP rights etc sold did not form a business unit at ET that was capable of transferring to the purchaser. It was therefore able to decide this matter without addressing the key question left open by the ECJ, namely what is meant by the "functional link" in each case. So whilst this decision is useful for purchasers it seems that further litigation in this area is inevitable.

A team from our Frankfurt office successfully acted for the purchaser (later re-named to Minteq International) before the German Federal Labour Court.

Dr Karl Maria Walter, Partner, Frankfurt and Dr Sebastian Buder, Senior Associate, Berlin

"So whilst this decision is useful for purchasers it seems that further litigation in this area is inevitable"

NEW POLISH LAWS ON CARRYING OVER HOLIDAY ENTITLEMENT

On 1 January 2012 Poland will introduce new legislation principally aimed at cutting red tape and easing restrictions on doing business in Poland. One of the proposed changes will, however, affect the rules governing the carry-over of unused holiday from one year to the next.

As things currently stand the Polish Labour Code provides that employees must use any outstanding holiday from one leave year by 31 March of the following year. This frequently causes disruption to businesses, as staff seek to take their unused holiday in the run-up to 31 March each year. This deadline is also frequently inconvenient for employees who are forced to take leave at a time not of their choice. A more flexible solution was therefore sought.

In an attempt to address these concerns the new legislation will extend the deadline for taking unused holiday by six months, from 31 March to 30 September of the following year.

So how should employers treat outstanding holiday for 2011? Unfortunately there are no transitional provisions in the legislation. The State Labour Inspectorate has issued its initial guidance on this point stating that it is only in 2013 that the new carry-over provisions will kick in, but many lawyers are of the opinion that the new legislation means that employees who have outstanding holiday from 2011 will no longer be required to take it by 31 March 2012, but will instead have until 30 September 2012.

Employers should ensure they are aware of these provisions and any documentation is changed to reflect them. The provisions governing annual leave entitlement and the procedure for requesting leave will remain unchanged.

Malgorzata Grzelak, Partner, Warsaw

RECENT DEVELOPMENTS IN ORGANIZED LABOR: WHAT US EMPLOYERS NEED TO KNOW

Management can face problems when a union representative knocks on a company's door trying to organize a union. Although union representation in the private sector has historically declined in the United States, organized labor has recently obtained traction, perhaps as a result of economic conditions:

(a) on November 8 voters overwhelmingly rejected the State legislature's attempt to significantly reform collective bargaining law in Ohio.

(b) the National Labor Relations Board ("NLRB") has imposed a rule requiring businesses to post an 11 X 17 inch poster explaining workers' rights in seeking union representation.

(c) the NLRB has also proposed union election changes which would significantly accelerate the timing of recognition elections. On November 30, 2011 the NLRB voted along political party lines to approve a resolution clearing the path for a final, narrower version of the rule to be drafted.

(d) the NLRB recently decided in ***Specialty Healthcare and Rehabilitation Center of Mobile*** (Aug. 23, 2011) that unions can organize smaller groups. This means that unions will be able to organize small bargaining units consisting of employees who share a "sufficient community of interest" even if the group excludes employees who perform similar work or have other items in common with the targeted group. It is expected that this decision will lead unions to concentrate their efforts on smaller bargaining units that are more easily organized.

US businesses are fighting to combat some of these initiatives. Several lawsuits have already been filed and employers are anxiously awaiting the Courts' decisions on the NLRB's posting requirement. In the meantime, the NLRB has delayed the deadline for compliance from November 14 to January 31 2012.

The United States Congress recently held hearings on the Workforce Democracy and Fairness Act. Although it would not address all of the recent changes involving organized labor, the Act would amend the National Labor Relations Act and require the NLRB to apply the pre-***Specialty Healthcare*** standards in union representation elections. This would prevent the NLRB from adopting many of the items in the proposed election rule.

In this time of uncertainty, any employer facing union organization efforts should continue to monitor future events closely. Employers should be prepared to react to potential unionization and have a strategy in place before the petition for certification (recognition) is filed. Frontline supervisors can be crucial when seeking to avoid union organization efforts. Accordingly, supervisors should be trained in the positive employee relations techniques that make a union unnecessary as well as what they can and cannot lawfully say about unions.

Keep an eye on our Employment Law Blog as we are anticipating further developments in this area.

Tara Aschenbrand, Senior Associate, Columbus, Ohio

FRENCH EMPLOYER LIABLE FOR THIRD PARTY BULLYING

In July 2011 the French Supreme Court held for the first time that an employer may be liable for acts of bullying carried out by third parties against its employees. A second decision of the Supreme Court has now confirmed this.

In handing down its decision in October, the Court combined two well known principles of French employment law: firstly, that an employer is liable for acts of bullying carried out by persons exercising 'de facto' authority over its employees and, secondly, that an employer cannot evade liability just because it did not carry out the act in question itself.

The case concerned the concierge-caretaker of a block of flats who was employed by the management company responsible for the block. The employee alleged that he had been constantly insulted and bullied by the chairman of the block's management committee and that his employer, the management company, should have protected him from this.

In order to escape liability in this matter, the employer argued that:

(a) it could not be held responsible for acts carried out by third parties who were not its employees and were not, therefore, under its control. In particular, the management company argued that the management committee was an independent entity which had been set up by the owners of the flats in the block and was in no way linked to the management company on any legal or formal basis. The management company could not, therefore, be held vicariously liable for the actions of the management committee under Article 1384 of the Civil Code.

(b) in the absence of overt fault on its part, it could not be held responsible, especially as it had taken steps to prevent the bullying as soon as it knew of it. Indeed, the employer had held a meeting with the members of the management committee immediately it found out about the bullying and reminded them that only the management company was empowered to monitor and criticise the work of its employees. This was then explained to the chairman of the management committee personally and he was reminded that the language which he had used towards the employee would not be tolerated. A further meeting was held shortly afterwards at which it was decided that the chairman should stand down from his role.

The Supreme Court dismissed these arguments and held that an employer has a duty to "respond to the actions of persons exercising de facto authority over its employees" and that the chairman of the management committee had clearly been exercising such authority over the claimant. The employer could therefore be held liable for the chairman's conduct towards him. In making its decision, the Court was guided by earlier decisions of the Supreme Court and Court of Appeal which stated that employers had to ensure the protection of their employees' health and safety at all costs.

The Court confirmed that employers are under a duty to protect their employees from bullying and harassment and the fact that such behaviour is carried out by third parties is not sufficient to exonerate an employer. This decision makes it clear that it will not be sufficient to take steps only after the event to prevent liability arising.

Jean-Marc Sainsard, Partner, Paris

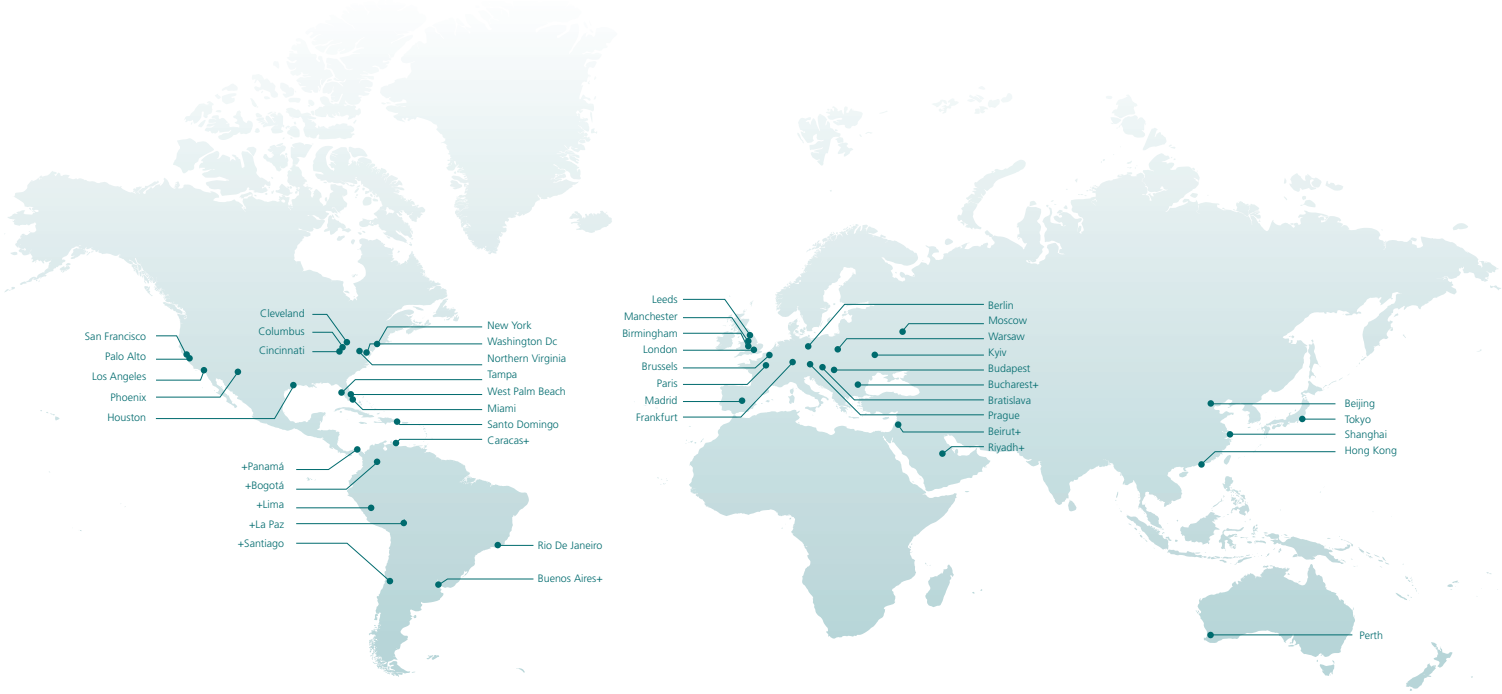
FURTHER INFOMATION

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

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE



+Independent Network Firm

5761/10/11

WWW.SSD.COM