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

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Uncertainty for US employers as National Labor Relations Board takes appeal to the Supreme Court

The National Labor Relations Board (NLRB), the independent federal agency charged with conducting elections for labor union representation and with investigating and remedying unfair labor practices in the US, has announced that it will appeal to the US Supreme Court a decision that the recess appointments made by President Obama to the NLRB were unconstitutional and, therefore, effectively void. The ultimate decision by the Supreme Court will determine the validity of hundreds of significant NLRB decisions made since the appointments on issues ranging from social media to union rights. If the Supreme Court finds that the people making those decisions were not properly appointed, those rulings cannot stand.

The appeal to be heard by the Supreme Court will consider the January 2013 holding of ***Noel Canning v NLRB*** in which a three-judge panel of the Washington D.C. Circuit Court held that President Obama's appointments to the NLRB whilst the Senate was away for the holiday break in January 2012 were an unconstitutional exercise of presidential power. As a consequence of its finding that the appointments were unconstitutional, the Circuit Court held that the NLRB did not have the required quorum of three legitimate members to issue an NLRB ruling; therefore the Board's decision was overruled. As a result of this decision, all NLRB rulings made since the January 2012 recess appointments have now been called into question and the same will continue going forwards until the NLRB's appeal is resolved.

The NLRB's appeal will likely be heard when the Supreme Court's next term begins in October. In the meantime, employers should treat any NLRB rulings made in the last year with caution and seek legal advice on any interpretive issues.

Anne Marie Prack, Associate, Columbus

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China places restrictions on staff engaged by secondment service companies

On 28 December 2012 China's legislators adopted proposed amendments to the Labor Contract Law. These amendments will change the rules regarding the use of workers supplied by so-called secondment service companies (manpower agencies) and are due to come into force on 1 July 2013.

The key changes are these:

(a) Employees supplied by so-called secondment service companies will only be allowed to be seconded for temporary, auxiliary or substitute positions, but not for extended or executive roles.

(b) The formation of a secondment service company will require its owners to possess a minimum registered capital of RMB 2 million and approval from the Labor Bureau.

(c) The policy of "same work, same pay" will have to be specified in contracts, so that staff engaged through secondment service companies will have to be on the same pay as those engaged directly by the employer if they are doing the same work.

(d) There will be limits placed on the number of employees that can be engaged through secondment service companies – the employee secondment rate will not be allowed to exceed a certain proportion of the workforce, as determined by the labor authorities.

(e) A breach of the new provisions may result in fines, confiscation of illegal income and revocation of approval by the Labor Bureau.

Employers operating in China need to be aware that the practice of outsourcing labor will be strictly regulated after these amendments come into force. Companies will need to consider whether they still wish to use staff through agencies given the reducing differences between seconded service workers and the employer's permanent staff. Serious breaches of the new provisions by secondment service companies could result in fines ranging from RMB 5,000 to 10,000 per affected employee.

All companies operating in China should ensure they are prepared for the introduction of these changes.

Sarah Xiong, Consultant, Beijing

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French employers urged to exercise care when dismissing employees for loss of their driving licence

According to French case law, the withdrawal of an employee's driving licence can, in certain circumstances, constitute a fair reason for dismissal. But what happens if that licence is subsequently reinstated – is the dismissal still fair? No, according to a recent decision of the Employment Chamber of the French High Court.

In this case the employment contract of a sales engineer specifically stated that he would be required to travel on business and he was given a company car for this purpose. Following the loss of all the "points" on his licence, the employee's driving licence was revoked for a period of six months. The employer, noting that the employee could no longer perform the tasks for which he had been hired, proceeded to dismiss him.

Several months after the dismissal, the administrative court reversed the decision to remove the "points" which had led to the employee's driving licence being revoked. The administrative court's ruling had retroactive effect which meant that the original decision to revoke the driving licence was deemed never to have taken place.

In light of these events the employee in question contested his dismissal. His claim was initially rejected, but it was then referred to the High Court as a "Priority Question on the issue of Constitutionality". The High Court declined to refer the matter to the French Constitutional Court and held that it was obliged to apply the principle of retroactive effect in these circumstances. This meant that the employee's driving licence was treated as never having been revoked which rendered the employer's decision to dismiss automatically unfair. The principle of retroactive effect clashes in this case with the principle that the reason for a dismissal should be considered on the day of dismissal.

This ruling imposed by the High Court creates great legal uncertainty for employers, as it means that a decision to dismiss an employee whose driving licence has been revoked may be fair at the time the dismissal is announced, but could turn out to be unfair if the employee's driving licence is subsequently reinstated. It seems that employers must bear the risks of any illegality resulting from the reversal of an administrative decision.

Employers forced to meet the financial consequences of a dismissal being reclassified as "unfair" in such circumstances may wish to consider seeking a remedy from the State. Case law has established that an employer which has to bear the damaging consequences of a protected employee's unfair dismissal case can seek liability of the State when the authorisation to dismiss given by the administration is subsequently reversed.

Mia Catanzano, Associate, Paris

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German Court rules that lower severance pay for older employees is possible

According to a recent decision of the German Federal Labor Court (*Bundesarbeitsgericht*), a lower amount of severance can now be stipulated for older employees in a social plan.

In the case of restructuring and large redundancy exercises in German companies, it can be necessary to agree a "social plan" with the Works Council if there is one. This plan usually contains agreements on severance payments and other benefits applicable to the dismissals. The amount of severance pay is often calculated according to a standard formula based on age, seniority and gross monthly salary. Under this formula older employees tend to get higher severance payments, even if they were already due to retire shortly thereafter and so were not looking for a new job.

Is it possible to agree a lesser provision in a social plan for employees who will shortly be in receipt of retirement benefits based on their age (and so would not suffer the same extended loss of anticipated income), or would this constitute unlawful age discrimination?

The Federal Labor Court has now taken a clear position on this issue in a recent decision on 26 March 2013. It held that when agreeing on the amount of severance payable in a social plan, it is lawful for the employer and the Works Council to take into consideration the fact that employees will receive statutory retirement benefits in the foreseeable future and to reduce their entitlement accordingly. This approach does not violate the equal treatment principle or the prohibition of age discrimination under EU law, said the Court.

In this particular case, the 62-year old plaintiff would have been entitled under the formula in the social plan to a severance payment of almost €240,000. However, the social plan also contained a provision which stated that employees should receive a reduced payment after reaching the age of 58, based on their financial loss up to the earliest date for receipt of statutory retirement benefits. The employer referred to this provision and paid the plaintiff a reduced severance payment of only €4,974.62. Ouch.

In a decision which is good news for employers, the Federal Labor Court approved the corresponding provision in the social plan – and thus consequently the significantly reduced amount of severance. It did not consider the regulation to represent unjustified age discrimination or a violation of the European principle of equal treatment with other employees.

The Court based its decision on the fact that the purpose of a social plan is to provide compensation for employees and to reduce any financial suffering incurred as a result of restructuring or redundancy exercises. The Court took into consideration that employers regularly only have limited funds available and that these need to be distributed to the worst-affected employees. On this basis it is legitimate for employers to focus more strongly on the actual disadvantages being suffered, particularly in the case of older employees.

In light of this new decision, there should be more leeway for employers engaged in large redundancy and restructuring exercises in Germany, which could lead to significant cost reduction for companies in the case of severance payments. Employers in Germany should be aware of this new court decision and the resulting options for designing agreements.

Dr. Sebastian Buder, Partner, Berlin

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Contact

Caroline Noblet
T +44 20 7655 1473
caroline.noblet@squiresanders.com

Susan DiMickele
T +1 614 365 2842
susan.dimickele@squiresanders.com

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