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

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Global ethics policy deemed inadequate in Australian sexual harassment claim

Software giant Oracle was recently found liable by the Australian Federal Court for the sexual harassment of one of its employees by another member of staff and ordered to pay $18,000 by way of damages. The Court held that Oracle's global "code of ethics and business conduct" policy was inadequate to show that it had taken "all reasonable steps" to prevent the harassment taking place.

Acts of sexual harassment

Oracle's former employee, Ms Richardson, worked closely with a sales representative as part of a team attempting to secure a major financial commitment from the ANZ Banking Group. The Federal Court of Australia found that from their first face-to-face meeting in April 2008, Ms Richardson was subjected to a series of humiliating slurs and sexual advances from the sales representative, which turned into a more or less constant campaign of sexual harassment. There were eleven separate incidents of sexual harassment over the course of several months, which the Court said represented a pattern of conduct by the sales representative.

Why was Oracle vicariously liable?

Under the *Sex Discrimination Act 1984* (Cth), an employer may be legally responsible for discrimination and harassment which occurs in the workplace or in connection with a person's employment. Vicarious liability can be reduced or avoided altogether if the employer can show that it took "all reasonable steps" to prevent the sexual harassment or discrimination taking place.

In this case, Oracle was found to be vicariously liable for the sexual harassment of Ms Richardson because it had not implemented adequate policies and had not provided adequate training to its employees.

This was even though Oracle had implemented in Australia its global "code of ethics and business conduct" policy and every two years Oracle employees were required to complete a global online training package in reinforcement of it.

The Court was particularly critical of the contents of the global code of ethics and the global online training package and the fact that neither made reference to the legislation in Australia which prohibits sexual harassment. Furthermore, neither the policy nor the training package included a clear statement that such conduct was unlawful or a statement that an employer may also be vicariously liable.

The Court commented that these omissions from Oracle's own policies was a sufficient indication that Oracle had not taken all reasonable steps to prevent sexual harassment in its Australian workplaces.

What does this mean for employers?

This case highlights the need for employers to ensure that they have systems and procedures in place adequate to ensure that they meet the standard of taking "all reasonable steps" to prevent sexual harassment in the workplace. In particular this means:

- employers with global operations need to ensure that their systems and procedures are specific to the Australian workplace, and that they avoid a 'one size fits all' approach to policies and training programs;
- employers need to ensure that any policy on sexual harassment specifically includes the legislative foundation in Australia for the prohibition of sexual harassment, a clear statement that such conduct is unlawful and a statement that an employer may be found vicariously liable;
- employers need to regularly review their workplace policies and procedures and ensure that they are consistent and up to date; and
- employers should provide clear and regular guidance to employees through training programs outlining appropriate workplace conduct specific to the Australian workplace.

Anna Elliott, Senior Associate, and Caitlin Cook, Associate, Sydney

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The Australian Government steps up to stop workplace bullying!

The Australian Federal Government has passed landmark amendments to federal employment legislation, the *Fair Work Act 2009* (Cth), in response to a government inquiry into workplace bullying. The new provisions will commence operation on 1 January 2014.

These provisions will for the first time enable a worker who is bullied at work to apply to the Fair Work Commission (FWC), Australia's federal employment arbiter, for an order to stop the bullying.

One of the key issues highlighted by the Government's inquiry was the difficulty many workers face in trying to find a quick way to end the bullying so that they do not suffer further harm or injury. The new anti-bullying provisions are designed to provide a quick and cost-effective individual remedy. Under the relevant provisions, the FWC is required to start dealing with the matter within 14 days. If the FWC is satisfied that the worker has been bullied, and there is a risk the worker will continue to be bullied, it may make an order to prevent the worker from being bullied at work.

The bullying behaviour must be repeated, unreasonable and create a risk to health and safety. However, a finding of bullying will not be made where the alleged bullying behaviour is in fact reasonable management action carried out in a reasonable manner.

The anti-bullying provisions do not just apply to the bullying of 'employees', but extend to the wider definition of 'workers' which can include contactors/sub-contractors, outworkers, apprentices/trainees, work experience students and volunteers.

The power of the FWC to make an order is wide ranging but does not extend to the payment of compensation. However, a pecuniary penalty may be imposed by the FWC if an order made is breached by the person(s) it applies to.

The Government has estimated that some 3,500 bullying-related applications may be lodged annually once the new provisions take effect on 1 January 2014, although this figure could be much higher.

Concerns have been raised by the Law Council of Australia regarding a number of potential issues arising from the amendments, including whether the definition of 'bullying' is truly an objective test (the explanatory memoranda to the Bill throws doubt on this) and whether the wide ranging powers given to the FWC could be used by an employee to bring 'unfair dismissal' type proceedings before a dismissal has occurred.

The anti-bullying provisions provide that they do not preclude separate investigation and prosecution under occupational, health and safety legislation. It is apparent the provisions could pose additional risks to employers, where anti-bullying orders could be used as evidence in safety investigations/prosecutions and workers' compensation disputes, and could complicate or stifle a performance management process.

The recent change in government in Australia in September could result in further amendments being made to the anti-bullying provisions. The coalition government's policy prior to the election indicated it was supportive of the provisions, but only if it is made clear that a worker has first sought help and impartial advice from an independent regulatory agency, and further, the changes are expanded to include the conduct of union officials towards workers and employers.

Employers operating in Australia should review and update their bullying and performance management policies and procedures, with a view to limiting claims under the proposed anti-bullying provisions. The FWC is required to take into account in considering the terms of any order it makes, any internal investigations being undertaken, available grievance procedures and any outcomes of an investigation/procedure. Accordingly, it will be in an employer's interests to quickly institute a proper and fair investigation process into any bullying claim and action any outcomes, as this will more likely steer the terms of any FWC order in its favour, or dispense with the need for any order at all.

Dominique Hartfield, Senior Associate, Perth

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What is the greatest risk to your trade secrets in China?

Your own employees

For businesses operating in China protection of intellectual property should be high on the agenda. Given the high turnover of employees, businesses should anticipate that at some point one of more of their employees will take trade secrets when they leave.

Under both China's Anti-Unfair Competition Law and its criminal law, a trade secret is a specific type of confidential information that gives an economic advantage to a given company, at least for so long as that information is kept confidential. It is therefore necessary when seeking to enforce rights to trade secrets to show the steps that have been taken to preserve the confidentiality of the material. There is no statutory limit on the duration of a trade secret – as long as it is kept secret and can be shown to have value, it can be claimed as a trade secret.

In order to minimise the risk of employees misusing confidential or classified trade secrets, employers operating in China should take robust and proactive steps to protect their intellectual property rights, including:

- imposing confidentiality and non-competition obligations on all "ordinary employees" in standard employment contracts, which are mandatory under Chinese law.
- requiring senior or mid-level management personnel and other employees who have access to trade secrets to sign a separate and stricter confidentiality and non-competition contract. This separate contract may permit enforcement without going through the labour arbitration that will be required for most employment disputes.
- specifying in employment contracts and the company handbook that theft of trade secrets or other IP constitutes grounds for termination of employment.

During the employment relationship employers should also:

- limit access to classified information on a need-to-know basis.
- maintain lists of employees with access to particular pieces of classified information.
- use software to monitor who accesses classified material.
- require passwords and codes to be updated at least every three months.
- educate and train employees about their responsibilities regarding trade secrets and IP, including the sanctions under Chinese law for breach.
- establish a hotline for employees to report risks of theft of trade secrets by colleagues or outside contacts.
- take prompt action to stop trade secret and IP theft immediately after identifying a

problem, for example by taking control of an employee's laptop, perhaps filing the case with the Public Security Bureau and applying for preliminary injunctive relief, if appropriate.

- consider participating in organisations focusing on IP in China, for example the Quality Brands Protection Committee or the European or American Chamber of Commerce.
- remind employees in any exit interviews at the end of the employment relationship of their continuing obligations regarding trade secrets and IP.

Although it remains difficult for employers to obtain adequate redress in China for theft of trade secrets, there have been some positive developments recently. In a recent decision from the Shanghai No.1 Intermediate court, an ex-employee of Eli Lilly was banned from circulating trade secrets after he was discovered downloading 21 documents containing trade secrets at work without authorisation and then refusing to delete them. This interlocutory injunction was the first of its kind under the new Chinese Civil Procedure Law and marks a significant step forward for IP protection.

China presents an attractive proposition for businesses looking to expand into the emerging markets, as its economic growth has, in general, remained strong despite turbulent market conditions elsewhere. However, businesses looking to capitalise on this growth are advised to take adequate preparatory steps to ensure that a launch into this market does not jeopardise what may be its core assets, IP and trade secrets.

Please contact us if you are interested in further advice on protecting IP and trade secrets in China. Dan Roules has more than 20 years of experience in international labor, employment and commercial matters in Asia, Europe and the United States and has been living and working in China for more than 15 years. Prior to moving to Shanghai, Dan spent four years in Squire Sanders' Beijing office and three years with Squire Sanders in Taipei, where he counseled manufacturing, technology and venture companies on a wide range of labor, employment, and corporate matters both there and in mainland China.

Daniel Roules, Partner, Shanghai, China

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Correction of the Saudi Labour Market

The Saudi Government has launched a number of regulatory reforms of labour legislation, often collectively referred to as the "Labour Correction". There is no comprehensive White Paper on reform strategy and plan; however, a vigilant observer of official releases discerns that the Labour Correction has three interconnected objectives:

Enhancing the nationalisation of jobs in the private sector

This is not a new policy. The Saudi Government has been exerting increasing efforts to improve the employability of Saudis. Most notably, it has adopted an incentive program known as Nitaqat, whereby companies which hire more Saudis have more privileges than others. The Ministry of Labour has also issued a list of "Saudi" jobs such as executive work. Furthermore, legal fees for obtaining work permits which were introduced last April are considerably higher for firms employing more foreigners than Saudis. Foreign expats still, however, comprise 90 percent of the workforce in private companies, while unemployment amongst young Saudi graduates is increasing.

Elimination of the problem of illegal workers

According to Saudi law, foreigners are not allowed to work without the business owner (known as the sponsor) first obtaining a work visa. The worker may not transfer from one job to another, as a general rule, without transferring his sponsorship to the new employer.

Immigration rules have however largely been ignored. Numerous expats have entered the country on pilgrimage or visit visas, or remained in the country after the expiry of their permitted work residency. These breaches of immigration laws have been blamed for distorting the labour market and reducing job opportunities for Saudis. In a decisive move, the Government issued a three-month ultimatum for all illegal expats and their employers to rectify the situation or face deportation and a ban from re-entering the country. Any foreign expat who leaves the country or rectifies his immigration status during the three-month grace period is granted an amnesty from immigration law violations and given the right to re-enter the country. Meanwhile, the Labour Law was amended to impose a fine of 100,000 SAR (26,600 USD) on any employer which hires a foreign employee without a valid work permit or under the sponsorship of another employer after the grace period.

As a result of these measures, huge numbers of expats rushed to rectify their situation. Long queues outside the Saudi Labour office and Passport Departments were hard to miss. The problem has even affected embassies, as it turns out that many expats have been in the country for a long time and have never bothered to renew their official passports. Some embassies, particularly from Asian countries, were unable to cope and in one incident riots erupted at the gates of Indonesian companies. As the huge size of the problem has unfolded, it has been decided that the grace period should be further extended until November 2013.

Improving work conditions

Young Saudis, who generally enjoy a high standard of living, have long preferred to work for the

Government rather than the private sector, since then they enjoy less working hours and a two-day weekend. Therefore, the Government has proposed amendments to the Labour Law reducing maximum working hours to potentially 40 hours or 44 hours, enabling the extension of the weekend. The amendment is currently before the legislative body, the Shura Council. In order to facilitate the amendment, a Royal Decree was issued to change the formal weekend from Thursday and Friday to Friday and Saturday. Private companies have understandably rejected the imposition of a long weekend, as it will isolate them from their international clients for four consecutive days, and so be harmful to their business.

Attempts to set a universal minimum wage for Saudi workers have not been endorsed. However, the Government has indirectly improved the minimum wage by imposing a minimum of 3000 SAR (800 USD) monthly wage in order to count as a "Saudi employer" for Nitaqat purposes.

How should companies cope?

The new restrictions on employing expats and the increase in their work permit fees have imposed many challenges for investors. Companies providing construction and transportation services have been particularly hit because they are heavily dependent on a large base of foreign expats. The restriction that no company can hire a worker under the sponsorship of another company has largely closed the door for secondment and outsourcing.

Part of the solution was to activate the Recruitment and Outsourcing Companies Law which allows specialised recruiting companies to sponsor instead of business owners. Few companies have already been licensed to provide outsourcing services which seems to have eased the problems faced by the business sector. Worth mentioning is that Squire Sanders' Riyadh Office assisted the Saudi Ministry of Labour on drafting this Regulation and provided assistance on the modernization of nationalisation regulations, including recruitment and outsourcing.

Nadia Al-Anani, Senior Associate, Riyadh

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New York employers should prepare for new wage deduction legislation

Last year, New York amended its wage deduction legislation to greatly expand the deductions that can lawfully be made from employees' pay. In addition to statutory deductions and deductions for health and welfare plans, which have traditionally been permissible, New York employers are now allowed to make deductions for the benefit of the employee.

The changes became effective in November 2012, but under the new law the deductions can be made only in accordance with regulations issued by the State Department of Labor. Draft Regulations have recently been issued and New York employers should start planning now on how to bring their procedures and processes on pay deductions into line.

- **Deductions for the benefit of the employee:** The New York Labor Law sets out numerous allowable deductions "for the benefit of the employee". The Regulations seek to clarify what deductions will be considered to be "for the benefit of the employee", including health and welfare benefits, contributions to bona fide charitable organizations and pensions and retirement benefits. They also warn against deductions which are for the "convenience" of the employee, but not his "benefit" e.g. cashing an employee's payroll cheque and charging a fee. The Regulations would replace the current "10% rule" which caps deductions for "similar payments for the benefit of the employee" at 10% of the employee's gross pay for the relevant pay period.

- **Deductions for overpayments:** The Regulations would allow employers to make deductions for unintended overpayments due to mathematical or clerical errors without obtaining prior written authorization from the employee. They are, however, very specific about how employers should go about making any deductions, including the timing, frequency and method of recovering any overpayments. For example, an employer may only recover overpayments made in the 8 weeks prior to its issuing the necessary "notice of intent" to an employee.

- **Deductions for advances:** The Regulations define an advance as "the provision of money by the employer to the employee based on the anticipation of the earning of future wages". They make it clear that if an employer provides money to an employee accompanied by interest, fees or a repayment amount consisting of anything other than the strict amount originally provided, this will not constitute an advance and cannot be reclaimed through wages. Under the Regulations, an employer and an employee must agree in writing to the timing and duration of the repayment deduction before any advance is given. Deductions may then be taken from an employee's wages in accordance with those written terms.

What do these proposed Regulations mean for your company?

You should review the permissible deductions "for the benefit of the employee" to identify if there are additional benefits you want to offer employees through payroll deduction.

Additionally, although the Regulations have not yet been finalized, you can safely anticipate that the final Regulations will be substantially similar to the draft version. You should therefore consider developing policies, procedures and notices now that conform to the new requirements, in order to enable you to make deductions for overpayments and advances once the final version of the Regulations come into force.

Susan DiMickele, Partner
Lew Clark, Partner
Meghan Hill, Senior Associate
New York

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Germany: General compensation clause is sufficient to settle claims for unpaid holiday pay

Since the decision of the Federal Labour Court (file no.: 9 AZR 844/11) on 14 May we finally have clarity around a longstanding question.

If a settlement is agreed that contains a clause which stipulates that all claims resulting from the employment relationship are excluded, this also covers holiday pay claims, according to the most recent jurisprudence. Up to now, a general compensation clause of this sort was not seen as sufficient. Instead, the settlement required a separate provision recording that the employee's holiday entitlement had been satisfied.

The Federal Labour Court now holds a different opinion. In this case, against the background of a termination dispute, the employee and employer concluded a settlement on the termination of the employment relationship and agreed that "*all reciprocal financial claims resulting from the employment contract, whether known or unknown and regardless of their legal basis, are settled*."

Despite this settlement wording, the employee filed a separate claim for 70 days' holiday pay, which he said he had been unable to take during his employment for reasons related to illness. In the employee's opinion, holiday pay did not fall under the compensation clause agreed in the settlement. The employer took the opposite view and declined payment of holiday pay due to the breadth of the general compensation clause.

The Labour Court in Chemnitz initially agreed with the employer and dismissed the employee's lawsuit. The Higher Labour Court of Saxony cancelled the decision of the Chemnitz Court and ordered the employer to pay the outstanding holiday claim. The employer then filed an appeal to the Federal Labour Court and was successful.

The Federal Labour Court will now generally consider outstanding holiday pay claims to fall under a broad general compensation clause so long as it is sufficiently widely and clearly drafted. In support of its decision, the Court stated that the general compensation clause agreed in the settlement represented a "constitutive negative acknowledgement of debt" pursuant to Section 397 (2) German Civil Code (BGB). The consequence of such an acknowledgement is that no further claims can be asserted and in this case the employee therefore had to reimburse the employer for the holiday pay.

As an incidental point with regards to the forfeiture of holiday due to long-term incapacity for work, the Federal Labour Court repeated its new point of view i.e. that statutory holiday is not lost prior to the expiration of 15 months following the termination of the holiday year in which that holiday accrued. In other words, if it has not been taken by then, it will be lost.

Tanja Weber, 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