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FYI

Labour Law
NEWS

Huge Labour Law Reforms in Brazil

and further information from the Labour Law environment

Newsletter
No. 03 | Winter 2017

Editorial

Dear Reader,

In many countries labour law is changing fast and as the working world becomes yet more globalised, many companies are finding themselves obliged to become informed about these changes that can have a significant impact on their employment relations.

Just as in the Netherlands two years ago, Brazil is facing the biggest changes in labour relations since 1988. You will find more information about these reforms in this newsletter. Furthermore, the UK has introduced new legislation in regard to the Gender Pay Gap which takes effect next April, and companies need to be preparing for it now.

Please do not hesitate to contact our Practice Group members as they are more than happy to assist you with international employment law matters. We would like to thank all the member firms that have contributed to this edition and hope that you will enjoy and benefit from the worldwide updates in this newsletter.

Jeffrey Kenens
Global Chairperson of the
GGI Labour Law Practice Group

Huge Labour Law Reforms in Brazil

By Leonardo Mazzillo and Alessandra Marcondes D'Elia

Recently, the Brazilian Congress has approved the country's first major review of labour rules in more than seven decades, substantially modifying the Consolidation of Labour Laws ('CLT'), promulgated in 1943.

Although it was an important milestone in the country's legislation at the time, the CLT was created at a time when there were no major technologies in the country and a considerable part of its population still lived in the countryside.

Since then, the aforementioned legislation has undergone considerable changes; maintaining, however, its essence, which has proved incompatible with the growth of the cities, the development of the Brazilian economy, the emergence of new technologies and the consequent development of new labour relations.

This situation, coupled with the government's interest in implementing a reform agenda, has led to a broad change in labour legislation in the largest economy in Latin America. In this scenario, Law No. 13467/2017 was created, which does not completely revoke the CLT's regulations, but changes hundreds of rules set forth in it.

These changes have been strongly criticised by trade unions, which may face budgetary restrictions stemming from the end of the compulsory union contribution, as well as their participation in the dismissals of workers, which has been indispensable until now. The changes were also criticised by pro-worker groups, under the arguments of precariousness of labour relations and loss of rights.

On the other hand, the reform was well-received by critics of the inflexible structure of Brazilian labour justice, who appreciate greater liberty in their labour relations. For this group, one of the most notable changes in the law is the possibility that individual agreements between companies and employees prevail over legislation in some relevant subjects, such as working hours, profit sharing plan and the work hours bank. This list does not include some

rights considered essential, such as the minimum wage, Employee's Dismissal Fund ('FGTS') and standards related to medicine, health and the safety of workers.

Another highlight is the possibility of including an arbitration clause in contracts signed between employers and employees who receive more than twice the maximum amount of the benefits of the General Social Security System (about BRL 11,000.00 or USD 3,500.00). Such a prediction, compatible with the spirit of the new law, places greater emphasis on agreements reached between the parties and ensures greater agility in conflict resolution.

In addition, some procedural changes –- such as the limitation for free justice benefits and the possibility of workers being condemned to the payment of labour costs and of defeated party's fees - tend to reduce the number of labour lawsuits, discouraging the filing of unfounded lawsuits or with low chances of success.

Lastly, the changes arising from Law 13467/1207 will become effective on 13 November 2017, four months after its promulgation.

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Be Nice, Be Honest or Pay – How to Separate the Poor Performer from the Others

By Kelly Schoening Holden

An employee should never reasonably be surprised at a termination for poor job performance.

The adage 'hire slow and fire fast' applies to new employees but not so much to longer-term employees. Employees should be provided a chance to improve and provided with the necessary tools to do so.

All coaching and/or counselling needs to be documented. In an ideal world, the manager would also have the employee sign. Documentation needs to be factual in nature. Documentation should have the date (including year), the author, and

...next page

facts about the meeting and who was in attendance. It should be written contemporaneously to the event.

Job evaluations are a great tool when actually done correctly. An evaluation of someone's performance needs to involve honest feedback. If an employee is not meeting expectations, it is only fair to explain the reasons, along with goals for improvement. Employees often assume performance is fine unless told otherwise.

The timing of a termination is crucial. If the employee has recently filed a worker's compensation claim, FMLA leave, a harassment complaint, etc., the employer should wait to take action. Proximity in time to a protected activity can be enough for the employee to get the claim to a jury.

The termination meeting should be attended by the manager and a representative from HR. A written letter of termination is advisable so there is no question over the basis for the termination. It is best to provide the reason for termination of employment to the employee. Allow the employee to clean out his/her own desk to avoid claims of theft or conversion for missing property.

A severance agreement should be strongly considered when the termination is for poor performance. The agreement should be written in compliance with the ADEA and the Older Worker's Benefit Protection Act as well.

There is no guarantee of preventing a lawsuit, EEOC or other type of claim. However, companies should put themselves in the best position to defend claims when necessary.

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Ontario's Highest Court Takes an Employee-Friendly Interpretation of Termination Clauses

By Marty Rabinovitch

Please note that this article is a follow up to the article entitled 'Termination Clauses in Canada: Where Do We Stand?' published in the Spring 2017 newsletter.

Ontario's highest court recently released another key decision about the enforceability of termination clauses, *Wood v. Fred Deely Imports Ltd.*, which takes a substantially different approach than in the case of *Oudin v. Centre Francophone de Toronto.*

In *Oudin*, the Court of Appeal for Ontario found that a termination clause which limited the employee's entitlement to the statutory minimums was valid, despite failing to mention benefit continuation or statutory severance pay.

In *Deely,* the court concluded that a termination clause that provided for an

all-inclusive payment to an employee upon termination without cause (i.e. without a valid legal reason) was unenforceable, as it did not include benefit continuation, as is required under employment standards legislation in Ontario. The court also decided that the fact that the employer did actually maintain its contribution to the employee's benefit plans was irrelevant to the enforceability of the termination clause; only the wording of the clause itself should be considered. These two decisions appear to be contradictory and are difficult to reconcile. It remains to be seen which approach the courts will follow in the future. One thing is still certain: carefully drafted termination clauses are necessary for employers who wish to have certainty and limit their liability upon the termination of an employee!

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Could You be Liable for the Sins of Your Staffing Agency?

By Jonathan R. Sigel

Businesses use staffing agencies to supplement their workforce with temporary workers, which saves money when meeting fluctuating production and staffing needs. However, companies can be held liable for the agencies' violations of law (e.g. wage & hour laws) if the entities are found to be 'joint employers' – even when unaware of the violations! While determination of joint employment is not automatic, companies are wise to proceed under the assumption that they may be held jointly liable.

You should always obtain references and find out whether the agency has been involved in any litigation. Furthermore, there should be a formal written agreement which covers not only items such as rates, 'temp-to-hire requirements

...next page

and termination provisions, but also requires the agency to take very specific measures to comply with laws concerning the payment of wages, illegal harassment and discrimination, workers' compensations, and employment taxes, to name a few. The agreement should also contain an indemnification clause. In addition, after engaging the staffing agency, your company should periodically conduct an 'audit' to monitor and help to ensure legal compliance.

In short, while staffing agencies can provide a vital source of workers for your business, contracting with them can also expose your company to a host of legal consequences, even when you are completely unaware of the existence of violations. Thus, taking some basic preventative measures can go a long way in preventing or mitigating those risks

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Jonathan Sigel advises clients on a broad range of employment issues, including employment and severance agreements, handbooks and policies, and terminations and layoffs. He also advises management on proper wage and hour classification and has extensive experience representing management in the negotiation and litigation of employment-related disputes, including discrimination claims.

MIRICK O'CONNELL
ATTORNEYS AT LAW

Interns – to Pay or Not to Pay?

By Erin Kidd

Employers need to understand the distinction between legitimate unpaid internships, which offer genuine work experience, and sham internships that exploit cheap (or free) labour, to ensure they do not fall foul of Australia's workplace laws.

The Fair Work Ombudsman has recently said 'Employers cannot simply choose to label an employee as an "intern" in order to avoid paying their staff according to their lawful entitlements'.

To be properly categorised as an unpaid intern, an individual must:

(a) be undertaking a 'vocational placement'; and/or
(b) not be in an employment relationship with the business.

A 'vocational placement' is a placement that:

(a) does not entitle the individual to any remuneration;
(b) is undertaken as a requirement of an education or training course; and
(c) is approved. That is, the institution delivering the course that provides for the placement must be approved to do so under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

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Erin Kidd advises on all aspects of the employment relationship. With qualifications in law, human resources management and industrial relations, Erin understands the complexities of people management and provides pragmatic, commercially astute advice.

mccabes

Where an internship is not a 'vocational placement', it can only be unpaid if no employment relationship exists. This requires examination of the nature and purpose of the arrangement, the length of the arrangement and whether the work would ordinarily be performed by an employee.

Individuals such as company directors, senior managers and human resources personnel can be personally liable for contraventions, such as underpayment of wages or failure to provide other employment entitlements, in respect of workers they have incorrectly engaged as unpaid interns.

Employee Handbooks – Why Employees Need to Sign Acknowledgement Forms

By Howard K. Kurman

It is no secret that Employee Handbooks are vital to organisations and should be updated regularly to reflect new workplace policies and procedures. However, employers should take note that newly hired employees need to sign an acknowledgment form upon receiving their new employer's Employee Handbook. Acknowledgment forms provide a valuable receipt confirming that the new or incumbent employee has received such a Handbook/revised policies and has had ample opportunities to seek clarification of any particular policy or policies.

Subsequently, employers can refer back to this receipt when disciplining or terminating an employee for violating a particular policy in the Handbook. The signed form should be in writing and included as a separate document in the employee's personnel file.

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Offit Kurman is a dynamic full-service law firm. As trusted legal advisors, they help clients to maximise and protect their business value and individual wealth. They strive to maintain clients' trust in every interaction, furthering their objectives and helping them to achieve their goals in an efficient manner.

Howard Kurman, Co-Founder of Offit Kurman Attorneys at Law, regularly counsels clients on all aspects of labour and employment issues. He represents employers ranging in size from as small as 20 employees to those employers with geographically disparate locations consisting of over 4,000 employees. Mr Kurman assures, through regular contact with his clients, that they promulgate and maintain the most effective employment policies that will, to the greatest extent possible, minimise their legal exposure in today's litigious workplace.

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Gender Pay Reporting in the UK and Why It Matters

By Gillian Burns

As of 6 April 2017, UK law requires employers with 250+ employees to produce an annual report with data about their gender pay gap. Those caught by the obligations have until 4 April 2018 to upload pay figures to a dedicated Government website. Relevant pay figures include the average hourly pay for men and women and the gender bonus gap as at the snapshot date of 5 April.

Sanctions for non-compliance are unclear, but the reputational damage and potential loss of key staff to competition that may be caused by the publication of apparent gender pay inequality could be significant. For example, the British Broadcasting Corporation (BBC), a public service broadcaster in the UK, is fighting hard to keep key female talent and regain public respect after it published embarrassing statistics of pay inequality between men and women in July.

The new obligation could have positive effects, however. Employers might compile a gender pay report and identify a hidden pay disparity, which could highlight an equal pay risk. If the imbalance is addressed, staff morale and productivity could improve, and equal pay liability exposure could fall. If there is no imbalance, the public will know that equal opportunities are high on the employer's agenda.

And that would be a win for both employee and employer!

For information on the new obligations, relevant calculations and more, please contact the author.

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Update on Labour Law in the Netherlands

International trade regulation

By Huub Kapel

As of 1 July 2017, the new 'International trade regulation' is applicable. This regulation offers Dutch employers more possibilities to temporarily employ non-EU nationals in the Netherlands without a separate work permit.

The Dutch minimum wage and holiday allowance must be applied. There is no other salary requirement. Em-

ployees falling within the scope of the Intra Corporate Transferees Directive are excluded.

In order to do so, the Dutch employer should file an application with the UWV (Labour office) for admission of the project before the activities begin. Employers can apply for a project for a maximum duration of three years, with the possibility to extend this period. If approved, employers only need to notify the non-EU employees to the UWV. Depending on the nationality of the employee and the duration of residence in the Netherlands, an entry visa and/or a Dutch residence permit might be required. In order to qualify for this regulation, the project should relate to international trade, services or cooperation. This implies that commercial companies should be involved.

Besides employees, contractors and directors/shareholders of a foreign company also qualify for this new regulation.

In case of questions regarding the above or Dutch labour migration, please feel free to contact LIMES international.

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Labour Reform in Brazil

By Luis Felipe Canto Barros

The status of Brazilian politics allows the government to promote unpopular reforms so the State may survive. Among these changes, emphasised by the high level of social mobilisation, are the limitations imposed on public expenditures and the newest labour reforms.

The motivation behind these reforms that are causing such social commotion comes precisely from the analysis of the current moment in Brazilian politics, in which the current President is now holding the post because of the impeachment of the former elected President.

Lacking popular support and unlikely to be re-elected since he is at the centre of a major corruption investigation, there was no other alternative besides

...next page

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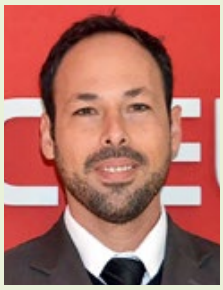

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the assumption of the role of a reformist government. In this way, the President is making these clearly needed reforms to maintain and improve the Brazilian State, even if it displeases a large swathe of society.

In this political context, labour reform is emerging, using an old piece of legislation dating from Getúlio Vargas' totalitarian government of 1943.

Among the changes that will soon become effective in the country, the most important are: the weakening of the syndicate's influence, as the contributions to these institutions are not mandatory anymore; regulation of the Home Office, allowing for new labour rules; and greater flexibility between employer and employee, for validation of group agreements and the possibility of break time reduction.

With this in mind, fundamental rights like vacation, strikes and the thirteenth salary have not been suppressed, so it can be concluded that the new legislation is in line with the ideals of a democratic and modernised State.

Workers' Compensation – Texas Style

By Nicholas Bettinger

Texas is the only state in the USA that allows private employers to opt out of the workers' compensation system. These 'nonsubscribers' comprise over 100,000 Texas employers.

Nonsubscribers are not legally required to compensate injured employees. Responsible nonsubscribers, however, provide discretionary benefits through privately implemented ERISA plans. Plans typically include medical expense reimbursement (with approved doctors) and disability payments between 75% and 90% of the employee's regular wage.

Most nonsubscribers achieve significant cost savings over traditional workers' compensation. Improving workplace safety, providing quality medical care and establishing reasonable return-to-work protocols all contribute to lowering the average claim cost and increasing employee satisfaction.

While subscribers enjoy immunity from employee tort litigation, nonsubscribers, even those who provide ERISA benefits, are subject to personal injury lawsuits with virtually no liability caps. Practically, though, only a small percentage of occupational injury claims end up in litigation. Even then, with binding arbitration becoming the norm with nonsubscribers, few disputes ever see a courtroom.

Attorneys who specialise in representing nonsubscribers can assist with the process of terminating the workers' compensation coverage, filing the appropriate forms with the Texas Division of Workers' Compensation and the required notifications to employees. Some nonsubscriber attorneys will also draft the ERISA Plan and offer guidance on insurance selection.

Before your Texas clients write another premium check for workers' compensation insurance, have them explore the nonsubscriber option.

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Consultation of the Works Council Applies to a Relaunch Following Liquidation

By Jeffrey Kenens

Article 25 of the Dutch Works Councils Act states that an entrepreneur is required to consult the Works Council about intended decisions related to matters of finance, commerce and business organisation. This includes, for example, an intended decision to transfer the control of the business or to cease the business activities. Under Dutch law there has been a discussion about whether the receiver is obliged to request advice from the Works Council during the liquidation of the company's business. The Works Councils Act and parliamentary history of that Act are unclear on this point.

In 2016, the Netherlands Enterprise Court at the Amsterdam Court of Appeal ruled that, in such cases, the Works Council does not have advisory rights, because such an advisory right would not easily be consistent with the nature of bankruptcy law. With its judgment of 2 June 2017, the Dutch Supreme Court corrected this opinion by deciding that in some situations there may be an advisory right for the Works Council.

The Supreme Court considers that, in principle, the advisory right does not refer to decisions on the sale of goods and decisions to dismiss employees in the event of bankruptcy, even if this results in the liquidation of the company's business. However, if on the other hand, there is an intended relaunch of (parts of) the company and it is foreseeable that jobs can be maintained, the receiver needs to consult the Works Council beforehand.

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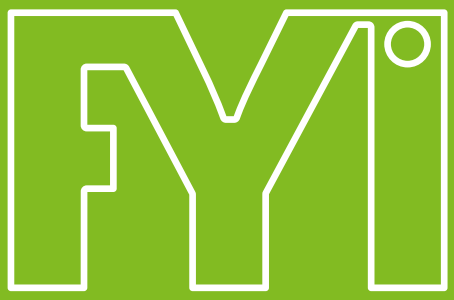

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