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Labour & Employment Law

NEWS

Measures taken by the Italian Authorities to Face the COVID-19 Pandemic in the Workplace

and further information from the Labour & Employment Law environment

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Editorial

Dear members

With COVID-19 impacting businesses and consumers, many pressing legal questions are raised. This newsletter examines the legislation and its consequences in several countries, bringing together contributions from our respected Practice Group members in Italy, Germany, Australia, and from Russia back to the Netherlands. Topics including how to deal with COVID-19 in relation to a safe return to the working environment, as well as the possibilities for cost-saving measures by optimising staff are dealt with in a clear and concise manner.

But it is not only corona that is ringing the bell. In the meantime, gender discrimination questions for the LGBTQ have been clarified by the US Supreme Court and the Court of Appeal for Ontario has ruled about the consequences of the unenforceability of any part of the employer's termination scheme.

Hopefully, you will enjoy reading this newsletter and, should you have any queries left as to the content of their contributions, please do not hesitate to contact the authors. They are happy to help you along!

Kind regards,

Jeffrey L. R. Kenens
Global Chairperson of the
GGI Labour & Employment Law
Practice Group

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Measures taken by the Italian Authorities to Face the COVID-19 Pandemic in the Workplace

By Sara Mandelli and Ilaria Ballabeni

Since March 2020, the Italian Government, through a sequence of Law Decrees (02 March 2020 and 19 May 2020), introduced several urgent support measures for families, workers, and companies seriously affected by the COVID-19 pandemic.

Specifically, the most relevant measures implemented in the field of labour law are briefly summarised below:

Prohibition of redundancies

All companies, regardless of the number of employees, are forbidden to make redundancies for economic reasons.

Right to smart working

Parents with children up to 14 years of age have the right to ask for such a measure, subject to two limitations: a) there must not be another parent in the household who benefits from other income support measures; b) there must not be a non-working parent in the household.

GGI member firm
Baldi & Partners
Avvocati e Commercialisti
Advisory, Auditing & Accounting, Fiduciary & Estate Planning, Law Firm Services, Tax
Reggio Emilia, Italy
T: +39 0522 271 220
W: baldiandpartners.it
Sara Mandelli
E: sara.mandelli@baldiandpartners.it
Ilaria Ballabeni
E: ilaria.ballabeni@baldiandpartners.it

Baldi & Partners was born from the merger between two GGI member firms: Studio Baldi (Tax & Accounting) and Studio Legale Baldi (Legal). It is a multidisciplinary professional firm specialised in legal, tax consulting, audit and accounting, and further advisory services. Its sister company, Baldi Finance, extends the array of offered services to corporate finance.

Sara Mandelli, an Italian Senior Lawyer, has been a partner at Baldi & Partners Avvocati e Commercialisti since 2018. She advises within the labour, corporate compliance, and litigation areas.

Ilaria Ballabeni, an Italian Junior Lawyer, has been part of the Baldi & Partners Avvocati e Commercialisti staff since 2014. She advises within the international corporate, commercial, and labour areas. In 2015, she took part in a GGI Staff Exchange Programme at McCabe Curwood, Sydney.

Sara Mandelli

Ilaria Ballabeni

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AVVOCATI E COMMERCIALISTI

Extension of social security cushions

The Decrees provide for simplified procedures to apply for the Ordinary (for companies having more than 15 employees) and Extraordinary payroll subsidies. The term for the salary integration measure, by means of the Italian Law Decree of 16 March 2020

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(Decreto Cura Italia), was set at nine weeks maximum from 23 February 2020 to 31 August 2020, and then, with the Italian Law Decree of 19 May 2020 (Decreto Rilancio), extended for an additional nine weeks, until 31 October 2020. In compliance with this simplification measure, among others, electronic information, consultation, and joint examination procedures with the trade unions are permitted and all workers are allowed access to the extraordinary payroll subsidies, as the seniority of service requirement of 90 days is temporarily not applied.

Parental leave

Parents and foster parents with children up to 12 years of age or of any age if disabled, have the faculty to be absent from work for a maximum of 30 days with the right to 50% of their wage. The same right is granted to parents with children between 12 and 16 years of age, but with no wage, and the provisions are also applied in case of adopted children or children in temporary foster care.

Babysitter bonus for families

As an alternative to parental leave, families may apply for the "babysitter bonus", now increased from EUR 600 to EUR 1,200. This budget could also be spent on childcare summer camps and supplementary childcare services.

Caregivers bonus

A bonus of EUR 500 per month for April and May 2020 has been granted to housemaids, caregivers, and babysitters who, as of 23 February 2020, had one or more employment contracts for a total time of more than ten hours per week, provided that they do not live with their employer.

Quarantine

In case of quarantine, the period spent by private workers under active health monitoring measures is treated as sick leave, for compensation purposes, and is not counted for sick grace period purposes (i.e., the time during which the worker, even though absent from work, has the right to keep the job, and after which, the worker may be dismissed).

Safety measures in the workplace

On 14 March 2020, the Italian Government signed a Protocol with the Trade Unions, updated on 24 April 2020, on the safety measures to be taken in the workplace to prevent the spread of COVID-19.

It is worth noting that the measures taken by the Italian Government to address the COVID-19 emergency are continuously evolving. Indeed, on 07 August 2020, the Prime Minister approved the Decreto Agosto, providing for several further actions to control the spread of the pandemic and supporting measures, including, a) a further extension of the social security cushions for 18 weeks, and b) the extension of the full prohibition to dismiss for companies benefitting from payroll subsidies (ordinary or extraordinary).

Does the COVID-19 Pandemic Extend a Trial Period under German Labour Law?

By Pascal Verma

Before employers commit themselves permanently to an employee, they are usually interested in testing the employee's performance and reliability. This interest is realised by the waiting period, which must be fulfilled in order for the Dismissal Protection Act to apply. It leads to a legally required trial period of six months. During the trial period, the employer can terminate the employment contract without giving reasons.

Due to the coronavirus pandemic and the introduction of short-term work, many employees have not worked under regular conditions for weeks. As a result, employers were unable to use the trial period to check whether they were pleased enough with the employee's performance and reliability that they wished to continue the employment contract

after the trial period. Since the Dismissal Protection Act is mandatory law, the waiting period cannot simply be extended by contract.

However, since case law has also recognised in individual cases that an extension is appropriate, it has approved a legal structure which can be used to extend the trial period.

The parties to the employment contract can agree on a termination contract with a termination date that comes after the end of the regular notice period. The trial period is then extended by the period between the regular termination date and the termination date after the extended period. If the employer does not want to continue the employment contract after the extended trial period, the employment relationship ends on the date specified in the termination contract. Otherwise, the parties may annul the termination contract.

It is imperative that the termination contract be concluded during the waiting period. Furthermore, the extended trial period must remain moderate. The Federal Labour Court accepted four months. Furthermore, the termination contract must be concluded in particular against the background that the employee has not yet proved himself sufficiently and the employer therefore intends to terminate the contract during the trial period. The employer must intend and promise to reinstate the employee if he meets the expectations during the extended trial period. This should be expressed in the preamble of the termination contract.

GGI member firm
nbs partners
Auditing & Accounting, Tax,
Law Firm Services
Hamburg, Germany
T: +49 40 44 19 60 01
W: nbs-partners.de
Pascal Verma
E: verma@nbs-partners.de

nbs partners is a multidisciplinary association of certified public accountants, lawyers and certified tax advisors with a focus on the audit and advisory of small, mid-size, and large entities, as well as international groups and high-net-worth individuals.

Pascal Verma is an Attorney-at-Law specialising in labour law and

Pascal Verma

Partner of the law firm nbs partners in Hamburg. He specialises in advising employers on labour law and companies on data protection law.

nbs partners

US Supreme Court Decision Clarifies Gender Discrimination Question for the LGBTQ Community

By D. Beth Langley

On 15 June 2020, the United States Supreme Court in a 6–3 decision issued a landmark ruling, Title VII of the Civil Rights Act of 1964, that, by its plain language, prohibits discrimination against lesbian, gay, bi, trans, and intersex (LGBTQ) individuals.

The ruling comes out of the hearing of three separate cases by the Supreme Court on 08 October 2019. Each case started similarly:

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Long-time employees were fired after revealing to their employer, or the employer learning, that the employee was gay or transgender. In *Zarda v. Altitude Express Inc.,* Donald Zarda worked as a skydiving instructor for Altitude Express for several seasons. He was fired shortly after disclosing he is gay. The Second Circuit Court of Appeals concluded that discrimination on the basis of sexual orientation violates Title VII.

The second case, *Bostock v. Clayton County,* involved Gerald Bostock, who worked as a child welfare services coordinator in Clayton County for a decade. Not long after Bostock began participating in a gay recreational softball league, influential members of the community allegedly began making comments about his sexual orientation. He was fired for conduct "unbecoming" a county employee.

The third case, *Stephens v. R.G. & G.R. Harris Funeral Homes, Inc.,* involved a transgender and transitioning employee, Aimee Stephens, who presented as a male when she began working at a funeral home. Six years later, she was diagnosed with gender dysphoria and her doctors recommended she begin living as a woman. When she explained her diagnosis to the funeral homeowner, she was fired. The funeral home's defences included an argument that Title VII did not protect transgender, and that Stephens' claims were barred by the Religious Freedom Restoration Act due to the religious beliefs of the funeral home's owner. The Sixth Circuit Court of Appeals ruled against the funeral home on both issues. Only the Title VII issue was before the Supreme Court.

GGI member firm
Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Law Firm Services
Raleigh (NC), Greensboro (NC), Wilmington (NC), USA
T: +1 336 373 8850
W: brookspierce.com
D. Beth Langley
E: blangley@brookspierce.com

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP is a full-service corporate law firm providing innovative and comprehensive legal services to businesses, organisations, and individuals worldwide.

D. Beth Langley is a Partner in the firm's Greensboro office with over 25 years of experience counselling employers of all sizes in a wide range of employment law issues and in employment litigation involving civil rights, non-competition agreements, and trade-secret protection.

BROOKS PIERCE

Navigating the Return to the Workplace in the Aftermath of COVID-19

By Nicola Martin and Liliana Freeman

After some months of remote working during the pandemic, many employees in Australia have started their transition back to the workplace. This is presenting challenges for employers as they navigate balancing health-and-safety obligations, maintaining productivity, and preserving morale.

Under health-and-safety legislation, employers have a duty to ensure, as far as reasonably practicable, a safe work environment. At a minimum, they are expected to follow government directions and recommendations. This would likely involve developing a "COVIDSafe" plan, which accounts for physical distancing, cleaning, and other safety measures.

However, even with such measures, some employees are hesitant to return to the office. Many have enjoyed remote working. It has allowed them to spend less time commuting, and more time on personal interests. This has resulted in an increase in employees making flexible work requests, with some asking to remain working from home on a permanent basis. Traditionally, under the Fair Work Act, an employee may make a flexible work request if they meet certain criteria, including if the employee is a parent of a young child, is a carer, has a disability, or is over the age of 55. An employer may only refuse this type of flexible work request if there are "reasonable business grounds". Given how many workplaces have quickly adapted to remote working, employers may find it increasingly difficult to justify declining such a request.

While some organisations have reported a decrease in productivity in remote working, employers should consider strategies for managing performance rather than issuing blanket directives for a return to the workplace. In Australia, the risk of a COVID-19 outbreak remains a concern for many employees, particularly those in high-risk categories. Employers therefore need to remain adaptable and agile in managing their operational needs while managing employees' individual circumstances.

GGI member firm
McCabe Curwood
Law Firm Services
Sydney, Australia
T: +61 2 9265 3249
W: mccabecurwood.com.au
Nicola Martin
E: nicola.martin@mccabecurwood.com.au
Liliana Freeman
E: liliana.freeman@mccabecurwood.com.au

Nicola Martin

Liliana Freeman

McCabe Curwood is a multi-disciplinary law firm. With a focus on technical excellence, McCabe Curwood provides astute and commercial legal solutions for its clients. By emphasising technical excellence and commitment to quality, McCabe Curwood offers commercially relevant legal solutions tailored to the current and future business objectives of its clients. McCabe Curwood distinguishes itself from other legal service providers by offering legal services that focus on the client's needs.

Nicola Martin is a highly experienced Employment Lawyer who heads the Employment Team at McCabe Curwood. Nicola provides a full service of employment relations, industrial relations, and HR advice to her clients, both in contentious and non-contentious matters.

Liliana Freeman is a Lawyer in the Employment Group at McCabe Curwood. She advises on a range of contentious and non-contentious employment and industrial law matters.

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Business Reorganisation and Collective Dismissal under Dutch Law

By Paulien van der Grinten

The coronavirus crisis has forced many companies to reduce costs. Such cost reductions can often only be effected by a reorganisation, which may lead to (collective) redundancies. To have a legally valid reorganisation in the Netherlands, there are several steps to take.

First, in the case of collective dismissal (20 or more employees within a time frame of three months) the Collective Redundancy Notification Act (Wet Melding Collectief Ontslag) is applicable. According to this act, the trade unions should be notified and consulted, and the dismissal should be reported to the Employee Insurance Agency (UWV). Second, the employer should verify whether its Works Council, if any (required in companies with 50 or more employees), has the right to advise.

Third, the employer has to establish which positions become redundant in accordance with the reflection principle (afspiegelingsbeginsel). In essence, this means the selection of employees is determined by a formula that acts to balance the scales. It targets different groups or categories of employees, for example the age of employees, so the representation of age groups in the company remains more or less the same.

After that, the employer needs to submit an application for dismissal to UWV to terminate the employment agreements. UWV investigates the

reasons for the requested termination of the employment agreements.

If there are sufficient grounds for termination, the approval (permit) by UWV will be granted and notice to terminate the employment agreement can be given.

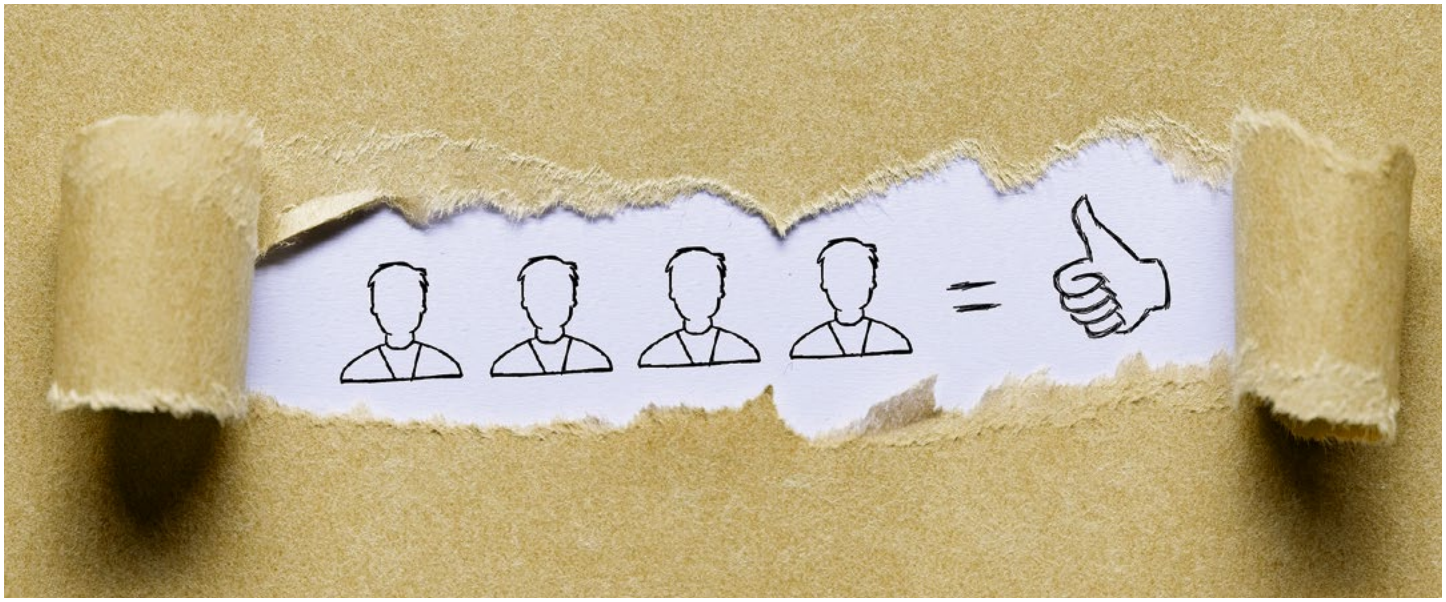
As this is a time-consuming and sometimes risky procedure, it is very common that the employer instead takes the initiative first to terminate the employment agreement by mutual consent based on a Social Plan which, if trade unions are involved, has been negotiated by them and the Works Council. In such a Social Plan, the social and financial consequences for the employees are arranged (severance payment, termination date, notice period, outplacement, redeployment, etc). In this way, a business reorganisation can be arranged quite quickly and smoothly.

GGI member firm
TeekensKarstens advocaten notarissen
Law Firm Services
Alphen aan den Rijn, Amsterdam,
Leiden, The Netherlands
T: +31 71 535 80 00
W: tk.nl
Paulien van der Grinten
E: vandergrinten@tk.nl

TeekensKarstens advocaten notarissen (TK) is a full-service Dutch law firm with extensive experience in the field of international law. TK established specific international teams to provide international clients tailor-made services and information.

Paulien van der Grinten

Paulien van der Grinten is an Attorney-at-Law at TK and part of the international Corporate Employment Law team.



Staff Optimisation During the Pandemic in Russia

By Roman Makarov

The 2020 crisis is characterised by a dramatic fall in both supply and demand. This has resulted in our customers looking to lower their costs drastically. Clients are looking to optimise their personnel. At the same time, anti-crisis legislation banned the dismissal of people in Russia last spring. We advise the following:

1. Development of the employer's local regulations on:
    a. Transition to a part-time working week;
    b. Transition to a part-time working day;
    c. Optimisation of expenses for social package and benefits;
    d. Sending staff on leave without pay;
    e. Transition to remote work.
2. Refusal of outsourcing services.
3. Refusal of freelancers and other persons working under civil law contracts (without benefits established by labour law).
4. Participation in negotiations on the employer's side to reduce the wage fund:

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GGI member firm
Nektorov, Saveliev & Partners
Law Firm Services
Moscow, Russia
T: +7 495 646 81 76
W: nsplaw.com
Roman Makarov
E: roman.makarov@nsplaw.com

Nektorov, Saveliev & Partners is a law firm established in 2006 in Moscow, Russia, focussed on providing comprehensive legal solutions to corporate and private clients under Russian and English law. Their main practice areas are public-private partnership, tax, corporate and M&A, arbitration and litigation, banking and finance, investments, and real estate. They provide legal support to clients in Russia, CIS countries (Belarus, Kazakhstan, Ukraine), and worldwide.

Roman Makarov is a Partner of Nektorov, Saveliev & Partners, specialising in dispute settlement and complex bankruptcy cases. Roman develops strategies and tactics of legal defence in court.

Roman Makarov

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a. Without reducing the number of staff;

b. By reducing the number of staff.

The most popular measure was self-isolation at home. An urgent and painless transition of employees to work from home in a pandemic implies amendment to the labour contract. We drafted additional agreements to labour contracts describing:

1. Additional responsibilities of employees for remote communication;
2. Providing conditions for work in the home office format (compensation for paper, ink, other consumables);
3. Rules for setting tasks for remote employees;
4. Tools for monitoring remote employees;
5. Conditions for using the employer's inventory (printers, etc.);
6. Liability for failure to fulfil such responsibilities.

The main way to fire employees without any risks for the employer was dismissal by agreement of the parties with the payment of fair compensation (in Russia, traditionally, this is four to six months' salaries on average).

As of August 2020, all quarantine measures for remote work and the prohibition on dismissals have been cancelled, but there is still a possibility of re-introduction if the epidemiological situation worsens.

OSHA Releases Guidance on Returning to Work

By Kelly Holden

The Occupational Safety and Health Administration (OSHA) released a publication entitled "Guidance on Returning to Work" on 17 June 2020. The publication offers guidelines on flexible workplaces, remote work, hygiene, social distancing, and other measures addressed by individual states and the Centers for Disease Control (CDC).

The guide contains relevant information that was previously issued by other agencies. However, it does clarify that if employers are keeping records of health screening or temperature checks, they may qualify as medical records under the Access to Employee Exposure and Medical Records standard (29 CFR 1910.1020).

This standard requires that employers retain these records for the duration of the employee's employment, plus 30 years. However, temperature records do not qualify as medical records unless maintained by a physician, nurse, or other health care personnel or technician.

OSHA's Guidance on Returning to Work can be found here.

GGI member firm
DBL Law
Law Firm Services
Cincinnati (OH), Crestview Hills (KY), Louisville (KY), USA
T: +1 859 341 1881
W: dbllaw.com
Kelly Holden
E: kholden@dbllaw.com

Kelly Holden

Dressman, Benzinger LaVelle psc (DBL Law) provides a complete range of services to meet legal needs in a wide variety of industries. With cross-industry collaboration, DBL Law attorneys offer comprehensive service on complex matters that transcend simple categorisation in many areas of law.

Kelly Holden heads DBL Law's Employment Law practice, representing private and public employers in employment-law matters. Kelly advises clients and conducts training on employment compliance, including drafting of employment and non-compete agreements, employee handbooks, and employment policies.

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Dressman Benzinger LaVelle psc

Enforceability of Termination Clauses and the Latest Blow to Employers in Ontario, Canada

Waksdale v. Swegon North America Inc.

By Marty Rabinovitch

Termination clauses are often relied upon by Canadian employers to define an employee's entitlement to notice when their employment is terminated without cause (i.e., without a valid legal reason). These clauses are often drafted to limit an employee's entitlement to their minimum statutory entitlements, which are significantly less than their common law entitlement. If the termination clause is unenforceable, then the common law will apply.

The Canadian courts, in particular the courts in the province of Ontario, generally dislike termination clauses which seek to limit an employee's termination entitlement to the statutory minimums. If a termination provision is ambiguous or provides the employee with less than their entitlements under employment standards legislation, then the clause will be unenforceable, and the employee will receive reasonable notice at common law.

In June 2020, the Court of Appeal for Ontario in *Waksdale v. Swegon North America Inc.* determined that if any part of the employer's termination scheme is unenforceable, then the entire termination scheme will be void and the common law will apply. Previously, the courts had held that only the offending portion(s) would be unenforceable, while the remaining separate and distinct provisions would remain in force. For example, if the employer's termination for just cause (with a valid legal reason) provisions are found to be unenforceable, then the termination without cause provisions would also be unenforceable, even if the without-cause provisions would have otherwise been enforceable on their own, and even if the employee was terminated without cause.

It is therefore especially important for Canadian employers to consult with a lawyer to determine whether their current termination language should be amended to ensure that it is compliant with the *Waksdale* decision.

GGI member firm
Devry Smith Frank LLP
Law Firm Services
Toronto, Canada
T: +1 416 449 1400
W: devrylaw.ca
Marty Rabinovitch
E: marty.rabinovitch@devrylaw.ca

Marty Rabinovitch

Devry Smith Frank LLP (DSF) is a full-service law firm based in Toronto, Canada. DSF provides professional and affordable client-tailored service.

Marty Rabinovitch is a Partner and Head of the Employment Law Group at Devry Smith Frank LLP. His practice focuses on representing employers with respect to issues which arise in the workplace. Marty has extensive employment litigation experience and provides legal services to both English- and French-speaking employers.

DSF DEVRY SMITH FRANK LLP
Lawyers & Mediators

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Contacts

GGI | Geneva Group International AG
Schaffhauserstrasse 550
8052 Zurich, Switzerland
T: +41 44 256 18 18
E: info@ggi.com
W: ggi.com
W: ggiforum.com

Let us know what you think about FYI – Labour & Employment Law News, we welcome your feedback. If you wish to be removed from the mailing list, please email info@ggi.com.

Responsible Editor in charge of Labour & Employment Law content:
Jeffrey L. R. Kenens
Global Chairperson of the GGI Labour & Employment Law Practice Group
E: kenens@tk.nl

GGI member firm
TeekensKarstens advocaten notarissen
Law Firm Services
Vondellaan 51
2332 AA Leiden
The Netherlands
T: +31 71 535 80 00
F: +31 71 535 80 01
W: tk.nl