

Chapter 3

SOCIAL MEDIA AND INTERNATIONAL EMPLOYMENT

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I INTRODUCTION

The early part of the 21st century has been characterised by the rapid proliferation of mobile devices and social media platforms. In May 2012, for example, the number of smartphones actively in use worldwide topped 1 billion, and Apple recently announced that it sold 9 million new iPhones during the first weekend after the release of the new 5c and 5s models in September 2013. Along the same lines, Facebook, arguably the most popular form of social media, announced on 14 September 2012, that it had reached 1 billion monthly active users, 600 million of whom access the site on mobile devices. Google+ and Twitter also each have more than 200 million monthly active users, and LinkedIn is estimated to have 160 million active users. In China, the popular social media networks Sina Weibo and Tencent Weibo have 287 million and 277 million active users, respectively. And Orkut, a popular social networking site in India and Brazil, has 33 million active users.

The message of these statistics is that mobile devices and social media are a ubiquitous part of everyday life on a global scale, including in the workplace, and becoming increasingly so.

For example, company work is increasingly being conducted on employees' personal mobile devices. Even when there are no formal policies permitting or addressing it, employees already are using their personal devices for work purposes by using workarounds such as forwarding work e-mails to personal e-mail accounts, taking conference calls from personal smartphones and using the calendar features of their personal devices to track both business and personal appointments. Accordingly, prudent employers are left with little choice but to embrace this trend and put into place

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policies and limitations that will prevent the employer from being caught flat-footed in a situation in which it needs to access, review or delete company information on an employee's personal device.

Such policies, if well-crafted, can also offer significant benefits for both employers and employees. For employees, these types of policies are desirable because they cut back on the number of devices that employees must tote around and check and also allow employees to choose which device and/or operating system is most comfortable for them. Such policies can also result in cost savings for the employee if the employer provides a technology allowance or covers a portion of the service costs for the employee's use of a personal device for work purposes. Employers also can realise significant savings as the costs of providing a technology allowance or paying a portion of service costs are likely to be significantly less than the hardware and service costs of providing a separate company-issued device. Moreover, as employees – and especially young employees – increasingly cite workplace flexibility and other similar 'intangible' benefits as key in their assessment of a company's desirability as an employer, any efforts that companies can make to give them an edge in this regard will be beneficial.

Social media similarly affects every aspect of the employment lifecycle: recruitment, potential bullying and harassment, productivity levels, potential discrimination, the protection of confidential information, trade secrets and IP, an employee's rights to a private life and freedom of expression, reputational issues for all parties, legal and regulatory obligations, defamation, privacy considerations, termination and even post-termination.

Accordingly, the key question for global employers is what policy and approach should be used to leverage the benefits and address the challenges posed by these new technologies in the workplace.

II RECRUITMENT

Employers must determine, for example, the extent to which social media will play a role in employee recruiting efforts. Throughout the world, most employers require some form of background information on candidates for employment. In some jurisdictions, like the United Kingdom, employers generally rely upon a reference provided by a former employer. In others, such as the United States and China, employers typically require a thorough background check carried out by a third-party provider. In addition to these formal mechanisms, however, employers also occasionally seek to gather information through informal channels. While some employers and those involved in recruitment still gather anecdotal information about candidates through 'word of mouth', there is now the greater temptation of reviewing the candidate's online profile and information posted on social networking sites and the internet. Information on these sites and the internet is very difficult to take down so tagged pictures taken from a drunken night out could follow a candidate throughout his or her career. While the result of this information permanence is a potential treasure trove of information for employers considering applicants for employment, there is widespread debate – as evidenced, for

example, by the debate across the EU in recent years over the ‘right to be forgotten’² – over whether this information should be reviewed and considered by employers during the recruitment process. And this debate is reflected in the widely varying laws on this topic throughout the world.

On the one hand are countries like China in which there currently are no laws or regulations prohibiting employers from using publicly available information from social media sites as background information on an employment candidate. The general view is that if an employee exposes his or her personal information publicly on social media networks, this is viewed as the problem of the employee and not a public policy issue. And in France, as long as information on a candidate is deemed public (i.e., as long as it is not published on spaces with access restricted to preselected ‘friends’ or ‘followers’) and the collection of information does not involve the violation of the right to private correspondence or privacy, then potential employers, and any third parties (including recruitment agencies) are entitled to look at such information. The candidate must, however, be informed of the social media-based data collection process.

On the other hand, a number of jurisdictions have put into place regulations that limit an employer’s ability to review a candidate’s social networking sites during recruitment, or are in the process of so doing. In Germany, for example, employers may not obtain any information from social media sites to answer questions that they would not have been permitted to ask of a candidate directly. Moreover, the comprehensive draft Data Protection Law, which has not been formally adopted but does carry some persuasive weight with courts and other authorities, regulates in detail what is permitted or prohibited in the field of employee data arising from social media. In particular, the current draft law provides that the employer may not conduct background checks by using data obtained from social networking sites such as Facebook and StayFriends. Only purely business-focused networks such as Xing or LinkedIn may be used for such research provided the employer informs the employee about this in the job advertisement. In addition, employee data should be acquired only directly from the employee; the employer is not allowed to collect any information on a severe disability or equal treatment; and the employer may only solicit information from the previous employer if it has the consent of the candidate. Similarly, in the UK, employers must be familiar with the UK Information Commissioner’s (ICO) Employment Practices Code and the Employment Practices Code Supplementary Guidance. The ICO recommends that an employer only seek personal information on a candidate if it is relevant to the job decision being made and that it views the gathering of such information as a form of vetting. Further guidance also is available from the UK’s Advisory, Conciliation and Arbitration Service in its fact sheet on the use of social networking in recruitment. A failure by an employer to comply with these laws or guidance may result in the employer facing an employment tribunal claim, an action for damages or a complaint to the ICO.

2 EU Justice Commissioner Viviane Reding speaking in November 2011 stated that individuals would have a right to force organisations to delete personal data they store about them. This new proposed right is set out in Section 3 of the draft regulation to revise the EU Data Protection Directive announced in January 2012.

III BRING YOUR OWN DEVICE

Once employees have been hired, employers must have in place policies to guide and manage employees' use of technology in the workplace. As mentioned above, 'bring your own device' (BYOD) programmes in particular can raise thorny issues for employers, despite their many obvious benefits for both employers and employees. For example, there are a number of scenarios in which an employer will want to be able to access, review or even delete data and other information on a device. For example, in conducting an internal investigation, an employer may need to review an employee's work-related e-mails or text messages. An employer might also be obliged to produce such information in a litigation or government investigation. The device could also include confidential business information or trade secrets that would need to be protected, particularly if the employee resigns or the device is lost or stolen. Accordingly, in enacting mobile device management policies, employers seek to ensure that their data, trade secrets and other proprietary information are secure and accessible to the company, even when residing on an employee's personally owned device. Because of these concerns, companies generally seek to craft policies that limit to the greatest degree possible their employees' expectation of privacy with respect to activity conducted and data stored on a mobile device. Employees, by contrast, expect a certain degree of privacy with respect to their use of mobile devices, and, particularly, their personal information stored on personally owned devices, and, especially outside the United States, that expectation of privacy often is protected by the law.

Specifically, the privacy and data protection laws of many jurisdictions place limitations on a company's ability to access information on an employee's mobile device (especially when that device is owned by the employee and therefore assumed to contain non-work-related personal information).

Some countries are particularly restrictive. In Brazil, for example, accessing or deleting any personal information of an employee will be problematic, even if the company issues a clear and specific policy that indicates that it may do so, and obtaining an employee's consent to such a policy is unlikely to bring such access within the bounds of the law. Similarly, in Germany and the Netherlands monitoring, accessing or deleting personal information on an employee's mobile device (whether company-issued or personally owned) is permissible only if there is circumstantial evidence that an employee engaged in serious misconduct, such as fraud, sexual harassment or disclosure of the company's confidential information and there are no less intrusive methods to achieve the company's legitimate business objectives. Moreover, in Germany, accessing the personal information of a third party (such as a family member or non-business acquaintance of the employee) on an employee's mobile device without such third party's consent could violate German data protection, telecommunication and even criminal laws. Because it would be nearly impossible to avoid this on an employee's personally owned device, companies should access such devices only in severe cases where there is no other viable means available to achieve the company's purpose in accessing the information. Finally, in many European countries, an employer that wishes to implement a mobile device or BYOD policy will need to inform and consult with the works council before doing so.

By contrast, in India and Mexico, employers have more flexibility provided that they are transparent with employees about the terms of their mobile device management policy and offer employees a choice about the degree of access that the company will

have to employee personal information. If an employee refuses to consent to the terms of a BYOD policy, or later withdraws his consent, the company should work with the employee to ensure that all company information is deleted from the employee's personal device, and the employee should from then on be required only to work from a company-issued device (and not to conduct personal business or store personal information on such device). In light of this BYOD-only policies can be particularly problematic because they do not offer employees a real choice as to whether or not to consent to the processing of their personal information.

IV DISCIPLINE AND TERMINATION

The lawful grounds for termination of employment will vary between jurisdictions depending upon the local definitions of gross misconduct, cause or personal reasons. Again, social media sites and mobile devices are increasingly playing a role in this key stage of the employment relationship. The central issue for most employers is whether they can terminate the employee for postings made on social media sites about their employer, colleagues, products or customers. These types of situations are arising with increasing frequency as participation in social networking becomes more widespread.

For example, in an unreported case from China, which hit the press in December 2012, an air stewardess lost her labour arbitration claim against the airline from which she was dismissed following an internal investigation after it was discovered that she had posted negative comments on her employer's official Weibo page deriding the airline's public announcement about improvements to its food service. The labour arbitrator upheld the company's dismissal on the grounds that her comments had greatly damaged the company's reputation.

The answer to whether employees can be terminated for such behaviour, arguably, is yes, if such postings constitute behavior that would be actionable if it took place in the 'real' (offline) world: bullying and harassment; discrimination; defamation; or breach of confidential information, trade secrets or intellectual property. But, the employer still needs to consider factors such as whether the postings are made during work time and from work equipment, what circumstances led to the posting, whether the company has a policy prohibiting the relevant conduct and whether it has tangible evidence of the breach or violation. Case law is indicating that the blanket justification for dismissal of bringing the employer's business or name into disrepute is not proving a reliable catch-all. Once again, however, there is fairly wide variation among jurisdictions as to what type of behaviour will be found to be actionable.

In many jurisdictions, the degree to which an employer can discipline or terminate an employee on account of the employee's use (or misuse) of technology will depend on the policies that are already in place. In Germany, for example, an employer's ability to use employee data obtained from social media with respect to a termination depends on the employer's policy on internet use in the workplace. Along the same lines, in China, whether an employer can justify a termination based upon comments posted on social networking sites turns on whether the act in question can be seen as a material violation of work rules set by the employer.

Other jurisdictions give broader rights to employers, though generally at least some restrictions exist. In the US, for example, employers are permitted to rely upon

information obtained from social media sites such as Facebook and Twitter to terminate its employees, subject to certain limitations, but the use of the data in employment decisions increases the risk of employment litigation. The National Labor Relations Act, for example, covers certain social media activity of non-supervisory employees where such activity constitutes concerted activity for collective bargaining or ‘other mutual aid or protection’. This means that if a non-supervisory employee posts a workplace complaint on a social media site to encourage other employees to take a stand against a workplace policy or if other non-supervisory employees comment on the post, the employer likely would be prohibited from terminating or taking other adverse action against such employees based on their posts, even if the posts were critical of the employer. Employers also are prohibited under federal law and the law of several states from demanding that their employees or job applicants turn over their social media passwords to their employer, and a number of other states are considering legislation banning such employer requests. In the UK, an employer is permitted to rely upon evidence from social networking sites when it terminates employees even if such conduct takes place outside of work hours and on personal equipment. The key to the successful use of such evidence by the employer is whether the evidence amounts to gross or serious misconduct that justifies the employer’s decision to terminate the employment relationship.

V RECOMMENDATIONS

With respect to both mobile device and social media management, advance planning is the best form of defence. Prudent companies will work to put policies into place that will best position them when difficult situations arise.

With respect to social media, companies should consider the following:

- a* determining as a matter of principle if personal use of social networking sites is permitted during work time or from work equipment and any rules on off-duty conduct. Consider whether certain sites can or should be blocked or if the employees can or should be expressly prohibited from mentioning their employer, place of work, customers and colleagues;
- b* considering as a matter of principle if business use of social media sites is permitted and set out clear examples of acceptable behaviour;
- c* encouraging employees to draw a distinction between their personal correspondence and usage and their working life;
- d* prohibiting the disclosure of confidential, business, client or personal information and trade secrets and making derogatory or defamatory comments; and
- e* prohibiting anonymous communications to ensure that there is no risk of employees being perceived to promote or comment on the employer’s products as well as to reduce the risk of bullying and harassment.

With respect to mobile device (including BYOD) policies, companies should consider the following:

- a* informing employees that there is no expectation of privacy with respect to company equipment, including their use of social media sites and notifying the

employee that the employer monitors employee use of social media sites, the internet and company equipment;³

- b* coordinating legal, human resources and IT colleagues and advisers to ensure that the policies and technology are consistent;
- c* providing transparent information to employees about how information on mobile devices (whether company-issued or personally owned) will be accessed, processed, reviewed, transferred, disclosed and deleted; and
- d* obtaining informed and uncoerced consent to the processing of personal information (recognising that BYOD-only policies may make obtaining uncoerced consent practically impossible).

Finally, in general, companies should:

- a* set out the sanctions for a violation or breach of the relevant policies and link these to any disciplinary rules, harassment and whistle-blowing policies;
- b* ensure that the policies are clear, up to date and well known and that reminders are circulated regularly;
- c* educate and train employees and managers on the policies; and
- d* ensure that the policies are enforced in a consistent manner.

If the employer already has a policy in place, in 2014 they must review it to ensure it is 'fit for purpose' bearing in mind developments in case law. Put simply, as technology develops, attitudes change and the global employer needs to be ahead of the game by ensuring its policies and documentation reflect those developments. For example, a small number of employers have taken the next step of revising employment contracts to tighten the definition of confidential information, specify ownership of LinkedIn contacts, place a duty on the employee to delete contacts on termination and provide when online activity will breach post-termination restrictions against solicitation and competition.

VI CONCLUSIONS

Global employers must deal with the issues set out above through their policies and employment documentation and be prepared for the additional challenges posed by local culture and changing social attitudes to technology, social media and privacy in relation to conduct in or outside of the workplace. Otherwise, multinational companies risk facing and potentially losing high-profile employment litigation that could damage both the reputation and value of the business.

³ In many jurisdictions, employees will, in fact, have an expectation of privacy with respect to their use of social media and mobile devices (even if such devices are owned by and provided to the employee by the employer), but having policies that clearly limit the employees' expectation of privacy will best position the company in the event that it wishes to access, review or delete information contained on a device or on social media.

Chapter 16

FRANCE

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I INTRODUCTION

There are two primary sources of French employment law: the French Labour Code and collective bargaining agreements. Collective bargaining agreements are written agreements concluded between union organisations and employer trade associations or individual employers to define the rules concerning employee working conditions, professional training, benefits and negotiating rights. The provisions of a collective bargaining agreement are applicable on a national, regional or local level. Such collective bargaining agreements, once extended nationally by the labour administration, may be binding upon an employer even if the latter has not participated in the negotiation or become a party.

The other sources of French employment law include company rules, employment agreements entered into with employees, trade usages, jurisprudential sources, as well as the international treaties to which France is a party.

The judicial enforcement of labour law is the primary responsibility of the labour courts. It is before these courts that an employer will almost always be initially sued by an employee for disputes arising out of the employment relationship. Each labour court is divided into five autonomous sections: the management section, the industry section, the commerce and commercial services section, the agriculture section and the diverse activities section. Labour court judges are not professional judges. They are laypersons elected to the various sections for five years by electoral colleges made up of employers and employees. A labour court claim is in principle heard first at a conciliation hearing, for the purpose of conciliating the parties' positions. The parties are then invited to attend a hearing on the merits if no conciliation has occurred. Decisions of the labour

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courts can be appealed to a court of appeal and then further appealed to the Supreme Court, which reviews rulings on questions of law only.

The administrative enforcement of French labour law is entrusted to the Ministry of Labour, which is represented by the regional and departmental directors of labour. The regional directors of labour responsible for the coordination of the national and regional labour administrations. The departmental directors of labour are responsible for overseeing the activities of certain governmental agencies such as the unemployment agencies and for supervising the labour inspectors. The role of labour inspectors is mainly to ensure observance of labour laws, regulations and applicable collective bargaining agreements within the companies.

II YEAR IN REVIEW

Legislative employment provisions adopted in recent years have been aimed at making the labour relations environment in France more flexible, notably by allowing various categories of employees to work in excess of the 35 hours per week working limitation.

A major employment law was adopted on 14 June 2013 and introduced significant changes relating notably to redundancy, consultation of employee representatives, statutes of limitation, professional mobility of employees, employee health-care benefits, etc.

The social plan, which must be implemented by any employer with at least 50 employees implementing a reduction in workforce of at least 10 employees within a period of 30 days must implement a job-saving scheme can be negotiated with relevant employee trade unions or drafted on a unilateral basis – but in both cases, the labour administration will have to validate or homologate the social plan in order for the redundancy to be effectively implemented.

The new regulations serve to set a defined and limited time frame in order for the works council to render its opinion when information and consultation of the works council is required; and limit situations where the works council could try to delay the rendering of its opinion. Employers will also have to provide the works council with a social and economic database containing specific information and documents (including financial information). This database shall be implemented before June 2014 for companies employing more than 300 employees and before June 2015 for other companies.

The statute of limitations applicable to claims relating to the performance or termination of an employment agreement has been reduced from five to two years and the statute of limitations applicable to any claim relating to the payment of remuneration has been reduced from five to three years.

Employers offering health-care benefits to executive-level employees or managers will have to offer the same health-care benefits to non-executive-level employees or non-managers as from January 2014. In addition, all employers will have to provide a health-care benefit scheme by January 2016 at the latest.

In the context of the global financial crisis and an increasing unemployment rate, another clear and recent trend in employment law before 2011 and again in the past year was to improve indemnification and benefits in the event of dismissal. Unemployment benefits have been increased for employees dismissed for economic reasons and

dismissed employees were granted the right to benefit from company health-care schemes for nine months following their dismissal. The debt crisis has also recently led the government to adopt several new social security regulations, notably to limit social security contribution exclusions applicable to termination packages as well as damages granted by labour courts to employees and to reduce the financial impact of favourable social security regimes applicable to certain payments made to employees (e.g., profit-sharing payments, pension-related payments). A pension reform act was adopted in 2010, which was presented as one of the necessary measures to reduce the deficit and caused a series of strikes and protests around the country. The main changes in the reform are the progressive increase of the minimum retirement age from 60 to 62 and the full state pension age from 65 to 67, which shall be fully achieved by 2023. Another pension reform passed at the end of 2013 will progressively extend the duration of the contribution period from 41.5 years up to 43 years in 2035 in order for an employee to be entitled to benefit from full pension scheme.

Finally, another clear trend in employment law over the past years was an increase in the employers' obligation to negotiate with union or employee representatives on various topics, including the employment of senior employees, working conditions and the equality between men and women at the workplace, with the enforcement of penalties in the event of non-compliance with these new regulations.

III SIGNIFICANT CASES

The recent rulings of the French Supreme Court described below highlight some of the issues discussed in this chapter.

On 30 April 2009, the Supreme Court ruled that an employer who awards discretionary bonuses to a category of employees must demonstrate with objectively justifiable reasons that its actions do not violate the principle of equal pay for equal work when an employee is denied a discretionary bonus. In a previous ruling dated 21 January 2009, the Supreme Court had ruled that compensation awarded to employees located in different locations of the same company must also comply with the equal pay for equal work principle, meaning that any differences must be justified by objective reasons assessed at the company level.

On 29 June 2011, the Supreme Court ruled that targets set forth in a variable compensation plan could not be enforced against an employee because the variable compensation plan was written in English only, whereas French employment law requires employment-related documents to be written in French. This employee was therefore in a position to obtain the payment of the maximum bonus amount even if said targets had not been achieved.

On the same date the Supreme Court also ruled that a manager's working time can be set out on an annual basis with a certain number of days to be worked (usually up to 218 working days per year), but this working time scheme, which was already subject to a collective bargaining agreement or company collective agreement being entered into in relation thereto and the formal consent of the employee, shall also be subject, under this recent ruling of the Supreme Court, to the absence of any working hours over the maximum daily and weekly working hours set forth at national and European level. This

ruling has been confirmed by the Supreme Court by a ruling dated 23 April 2013. This case law is a recent illustration of the importance for employers to effectively control the working hours of employees.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Labour law does not require that the parties to an employment relationship have a written employment contract *per se*. However, most collective bargaining agreements provide that employers must be provided a written agreement with particular terms.

EU Directive No. 91-533 of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship provides that an employee must be informed in writing of the following terms within two months of the hiring date:

- a* the identities of the parties;
- b* the place of work;
- c* the title, grade, nature or category of the work for which the employee is employed or a description of the work;
- d* the date of commencement of the employment relationship;
- e* the amount of paid leave to which the employee is entitled or the procedures for allocating and determining such leave;
- f* the length of the notice periods upon termination of the employment agreement;
- g* the compensation served to the employee;
- h* the working time; and
- i* the applicable collective bargaining agreements governing the employee's working conditions.

Applicable collective bargaining agreements usually provide that these terms must be provided in the employment agreement entered into before or when the employee is hired.

Although it is not required by law to enumerate an employee's tasks in an employment agreement, it is in the best interests of the employer to specify these tasks to provide a legal framework against which the performance of the employee may be evaluated.

Any written employment agreement must be written in French, although a foreign employee may request an additional translation of the employment agreement into his or her native language.

Parties may agree to amend or modify the terms of employment at any time, with the employee's approval required for such an amendment. A written employment agreement should be amended in writing. Temporary amendments to employment agreements should be handled carefully, however, as recent case law provides that the parties must enter into another amendment if they are to put an end to a temporary arrangement.

Fixed-term employment contracts may be entered into provided that it is for the performance of a specific and temporary task, it does not have as its purpose or

effect to permanently fill a position related to the usual and permanent activity of the company, and it is used mainly where the employee is hired to: replace an employee who is temporarily absent or whose employment contract has been suspended for a reason other than a labour dispute; respond to a temporary amount of work; do a job that is seasonal in nature; or do a job that is limited in duration by its nature or trade usages.

As a general rule, the term of a fixed-term employment contract must be specified at the time such contract is executed and its duration may in principle not exceed 18 months. Under specific circumstances, an engineer or executive-level employee may, however, be hired under a fixed-term employment contract for a specific project whose duration must be between 18 and 36 months.

ii Probationary periods

The employer and the employee may agree in the employment agreement that the employment contract will not become fully binding until the expiration of a probationary period. During such period, the normal laws governing the termination of the employment relationship do not apply and either party may unilaterally end the employment, subject to notice period applicable to the duration of the probationary period required by law. The duration of the probationary period must be provided in the employment agreement in accordance with the maximum duration set forth by French law and subject to the applicable collective bargaining agreement.

The maximum duration of the probationary period, subject to the application of more favourable provisions in an applicable collective bargaining agreement, is two months for staff, three months for intermediate-level employees, and four months for management-level employees. The probationary period can be renewed once only if the employment agreement or the offer letter states that the probationary period is renewable and with the employee's consent. The conditions of such renewal must also be defined by a collective bargaining agreement applicable at the level of a specific branch of activity or profession.

iii Establishing a presence

Even if an undertaking has no fixed place of business in France, when it has an employee that is subject to the French social security system, that undertaking must declare its employer status with the French social security agency (URSSAF) of the Bas-Rhin region. This institution then transmits the information to the other relevant statutory social security institutions with whom the undertaking must also be registered. Normally, such an undertaking must have a formal business presence to register.

Employers can, however, appoint a single representative for social security purposes by written agreement, provided that the person resides in France. The representative agrees to carry out all the company's social obligations regarding payment and declarations.

The employer must pay social security, unemployment and pension contributions for employees who are subject to the French system. Such contributions include employer social contributions (up to approximately 45 per cent of the gross compensation) and employee social contributions (up to approximately 20 per cent of the gross compensation). Employee social contributions are paid by the employer on behalf of

the employee and are therefore withheld by the employer from the employee's monthly gross compensation. An employer does not withhold or remit personal income taxes for employees.

Foreign companies may use temporary workers engaged through a temporary or manpower agency, although such use is permitted only in limited circumstances and is likely to be considered as establishing a business presence.

A foreign company that is not officially registered in France can engage an independent contractor. Independent contractors do not qualify as employees under French law and are therefore not subject to the French labour and social security law applicable to employees. As long as the independent contractor does not work exclusively for the foreign company in a state of subordination (according to the standards under French law), an independent contractor is a third-party service provider, and not an employee. The independent contractor would otherwise be in a position to claim that he should actually qualify as an employee.

When subordinated to a foreign company, within the meaning of tax case law, an independent contractor is deemed to constitute a permanent establishment (i.e., a fixed place of business in France through which the business of the foreign company is wholly or partly carried on). Should a foreign company have a permanent establishment in France, such company would have the same obligations as the French companies to register and pay taxes in France.

V RESTRICTIVE COVENANTS

French law allows for the employer to include non-compete clauses in employment contracts.

During employment, the employment contract may provide that the employee must work exclusively for the company, unless the employee is only offered a part-time position, thereby ensuring that the employee will not be in a position to compete.

As non-compete clauses applicable after the employment reduce the freedom of employees to find other job positions, the validity of non-compete provisions is subject to the following:

- a* the non-compete obligation shall be provided only to protect the employer's legitimate interest, and the validity of a non-compete obligation will depend on the position of the employee within the company, for example, the fact that the employee may have access to some critical knowledge or sales information of the company, taking into account the activity of the company;
- b* the geographical scope and the duration of the non-compete obligation shall be limited and clearly determined; and
- c* the employee shall receive a non-compete indemnity during the period of the non-compete, which shall not be derisory (which is understood to mean that the monthly non-compete indemnity shall not be less than 25 per cent of the employee's monthly gross salary before the termination of the employee's employment contract).

Some collective bargaining agreements provide for a maximum duration of non-compete obligation and a minimum non-compete indemnity that must be served to the former employee during the period of the non-compete obligation, or the conditions under which an employee can be released from such non-compete obligation.

VI WAGES

i Working time

The normal working week in France consists of 35 hours. An employee may generally not work more than 10 hours per day, 44 hours per week averaged over any period of 12 consecutive weeks or 48 hours during any given week. An employee may also not work for six hours without at least one 20-minute break.

Although there are six days a week during which work may normally be performed, it is common practice in France to limit the working week to five working days, given the 35-hour restriction.

Where necessary in light of the regular variations of the company's workload during the year, a collective bargaining agreement or a company agreement may provide that the length of the working week can fluctuate for all or part of the year subject to a limit of 1,607 hours per year. Overtime compensation is then not payable for hours worked above 35 hours per week where the work is within the limit set by one of the aforementioned agreements.

Additionally, the labour law distinguishes between three different categories of management-level employees and provides specific working-time regulations applicable to each of these categories:

Managing executives (i.e., executives having significant responsibilities, enjoying a substantial degree of independence in the organisation of their work schedule, having largely autonomous decision-making powers, and provided with a remuneration that is among the highest paid by the company) are not subject to the rules governing working hours, including those relating to the duration of the working week, daily and weekly rest periods and legal holidays. Only a limited number of management-level employees within each company actually meet this definition.

Integrated managers (i.e., management-level employees having the same work schedule as other members of their department, workshop, or team) are subject to the normal rules governing working hours.

Autonomous managers (i.e., all management-level employees who do not fall within the definitions of the above two categories, for instance because such managers have a work schedule that cannot be determined in advance) may enter into individual agreements pursuant to which they work a fixed number of hours per week, month or year or a fixed number of days per year.

An employee generally may not work more than eight hours during night-time hours. Night-time work (between 9pm and 6am) may only be conducted in exceptional circumstances, for example, to ensure the continuity of the employer's economic activity or the performance of certain social services, and special measures must ensure the health and safety of night-time employees. The performance of night-time work is contingent

on the conclusion of a supplemental collective bargaining agreement or a company agreement or, alternatively, an authorisation of the labour inspector.

ii Overtime

For overtime hours, the employer is obliged to pay the employee his or her basic hourly salary plus a percentage. The percentage may not be less than 10 per cent. In the absence of an applicable collective bargaining agreement, overtime hours performed through the 43rd hour worked by the employee in any given week must be remunerated at 125 per cent of the employee's basic hourly rate, and all overtime hours in excess of 43 hours must be remunerated at 150 per cent of the employee's basic hourly rate. All or part of the aforementioned overtime compensation may be replaced by unpaid compensatory time off under certain circumstances.

The number of overtime hours that an employee may work during a calendar year may be limited by applicable collective bargaining agreements. Where collective bargaining agreements do not provide for such limits, the number of overtime hours is legally limited to 220 hours and the average number of hours that an employee may work per week over any period of 12 consecutive weeks may not normally exceed 44 hours. Additionally, an employee may not work more than 48 hours in any given week, although a temporary authorisation to exceed such limits may be granted by the labour inspector under certain conditions.

In addition to paying overtime compensation, employees may also be entitled to benefit from additional paid time off based on the headcount of the company and the number of overtime hours performed.

VII FOREIGN WORKERS

French labour law distinguishes between foreign workers who are seconded to France on a temporary basis by a foreign company and foreign workers who are hired directly by a French company.

Generally, recruiting by French employers of foreign workers outside of the European Union, European Economic Area and Switzerland is allowed, provided that there are no qualified workers available within France. The employer must therefore look for local applicants first, such as by placing an announcement at the French employment agency.

While there is no obligation for employers to keep a specific register of foreign workers, French labour law provides that employers must keep a general employee register which must mention the nationality of each employee, as well as the work permit number when applicable.

A work permit is required for foreign nationals in principle, except for EU, EEA and Swiss nationals who enjoy freedom of movement within the EU, as set forth in Article 39 of the amended Treaty of Rome. Bulgarian and Romanian nationals are still required, however, to obtain a work permit during a transition period lasting until 2014.

The request to obtain a work permit must be filed by the French employer with the local labour administration. The decision to accept or deny the working permit request is at the discretion of the local labour administration, which studies requests

on a case-by-case basis. This authorisation process tends to limit the number of foreign workers a company may have, although there is no official limit. It is actually becoming more difficult to obtain such an authorisation as the unemployment rate is increasing.

Once the employment form has been validated and the working permit granted by the labour administration, the employer and the employee must register with the French Office of Immigration and Integration, which assists the employer and foreign worker with further administrative documents to be filed and conducts a preventive and compulsory medical examination.

Foreign workers hired by a French employer under a local employment agreement will benefit from all provisions of French employment law; however, foreign workers who are seconded to France by a foreign company only benefit from limited provisions of French employment law, including mainly non-discrimination, maternity leave, working time, paid vacation, minimum wage and overtime, and hygiene and security regulations, as well as the right to strike, but excluding provisions regarding the termination of local employment agreements.

Foreign workers hired by a French company must be registered with the French social security system, whereas foreign workers seconded to France by a foreign company may remain affiliated to their local social security system if France has entered into a social security treaty with the country in which the employee worked previously. As a general rule, the employee seconded to France then continues to receive benefits from the home social security system during his or her time in France if such assignment does not exceed the maximum duration specified in the relevant treaty, which is normally five years. The social security treaty entered into between France and the US provides, for instance, that the maximum duration of the secondment for social security purposes is five years.

VIII GLOBAL POLICIES

All employers with 20 employees or more are obliged to prepare internal regulations that set forth certain rules that employees must respect in the performance of their duties.

Internal regulations may only set forth rules relating to health and safety matters or disciplinary rules and sanctions. With reference to the first area, internal regulations must specify the measures adopted by the employer to guarantee the health and safety of the employees. With reference to the second area, internal regulations must set forth the hierarchy of disciplinary sanctions to which an employee may be subject. The internal regulations also set forth the provisions relating to the employee's right to defend him or herself, and the prohibitions against both sexual and psychological harassment, which are set forth in the Labour Code.

Internal regulations must be written in French and may be accompanied by translations in one or more languages.

The text of, or an amendment to, internal regulations may not be adopted by the employer until employee representatives, as well as the workplace health and safety and working conditions committee, have issued an opinion.

Internal regulations must be published, which includes posting at the workplace and at the area where employees are hired, filing with the labour court and filing with the labour inspector.

IX TRANSLATION

The employment agreement and related documents (variable compensation plans, restrictive covenants, etc.) must be written in French. If the employee's native language is not French, the employer must also provide the employee, if the latter so requires, with a translation of the employment agreement in the employee's native language. There is no specific formality for such translation.

If employment documents are not translated into French, the employee would be in a position to challenge the enforceability of any provisions included therein. In addition, non-compliance with the obligation to use the French language in employment documents is sanctioned by a fine of up to €18,750.

X EMPLOYEE REPRESENTATION

The four principal employee representative bodies under French labour law are: (1) staff delegates, whose primary role is to ensure that the employer respects the rights of the employees created by law or an applicable collective bargaining agreement and to present to the employer the demands of the employees relating thereto; (2) the works council, whose primary role is to express the opinion of the employees on, or to approve on behalf of the employees, certain decisions of the employer relating to working conditions and economic matters that affect the employees; (3) union sections and union delegates, whose primary role is to present the demands of the employees to the employer; and (4) health, safety and working conditions committees, whose primary role is to help formulate and ensure the respect of applicable health and safety regulations within the employer's enterprise.

The number of deputy and permanent employee representatives to be elected or appointed is calculated based on the headcount of the company, as follows (overleaf):

<i>Number of employees*</i>	<i>Staff delegates (permanent members/deputy members)</i>	<i>Members of the works council (permanent members/deputy members)</i>	<i>Unique personnel delegation (permanent members/deputy members)**</i>	<i>Members of the Health, Safety and Working Conditions Committee</i>	<i>Union delegate who may be appointed by each union section</i>
11 to 25	1 / 1	0	0	0	0
26 to 49	2 / 2				
50 to 74		3 / 3	5 / 5	3 / 3	3
75 to 99	4 / 4	4 / 4			
100 to 124	4 / 4	5 / 5			
125 to 149	5 / 5	6 / 6			
150 to 174		7 / 7			
175 to 199	6 / 6	8 / 8			
200 to 249		6 / 6	Not applicable	4	
250 to 399	7 / 7				
400 to 499	8 / 8			6	
500 to 749	9 / 9	7 / 7			

* The number of employees is calculated within each separate workplace. For companies having several premises employing more than 50 employees, a works council must be implemented at the level of each workplace and a central works council must be implemented at the level of the company.

** Where a company has fewer than 200 employees, the employer may, to reduce the costs associated with employee representation bodies, elect to have the staff delegates also act as and perform the functions of the employee representatives to the works council, under a unique personnel delegation.

Where a company employs over 1,000 workers, one additional permanent and deputy staff delegate are elected for each additional group of 250 employees or a part thereof. If a company has more than 10,000 workers, there may be up to 15 permanent members and 15 deputy members of the works council.

For companies with between 1,000 and 1,999 employees, two union delegates may be appointed; this increases to three for 2,000 to 3,999 employees; four for 4,000 to 9,999 employees; and five for more than 9,999 employees.

An employer is obligated to take the initiative to organise elections for the initial appointment of staff delegates at a threshold of eleven employees. For a works council, the threshold is 50 employees. These thresholds must be achieved for a period of 12 consecutive or non-consecutive months during the last three years.

Staff delegates and members of the works council are elected by the employees voting in two or three electoral colleges made up of various categories of employees. The employer must prepare and disclose to the employees the list of those employees who can vote and the electoral college to which they have been assigned (such assignment is negotiated with unions or determined by the labour inspector), as well as those employees who may be elected.

Elections are conducted by secret ballot or, under certain limited conditions, by electronic vote, with separate elections being conducted within each electoral college for permanent employee representatives and deputy employee representatives.

At the first round of elections, candidates run on lists established by unions and the electors vote for a union list of candidates. If there are not enough candidates or no candidates at all presented by unions in the first round of elections, or if half of the electors do not vote in the first round of elections, a second election for individual candidates must be held within 15 days of the first election.

The above election process does not apply to members of the health, safety and working conditions committee who are elected by the members of the works councils, and to union delegates who are appointed by unions.

The term of office for staff delegates, members of the works council and members of the health, safety and works council is four years. The term of office for a union delegate is not limited by law.

Any person who prevents, or attempts to prevent, the election of employee representatives or the performance of duties by employee representative is subject to penal sanctions of a maximum fine of €18,750, imprisonment for 12 months, or both.

In addition, employee representatives benefit from certain protection designed to ensure that they are not dismissed or discriminated against as a result of the performance of their duties. Where an employee representative or a union delegate is to be dismissed, one or two additional steps are therefore added to the normal dismissal procedure. The first additional step consists of consultation with the works council. The second additional step is to obtain the prior authorisation of the labour inspector.

The role of the staff delegates is to present the collective or individual demands of the employees relating to salary, professional classifications, and adherence to the application of laws and regulations assuring the protection and health of workers and adherence to the applicable collective bargaining agreements. To carry out their duties, staff delegates may each spend up to 15 hours per month attending to these responsibilities. The time spent by staff delegates carrying out such functions is deemed to be ordinary work time and is treated as such for the purposes of salary, vacation, seniority rights and other employee benefits.

Although the specific powers granted to the works council are very numerous, they may be classified into three principal categories.

- a* First, powers relating to employee working conditions. The works council must be informed and consulted for any matter relating to change (positive and negative) in the working conditions or the personnel relations.
- b* Second, powers relating to certain economic decisions made by the employer. The employer must inform and consult with the works council and obtain the non-binding opinion of the works council on proposed economic decisions that may affect employees. The works council notably gives its opinion on any proposed

lay-off plan of employees, as well as on any proposed modification of the economic or juridical organisation of the employer, including, without limitation, those modifications resulting from a merger, sale of assets, change in the production capacities or a merger or acquisition of a subsidiary, if such modification would affect the employees. The works council also has the right to receive documents from the employer that are necessary for it to prepare comments on the social and economic situation of the company, including all documents which must be submitted to the shareholders or to which the shareholders have access. In a consultation, the works council may also appoint an expert to prepare a report.

c Third, powers relating to the social and cultural activities of the employer. Examples of such social and cultural activities are family assistance programmes, vacation retreats, excursions, summer camps and childcare centres organised or operated by the employer.

In order to permit the works council to carry out its functions, the employer must set aside a subsidy equal at least to 0.2 per cent of the aggregate of the annual gross salaries paid to employees. The works council has a separate budget from which its social and cultural activities are financed. The funds constituting this budget are derived from contributions made by the employer each year.

The role of the union sections and union delegates is to represent the interests of its members before the employer. Union sections and delegates may post notices and hold meetings. The employer must place a bulletin board at the disposal of union sections and, if an employer has more than 200 employees, make a meeting room available to the union sections.

The employer must meet with staff delegates at least once a month or, in urgent situations, upon demand. A meeting of the works council must be called by the employer at least once a month. Where a company employs fewer than 150 employees, however, a meeting of the works council is only called at least once every two months.

XI DATA PROTECTION

France was one of the first Member States of the EU to adopt a law on data privacy (the Data Protection Act of 6 January 1978). The Act instituted an independent data protection agency, known as the CNIL, whose mission is to ensure compliance of individuals and companies with the requirements of the Act. The European Commission also adopted Directive No. 95/46 on Data Protection in 1995, which aims at harmonising national rules on the protection of individuals with regard to the processing of their data in the EU Member States.

i Requirements for registration

To collect and use employee personal data, all companies established in France must inform the CNIL of their intention to create such a database. The principle is that any personal database subject to automatic processing must be registered with the CNIL prior to any established processing, requiring companies to identify in detail the information being processed. Taking into consideration the increasing number of declarations to be

filed with the CNIL, it has allowed companies to file simplified declarations, notably when dealing with the automatic processing of some human resources data. Under the simplified process, the applicant (the employer) is only required to certify that it undertakes to comply with applicable data privacy regulations.

Employees also benefit from specific rights under the French Data Protection Act. Employers must inform the employee representatives of any personal data processing. Employers must inform employees when collecting personal data of the compulsory or optional nature of the employee's responses, any consequences resulting from the employee's failure to answer, the categories of persons who could have access to the data collected and the terms and conditions of the employee's right of access and correction of personal data collected. An employee may also require at any time the correction, addition, clarification, updating or erasure of personal data that is inaccurate, incomplete, ambiguous, outdated, or used, disclosed or stored in an unlawful manner.

In addition, the employer must ensure that all necessary precautions are taken to protect the personal data collected and in particular to prevent data from being distorted, damaged or disclosed to unauthorised third parties. The French Data Protection Act also provides that personal data cannot be stored for an excessive time. Therefore, the CNIL ensures that the storage time reflected in the declaration is not disproportionate to the purpose of the database. For instance, personal data collected in relation to the use of the internet by employees cannot be stored for more than six months.

The Criminal Code provides that infringement of the above regulations may be punished by a prison sentence of up to five years, a fine of up to €300,000, or both.

ii Cross-border data transfers

Under French law, an employer is under the obligation to specify in the notification to the CNIL, even under a simplified declaration notification process, if such data will be transferred outside the EU and more particularly to a country providing an insufficient level of protection. Such transfer is subject to the CNIL's prior approval. The countries that are considered by the European Commission and the CNIL as providing a sufficient level of protection of personal data are Member States of the EU and the EEA, Switzerland, Canada and Argentina.

For personal data to be transferred from France to a foreign country that does not offer a sufficient level of protection for personal data, the CNIL requires the company to join to its declaration the model contract specified by the European Commission for cross-border transfer, binding corporate rules (BCR) or, in the case of transfer to a US-based company, a document acknowledging that said company is registered under the Safe Harbor scheme.

Each employee, as well as employee representatives, must be informed when personal data is collected that such data will be transferred and to whom it will be transferred.

The same criminal sanctions as described above are applicable to a company infringing the cross-border declaration regulation.

iii Sensitive data

Personal data that directly or indirectly reveals a person's racial and ethnic origins, political, philosophical, religious opinions, trade union affiliation, health or sexual life are considered sensitive data that can not be collected and processed by employers.

The above-mentioned prohibition shall not apply to processing for which the employee has given his or her express consent, or where processing is necessary for the protection of human life, and the employer is unable to give consent because of a legal incapacity or physical impossibility, where the employee has made the data public or the processing is necessary for the establishment, exercise or defence of a legal obligation.

The Criminal Code provides that infringement to the above rule may be punished by a prison sentence of up to five years, a fine of up to €300,000, or both.

iv Background checks

Background checks are allowed to some extent under the law. Employers may ask the employee to provide a copy of his or her diploma and contact the employee's previous employers to check past professional experience or ask the employee to provide documents acknowledging such professional experience. The employer is not allowed to obtain the employee's criminal record or require the employee to provide such criminal record, except for specific job positions for which the law requires that the employee shall not have previously committed a criminal offence (e.g., for positions requiring the handling of funds).

XII DISCONTINUING EMPLOYMENT

The requirements for terminating employment will differ for fixed-term and indefinite-term contracts. For indefinite-term contracts the requirements further differ depending on (1) the grounds for termination (i.e., personal grounds or economic grounds); (2) the dismissal of one employee or the dismissal of several employees; and (3) the headcount of the company.

In the event of termination of an employment agreement by common consent, the employer and the employee may enter into a common consent termination agreement, which is subject to the prior homologation (or authorisation for protected employees) of the labour administration. The common consent termination process can usually be achieved within five to six weeks and the parties may decide that the employment contract is terminated as soon as the common consent termination agreement is homologated by labour administration (i.e., without a further notice period).

In the event of redundancy, it is permissible to negotiate a settlement agreement (transaction) whereby the former employee waives all rights in relation to the conclusion, execution and termination of his or her employment agreement. To be valid and put an end to a dispute, a settlement agreement must be signed after the employee receives the formal dismissal letter by registered post and must provide reciprocal concessions by the employer and employee.

i Dismissal

Unless the parties otherwise agree, a contract for a fixed period may not be terminated before its expiration except in the event of gross or flagrant misconduct, force majeure or if the employee is offered an indefinite-term employment agreement.

An employer may terminate an indefinite-term employment agreement at any time, except when said employee benefits from a protected employee status (employee on maternity leave, employee representatives, etc.) subject to applicable dismissal procedures requiring that a real and serious cause must justify the dismissal.

The first step of the dismissal procedure usually consists of inviting the employee to attend a preliminary meeting with a representative of the employer to discuss the contemplated dismissal. The invitation must be received by or handed to the employee at least five working days before the date of the preliminary meeting, except where applicable collective agreements provide for a longer period. The second step is to hold the preliminary meeting with the employee. The purpose of the preliminary meeting is to furnish the employee with the reasons for the contemplated dismissal and to enable the employee to present a defence. The third step is to send a formal dismissal letter to the employee by registered post, return receipt requested. This letter may not be posted sooner than two working days after the date of the preliminary meeting. In such letter, the employer must inform the employee of the reasons for the dismissal. If the employer does not want the employee to work during the termination notice period, the formal dismissal letter must expressly inform the employee of this.

Upon dismissal, an employer must pay termination indemnities. As a general rule, dismissed employees are entitled to severance pay if they have worked for at least one uninterrupted year, except in cases of dismissal for gross or flagrant misconduct. Unless the provisions of an applicable collective bargaining agreement are more favourable, the severance pay shall be equal to one-fifth of the employee's monthly gross salary for each year he or she has worked for the employer up to the 10th year of service and one-third of the monthly gross salary for any additional year of service (see below for redundancy enhancements). The dismissed employee is entitled to an indemnity in lieu of accrued but unused paid vacation.

In addition to employee representatives who benefit from a specific protection against dismissal as described in Section X, *supra*, other categories of employees benefit from protection against dismissal. These employees include those on maternity leave and certain employees on sick leave when the applicable collective bargaining agreement provides for a specific employment guaranteed during a limited period. These employees benefit from specific dismissal procedures.

ii Redundancies

The law permits dismissal for economic reasons mainly where the employer can demonstrate economic difficulties or the necessity to safeguard the competitiveness of the company. The economic justification is assessed within the sector of activity within the corporate group to which the company belongs, including all national and foreign companies of said corporate group. Failure to provide economic information regarding the entire sector of activity, particularly if requested by French labour courts, would render the dismissal on economic grounds unlawful.

Prior to dismissing an individual employee on economic grounds, the employer must first try to retrain the employee and search for redeployment opportunity within the company or the group to which it belongs, including positions outside the country (a specific redeployment questionnaire must be completed by employees whose redundancy is contemplated for them to express whether they would accept redeployment offers located abroad). Where these measures are unsuccessful, the employer must comply with a dismissal procedure that depends on the number of employees to be dismissed. In a redundancy, the termination letter must identify the employee's priority right to be rehired within a 12-month period. The letter may not be sent prior to the expiration of seven working days after the preliminary meeting, extended to 15 days for a management-level employee.

The employer must also take certain measures regarding the retraining of the dismissed employees. For employers with fewer than 1,000 employees (within the company group), the employer must offer the employee a state personalised retraining agreement that entitles the employee, following his dismissal, to an evaluation of the professional qualifications and other assistance which will help him or her to more easily obtain or adapt to another job, and more generally to benefit from accompanying measures and increased unemployment benefits for 12 months. Employers with 1,000 or more employees must offer the employee an employer-sponsored redeployment leave scheme. Such redeployment leave must be no less than four months and may not exceed nine months (including the termination notice period), during which the employee is also entitled to an evaluation of his or her professional qualifications and may take professional training courses, all of which is paid for by the employer.

Finally, the employer must notify the local labour administration that an employee has been made redundant.

Where the employer wishes to dismiss more than one employee on economic grounds, special additional dismissal procedures come into effect. These procedures vary based on the number of employees that the employer wishes to dismiss during any given 30-day period.

Where the employer dismisses fewer than 10 employees on economic grounds, it must inform the employee representatives and obtain their opinion on the proposed collective dismissal, the reasons therefore and the modalities. The local labour administration must also be informed of the redundancy process.

Where the employer dismisses 10 or more employees on economic grounds during a 30-day period, it must also inform the employee representatives and obtain their opinion on the proposed collective dismissal, the reasons for the dismissal and the modalities. In addition, if the company employs more than 50 employees, the employer must also negotiate with the works council the economic measures it intends to take as well as the social plan it intends to implement in order to avoid or reduce the number of dismissals and facilitate the obtaining of redeployment positions for the employees to be dismissed. The social plan must be entered into with relevant employee trade unions or drafted on a unilateral basis – but in both cases, the labour administration must have validated or homologated the social plan in order for the redundancy to be effectively implemented. The failure to submit a social plan or the submission of an inadequate social plan may result in the dismissal procedure being declared null and void.

The employer must also provide the local labour administration with the information provided to the works council or the staff delegates, as the case may be, including the minutes of the employee representation body meetings, and any opinions, suggestions or proposals the employee representation body may have on the proposed collective dismissal. It must also notify the local labour administration of the anticipated dismissals. The formal dismissal letter to employees may not be sent before the expiration of 30 to 60 days following notification to the local labour administration of the anticipated dismissals, depending upon the number of employees to be dismissed.

XIII TRANSFER OF BUSINESS

French labour law protects employees affected by a transfer of business. In the event that the legal situation of an employer is modified in connection with, *inter alia*, a sale, merger, transformation, spin-off or certain types of reorganisations, all employment contracts in effect at the time of such modification continue in effect as between the employees and the employer in his new form or the employer's successor. It is required, though, that the activity carried out by the previous employer continues and that, as a consequence of the continuation of such activity, the jobs of the employees may be maintained.

The continued validity of employment contracts despite a modification of the legal situation of the employer is binding on both the employer and the employee. An employee may therefore not refuse to work for the new employer. The new employer is also obligated to respect all of the obligations imposed on the previous employer by the employment contract. The previous employer must, however, reimburse the new employer for all sums that the latter pays to employees in satisfaction of rights that accrued before the transfer of the employment contract.

XIV OUTLOOK

In addition to the recent French labour law trends described in Section I, *supra*, which have tended to make the labour relations environment in France more flexible, there have been significant employment reforms over recent months to encourage the employment of older employees (i.e., 50 years or older), and discourage employers dismissing such employees, which is consistent with the pension reform described at Section I, *supra*. As the percentage of older employees in France is particularly low compared with other European countries, these changes to French law aim at encouraging older workers to extend their working life. The age at which employers may unilaterally require their employees to take retirement has recently been increased to 70.

In the context of the international crisis and an obligation to reduce the deficit, finance and social security funding acts for 2012 have become more restrictive regarding certain payments made to employees who benefit from tax and social contribution exemptions. The taxation of stock options and free shares has notably been increased and the maximum threshold below which termination packages benefit from a favourable social security regime has been reduced from €207,720 in 2010 to €74,064 as from 2013.

Chapter 20

HONG KONG

*Michael J Downey*¹

I INTRODUCTION

i Sources of law

The primary sources of employment law in Hong Kong are local legislation (ordinances, regulations and codes of practice)² and the common law. In addition to Hong Kong law, the Hong Kong courts will also consider the jurisprudence of England and other common law jurisdictions. Prior to the transfer of the United Kingdom's sovereignty over Hong Kong to China in 1997, the decisions of the English courts were binding on Hong Kong courts. Since 1 July 1997, the decisions of the English courts only have persuasive authority in Hong Kong.³

ii The Employment Ordinance

The principal employment legislation in Hong Kong is the Employment Ordinance. This sets forth many mandatory employment rights, obligations and protections for employees and employers which apply to the formation of an employment contract, wages, benefits, leaves of absence, termination of employment, entitlements upon termination, employment records and other related employer and employee matters.

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2 Codes of practice do not have the force of law, but rather are voluntary guidelines to assist employers to comply with ordinances and regulations. Failure to abide by a code of practice may be taken into account in any Hong Kong court or Labour Tribunal proceeding, or by a commissioner in any investigation, when deciding whether an employer has complied with the related ordinance.

3 As a result the courts increasingly rely on Hong Kong case law applying to employment.

Employees may not contract out of the Employment Ordinance provisions. Any agreement attempting to do so is void.⁴

iii Dispute resolution

The hierarchy of the courts of justice in Hong Kong is as follows:

- a* Court of Final Appeal;
- b* High Court:
 - Court of Appeal, which hears appeals on all matters from the Court of First Instance and the District Court; and
 - Court of First Instance;
- c* District Court, which has limited civil jurisdiction over claims of up to HK\$1 million;
- d* Labour Tribunal; and
- e* Minor Employment Claims Adjudication Tribunal.

Employment claims for monetary damages⁵ cannot be commenced in court; such claims must first be brought to the Labour Tribunal. This tribunal provides an informal method of settling disputes between employees and employers. No legal representation is allowed in proceedings before the tribunal. To commence a claim in the Labour Tribunal, a claimant fills out a form with the Hong Kong Labour Department. Subsequently, the defendants must respond to the claims and submit various documents requested by the Labour Department or the tribunal.

The Labour Department will usually attempt conciliation and, if unsuccessful, a Labour Tribunal hearing is held before a presiding officer. Appeals to the courts from a decision of the Labour Tribunal are limited to errors of law or where the Labour Tribunal has exceeded its jurisdiction.

II YEAR IN REVIEW

As has been the case in recent years, very limited amending legislation or new legislation was introduced in Hong Kong during the last year.

III SIGNIFICANT CASES

2013 saw a significant number of court cases handed down in Hong Kong, which included but were in no way limited to:

⁴ See Section 70 of the Employment Ordinance.

⁵ Codes of practice do not have the force of law, but rather are voluntary guidelines to assist employers to comply with ordinances and regulations. Failure to abide by a code of practice may be taken into account in any Hong Kong court or Labour Tribunal proceeding, or by a commissioner in any investigation, when deciding whether an employer has complied with the related ordinance.

In *Grant David Vincent Williams v. Jefferies Hong Kong Limited*,⁶ an employer summarily dismissed a senior employee by reason that a client newsletter that had been prepared by employee included a link to a video of an actor dressed as Adolf Hitler which was understood to parody the CEO of a competitor. The video included subtitles that were both obscene and offensive. The newsletter was released to the employer's clients prior to the content being approved by senior management.

In finding that the employer had wrongly dismissed the employee the court found that:

- a* the employer was overly sensitive (which amounted to a 'panic-stricken, hypersensitive corporate reaction') in treating the video link as promoting Nazism and anti-Semitism as well as being sexist. The court concluded that the mere reference to Hitler in the newsletter could not by itself amount to promoting Nazism;
- b* the employer wrongly concluded that the employee had produced and edited the subtitles contained in the video. The employee had merely included a link to a video that was widely available to the public on the internet;
- c* the employer had wrongly blamed the employee for the distribution of the newsletter when it knew full well that the distribution had occurred by reason of the error on the part of a third party and not through any error on the part of the employee; and
- d* the employer was in breach of its implied duty of trust and confidence in the unreasonable manner it effected the employee's dismissal.

In *Lilas Aromas Limited v. Chan Ka Yan & Anor*,⁷ the court dismissed an employer's application for an injunction against two former employees on the grounds that the employer had not no legal basis on which to prevent former employees from engaging in mere competition. In reaching this conclusion the court cited *Midland Business Management Ltd v. Lo Man Kui* [2011] 1 HKLRD 470 (applying *Natuzzi Spa v. De Coro Ltd*, HCA 4166 of 2003, 16 June 2006, Sections 44 to 61).

In *Tangarorang Jessamie Mendrez v. Chan Chau Wing*,⁸ a Filipino domestic helper was sexually assaulted by the husband of her employer. The husband was subsequently charged with indecent assault and criminal intimidation. The domestic helper commenced legal proceedings to recover damages as a result of the husband's tortious acts. The court awarded the domestic helper HK\$367,790 in damages under the following heads:

- a* pain, suffering and loss of amenity: HK\$140,000;
- b* aggravated damages: HK\$30,000;
- c* pretrial loss of earnings: HK\$74,560;
- d* loss of earning capacity: HK\$30,000;
- e* miscellaneous special damages: HK\$48,230; and
- f* future medical expenses: HK\$45,000.

6 Court of First Instance, Action No. 320 of 2011.

7 District Court, Civil Action No. 3868 of 2012.

8 District Court, Personal Injuries Action No. 433 of 2010.

In *Tan Shih Ying v. City University of Hong Kong*,⁹ the issue arose of whether the non-renewal of an employee's employment was subject to judicial review. In rejecting the employee's application for a to judicial review the court observed:

[T]he applicant's complaint is essentially that there has been a failure to apply the terms and conditions set by the Council to her and that is a private law dispute.

Thus, in my view, on any analysis there is no public law element in the applicant's claim. [...] The fact that private law remedies may not be adequate in some way to redress the applicant's complaint cannot make up for the absence of a public law element so as to transform a claim not amenable to judicial review into one that is."

In *Dr Alice Li Miu-Ling v. The Hong Kong Polytechnic University*,¹⁰ an employee commenced legal proceedings against her employer after being notified that her employment was being terminated. The employee's claims included claims of sexual harassment.

In rejecting the employee's sexual harassment claim the court noted that in order for harassment to be made out there must be an element of 'unwelcome conduct':

In particular the matter must be unwelcome in relation to the person who is the object of the advance, request or conduct. [...] Dr Li admitted in cross examination she was not put in fear when the alleged comments were made, she admitted she had regarded them as jokes. Neither was she annoyed or distressed at the time.

In *HKSAR v. Chow Kin Cheung*,¹¹ a shop owner was observed being assisted by another person to remove a wooden cabinet from his shop. The shop owner was subsequently convicted of employing a person contrary to Section 17I of the Immigration Ordinance. The employer appealed the conviction on the grounds that the person who assisted him was not an employee but rather an independent contractor. In concluding that there was insufficient evidence to support an employer–employee relationship the court observed:

Depending on circumstances, contract of employment might arise in relation to a specific engagement. The modern approach to the question whether one person is another's employee is therefore to examine all the features against the background of the indicia of employment with a view to deciding whether, as a matter of overall impression, the relationship was one of employment (Poon Chau Nam v Yim Siu Cheung [2007] 10 HKCFAR).

Control is one indicia that the learned magistrate can take into account. However, in the present case, there are other features as well:

- (i) the appellant did not know the 1st defendant prior;*
- (ii) the job was unlikely to be repeated;*
- (iii) the remuneration was on item basis and described as transportation fee in the record of interview of the appellant; and*

9 Court of First Instance, Constitutional and Administrative Law List, No. 36 of 2012.

10 District Court, Equal Opportunities Action No. 1 of 2004.

11 Court of First Instance, Magistracy Appeal No. 248 of 2012.

- (iv) *the 1st defendant provided all the tools, trolley and ropes, and was not part of the employer's business activity and would never be.*

In *Campbell Richard Blackeney-Williams & Ors v. Cathay Pacific Airways Limited & Others*,¹² the employer appealed the Court of Appeal's finding that employees who were involved in industrial action in the form of contract compliance were undertaking 'permissible activities of a trade union' in accordance with Section 21B(1)(b). In a unanimous decision that upheld the Court of Appeal, the Court of Final Appeal held (Ma CJ):

The conclusion reached by Lord Neuberger of Abbotsbury NPJ is that the industrial action which was said to be carried out by the plaintiffs in the form of contract compliance, came under the rubric of "activities of the trade union" for the purposes of s 21B(1)(b) of the Employment Ordinance Cap 57. As a matter of law, industrial action (including strikes) where such action has been proposed, organized and enforced by a trade union (as in the present case) will come under the statutory wording of "activities of the trade union".

In *Zhu Li v. Mayer Brown JSM (a firm)*,¹³ an employee's assertion that the provisions of the Employment Ordinance applied to all individuals providing personal services was rejected by the court. In doing so the court drew attention to Section 4 of the Employment Ordinance, which states that 'this Ordinance applies to every employee engaged under a contract of employment, to an employer of such employee and to a contract of employment between such employer and employee,' concluding that 'as such, I do not share the plaintiff's views that she can on one hand say she is not an employee, but on the other hand seek compensation under the Employment Ordinance.'

In *Cheng Kwok Chung & 10 Others v. Tri Tech Corporation Limited & Another*,¹⁴ the court refused to grant leave to appeal the terms of an order of the Labour Tribunal that incorporated the voluntary terms of settlement between the an employer and its former employees. In refusing the employer leave to appeal the court held that settlement agreement which the parties had entered was a binding contract which was not capable of being set aside on the grounds advanced on behalf of the employer. The court further held that even accepting the presiding officer had made some erroneous comment regarding the employer's liability to pay, no evidence had been adduced or grounds formulated to demonstrate how such an error amount to an error of law. For a very similar case in which a court refused to grant leave to an employer to appeal the terms of a voluntary settlement agreement, see *Alcantara, Evelyn Rueme v. Ngai Chau Kam Rosita*.¹⁵

12 Court of Final Appeal, Final Appeal No. 13 of 2011.

13 District Court, Civil Action No. 977 of 2012.

14 Court of First Instance, Labour Tribunal Appeal No. 2 of 2013.

15 Court of First Instance, Minor Employment Claims Adjudication Board Labour Appeal No. 14 of 2010.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The Employment Ordinance mandates certain minimum terms of employment, which are discussed below. Other than these terms, the employment relationship in Hong Kong is contractual. Employment contracts need not be written,¹⁶ but before employment commences, employees must be clearly informed of:

- a* wages and the wage period;
- b* the end-of-year payment, if any; and
- c* the length of notice required for the parties to terminate the employment contract.

There are no restrictions on employing employees on fixed-term employment contracts in Hong Kong. Employees employed on fixed-term contracts are entitled to exactly the same statutory benefits and protections as employees employed on open-ended employment contracts.

Independent contractors

The Employment Ordinance provides certain rights and protection to employees, but not to other workers such as independent contractors. Thus, employers sometimes seek to avoid an 'employment' relationship by entering into independent contractor agreements or similar arrangements. To ensure that employee rights are protected, however, courts look critically at such non-employment relationships. Courts seek to determine the true relationship, regardless of the 'label' given to the agreement that the parties have made. In other words, even if a company hires an individual as an independent contractor, the courts may still find that a *de facto* employment relationship exists and require the company to meet all obligations to the contractor as if he or she were an employee.

In determining the true relationship between the parties, the courts will take into account numerous factors, including whether the company and worker are mutually obliged to act in some manner and the degree of control exercised by the company over the worker. Perhaps more importantly, the courts will consider the extent to which the worker can realistically be regarded as operating his or her own business.

Variation of contract

As a general rule, the terms and conditions of an employment contract may not be varied without the consent of both the employer and the employee. Where an employer has reserved the 'right to vary' the terms of the employment contract,¹⁷ the employer may

16 Statutory limits are imposed if an employment contract is not in writing. For example, an employment contract for a fixed term of two years may only be entered by both parties agreeing to such terms in a signed written document. Where any of these formalities are missing the employment contract will be regarded as a monthly contract that may be terminated by either party giving the other party one month's notice of termination.

17 Increasingly, Hong Kong employers expressly reserve the right to amend employment terms as a term of the employment contract.

unilaterally modify contract terms simply by notifying the employee of the changes. In practice, any right on the part of the employer to vary the terms of employment is usually limited, though, to changes of a minor and non-fundamental character.

ii Probationary periods

Whether an employee is employed under probationary terms is purely a matter of contract. The only statutory provision that applies to probation provides that either party may terminate without giving notice during the first month of probation.

iii Establishing a presence

It is not necessary for an employer to establish a business presence in Hong Kong to enter into employment contracts with employees in Hong Kong. The mere fact that an overseas entity engages an employee to work in Hong Kong will not of itself give rise to any presumption that the entity concerned has established a permanent establishment in Hong Kong.

V RESTRICTIVE COVENANTS

Post-termination obligations (e.g., non-compete, non-solicitation of clients and non-poaching of employees) are common for both junior staff and executives in Hong Kong, though the courts are extremely reluctant to enforce such agreements for public policy reasons. For a restrictive agreement to be enforceable, an employer must be able to demonstrate sufficient proprietary interest in the subject matter of the restraint.¹⁸ Even if an employer satisfies this criterion, any restriction must still be reasonable in relation to the public interest and the parties, as well as being reasonable in terms of scope, duration and geographic ambit.

VI WAGES

i Working hours and overtime

There are no statutory provisions relating to maximum working hours, overtime limits or periods of rest in the workplace in Hong Kong.¹⁹ There is a minimum wage, which is currently HK\$30 per hour. All employees are entitled to at least one rest day every seven days. An employee may volunteer to work on this rest day,²⁰ but unless there is an unforeseen emergency, an employer has no right to compel an employee to work on a rest day.

18 For example, an employer will usually have no difficulty in demonstrating sufficient interest in a trade secret; by contrast, Hong Kong courts will not usually uphold any restrictive covenant that merely prohibits an employee from engaging in competition with a former employer.

19 There are regulations that limit certain types of work and periods of work in the cases of children and young people.

20 It is advisable to obtain the employee's agreement in writing.

There is also no statutory regulation requiring overtime to be undertaken on a paid basis. As a consequence, whether employees can be required to work overtime and whether or not such overtime is to be undertaken on a paid or unpaid basis will be determined solely by the terms of the employee's employment contract.

VII FOREIGN WORKERS

Any individual who does not have the right of abode, right to land, or the status of unconditional leave to remain in Hong Kong must obtain an employment visa before commencing any work in Hong Kong. Employing an individual to work in Hong Kong without a valid work visa incurs criminal liability, which may include imprisonment. Employers need to be careful of this requirement as it is not uncommon for employers to be imprisoned for hiring employees who are not lawfully employable.

The Hong Kong Immigration Department usually requires between four and six weeks to process an employment visa application. The application process requires the completion of several Immigration Department forms in addition to other documents including a copy of the employment contract, a thorough description of the applicant's proposed job in Hong Kong, the applicant's CV and academic certificates, and copies of the sponsoring company's most recent audited financial statements and list of employees in Hong Kong. Most importantly, a sponsoring employer must be able to provide the Hong Kong Immigration Department with cogent reasons and evidence for why a suitably qualified local person cannot fill the position.

VIII GLOBAL POLICIES

i Anti-discrimination protection

Statutes prohibiting discrimination in Hong Kong are relatively new and undeveloped, especially as compared with those in the United States. There are discrimination ordinances relating to gender, pregnancy, marital status, disability, race and family status discrimination. There have been relatively few discrimination claims filed in Hong Kong courts since the enactment of these statutory measures. Discrimination based on age, religion, or sexual orientation is not prohibited in Hong Kong.

Although an employer is under no statutory duty to investigate an employee's discrimination complaint, employers are well advised to document carefully and respond to any complaints relating to discrimination in the workplace. Evidence that the employer took the complaint seriously, conducted an investigation in good faith and responded appropriately to the employee's complaint may help to resolve the matter prior to legal proceedings (such as through conciliation with the Equal Opportunities Commission). Evidence of a *bona fide* investigation having been undertaken may also undercut any subsequent allegation of victimisation (discussed below).

Employers are liable for discriminatory acts²¹ committed by their employees. However, an employer may argue as a defence that it took reasonable steps to prevent the offending employee from acting improperly (e.g., implementing and enforcing an equal opportunity policy).

Sex Discrimination Ordinance

The Sex Discrimination Ordinance (SDO) makes it unlawful for employers to refuse to hire, to fire or to make other employment decisions affecting pay, benefits, conditions, or other aspects of employment based on a person's gender,²² marital status or pregnancy.

Direct and indirect discrimination

The SDO prohibits two types of discrimination. First, it prohibits direct discrimination. For example, where an employer does not hire a woman because of her gender, she may bring a sex discrimination claim under the SDO. In addition, the SDO prohibits certain forms of indirect discrimination, where employment practices are non-discriminatory on their face but have an indirect discriminatory impact upon protected groups.

Discrimination may be permitted where a genuine occupational qualification (GOQ) exists; in other words, if a certain gender, certain marital status or pregnancy (or lack thereof) is a characteristic that is essential to a job, the employer may require such status.

Sexual harassment

The SDO prohibits engaging in unwelcome conduct of a sexual nature to an employee in circumstances in which a reasonable person, having regard for all the circumstances, would have anticipated that he or she would be offended, humiliated, or intimidated and subjecting an employee to conduct of a sexual nature that creates a sexually hostile or intimidating work environment. 'Conduct of a sexual nature' may be either oral or written statements made either to the employee or in his or her presence.²³

The Code of Practice on Employment under the SDO (the SDO Code) notes that the following behaviour may be regarded as sexual harassment:

- a* unwelcome sexual advances (e.g., leering and lewd gestures, touching, grabbing or deliberately brushing up against another person);

21 The Sex Discrimination Ordinance (SDO), Disability Discrimination Ordinance (DDO), Race Discrimination Ordinance (RDO) and Family Status Discrimination Ordinance (FSDO) also prohibit discrimination by educational institutions and those providing goods, facilities, services or housing (with certain exceptions). In addition, the DDO prohibits all persons from performing any public activity that incites hatred towards, serious contempt for or severe ridicule of any disabled person. Such incitement includes threatening physical harm of the person or property of any disabled person.

22 The SDO applies equally to discrimination against men.

23 The SDO does not specifically require an employee to suffer some type of detriment for a finding of harassment.

- b* unwelcome requests for sexual favours (e.g., suggestions that sexual cooperation or the toleration of sexual advances may further a person's career);
- c* unwelcome verbal, non-verbal, or physical conduct of a sexual nature (e.g., sexually derogatory or stereotypical remarks; persistent questioning about a person's sex life); or
- d* conduct of a sexual nature that creates a hostile or intimidating work environment (e.g., sexual or obscene jokes around the workplace; displaying sexist or other sexually offensive pictures or posters).

Disability Discrimination Ordinance

The Disability Discrimination Ordinance (DDO) prohibits direct and indirect discrimination against an employee or job applicant on the grounds of disability. Both direct and indirect discrimination are unlawful. Disability harassment and victimisation are also unlawful.

Definition of disability

Disability is widely defined as including:

- a* total or partial loss of the person's bodily or mental functions;
- b* total or partial loss of a part of the person's body;
- c* the presence in the body of organisms causing or capable of causing disease or illness;
- d* the malfunction, malformation, or disfigurement of a part of the person's body;
- e* a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- f* a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

In addition, the term 'disability' is broad in the sense that it includes a disability that presently exists;²⁴ previously existed but no longer exists; may exist in the future; or is imputed to a person.

The DDO also protects (non-disabled) persons who are discriminated against due to the disability of an 'associate'. The term 'associate' includes the person's spouse, relative, care provider, other persons living with him or her on a 'genuine domestic basis' and other persons who are in a business, sporting or recreational relationship with him or her.

Exceptions

Employers face a reasonable accommodation obligation in assisting disabled persons to perform work. Disability discrimination may be permitted where a GOQ exists; the employer may argue that the employee or applicant: cannot carry out the inherent

24 In addition, persons who use a 'therapeutic device or auxiliary aid or device,' or are accompanied by an interpreter, reader, assistant or care provider who provides services because of a disability are protected by the DDO.

requirements of the job due to his or her disability; or reasonable accommodation would impose an unjustifiable hardship²⁵ on the employer.

In addition, the DDO provides an exception to discrimination protection where the 'disability' is an infectious disease,²⁶ and the discriminatory act is reasonably necessary to protect public health.

Family Status Discrimination Ordinance

The Family Status Discrimination Ordinance (FSDO) prohibits discrimination against any person due to his or her status of being responsible for the care of an immediate family member.²⁷ Both direct and indirect discrimination are prohibited under the FSDO.

Race Discrimination Ordinance

The Race Discrimination Ordinance (RDO) prohibits discrimination against any person due to his or her race, colour, descent or national or ethnic origins.

Victimisation

The SDO, DDO, RDO and FSDO prohibit workplace victimisation; that is, taking an adverse employment action against an employee because he or she has brought (or may bring) a legal claim, provided evidence or information in relation to a legal claim, or alleged that a person acted in violation of one of the discrimination ordinances.

A victimisation claim typically would arise when an employee makes a work-related complaint of unlawful conduct to a supervisor or participates in some lawful activity (such as giving evidence in connection with proceedings brought under the SDO by a third party), and then the employer subsequently subjects the employee to some type of negative employment action, such as termination or demotion.

25 In determining what constitutes an unjustifiable hardship, a court considers all relevant circumstances including: the reasonableness of any accommodation to be made available to a person with a disability; the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; the effect of the disability on a person concerned; and the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship.

26 Infectious diseases may be specified either by the Director of Health (by notice in the Gazette) or in the First Schedule to the Quarantine and Prevention of Disease Ordinance. Currently, for example, measles, mumps and SARS are included, but AIDS and HIV-positive statuses specifically are not.

27 An 'immediate family member' is defined as someone related to the person by blood, marriage, adoption or affinity.

ii Occupational health and safety

The Occupational Safety and Health Ordinance (OSHO) is one of the main regulations pertaining to occupational health and safety.²⁸ The OSHO mandates employers to ensure the safety and health of employees at work, so far as is reasonably practicable. Employer obligations may include provision and maintenance of a safe work environment and work practices; arrangement of safe handling, storage, and transport of substances; and provision of information, instruction, training, and supervision to ensure health and safety.

Employers must notify an occupational safety officer²⁹ within seven days of any accident which causes an employee to be permanently or temporarily incapacitated from working. Such notification must be within 24 hours for any accident causing death or serious bodily injury.

The Commissioner for Labour may serve an improvement or suspension notice on an employer for contravention of the OSHO or the Factories and Industrial Undertakings Ordinance.

Individuals may be found guilty of offences under the OSHO, in addition to employer companies. If an employer is convicted of an offence under the OSHO, and if the offence was committed with the consent or connivance or as the result of any negligence of a director, manager, company secretary, or other similar officer, he or she may also be found guilty of such offence.

IX TRANSLATION

Both English and Chinese are the official languages in Hong Kong. As a consequence, documents in either language have equal legal effect. In the event that an employment document is written in a language other than English or Chinese it would only be necessary to translate such document in the event that the document concerned was being relied on for the purposes of court proceedings. In practice it is extremely rare to find employment documents written in a language other than English or Chinese.

X EMPLOYEE REPRESENTATION

Membership in trade unions is uncommon in Hong Kong, and collective bargaining and union-organised disruptions of a business or workplace are very rare.

i Requirements for trade unions

The Trade Unions Ordinance (TUO) requires every trade union to apply for registration to the Hong Kong Registrar of Trade Unions. Such application may be denied if the

28 Some other ordinances (e.g., the Factories and Industrial Undertakings Ordinance) also regulate occupational safety.

29 These individuals are appointed by the Hong Kong Commissioner for Labour.

provisions of the TUO are not complied with, or in the event any purpose of the trade union is declared unlawful, or for any other exceptional reasons.

The TUO mandates certain requirements in relation to officers and members (e.g., they must be ordinarily resident in Hong Kong), the unions' rules and other matters. The Ordinance also regulates the rights and liabilities associated with union activities. A registered trade union enjoys limited immunity from certain civil lawsuits.

ii Employee rights

Every employee has the right to: associate with other persons for the purpose of forming or applying for registration of a trade union pursuant to the TUO; be or become a member or officer of a trade union registered under the TUO; and take part in trade union activities at any appropriate time,³⁰ if he or she is a member or officer of such union.

Any employer that prevents or deters an employee from, discriminates against, terminates the employment of or penalises an employee due to exercising any such right, is guilty of a criminal offence and liable to a fine. In addition, employers may not make an offer of employment conditional on agreement not to exercise any such right. Further, an employee is protected by Part VIA of the Employment Ordinance in relation to trade union activities. In other words, when employment is terminated, if the employer fails to establish a 'valid reason' for such termination, and the employee has exercised any right in relation to trade union activities (as detailed above) within the preceding 12 months, the employee is entitled to remedies pursuant to Part VIA of the Employment Ordinance. Employee complaints are heard by the Labour Tribunal.

Any demonstration, picketing or attendance at or near a place of business which is not for the purpose of 'peacefully obtaining or communicating information or peacefully persuading any person' in relation to a trade dispute is unlawful, and may result in a fine and imprisonment for six months.

XI DATA PROTECTION

i Personal Data (Privacy) Ordinance

The Personal Data (Privacy) Ordinance (PDPO) requires any individual or organisation handling 'personal data' to ensure proper collection, handling, processing, use, accuracy, security and transfer of such information.

In addition, anyone handling such data must inform the individual concerned about why such data are being collected. Also, where personal data are collected, the individual must be informed of his or her rights in relation to accessing and correcting the data held.

'Personal data' is defined as any data relating to a living individual that can be directly or indirectly identified from such data and the data are held in a form that it is reasonably practicable to access or process.

30 'Appropriate time' means any time outside of working hours, or a time within working hours as agreed to by the employer.

Supplemental codes of practice

The PDPO has been supplemented by codes of practice (the PDPO Codes) on the collection of Hong Kong identity card numbers and other personal identifiers; consumer credit data; and human resource management (dealing with solicitation and collection of personal data during recruitment and employment, and retention and transfer of such data after employment).

Guidelines on 'Monitoring and Personal Data Privacy at Work' have been issued. The provisions of the guidelines are limited to employers' monitoring of employees' usage of: telephone calls, e-mail, internet and video.

Currently there are no laws in Hong Kong specifically addressing these issues nor are there laws or codes related to drug testing or psychological profiling of employees.

Employee access to personal data

The PDPO mandates that individuals whose personal data are held may request to be informed whether their data are held, and to be supplied with a copy of such data. The data holder must comply within 40 days, or formally refuse to comply (due to, for example, compliance forcing disclosure of another person's identity).

Policy

Employers must have a policy in relation to data privacy relating to, at a minimum:

- a* employees' right to access and correct their personal data held by the employer;
- b* the employer's possible transfer of personal data, within and outside Hong Kong, to related companies and third parties such as insurance companies; and
- c* employees' duty to protect the confidential nature of the personal data of others.

Employment records

Employers must maintain a record in relation to each employee containing his or her:

- a* name and Hong Kong identity card number;
- b* commencement date of employment;
- c* job title;
- d* wages paid in respect to each wage period;
- e* wage period;
- f* periods of annual leave, sick leave, maternity leave, and holidays to which he or she is entitled, and that he or she has taken, along with details of payments made in respect thereof;
- g* the amount of any end-of-year payment and the period to which it relates;
- h* the length of notice required to terminate the employment contract;
- i* total number of hours worked in a particular wage period by employees earning less than HK\$12,300 per month; and
- j* the date of any employment termination.

This record must be maintained either at the employer's place of business or at the employee's work location, in relation to his or her preceding 12 months of employment, and for six months after termination thereof.

Employers must file forms with the Hong Kong Inland Revenue Department for every employee working in Hong Kong in relation to: commencement of employment;

cessation of employment; and remuneration paid to each employee (annually). Other forms and notifications may be necessary in certain circumstances (e.g., for remuneration paid to persons other than employees, or upon termination of employment of an employee who is expected to depart Hong Kong).

XII DISCONTINUING EMPLOYMENT

i Dismissal

The principle of 'at-will' employment is not recognised in Hong Kong. Conversely, employment may be terminated:

- a* by mutual agreement;
- b* by either party giving notice;
- c* by either party making a payment in lieu of giving notice;
- d* by the employer summarily dismissing an employee for serious breach of a fundamental term of employment (i.e., termination for cause);
- e* by the employee terminating without notice for the employer's serious breach of a fundamental term of employment (i.e., constructive dismissal);
- f* upon the expiration of a fixed-term employment contract;
- g* by operation of law (e.g., where an employee suffers a serious disability that results in the employee being declared unfit to continue employment or where the employer is declared bankrupt or placed in receivership); or
- h* any other manner recognised by law.³¹

Notice of termination

An employment contract may be terminated by either party giving the other party notice (either orally or in writing). The length of the notice period typically is stated in the employment contract.³² If the employee and employer have not agreed on the length of the notice period, the Employment Ordinance implies one month's notice. An employment contract may also be terminated by one party agreeing to pay the other party a certain sum in lieu of notice. In the absence of notice or a payment in lieu of notice it is not possible to terminate an employment contract immediately unless there are grounds for summary dismissal.³³

31 The law in fact recognises many other ways in which an employment contract may be lawfully (and unlawfully) terminated in addition to those listed above.

32 In the case of a continuous contract the agreed notice period must not be less than seven days.

33 There are two exceptions to this rule. First, during the first month (only) of the probationary period, either an employee or an employer may terminate the employment contract without notice, without making a payment in lieu of such notice, and without grounds for summary dismissal. Second, the Employment Ordinance recognises that an employee and employer may voluntarily agree to terminate an employment contract immediately without notice or payment in lieu.

Summary dismissal

An employer may terminate an employment contract immediately pursuant to Section 9 of the Employment Ordinance, without notice or payment in lieu, if an employee:

- a* wilfully disobeys a lawful and reasonable order;
- b* misconducts himself or herself, such conduct being inconsistent with the due and faithful discharge of his or her duties;
- c* is guilty of fraud or dishonesty;
- d* is habitually neglectful in his or her duties; or
- e* on any other ground on which the employer would be entitled to terminate the contract without notice at common law.

Case law provides an insight into what grounds are sufficiently serious to permit an employer to summarily dismiss an employee. In practice around half of the summary dismissals adjudicated by the courts are held to be unlawful.

Immediate termination by employee

An employee may terminate an employment contract without notice or payment in lieu if the employee:

- a* reasonably fears physical danger by violence or disease such as was not contemplated by the employment contract (either expressly or implicitly);
- b* has been employed for at least five years, and is certified (in the form required) by a doctor as permanently unfit for the particular type of work for which he or she is employed;
- c* is subjected to ill-treatment by the employer;
- d* is not paid wages within one month from the due date; or
- e* on any other ground on which he or she would be entitled to terminate the contract without notice at common law.

Case law provides an insight into what grounds are sufficiently serious to permit an employee to be regarded as being constructively dismissed. In practice around half of the constructive dismissals adjudicated by the courts are held to be unlawful.

Restrictions on termination

In certain circumstances, an employee's employment may not be terminated, unless there are grounds for summary dismissal. An employer may not terminate the employment of an employee who is: pregnant³⁴ or on statutory maternity leave; on statutory paid sick leave;³⁵ or incapacitated and entitled to compensation pursuant to the Employees' Compensation Ordinance.³⁶

34 If an employer terminates an employee who then immediately notifies the employer of her pregnancy, the employer must withdraw the termination (or notice thereof).

35 Statutory sick leave may accrue up to 120 days, as discussed above.

36 In certain limited circumstances, an employee may be terminated despite such incapacity.

Grounds for termination

Where an employee has been employed continuously for at least 24 months (but not more than five years), the employee is protected by Part VIA of the Employment Ordinance, which requires the employer to have a 'valid reason' to terminate an employee's employment. Statutory awards of compensation will be payable in the event of an employer terminating employment without a valid reason.

A valid reason for termination may include:

- a* any reason relating to the employee's conduct (e.g., an employee having a proven performance issue);
- b* any reason relating to the employee's capability or qualifications for performing the type of work for which the employee was employed;
- c* any reason relating to the employee's redundancy or other genuine operational requirements of the employer's business;
- d* any reason that would entail the employee or employer violating the law if the employment were to continue; or
- e* any other reason of substance which the court or Labour Tribunal holds is sufficient reason to terminate.

If the employer has no valid reason for terminating the employment, the Employment Ordinance will presume that the termination was (improperly) undertaken for one or more of the following reasons:

- a* to eliminate or reduce the employee's rights, benefits or protections provided pursuant to the Employment Ordinance;
- b* due to the employee's pregnancy, in violation of Section 15(1) of the Employment Ordinance;
- c* due to the employee's participation in trade union activities, in violation of Section 21B(2)(b) of the Employment Ordinance;
- d* due to the employee's sickness and entitlement to paid sick leave, in violation of Section 33(4B) of the Employment Ordinance;
- e* due to the employee's giving information or evidence for a proceeding in relation to the enforcement of the Employment Ordinance or a work-related accident, in violation of Section 72B(1) of the Employment Ordinance;
- f* due to the employee's giving information or evidence for a proceeding in relation to the enforcement of the Factories and Industrial Undertakings Ordinance,³⁷ in violation of Section 6 of such Ordinance; or
- g* due to the employee's giving information or evidence for a proceeding or investigation in relation to the enforcement of the Employees' Compensation Ordinance or due to the employee's entitlement to compensation without the Labour Commissioner's consent to such termination,³⁸ in violation of Section 48 of the Ordinance.

37 Generally, this ordinance relates to health and safety at work.

38 This is a general summary of Section 48 of the Employees' Compensation Ordinance, which should be reviewed in full.

If the employer has no valid reason for termination the court or Labour Tribunal may make an order for reinstatement of the employee;³⁹ award the employee with a statutory compensation (e.g., accrued statutory annual leave); or make an ‘award of compensation’ pursuant to Section 32P of the Employment Ordinance, of up to HK\$150,000.

Entitlements upon termination

Payments payable to an employee include all amounts due to an employee either by statute or contract including:

- a* wages through the termination date;
- b* accrued but unused statutory annual leave;
- c* (if applicable) an end of year bonus; and
- d* (if applicable) payment in lieu of notice.

ii Redundancies

Severance payment

A severance payment will be payable where an employee’s employment is terminated due to redundancy or lay-off after continuous employment for at least 24 months.⁴⁰

The term ‘redundancy’ includes the following: the employer has ceased or intends to cease carrying on business for which the employee was employed; the employer has ceased or intends to cease carrying on business for which the employee was employed at the location where the employee is employed; or the employer must cut back employees due to operational requirements.

A severance payment is not required where:

- a* the employee is dismissed summarily;
- b* not later than the termination date, the employer employs the employee under a new employment contract; or
- c* not less than seven days before the termination date, the employer offers to re-engage the employee under a new employment contract⁴¹ and the employee unreasonably refuses such offer.

The amount of severance pay is determined pursuant to a statutory calculation and based on the employee’s length of service, but is no more than HK\$15,000 for each year of service, up to a statutory cap. In addition, the employer’s contribution (i.e., not the employee’s contribution) to the employee’s retirement scheme (e.g., the employee’s mandatory provident fund) may be deducted from any severance pay due.

39 Such an order is possible only with the consent of the employer and the employee.

40 An employee must make a specific demand to the employer for severance pay; it becomes due within two months of such demand.

41 It makes no difference that the terms of employment that are offered are different from those under which the employee worked so long as the terms amount to ‘suitable’ terms.

Long-service payment

Where a severance payment is not payable, a long-service payment may be payable when an employer terminates⁴² an employee's employment after at least five years of continuous service.⁴³ The calculation of long-service pay is identical to that of severance pay.

XIII TRANSFER OF BUSINESS

There are two circumstances in which a transfer of business affects the employment relationship of employees in Hong Kong. Where a trade, business or undertaking is transferred from one entity to another, the period of employment of an employee in the trade, business or undertaking at the time of the transfer counts as a period of employment with the transferee entity. As a result, such a transfer does not in any way break the continuity of the employment of any employee employed by the transferor entity immediately prior to the transfer. Where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed, no statutory severance payment will be payable in the event of an employee unreasonably refusing an offer of employment by the new owner of the business.

XIV OUTLOOK

Hong Kong has been historically and continues to be a pro-business jurisdiction. As a result, employment laws tend to be non-interventionist in nature and seek merely to provide basic statutory protection. There is no indication that this long-standing policy is about to change in the very near future.

42 No long-service payment is payable where an employee is summarily dismissed for cause.

43 A long-service payment may also be payable whenever an employee's employment is terminated by reason of an employee having being constructively dismissed.

Chapter 51

UNITED KINGDOM

Suzanne Horne and Tom Perry¹

I INTRODUCTION

Employment law is derived from six principal sources:

- a* statute law – this emerges from the parliamentary process as an act of Parliament. Key statutes are the Employment Rights Act 1996 and the Equality Act 2010;
- b* designated legislation – Parliament may delegate its lawmaking powers to other government agencies for technical matters. Law derived from this source includes the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and the Working Time Regulations 1998 (WTR);
- c* common law – this is based on custom and practice developed over a long period of time. This includes the common law duty of care to provide a safe place of work;
- d* legal terms automatically incorporated into contracts – these are implied terms such as the implied duty of trust and confidence;
- e* case law – the reasoning by the judge in reaching a decision creates a legal principle which then becomes a precedent for other cases; and
- f* European law – this may arise from the provisions of an EU treaty, EU legislation or decision of the European Court of Justice (ECJ).

In the event of a conflict or inconsistency between UK law and EU law, EU law overrides UK law.

The principle route used by employees who believe their statutory employment rights have been infringed is to bring a claim before the employment tribunal. Appeals against decisions of the employment tribunal are to the Employment Appeal Tribunal, then the Court of Appeal (or the Court of Session in Scotland) and then the Supreme

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Court. Where the matter involves an issue of EU law, a reference can be made to the ECJ for determination or a claim can be appealed to the ECJ.

Some disputes, such as breach of contract claims or the enforcement of confidentiality provisions or restrictive covenants are heard in other civil courts such as the County Court or the High Court depending upon the value of the claim.

In addition to the civil courts, certain employment-related legislation is enforced by government agencies and public-sector bodies. For example, the Equality and Human Rights Commission has powers to enforce certain aspects of the Equality Act 2010; Her Majesty's Revenue and Customs (HMRC) has powers to enforce breaches of the national minimum wage laws; and the Information Commissioner's Office has powers to enforce data protection laws. The Advisory, Conciliation and Arbitration Service (ACAS) is a government-funded conciliation service to help resolve industrial and individual disputes in the workplace.

II YEAR IN REVIEW

2013 proved to be a hugely busy year, which saw the culmination of much of the government's programme of employment law reform. Among the new laws coming into effect were a new employee-ownership scheme whereby employees give up employment rights in return for shares in the business, new employment tribunal rules and fees to bring claims in the employment tribunal, new High Court rules concerning cost management, a second cap on the amount of compensation payable for unfair dismissal, revisions to the collective redundancy rules, renaming of compromise agreements as settlement agreements, revisions to whistle-blower protection and a new law to encourage early confidential settlement discussions between employers and their employees. The UK government also finalised its proposed amendments to TUPE, due to come into effect on 31 January 2014 (see Section XIII, *infra*).

Automatic enrolment, requiring all employers in Great Britain to automatically enrol eligible employees into a pension scheme and make mandatory contributions continued to be rolled out. In the period from 2 April 2014, employers with between 50 and 249 employees will begin to be affected.

III SIGNIFICANT CASES

In addition to the employment law reforms and legislative developments referred to above, the courts considered a number of significant issues in 2013. A few of the key cases are set out below.

In *Dresdner Kleinwort Ltd and another v. Attrill and others* the Court of Appeal held that an employer who announced at a staff meeting a guaranteed bonus pool intended to retain talent at a time of uncertainty was bound to pay bonuses from the pool subject to individuals achieving performance targets. The announcement of the pool was a unilateral variation of contract by the bank. Accordingly, it is a useful reminder that employers must remain vigilant when making any communications to employees.

In *USDAW v. Ethel Austin Ltd (in administration)* the Employment Appeal Tribunal (EAT) held that the words 'in one establishment' should be removed from

Section 188 Trade Unions and Labour Relations (Consolidation) Act 1992 on the basis that they are inconsistent with the EU Collective Redundancies Directive. This means that collective consultation obligations are triggered whenever a company proposes 20 or more redundancies anywhere in the UK within a 90-day period. Employers cannot argue that these obligations are only triggered when the redundancies are in an establishment such as an individual workplace. This case is being appealed but in the meantime it will have a significant impact on large-scale restructurings.

In *Geys v. Société Générale* the Supreme Court held that an employee who was dismissed in breach of contract remained employed (for contractual purposes) until he either accepted the breach of contract or the employer correctly complied with the terms of his contract relating to termination. In relation to the operation of payment in lieu of notice clauses, this case confirmed that to bring the contract to an end the employer cannot simply make the payment but also has to make it clear that it is doing so in exercise of its right to terminate employment. Given that so many employers pay in lieu of some or all of the notice period, this decision has a significant impact on employers.

In *Alemo-Herron v. Parkwood Leisure Limited* the ECJ has confirmed that UK courts cannot interpret TUPE to transfer collective contractual obligations dynamically. This means that a transferor who acquires employees whose contracts incorporate terms determined by collective agreements to which the employer is no longer a party post-transfer will not be subject to further changes to those collective agreements. This has been reflected in the UK government's amendments to TUPE and it will be a welcome relief to employers.

In *Croft Vets Limited and others v. Butcher* the EAT held that it was a reasonable adjustment for an employer to pay for an employee, who was suffering work-related stress and depression to have private counselling and by failing to do so the employer was liable for, among other things, disability discrimination. Given that government statistics suggest that 50 per cent of all work-related conditions are stress related, this decision is alarming to employers.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Generally, an employer and its employees are free to agree whatever contractual terms they wish, provided certain statutory and common law rights are addressed. A mutually agreed employment contract forms the basis for an employment relationship. The employment contract need not be written, formal or signed by the employee. It can be a full time, part time or a fixed-term agreement. However, an employer must by law provide an employee with a written statement of terms within two months of beginning employment. The statement of terms must contain certain prescribed information (including names of the parties, dates of employment, remuneration details, hours and holidays, notice periods, job title or description, place of work, entitlement to pension and sick pay benefits, disciplinary and complaints procedure, and details of any applicable collective agreements).

Any terms that contradict statutory employment rights (for example, contracting to pay less than the national minimum wage) will be null and void even if agreed to by

both parties (with certain exceptions, for example, if there is an opt-out available with regard to maximum working hours under the WTR).

Terms may be varied at any time but only with the consent of both parties. Employment contracts often contain a clause concerning potential variation of the contract. If a contract is varied, the employee usually signs a variation to his or her contract.

ii Probationary periods

Probationary periods are permitted and their scope and terms (including notice requirements) are governed by the terms of the employment contract. Probationary periods typically last between one and six months.

During a probationary period, employees maintain their statutory rights, but they may not be entitled to all of their contractual benefits. However, employees dismissed while on probation are still entitled to bring claims for unfair dismissal provided they have more than two years of continuous service for those hired after 6 April 2012 and one year of continuous service for those hired prior to 6 April 2012.

iii Establishing a presence

A foreign company can hire employees or independent contractors without having to officially register to carry on business in the UK, and can appoint a UK resident agent to represent it and recruit on its behalf.

If HMRC deems that a permanent establishment (PE) in the UK exists, then a corporate tax return must be filed annually. A PE will be deemed to exist if selling is taking place and contracts are executed, and if there are decisions being taken locally on issues such as prices. Thus, the employment of someone either as an employee or as an independent contractor does not in itself create a PE in the UK. The more employees there are in the UK, however, the greater the company's presence in the UK will be and therefore the more chance there is of a PE being deemed to exist. Notably, HMRC can retrospectively deem a PE to have existed.

If a company hires employees in the UK, income tax and national insurance contributions must be deducted at source, and the employer is responsible for reporting and withholding.

V RESTRICTIVE COVENANTS

Certain restrictions are implied by case law into employment contracts. For example, the employee owes his or her employer an implied duty of fidelity, and has an implied duty not to use or disclose the employer's trade secrets or confidential information during employment.

These implied covenants are of a limited nature, however, and most do not extend to the period after termination of the contract. Therefore, employers usually include explicit restrictive covenants in employment contracts, which are drafted to cover the particular circumstances of the employment relationship.

Employment contracts typically contain the following non-compete clauses:

- a* non-solicitation covenant: this restricts the employee from encouraging other employees to leave or join another company and from soliciting the employer's customers after the termination of their employment;
- b* non-dealing covenant: this restricts the employee from dealing with the employer's customers after termination of employment. This differs from a non-solicitation clause because it applies even if the customers approach the employee rather than vice versa;
- c* non-competition covenant: this restricts the employee from working for or setting up a competing business for a certain period following termination of their employment. Employers often prevent current employees from taking on another job that may interfere with their responsibilities;
- d* confidentiality covenant: this requires the employee not to disclose any confidential information that he or she has learned of during his or her employment; and
- e* gardening leave: this requires the employee to stay at home for a certain amount of time as an employee before he or she is dismissed.

Post-termination restrictive covenants are void for being in restraint of trade and contrary to public policy unless they can be shown to be no wider than reasonably necessary to protect the employer's legitimate business interests (e.g., case law has established that a post-termination restriction of more than 12 months' duration is unlikely to be enforceable).

If covenants are too broad, the courts will not rewrite or limit them in any way – the whole covenant will be unenforceable. If a clause contains two separate promises, however, the court has the power to 'sever' the unenforceable covenant so that the rest of the clause still stands.

VI WAGES

i Working time

The WTR govern the working time of UK employees other than individuals of compulsory school age, seafarers and those managing their own time. 'Working time' is any time during which an individual is at work, working or receiving training.

Employers must ensure that all adult workers work no more than 48 hours on average (over 17 weeks) in each week. The employer can renegotiate this 48-hour limit and request longer hours by obtaining the written permission of each worker. Workers may cancel this by giving up to three months' notice in writing.

Employers must ensure that night workers do not work more than an average (over 17 weeks) of eight hours in every 24-hour period. Night work involving 'special hazards or heavy physical or mental strain' carries a limit of eight actual (non-averaged) working hours. All night workers must be offered free health assessments. A 'night worker' is someone working at least three hours of daily working time between midnight and 5am.

Employees under 18 years of age are subject to a maximum working day of eight actual (not averaged) hours and a maximum working week of 40 actual hours. Their hours must be calculated as a total for all their employers. Young workers cannot work

at all between 10pm and 6am, or, if their contract specifies work after 10pm, between 11pm and 7am.

ii Overtime

Overtime is any time that an employee spends working in addition to their basic hours specified in their contract.

Overtime compensation is not legally required, but workers' average pay rates must not fall below the national minimum wage. Workers cannot be forced to work overtime unless contractually obliged (and even then they cannot work more than 48 hours a week on average unless they have agreed to an opt-out clause). Similarly, workers have no entitlement to work overtime unless this has been guaranteed in their contract.

VII FOREIGN WORKERS

An employer may be liable to civil liability if it negligently employs someone who does not have the right to work in the UK and criminal liability if the employer knows that they do not have the right.

Employees who are not nationals of the UK can broadly be split into three groups.

Non-European Economic Area (EEA) nationals

Non-EEA nationals require a licence before they are legally allowed to work in the UK. Since 2011 the UK Border Agency (UKBA) has imposed limits on the number of individuals who may enter the UK under the most common tier used by employers, Tier 2 (general). There are no absolute limits on the number of foreign workers a company may employ but by limiting the number of certificates of sponsorship available for most roles earning under £152,100 the UK government effectively does impose a limit. The employer (or sponsor) must check key documents and keep certain records and documents pertaining to the worker, who must also comply with any visa requirements. An employer is also required to report to the UKBA within 10 days if the migrant is, *inter alia*, absent without permission or dismissed.

There are five tiers into which an immigrant may fall. These will influence the type of visa that may be obtained and the need for sponsorship of the employee by the employer. The categories are as follows:

- a Tier 1: high-value migrants – general (i.e., highly skilled workers), entrepreneurs, investors, graduate entrepreneur and exceptional talent. A Tier 1 applicant is awarded points based on various factors such as qualifications and does not need employer sponsorship. A number of these categories closed to new applicants in 2011/2012. A Tier 1 visa lasts for three years and can generally be renewed for another two years.
- b Tier 2: sponsored skilled workers (including intra-company transferring employees). The employer must register online with the UKBA, receive their licence and be granted a certificate of sponsorship for the role in question. The worker must then acquire 70 points, be allocated the certificate of sponsorship and then apply for clearance. A Tier 2 permit lasts for up to three years and one month but it can be extended up to a maximum of six years. Intra-company

transferees may only come to the UK for a maximum of five years. They are then required to leave the UK for at least 12 months, unless they earn over £152,100.

c Tier 3: low-skilled workers. This tier is not currently in use.

d Tier 4: students.

e Tier 5: temporary or exchange workers. Tier 5 applies to employees who wish to work in the UK on a short-term basis (generally less than 12 months) as part of a scheme such as the Youth Mobility Scheme. There is a points-based assessment.

EEA, Swiss and Commonwealth nationals

EEA nationals have freedom of movement within the EEA and as such may (with their families) work in the UK without a licence, with the exception of workers from Bulgaria and Romania.

Swiss nationals and spouses of a British citizen or Swiss national can also work in the UK with no visa.

Commonwealth nationals with a grandparent born in the UK or British Isles can also work in the UK with no visa. The Commonwealth comprises 53 independent states, most of which are former British colonies. The Commonwealth countries include Australia, New Zealand, Cyprus, India, Pakistan and Nigeria.

There is currently no limit on the number of EEA, Commonwealth and Swiss nationals that a company may employ.

Nationals of Bulgaria, Romania and Croatia

As of 1 January 2014 nationals of Bulgaria and Romania are free to live and work in the UK after controls in place since their accession to the EU in 2007 expired. Nationals of Croatia must (unless they were employed in the UK for 12 months prior to 1 July 2013) be sponsored by an employer under the points-based system if they wish to work in the UK.

As a general rule, all employees ordinarily working in the UK are entitled to the protection of UK employment law. In addition, those with a sufficiently strong connection to the UK may also be covered.

VIII GLOBAL POLICIES

There is no legal obligation on companies to have policies in place. It is advisable for them to do so, however, as such policies set out clear guidance for the employer and employee and this can be relied on in the event of a claim. This is particularly the case with disciplinary and grievance procedures, which are not typically incorporated into the contract. Companies typically have the following policies in place: confidentiality; data protection; substance misuse; equal opportunities; health and safety; code of conduct; whistle-blowing; parental leave; sickness absence; anti-harassment and bullying; and grievance and disciplinary procedures.

If a policy is put in place, notification of the rules to employees is sufficient – employees do not have to agree to or sign the rules for them to be effective and it does not need to be filed or approved by any labour authority. It is, however, wise to ask

employees to sign their acceptance of policies, so as to ensure that they are fully aware of them. Policies are generally contained in a staff handbook but they can be posted on the company's intranet.

IX TRANSLATION

There is no general requirement under the laws of the United Kingdom that employment-related documents must be translated into an employee's primary language or that they must be written in English. Clearly, there is a practical and evidential difficulty if the employee does not understand the terms and conditions of their employment or any applicable policies or procedures. Accordingly, it is generally recommended that an employer of UK employees considers whether translation would be appropriate.

X EMPLOYEE REPRESENTATION

Employee representation in the UK takes the form of trade unions, national works councils and European works councils.

Employees have the right to join a trade union. Employers may recognise trade unions voluntarily, but if not, trade unions with more than 20 employees can use a statutory procedure to obtain recognition by an employer. This recognition means that the employer will have to consult with the trade union on a number of issues, including proposed redundancies and any proposed transfer of the business or company.

There is no required ratio of representatives to employees, and representatives are not required to serve a minimum or maximum term. The law does not prescribe how frequently trade union representatives must meet.

Employers with at least 50 employees are required to set up information and consultation bodies if they receive a written request from at least 10 per cent of the employees (subject to a minimum of 15). These information and consultation bodies are commonly known as national works councils. In addition, employers with at least 1,000 employees throughout the EU and at least 150 employees in two or more EU Member States must establish a European works council (EWC), which has information and consultation rights in relation to transnational issues, if they receive a written request from 100 or more employees in at least two states. The remit of the EWC is to address issues affecting more than one Member State. A failure to set up either a national works council or EWC after a valid request by employees will result in the standard default agreement being imposed on the employer.

Employee representatives have statutory rights to paid time off to perform their duties and in some cases to be released for training, and be provided with facilities. Representatives are protected from dismissal or detriment in carrying out their duties or in standing for election.

Employers are also required to elect (if necessary) and consult with employee representatives in certain circumstances; for example, in a collective redundancy situation, if the employer proposes to make more than 20 employees redundant within a 90-day period, in respect of certain changes to occupational pension benefits, health and safety issues and takeovers. The same obligation exists for most planned transfers

of businesses that fall under the scope of the Transfer of Undertaking (Protection of Employees) Regulations 2006. The exception to this rule is for employers with ten or fewer employees, where there are neither existing representatives, nor an independent trade union. With effect from 31 January 2014, these 'micro employers' are able to consult directly under TUPE with affected employees rather than having to elect representatives.

XI DATA PROTECTION

i Requirements for registration

Data protection laws in the UK are contained in the Data Protection Act 1998 (DPA). The organisation that regulates and enforces data protection in the UK is the Information Commissioner's Office (ICO). The ICO has issued the Employment Practices Code and Supplementary Guidance, which sets out guidance for employers in respect of recruitment, management of records, monitoring and health records. A breach of the Code or Guidance will not in itself give rise to liability but it will be persuasive if action is taken by the ICO or in the courts.

Under the DPA, all public and private organisations are legally obliged to protect any 'personal data' that they hold. Broadly, 'personal data' is defined as data that relates to an individual and enables the individual to be identified. It includes not only factual information but also opinions expressed about employees. It does not, however, include any future indications, such as an intention to promote.

Employers must ensure that personal information is dealt with in accordance with eight data protection principles:

- a* it must be fairly and lawfully processed;
- b* it must be processed for limited purposes;
- c* it must be adequate, relevant and not excessive;
- d* it must be accurate and up to date;
- e* it must be not kept for longer than is necessary;
- f* it must be processed in accordance with the data subject's rights;
- g* there must be appropriate technical and organisational measures to keep the data secure; and
- h* it is not transferable to other countries outside the EEA without adequate protection (see below).

An organisation that collects, controls and processes personal data in the UK (data controller) must generally notify this to the ICO by registering with it annually. The ICO then publishes its details in the register of data controllers, which is available to the public for inspection. Exceptions to this requirement apply, including when the personal data is only held for payroll purposes, for tax collection or for salary surveys.

Workers have the right to access their personal data held by their employer, and to know for what purpose the information is held and its relevance to their working life. Computerised personal data must be available, so that individuals can be informed about their personal data and have it corrected or erased.

ii Cross-border data transfers

Personal data must not be transferred to a country or territory outside the EEA unless that country ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data. The European Commission maintains a list of countries for which it has made an ‘adequacy finding’ and therefore to which personal data can be freely transferred – this list includes Switzerland, Argentina, Canada and Guernsey.

Although no adequacy finding has been made in relation to the US, personal data can be transferred to companies in the US that have signed up to the Safe Harbor Principles agreed between the European Commission and the US government in 2000.

The restriction on cross-border data transfers does not apply in certain circumstances, including when the data subject consents to the transfer, the transfer is necessary for public interest reasons or for legal proceedings or where the parties use the EU approved model contract clauses or approved binding corporate rules.

Most employers try to rely on the ‘consent’ exception. A high standard of consent is required. Consent must be ‘freely given’ (that is, it is not valid if the employee feels no option but to consent) and must be specific to the particular circumstances (broad consent clauses in employment contracts are not sufficient). There is no requirement to register a transfer with the ICO or other authority.

iii Sensitive data

The following types of data are classified by the DPA as sensitive data: racial or ethnic origin; political opinions; religious beliefs or beliefs of a similar nature; trade union membership; physical or mental health; sexual life; and the commission or alleged commission of any offence, including related proceedings.

Sensitive personal data can only be processed if one of the following conditions is met:

- a* explicit consent has been received from the data subject;
- b* the information has already been made public by the data subject; or
- c* processing is necessary for legal proceedings, the administration of justice, medical reasons, ethnic monitoring, to safeguard the vital interests of the data subject or another person, or to comply with employment legislation.

‘Explicit consent’ means that it is not appropriate either to use very wide-ranging definitions of purpose on consent forms to cover all possible data transfer circumstances, or to rely on an opt-out clause in an employment contract.

iv Background checks

Background checks and credit checks are permitted in the UK provided the employer complies with the DPA, the Code and Supplementary Guidance referred to above. Past convictions cannot be used when making employment decisions, except in certain circumstances, for example, if the job involves security services. Disclosure and barring service checks are common in the financial services sector and required for jobs that involve contact with children or vulnerable adults.

XII DISCONTINUING EMPLOYMENT

i Dismissal

An employee may not be fairly dismissed without cause. Employers must ensure that any dismissal is not unfair, by following the fair procedure outlined in the ACAS Code and by dismissing for one of the five statutory fair reasons: conduct, capability, redundancy, breach of a statutory restriction or some other substantial reason. Certain dismissals are automatically unfair (i.e., where the dismissal is related to pregnancy) and there is no qualifying requirement. In all other cases, the employee must have two years' continuity of service with the employer if hired on or after 6 April 2012 and one year's continuity if hired prior to 6 April 2012 in order to bring a claim of unfair dismissal. They must also ensure that the dismissal is not wrongful (when the employer is in breach of their employment contract) or constructive (where the employee is entitled to resign due to the employer's repudiatory breach of the contract).

If an employee brings a successful employment tribunal claim for unfair dismissal or constructive unfair dismissal the Tribunal may award a basic award of up to £13,500 and a compensatory award of up to the lower of one year's salary or £74,200. The government will increase these statutory maximum compensation limits as of 6 April 2014 but at the time of writing these figures have not been announced.

Unless in response to a repudiatory breach of contract by the employee (e.g., gross misconduct), the company must provide notice to the employee. The statutory minimum notice periods are one week's notice for an employment period of between one month and two years, one week's notice for each year worked for an employment period of between two and 12 years, and 12 weeks' notice for an employment period of over 12 years.

Pay in lieu of notice (PILON) is permissible and will be effective if the employer notifies the employee of this fact. If this practice is set out in an employment contract or agreement between the parties, then the pay is taxable. However, if the employer does not set out an express contractual term regarding PILON, then that payment is held to be compensation for the employer's breach of contract and is not taxable (with exceptions, for example, if the amount is over £30,000 or if the employer automatically pays in lieu of notice every time). Following the *Geys v. Société Générale* case (see Section III, *supra*) an employer must strictly comply with terms of the individual contractual provisions relating to PILON to effect a valid dismissal.

There is no requirement to notify a government authority for dismissals unless it is a collective redundancy situation (described in further detail below). An employer will not normally have to notify a national works council, EWC or trade union. Rehire rights, offers of suitable alternative employment, enhanced severance pay, social plans or other dismissal indemnities are not normally legally required, and no categories of employee other than employee representatives or occupational pensions trustees are protected from dismissal (provided the dismissal is both substantively and procedurally fair). Generally, dismissal terms are agreed by both parties at the start of the working relationship but the parties can enter into a settlement agreement where the employee waives all statutory, contractual and tortious claims if he or she receives independent legal advice or the agreement is signed off by ACAS and certain conditions are met.

ii Redundancies

An employee's dismissal will be due to redundancy if his or her employer has ceased (or intends to cease) to carry on the business for which the employee was employed, or if the requirements of the business for the employee to do work of a particular kind or in a particular place have ceased or diminished (or will cease or diminish).

The dismissal must be fair, that is, it must involve a fair selection of the employees to be made redundant, consultation with those employees, consideration of alternatives to dismissal and consideration of other suitable employment alternatives within the organisation for those employees, including an offer if such an alternative is available.

Where 20 or more redundancies are proposed, additional duties are imposed on the employer. There is currently no requirement for the redundancies to be at one establishment to trigger these additional duties (see Section III, *supra*) and in a recent case, *University and College Union v. University of Stirling*, the court held that the termination of a fixed-term contract does not count towards the number of proposed redundancies for these purposes. In terms of timing, consultation with appropriate representatives of affected employees must begin 'in good time' and no later than 30 days (45 days if at least 100 redundancies are proposed) before the first dismissal takes place. There is also an obligation to notify the Department for Business, Innovation and Skills within the same time period and a failure to comply with this obligation is a criminal offence. Appropriate representatives of affected employees will be trade union representatives (where a union is recognised) or elected employee representatives (see Section X, *supra*).

With effect from 31 January 2014, UK law is being changed so that it will be permissible for the transferee to a TUPE transfer who is proposing to make 20 or more redundancies to begin consultation with appropriate representatives of the transferor's employees before the transfer so long as the transferor agrees to this and the dismissals do not take effect before the transfer.

Rehire rights and social plans are not required, and no categories of employee other than employee representatives are protected from dismissal due to redundancy (provided the dismissal is both substantively and procedurally fair). However, employees on maternity, paternity and adoption leave are entitled to be offered any suitable alternative employment and are given priority over other employees.

Employees are entitled to statutory redundancy pay of up to £13,500 (which will increase on 6 April 2014) if they have been continuously employed by their employer for two years or more and have not unreasonably refused an offer of suitable alternative employment by the employer. In addition, employees are entitled to notice of termination or payment in lieu thereof. As set out above, the parties are permitted to enter into a settlement agreement provided certain conditions are met.

XIII TRANSFER OF BUSINESS

An asset sale or a change in service provider may be a relevant transfer under TUPE as amended as at 31 January 2014 if there is a transfer of an economic entity which retains its identity or if there is a change in service provider where the new provider will have to carry out activities that are fundamentally the same as the old provider.

If TUPE applies to the transfer, the contract of employment of any transferring employees does not come to an end. It transfers automatically by operation of law unless the employee objects to the transfer. Any dismissal by the transferee (i.e., buyer or new service provider) or transferor (i.e., seller or old service provider) will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself. Dismissals which are for an economic, technical or organisational reason (ETO reason), such as redundancy, will not be unfair. Similarly, if the reason for the dismissal is connected with the transfer, it will not be unfair. Further, an ETO reason will now include a change in the location of a workforce. However, the application of these rules is complex in practice so employers should be wary.

The affected employees transfer on their existing terms and conditions of employment. Any changes to terms and conditions of employment are void if the sole or principal reason for the change is the transfer. Like the position for dismissals, there are specific and complex rules in relation to changes for a reason connected with the transfer or those that are for an ETO reason. In addition, an employer is only prohibited from varying collectively agreed terms for one year after transfer and such collectively agreed terms remain static at the date of transfer if the new employer is no longer a party to the collective agreement as clarified by the decision of the ECJ in *Alemo-Herron v. Parkwood Leisure Limited*.

At least 28 days prior to the transfer, the transferor must provide certain information to the transferee in relation to the employees (employee liability information).

Prior to the transfer, the transferee and transferor must inform and consult representatives of any of their own employees who will be affected by the transfer or measures taken in connection with it. If there are no appropriate representatives, the employer will need to hold an election. The obligation to inform and consult arises whatever the number of affected employees but employers with 10 or fewer staff who do not have existing representatives or recognise a trade union are not required to hold an election (see Section X, *supra*). A failure to carry out adequate consultation may result in a claim for a 'protective pay award' of up to 13 weeks' uncapped pay per affected employee. In addition, if transferees are proposing 20 or more redundancies, they may, with the consent of the transferor, begin collective redundancy consultation with their future employees prior to the date of transfer so long as the dismissals take place after the transfer (see Section XII, *supra*).

XIV OUTLOOK

2014 promises to be somewhat less busy than 2013. The government's planned legislative timetable for the year includes:

- a* implementing on 31 January 2014 the TUPE changes mentioned above;
- b* compulsory pre-claim mediation via the government conciliation service ACAS for tribunal claims;
- c* expanding the right to request flexible working to all employees with six months' service with a simplified process for considering such requests;
- d* the coming into force of the final parts of the Enterprise and Regulatory Reform Bill, which will result in the abolition of statutory discrimination questionnaires;

- e* regulations providing for tribunals to order equal-pay audits;
- f* the introduction of the Heath and Work Assessment and Advisory Service as a specialist government occupational health provider; and
- g* proposals for further changes to whistle-blower legislation.

From a case law perspective, we await:

- a* the appeal of *USDAW v. Ethel Austin Ltd (in administration)* on the interpretation of 'establishment' for collective redundancies;
- b* the appeal of *Clyde & Co v. Bates van Winkelhof* on the employment status of partners in LLPs;
- c* the Court of Appeal's decision in *Rowstock Limited and another v. Jessemey* on whether the Equality Act 2010 prohibits post-employment victimisation; and
- d* the ECJ's decision in *Lock v. British Gas Trading Limited* and others as to whether holiday pay should include both basic salary and an amount that reflects commission or other variable components.

Chapter 52

UNITED STATES

*Patrick Shea and Erin LaRuffa*¹

I INTRODUCTION

The employment relationship in the United States is governed by a number of overlapping local, state, and federal laws. According to the United States Constitution, federal law is a higher authority than state or local law when they deal with the same subject. In many cases, state and local laws provide greater regulation and protection of employees' rights.

These laws govern the creation of an employment relationship, the substance of that relationship, and the termination of that relationship. Most of these laws, however, are prohibitory. For example, an employer may not make hiring or termination decisions based on an individual's protected characteristic (e.g., age, race, gender, religion). Most details governing the employment relationship itself are contractual in nature.

Lawsuits implicating employment laws can be brought in state or federal court. Certain employment contracts may require arbitration or mediation of disputes, while others (such as collective bargaining agreements) may specify detailed grievance mechanisms for the handling of disputes. A number of state and federal government agencies also regulate aspects of the employment relationship. For example, the National Labor Relations Board (NLRB) will hear cases that implicate laws related to collective bargaining and union. The Equal Employment Opportunity Commission (EEOC) investigates complaints of discrimination on a federal level, while agencies such as New York State's Division of Human Rights do the same on a state level. Federal whistleblowing laws are governed by the United States Department of Labor. In many cases, employees must first bring their case to the appropriate agency before filing a lawsuit in court.

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II YEAR IN REVIEW

The main drivers of change in employment law throughout 2013 continued to be courts and federal agencies. The United States Congress, which was divided between a Senate controlled by Democrats and a House controlled by Republicans, passed no new national employment laws of note. By contrast, state legislatures were relatively active in passing new laws.

i The Employment Non-Discrimination Act, 2013

In November 2013, the US Senate passed the Employment Non-Discrimination Act, a proposed federal law to prohibit discrimination in employment based on sexual orientation. The House is unlikely to vote on the legislation, however.

ii OSHA rule on whistle-blower claims under the Patient Protection and Affordable Care Act

The Patient Protection and Affordable Care Act of 2010 (often called ‘Obamacare’) prohibits employers from retaliating against an employee for receiving a tax credit (for which the employee may be eligible if the employer does not provide health insurance) or for reporting violations of the Act. On 22 February 2013, the Occupational Safety and Health Administration (OSHA) published its interim final rule to implement these provisions. The rule defines ‘employee’ to include current and former employees, and applicants. The rule also includes procedures for filing a complaint and OSHA’s procedures for investigating complaints.

iii Affordable Care Act penalty provision delayed

The Affordable Care Act also will require large employers (those with 50 or more full-time employees) to pay a penalty if they do not offer affordable health insurance to at least 95 per cent of their employees. This provision was to go into effect in 2014, but has been delayed until 2015.

iv Federal contractors face new regulations

In 2013, the Office of Federal Contract Compliance Programs (OFCCP) issued new regulations to expand affirmative action obligations of federal contractors related to the employment of veterans. The regulations include requirements for collecting metrics and implementing action plans.

v Courts reject NLRB regulation and ruling

In 2013, federal appellate courts struck down an NLRB rule requiring private sector employers (whether unionised or not) that are subject to the NLRA to post a new notice of employee rights under the National Labor Relations Act (NLRA). As of the time of writing, therefore, employers are not required to post the new notice. Federal appellate courts also have struck down the 2012 NLRB ruling that class action waivers in predispute arbitration agreements violate employees’ rights under the NLRA, which guarantees the right to ‘concerted activity.’ However, other federal appellate courts and the US Supreme Court have yet to weigh in on the issue. A federal appellate court in

the case of *Noel Canning v. NLRB* also held unconstitutional President Obama's 'recess appointments' of three members to the NLRB, finding that the President may only use the recess appointment power between Senate sessions and only to fill vacancies that arose during that particular recess. Therefore, the appellate court held, the NLRB's decision in the *Noel Canning* case was invalid, because the Board lacked a quorum when it made the decision. The Supreme Court is expected to rule on this case in 2014.

vi States passed several new laws affecting employers

Employers must also be aware of new state statutes. Several states, including New Jersey, passed laws in 2013 to restrict employers from asking employees or job applicants for passwords to their personal social media accounts. States such as Maryland, California, and Illinois already have similar laws, and several other states are considering such laws. Maryland's Pregnancy Fairness Act increases employer's obligations with respect to accommodations for pregnant workers. Connecticut amended its personnel policy statute, including adding a requirement that employers must provide documentation of disciplinary actions to the employee subject to discipline within one business day and allow him or her to furnish a written response that must be included in the personnel file. California enacted 17 new employment laws, including laws expanding protection for whistleblowers, undocumented workers, crime victims, good Samaritans, military veterans, and domestic workers.

III SIGNIFICANT CASES

i United States v. Windsor (decided 26 June 2013)

In *United States v. Windsor*, the US Supreme Court held unconstitutional the Defense of Marriage Act (DOMA), which had prohibited recognition of same-sex marriages for the purposes of federal statutes, such as the Internal Revenue Code, the Family and Medical Leave Act and other statutes governing benefit plans, even where such marriages were recognised as a matter of state law. Now, employers must comply with the definition of marriage under state laws wherever they operate, and therefore should review their benefit plans and leave policies with this change in mind.

ii Vance v. Ball State University (decided 24 June 2013)

Under prior Supreme Court decisions, employers can be vicariously liable under Title VII (the federal statute prohibiting discrimination based on race, colour, national origin, gender, and religion) for harassment committed by a 'supervisor.' Lower courts had adopted varying standards for who qualified as a supervisor. In *Vance*, the Supreme Court defined supervisor narrowly to include only employees 'empowered by the employer to take tangible employment actions against the victim.'

iii University of Texas Southwestern Medical Center v. Nassar (decided 24 June 2013)

Title VII also prohibits employers from retaliating against employees for complaining about discrimination. In *University of Texas Southwestern Medical Center v. Nassar*, the

Supreme Court held that a plaintiff advancing a retaliation claim must establish that his or her complaint was the ‘but-for’ cause of the employer’s alleged adverse action. Prior to this ruling, some lower courts had held that it was enough to show that the employee’s complaint was one motivating factor.

iv American Express Co v. Italian Colors (decided 20 June 2013)

The Supreme Court held that courts cannot refuse to enforce arbitration agreements that preclude class-based arbitration simply because the cost of individually arbitrating a federal statutory claim exceeds potential recovery. The ruling will make it easier for employers to avoid class litigation through pre-dispute arbitration agreements containing class action waivers.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The employer and the employee are usually free to agree to a contract on terms chosen by them. Based on mutual consent, an employment contract is an agreement by which the employee gives the employer his or her labour or services at a predetermined price. These contracts can range from fixed and negotiated agreements to contracts that are implied under certain situations. Negotiated contracts are formed either orally or in writing. If the parties enter an oral contract of undefined duration, this will generally be considered an ‘at-will’ contract. An at-will employment relationship means that either party can terminate the employment relationship at any time and for any reason that is not unlawful.

When there is no express contract, a court may find that an implied contract was formed. The court will look for certain indications that an employment contract was contemplated by looking at the conduct of the parties and the usual practices within the business in question. Many jurisdictions also look to the provisions of employee handbooks for implied contract terms. An employer can avoid implied contract claims by using express disclaimers that state that the employment relationship is at will.

Promises within any written employment contract should be definite and certain as to essential terms, such as the nature and location of the service and the compensation. However, if any terms are uncertain, courts will often enforce contracts if they can discern intent from the parties’ behaviour.

Parties to an employment contract may modify it by mutual assent. Explicit modification of a contract is not always necessary, especially if the parties’ conduct has changed. Also, if the employment is at will, the employer will usually be able to unilaterally impose future changes, for example, by altering policies contained in an employee handbook.

ii Probationary periods

Probationary periods are not required by statute, but are common in employment agreements and employee handbooks. During a probationary period, an employee’s performance is subject to more frequent review. Even if an employee successfully completes a probationary period, employment typically remains at will unless the

employee's contract specifies otherwise, meaning that no notice is required to terminate the agreement.

iii Establishing a presence

To hire employees and conduct business in the United States, foreign corporations must register with the national and state tax authorities. All businesses operating in the United States must pay federal, state, and in some cases, local taxes. When a corporation registers with the appropriate tax authorities, they receive a tax ID number or permit.

Depending on the size and nature of the corporation, the list of taxes imposed on it can be quite extensive. Also, depending on the size of the corporation there may be requirements for medical leave, continuation of employee benefits after termination, health and safety standards and compensation for employees injured on the job.

A company that is not registered with the tax authorities may engage an independent contractor. However, it should be noted that federal and state taxation and labour authorities are rapidly increasing their enforcement activities against employers who misclassify workers as independent contractors rather than employees.

A company that is registered with the tax authorities will have certain withholding and deduction requirements at the federal, state, and sometimes local level that must be followed.

V RESTRICTIVE COVENANTS

Non-competition clauses that restrict a former employee's ability to compete with his or her former employer for a limited period following termination of employment are permissible in the majority of US states. Some states take a negative stance towards these clauses, while others are much more permissive when it comes to their enforcement.

In California, 'every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.'² Accordingly, California only allows the limited use of non-compete clauses in the context of a sale or dissolution of a corporation, partnership, or limited liability corporation.

Almost all other states, including states with a major international business presence such as Delaware, Illinois, New York and Texas, will enforce a non-compete agreement if it satisfies that state's requirements of reasonableness. To be reasonable, a non-compete agreement generally must:

- a* satisfy general contract law requirements (e.g., be free from duress, fraud);
- b* have restrictions that are reasonably limited, both geographically and temporally;
- c* advance a legitimate business interest of the party seeking to enforce the non-compete agreement; and
- d* survive a balancing of both parties' interests and consideration of the public interest.

2 California Business and Professions Code, Section 16600.

The standards of reasonableness vary by state. In Delaware, courts balance the harm to the former employee, the legitimate interests of the employer (e.g., protection of goodwill, confidential information and trade secrets), and any harm to the public (e.g., preventing a medical specialist from serving a community where there is a great need). In New York, as in many states, courts state that they disfavour non-compete agreements, but will often enforce narrowly tailored clauses that are necessary to protect legitimate business interests and which are reasonable in scope. Recently, it has become easier to enforce non-compete agreements in Texas and Georgia as a result of court decisions in the former and a voters' referendum in the latter.

In general, non-compete agreements must be 'ancillary' to another valid contract; for example, an employment agreement supported by adequate consideration.³ Jurisdictions differ on whether an offer of continued employment is sufficient consideration for the imposition of a non-compete agreement, or whether a beneficial change in the employment relationship is required. For example, in Illinois, an at-will employee must be employed for at least two years before a court will find that there is sufficient consideration to support enforcement of a non-compete. Regardless of whether a post-employment non-compete agreement is entered into, employees may not compete with their employers while they are employed, because of an implicit duty of loyalty that employees owe their present employer.

VI WAGES

i Working time

The Federal Labor Standards Act does not impose maximum working hours for adults. It does prohibit the employment of minors under 14 years of age. It also regulates the type and amount of work minors under the age of 18 can engage in. States have similar laws, with some states specifying limits on working time, such as prohibiting employers from requiring work for seven consecutive days.

ii Overtime

The Federal Labor Standards Act requires that employees be paid overtime for any time spent working over 40 hours in a working week. In general, the employee must be paid one-and-a-half times his or her regular pay for all overtime worked. Overtime is calculated on a weekly basis, so that if an employee works 60 hours one week but only 20 hours the next week, the employer is still obligated to pay the employee for 20 hours of overtime worked during the 60-hour week. Some states have overtime laws that are more generous than federal law. For example, in California overtime is generally payable for all work exceeding eight hours in a day or exceeding 40 hours in a given week at one-and-a-half times the regular rate of pay. However, overtime pay in California becomes double the regular rate of pay if an employee works more than 12 hours in a workday and for all hours worked in excess of eight hours on the seventh consecutive day of work in a working week.

3 See *Hess v. Gebhard & Co, Inc*, 808 A 2d 912, 917 (Pa 2002).

Both federal and state laws provide for a range of exemptions from overtime requirements. Under federal law, the most common exemptions apply to employees who are:

- a* executives;
- b* administrators;
- c* professionals (e.g., doctors or attorneys);
- d* outside salespeople; and
- e* certain computer industry employees.

States may add or subtract categories to these exemptions for state law purposes. To qualify for an exemption, the employee generally must meet certain tests, such as a requirement that he or she be paid on a salary basis (with certain threshold requirements) and have specified 'primary' job duties.

iii State wage theft protection laws

Several states have wage theft protection laws. Both New York and California, for example, require employers to provide newly hired employees and certain current employees with detailed information concerning their wages. The statutes impose substantial penalties for non-compliance.

VII FOREIGN WORKERS

A domestic company that wishes to employ a foreign worker must apply for a temporary work visa for that worker. This is not to be confused with employment-based immigration, where the foreign worker wishes to immigrate to the United States permanently as an employee. In those cases, the foreign worker must possess one of a number of categories of unique skills, or the employer must obtain a certification from the United States Department of Labor by showing that the foreign worker is being offered a job that will not displace a US worker or have a negative effect on wages and working conditions of US workers.

One of the most common temporary work visas is for 'specialty occupations'.⁴ For the foreign worker to be able to accept an offer of employment in a specialty occupation he or she must meet certain educational requirements or have extensive training or experience in the field.⁵

Some non-immigrant visas also require the employer to obtain a certification of labour condition from the Department of Labor. In its application, the employer must promise to pay proper wages and provide a working environment that is not detrimental to its workers.

Foreign workers generally must pay state and federal taxes. An individual's ultimate federal tax liability will depend on the nature of any tax treaty between his or her home country and the United States.

4 Code of Federal Regulations Section 214.2(h)(4)(iii)(A).

5 *Ibid.*, (4)(iii)(C).

VIII GLOBAL POLICIES

Employers of a certain size (depending on the particular legislation) must comply with non-discrimination laws. For example, employers who employ 15 or more employees are prohibited, under Title VII of the Civil Rights Act of 1964, from discriminating on the basis of race, religion, colour, sex or national origin, and are likewise prohibited under the Americans with Disabilities Act from discriminating on the basis of an individual's mental or physical disability. Employers who employ 20 or more employees are prohibited from discriminating on the basis of age against employees aged 40 and older. Many states have laws of their own regarding discrimination that go further than the federal requirements. Independent contractors, on the other hand, generally do not enjoy the same protection as employees. Religious organisations, which enjoy a certain amount of protection from government infringement under the United States Constitution, are also exempted from some discrimination laws.

Federal law also establishes requirements regarding workplace health and safety. Employers covered by the Occupational Safety and Health Act of 1970 must ensure that their workplaces are free of serious health hazards, and they must follow the health and safety standards promulgated under OSHA. The Department of Labor may impose fines on employers that do not abide by OSHA's requirements. As in most areas of federal employment legislation, OSHA encourages the individual states to move beyond the minimum standard of protection under federal law. It encourages states to submit their own proposals for occupational health and safety. If a state does not submit a plan, then federal law overrides any state laws passed concerning issues covered by OSHA. If a state does submit a plan, and it is approved by the Department of Labor, the state may assert jurisdiction over the workplace health and safety issues covered under the state law or regulation.

Rules regarding company discipline or conduct are often contained in employee handbooks. A handbook should contain a prominent and express disclaimer that the document is not a contract; otherwise, there is a risk that a court will consider the document an implied contract that modifies the employment relationship.

IX TRANSLATION

There is no general requirement under United States law that employment-related documents be translated into an employee's primary language, and no general federal laws requiring the use of a particular language in legal or contractual employment documents. Federal and state courts in the United States (except in local courts in some United States territories such as Puerto Rico) conduct court business in English. Some federal and state laws mandate translation of employment notices into employees' primary languages.

Even when it is not required, it is generally recommended, if practical, that important employment documents be translated into an employee's native language because such documents are frequently used as evidence in employment-related lawsuits. If the employee can reasonably claim that he or she could not understand the employment agreement, offer letter, work rules, or handbook, the usefulness of these materials in defence of the employer may be more limited.

X EMPLOYEE REPRESENTATION

The NLRA explicitly provides for self-organisation among employees and for collective bargaining between employees and management. It also establishes certain 'unfair labour practices', which, if violated, could result in administrative sanctions in proceedings before the NLRB.

Employees have the right to form labour organisations or unions (which, if approved by a majority of employees in a secret ballot, management must recognise and bargain with). The NLRA also allows them to engage in collective activities such as strikes and peaceful picketing in support of lawful bargaining objectives or to protest against unfair labour practices.

Managers cannot organise for collective bargaining purposes.

An appropriate bargaining or election unit typically contains employees with similar skills and levels of pay, who work together in close physical proximity and perform the same functions. A union seeking to organise a group of employees must first file an election petition and show that they have substantial support among the proposed unit. Then, the Regional Director's Office of the NLRB conducts a preliminary investigation to ensure that the election would be within the NLRA's jurisdiction and comply with its regulations. If the parties agree on all relevant issues, such as the place and timing of the election, the definition of the bargaining unit and who is eligible to vote, then the Regional Director will approve that agreement and the election will be scheduled.

The election is usually held at the workplace and is monitored by the Regional Director. Voters use a secret ballot, and either the union or the management may have observers to monitor the election and challenge potential voters. Apart from these challenges, a party can challenge the conduct of the election. In those cases, if the Regional Director finds valid objections, it will order a new election. If the employer's unfair labour practices have made it impossible to hold a fair election, however, the NLRB has sometimes ordered the employer to recognise and bargain with the union.

There are a number of statutory protections for unions and workers who wish to organise. For example, employers may not threaten employees with discipline or termination if they do not vote against the union. The employer likewise may not promise benefits to workers who vote against the union. The NLRA also prohibits discriminating against job applicants or employees on the basis of union affiliation, either in hiring, termination, discipline, or the awarding of benefits.

Once the bargaining representative is determined, the two sides must meet to agree on a collective bargaining agreement (CBA) that will govern the relationship between the represented employees and the employer. The CBA is a product of the parties' own negotiations and there are no imposed terms. Both sides must, however, bargain in good faith. If one side can prove that the other is bargaining in bad faith (or is refusing to bargain), the NLRB or a court can impose unfair labour practice sanctions on the offending party.

Under the NLRA, the parties must bargain about wages, hours and certain other conditions of employment. This is the bare minimum, and both sides must be open in their bargaining (including sharing information). Once the CBA has been agreed, it must be reduced to writing and signed by all representatives. If the parties cannot reach an agreement despite bargaining in good faith, either side can declare an impasse. The

union can initiate a strike (after giving proper notice) and seek to compel the employer to accept its terms. The employer can implement its final offer or resort to a lockout of the employees to gain acceptance of its proposal.

XI DATA PROTECTION

The United States has no centralised data protection agency, though there are federal laws protecting financial and medical data. Some states have their own data protection laws, which vary from state to state.

i Requirements for registration

The United States reached an agreement with the European Commission in 2000 regarding the permitted export of data from the European Union to the United States, under certain conditions. Called the ‘Safe Harbor Principles’, this agreement allows a company that wants to transfer personal data from the EU to the United States to do so by having its US counterpart notify the Department of Commerce that it has adopted the Safe Harbor Principles agreement. Safe Harbor is a self-certification registry, and certification must be confirmed annually to the Department of Commerce.

ii Cross-border data transfers

According to the agreement, the organisation responsible for data transfer must inform individuals whose data is being transferred about the purposes for which the information is being stored and used. Those individuals must be informed about how to contact the organisation, types of third parties to which it discloses this information and steps the organisation takes to protect privacy. Individuals must be allowed to decide if their personal information will be transferred to a third party or used for purposes different from those for which it was originally collected. For sensitive information, individuals must expressly agree to third-party transfer or use for different purposes.

iii Sensitive data

There is some protection of ‘sensitive’ data in the United States. For example, the Health Insurance Portability and Accountability Act (HIPAA) seeks to protect the privacy of employees’ health information in the health insurance context. HIPAA also encourages health-care providers and insurers to store and transfer health information electronically. The Fair Credit Reporting Act (FCRA) seeks to protect the privacy of consumers’ financial (especially credit) information. The FCRA requires consumer credit reporters to investigate and verify the accuracy of consumers’ credit information, at their request. Regulations for the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibit employers from intentionally gathering their employees’ genetic information or discriminating against employees on the basis of such information, and provide that employers may not disclose genetic information they do receive, except under very limited circumstances. Employers are also forbidden from retaliating against employees who complain of violations of the Act.

iv Background checks

The permissibility (or mandatory nature) of criminal and credit-related background checks varies by state and occupation. At the federal level, the FCRA creates procedural requirements for criminal and credit-related background checks performed on applicants or employees by third parties. Many states require a criminal background check for employees in certain occupations such as those working in childcare, primary education, nursing, law enforcement and prison security. Some states place limits on an employer's ability to use criminal records to disqualify an applicant, and a number of states strictly limit or prohibit an employer's use of credit history to disqualify an applicant for employment. The EEOC has taken the position that reliance on a criminal conviction to disqualify an applicant from employment may violate the anti-discrimination provisions of Title VII if the conviction is not job related.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Persons employed on an at-will basis may generally be dismissed for any lawful reason or no reason at all. While the employment-at-will doctrine governs most employment relationships in the United States, there are many limitations on the doctrine. As mentioned above, employee handbooks and manuals can create an obligation to follow certain procedures for dismissal, which, if not followed, could give rise to a claim for breach of contract. Employers who wish to limit the binding effect of language within a handbook should place a prominent disclaimer stating that the manual contains no promises of any kind that should be relied on by any employee, and that employment is strictly at will. The more prominent, visible and explicit the disclaimer, the more likely it is that courts will uphold it.

Oral contracts can also alter an otherwise at-will relationship. As long as the language and promises are specific enough, and there is an exchange of value within the contract, courts may uphold oral contracts that attempt to limit terminations only for good cause. Contracts implied from the conduct of the parties can also limit the at-will doctrine. Union members who are subject to a collective bargaining agreement may only be dismissed under the terms of that CBA, and union members are virtually never employed at will. Most CBAs have a dispute or grievance mechanism, and the parties must work within that contractual framework.

In the rare instance that a United States employee has a written contract, the terms of the contract must be followed in the dismissal.

ii Redundancies

Very large terminations, or reductions in force (RIF), are governed by a federal law, the Worker Adjustment and Retraining Notification Act (WARN). WARN requires businesses that employ 100 or more full-time employees to provide the affected employees (or their bargaining representatives), and certain state and local government entities 60 days' written notice before: (1) any shutdown of a site, or of one or more facilities or operating units at a single site that results in an employment loss for 50 or more employees; or (2) a large-scale lay-off in the form of an employment loss during a

30-day period (or a 90-day period for lay-offs that occur for similar reasons as part of the same process) at a single site of either 33 per cent of that site's workforce (if they number 50 or more) or a loss of 500 or more employees in total.

Many states have their own 'mini-WARN' acts that contain similar or more protective provisions.

XIII TRANSFER OF BUSINESS

The United States does not have a general 'transfer of undertakings' law or 'business transfer law' affecting mergers, acquisitions, or outsourcing decisions by companies. Some collective bargaining agreements and other employment contracts may have provisions affecting business transfers. And some federal and state laws require advance notice in cases of large-scale lay-offs and plant closings.

In an asset sale where the purchaser wishes to retain employees of the selling business, it must make individual offers of employment to the employees since their employment will not transfer automatically.

XIV OUTLOOK

Major developments in employment and labour law in 2014 are not expected to come from federal legislation, but rather from courts, federal agencies and state legislatures.

Employment-based litigation remains an ongoing concern. Wage and hour claims have become some of the most common and expensive claims to defend, and the rampant growth in such claims shows no signs of abating. A report from 2012 also showed a sharp increase in retaliation claims, which now encompass 38 per cent of all discrimination claims filed with the EEOC, a trend that likely will continue.⁶ Employers are likely to face even more retaliation suits under the Affordable Care Act. However, the US Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar* may help employers to prevail in some retaliation lawsuits more quickly than in the past.

Government agency enforcement actions are also a growing concern for employers. State and federal agencies have increased audits and other enforcement actions related to wage and hour laws. Further, the EEOC has identified its priorities for 2012–2016 as: (1) eliminating barriers in recruitment and hiring; (2) protecting immigrant and migrant workers; (3) addressing emerging issues (including those related to the Americans with Disabilities Act and the potential application of Title VII sex-discrimination provisions to lesbian, gay, bisexual, and transgender individuals); (4) preserving access to the legal system; and (5) combating harassment on the basis of race, colour, sex, ethnicity, age, disability and religion.

⁶ EEOC, 'Charge Statistics', available online at www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

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Mr Downey has written extensively on labour and employment in China and Hong Kong. His published works have established themselves as standard texts for both legal practitioners and a wider audience.

Mr Downey went to university in New Zealand and gained degrees in anthropology and law. In 1990 he was awarded a master's degree in law from the University of Hong Kong. Mr Downey has been admitted to practise in Hong Kong, New Zealand, and England and Wales.

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Ms LaRuffa received her BA in political science from the University of Notre Dame in 2003, and her JD from William & Mary Law School in 2007. While at William and Mary, she was an editor of the *William & Mary Law Review*. She is a member of the Bars of New York, Connecticut, and the District of Columbia.

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Ms Sankowicz is listed in the 2010 edition of the *Legal 500 EMEA*. She is ranked as excellent by *Décideurs Juridiques 2009* in employment law, employment criminal litigation, M&A employment-related issues, restructuring and lay-off plans. She is cited in the *International Who's Who of Management Labour and Employment Lawyers 2009* and *European Legal Experts 2010*. She is also highly recommended by PLC, being described as 'an internationally respected labour and employment specialist who advises foreign and in particular US clients on labour issues such as collective negotiations and lay-off plans, and represents clients in collective litigation matters in France'.

Ms Sankowicz has acquired over 15 years' experience working with both French and global companies in this area.

Ms Sankowicz offers clients counsel and litigation services on the full range of labour and employment law issues and has extensive experience in:

- employment aspects of corporate restructurings and lay-off plans;
- negotiations with works councils and trade unions;
- individual employment matters, from recruitment and work contracts to career planning, secondments, expatriations and separations;
- compensation and benefits packages, including stock option plans; and
- new information technology (company internet policies, whistle-blowers).

Ms Sankowicz holds law degrees from the University of Paris II and Queen Mary and Westfield College, University of London (1993), a master's degree in labour law from the University of Paris II (1994), and an LLM degree from New York University (1995).

She is a member of the European Employment Law Association (EELA), AVOSIAL (a French association of employment lawyers) and XBHR. She also participates regularly as speaker in seminars and symposia on employment law (EELA, ABA, and XBHR) and assists clients with their internal training programmes.

Ms Sankowicz is admitted to the Paris Bar and speaks French and English.

PATRICK SHEA

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Patrick Shea is a partner in the Paul Hastings LLP employment law practice. He represents companies in a wide range of employment-related litigation, including matters involving employee benefits, employment discrimination, wage and hour claims, and wrongful discharge. His clients include major companies in the retailing, data processing, manufacturing, financial services, defence and high-tech industries. He is a fellow of the College of Labor and Employment Lawyers, and he is named in *The Best Lawyers in America*.

Mr Shea has extensive experience in the defence of large multiparty cases and class actions.

Mr Shea was appointed by the chairman of the EEOC to serve on a negotiated rule-making committee that developed regulations governing age discrimination releases under Title II of the Older Workers Benefit Protection Act.

Mr Shea is a member of the New York, District of Columbia and Connecticut Bar Associations, and is admitted to a number of federal district and circuit courts. He is a frequent speaker on topics in the employment law area.

Mr Shea received his BA degree, with honours, from the University of Scranton in 1978. He received his JD degree from Yale Law School in 1981. While at Yale, he was a member of the board of editors of the *Yale Law Journal*. After graduating from law school, he served as law clerk to the Honourable Raymond J Pettine, Chief Judge of the US District Court for the District of Rhode Island.

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