WHITE & CASE

# Global employment and benefits update

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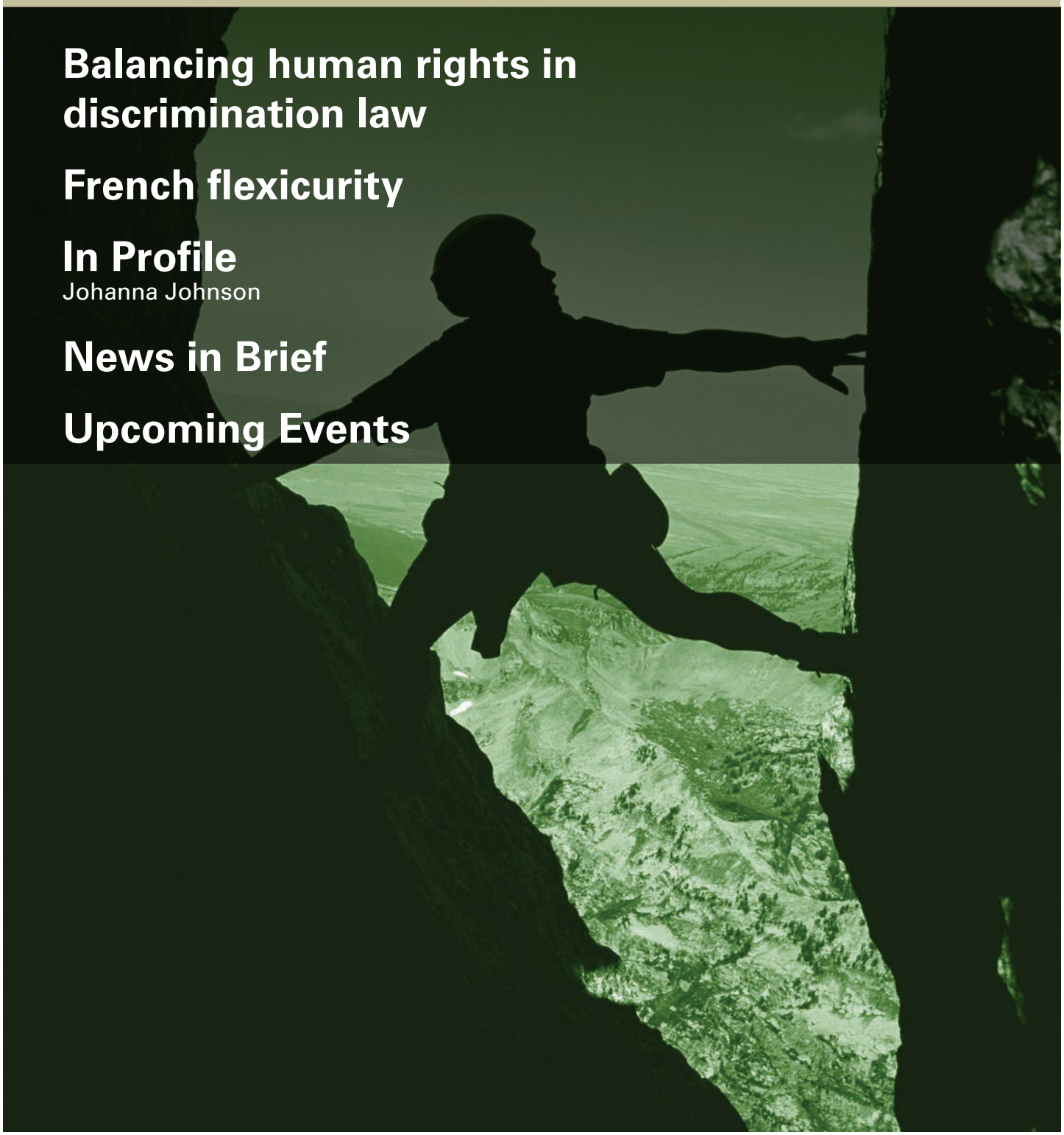

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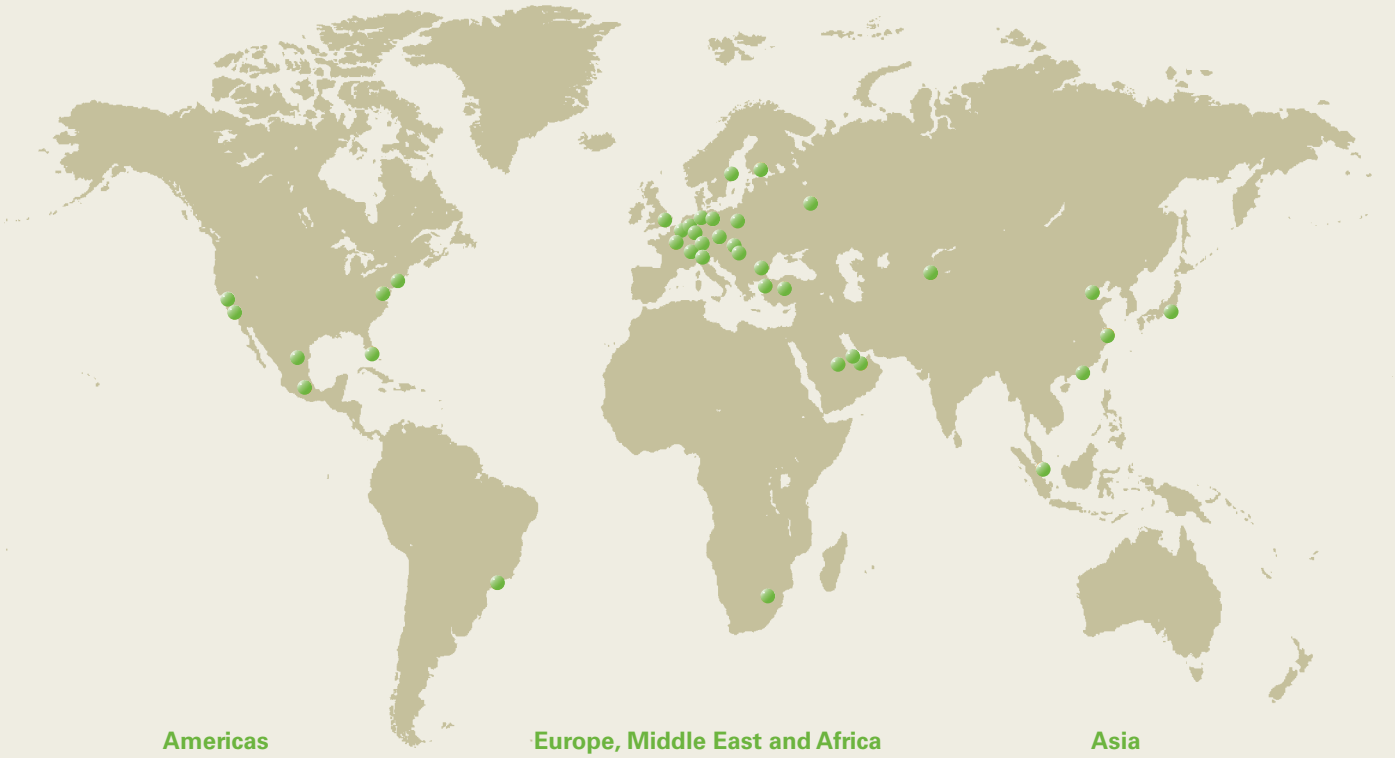

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# Balancing human rights in discrimination law

In *Eweida and others v United Kingdom*[1], the European Court of Human Rights (ECHR) considered four Christian employees' arguments that UK law failed adequately to protect their right under the European Convention on Human Rights to manifest their religious beliefs.

On 15 January 2013, the ECHR held that the UK failed to protect a Christian employee's right, under Article 9 of the European Convention on Human Rights, to manifest her religious belief. Ms. Eweida, whom British Airways (BA) prevented from wearing a white gold cross visibly owing to its uniform policy, failed with her religious discrimination claim before domestic courts and tribunals. However, while BA's wish to "project a certain corporate image" was legitimate, the Court of Appeal accorded it too much weight in deciding that the uniform policy was objectively justified.

The ECHR rejected the complaints of three other Christian employees: Mrs. Chaplin, a clinical nurse whose employer prevented her from wearing a crucifix on hospital wards because of the legitimate aim of protecting the health and safety of its staff and patients; Ms. Ladele, a registrar of births, deaths and marriages who was dismissed by a council for refusing to conduct civil partnership ceremonies; and Mr. McFarlane, a Christian and a sex counselor who was dismissed by his emloyer, Relate, for refusing to counsel same-sex couples.

In upholding Ms. Eweida's complaint, the ECHR departed from its previous case law, which suggested that employers' requirements do not interfere with religious freedom for Article 9 purposes, since employees are always entitled to resign and seek work elsewhere. This shift is likely to have a significant effect on future indirect discrimination cases in the UK based on religious or philosophical belief.

## The facts

Ms. Eweida, Mrs. Chaplin, Ms. Ladele and Mr. McFarlane brought claims against their respective employers under the Employment Equality (Religion or Belief) Regulations 2003[2], arguing that their employers' policies subjected them to an unjustifiable detriment owing to their religious beliefs. Their claims were rejected.

The four employees brought complaints to the ECHR against the UK. They argued, with reference to Article 9 and/or 14 of the European Convention on Human Rights, that the UK (whether by way of the Employment Equality (Religion or Belief) Regulations 2003 or otherwise) had failed adequately to protect their right under the European Convention on Human Rights to manifest their religious beliefs.

*continued overleaf*

1 [2013] ECHR 37

2 SI 2003/1660

## The decision

The ECHR:

- by five votes to two, upheld Ms. Eweida's complaint that her Article 9 rights had been violated, and awarded her €2,000 in respect of non-financial loss (given her anxiety, frustration and distress) and €30,000 costs.
- by five votes to two, rejected Ms. Ladele's complaint that her rights under the European Convention on Human Rights had been violated.
- unanimously rejected Mrs. Chaplin's and Mr. McFarlane's complaints that their rights under the European Convention on Human Rights had been violated.

## Key principles applicable to all four cases

In light of its previous case law, the ECHR made the following points:

- **Article 9 rights:** As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the European Convention on Human Rights. Religious freedom encompasses the freedom to manifest one's belief, both in private and in public. However, since the manifestation of religious belief might have an impact on others, Article 9(2) allows this to be limited by national law, to the extent that the limitation is necessary in a democratic society.
- **manifestation of belief:** The right to freedom of thought, conscience and religion covers views that "attain a certain level of cogency, seriousness, cohesion and importance". However, not every act inspired, motivated or influenced by such a belief is a "manifestation" of that belief. To be so, the act must be "intimately linked" to the religion or belief. Whether there is a "sufficiently close and direct nexis" between the act and the belief must be determined on the facts of the case. In this regard, there is no requirement that the act be "in fulfilment of a duty mandated by the religion". In Ms. Eweida's case, the ECHR accepted that the wearing of a cross visibly was intimately linked to her faith.
- **interference with Article 9 rights in the workplace:** As noted by the House of Lords in *R (Begum) v Headteachers and Governors of Denbigh High School*[3], in several cases the ECHR has held that the employee's right to resign and change employment meant that individual employers' rules do not interfere with religious freedom for Article 9 purposes. However, the ECHR has not applied a similar approach to other rights under the European Convention on Human Rights (such as the right to private life under Article 8, the right to freedom of expression under Article 10 and the right not to join a trade union under Article 11). Given the importance of freedom of religion, rather than holding that the possibility of changing one's job negates interference with the right, the better approach is to weigh that possibility in the balance when considering whether an employer's workplace restriction was proportionate.
- **fair balance must be struck:** States have a margin of appreciation when deciding whether interference with a right under the European Convention on Human Rights is necessary. Although Ms. Eweida and Mr. McFarlane were employed by private companies, the ECHR must consider their cases with reference to the UK's positive obligation to secure Article 9 rights for people in its jurisdiction. Regard must be given to the fair balance to be struck "between the competing interests of the individual and of the community as a whole".

## Impact

The decisions in respect of Ms. Eweida's and Ms. Chaplin's applications highlight the balancing act to be struck between the protection of religious expression and an employer's legitimate aims. In Ms. Eweida's case, it was held that, whilst BA's aim of protecting its corporate image was legitimate, the English Courts had given too much weight to this and Ms. Eweida's right to religious expression had been infringed. On the other hand, in Ms. Chaplin's case, it was held that the hospital policy (which banned the wearing of all jewellery to reduce the risk of infection) was of greater importance than Ms. Chaplin's religious expression as it was based on ensuring the health and safety of the hospital's patients.

The decisions in respect of Ms. Ladele and Mr. McFarlane's applications, however, emphasize the importance of protecting others from discrimination over the expression of faith. In both cases the court held that the employer's aim of requiring all of its employees to act in a way which did not discriminate against others was legitimate. As to the future, the differing decisions in Eweida and Chaplin demonstrate that, where visible manifestations of faith are concerned, employers must proceed on a case by case basis. What is, however, clear is that employers do not have to accommodate religious views which have the effect of infringing the rights of others.

## What do employers need to do?

Following the judgment, there is now an increased requirement for employers to justify any dress code that could be discriminatory against religious groups. Therefore, blanket dress codes, which preclude employees from wearing items such as a visible cross, hijab or turban purely because they are at odds with a corporate image, are likely to contravene Article 9 of the European Convention of Human Rights, which provides the right to freedom of thought, conscience and religion.

An employer's ban on items that pose health and safety risks, such as hospital staff being unable to wear jewellery for hygiene reasons, will be more easily justified—as was the decision in the case of Ms. Chaplin.

3 [2006] UKHL 15

# France

## French flexicurity

The National Inter-Sectorial Agreement (the "Competitiveness and Employment Agreement") was concluded by French trade unions and employers' associations on 11 January 2013. It is likely to produce numerous and significant changes in French labor law, with one of the declared objectives being to introduce a new French model of flexibility and security, referred to as "flexicurity." The Competitiveness and Employment Agreement is likely to come into force at the end of May 2013.

The entry into force of the provisions of the Competitiveness and Employment Agreement is dependent on the adoption of necessary laws and regulations. Moreover, a certain number of provisions require the negotiation of collective bargaining agreements. The principal measures provided by the Agreement are as follows:

### The introduction of new rights in favor of employees in order to secure their professional career (Title I of the Agreement)

- **taxation of fixed-term employment contracts and state assistance for recruiting young employees under indefinite-term employment contracts:** In order to encourage the conclusion of indefinite-term employment agreements, on the one hand, the employers' social contributions for unemployment insurance will increase in respect of short fixed-term employment contracts, and on the other hand, state assistance for recruiting young employees under indefinite-term employment contracts will be implemented via temporary exemption of employers' contributions.
- **stability of employment via rights to training:** The principal measures concern the facilitation of training schemes and the creation of an individual training account, which will be transferrable from one company to another.
- **"secure voluntary mobility":** For companies with less than 300 employees, some employees will be able to benefit from a voluntary redeployment scheme that will allow them to take a new employment position outside the company. Following the mobility period, if the employee chooses to return to the original company, he/she will recover his/her former position (or an equivalent position). Otherwise, he/she will be deemed to have resigned and the employer will be exempt from obligations resulting from economic redundancy.
- **part-time work:** Trade unions and employers' associations are invited to negotiate the possibility of creating two concurrent part-time employment positions, with the minimum period of activity fixed at 24 hours per week, and a premium for overtime.

### Reinforcing the information provided to employees' concerning employment perspectives and the strategic economic decisions of the company in order to reinforce job and skills forecast management (Title II of the Agreement)

- **reinforcing the social dialogue with the employees' representatives:** A single database of the economic and employment information of the company will be put in place and regularly updated, thus replacing periodical reports of information.
- **providing a framework for the use of expert proceedings:** When relying on expert proceedings requested by the employee representative bodies, the assignment of the expert proceedings will be partly funded by the operating budget of these entities. Such assignment will be organized within a pre-set period of time and on the basis of a pre-established tariff matrix.
- **representation of employees in corporate governance bodies:** Within companies employing at least 10,000 employees worldwide, or 5,000 employees domestically, the employees will enjoy voting rights with the corporate governance bodies.
- **encouraging internal mobility:** Companies will be able to implement collective internal organization measures, without downsizing, such as changes of position or workplace. An employee's refusal to accept such a change would be subject to dismissal for personal reasons (instead of economic reasons), which would justify redeployment measures.

### Measures for adapting to economic difficulties and for the preservation of employment (Titles III and IV of the Agreement)

- **collective redundancies:** In companies with at least 50 employees, in the case of economic redundancies concerning at least 10 employees, the procedure and the content of the plan for safeguarding employment will be determined: (i) either by a collective agreement; or (ii) by means of a document produced by the employer and approved by the relevant French administrative body (the "Direccte").
- **collective agreement for maintaining employment and partial work-stoppage:** In the case of economic difficulties and in the interest of preserving employment, the possibility is provided for concluding a company agreement, allowing for a temporary reduction in remuneration and/or working time.

### Reducing the risks in labor disputes (title V of the Agreement)

- **measures encouraging pre-judgment dispute resolution:** The parties will be able to terminate a dispute by payment of a flat-rate indemnification set at 2 to 14 months of salary and calculated on the basis of the employee's seniority.
- **reducing the statute of limitations from 5 to 2 years:** This new statute of limitations would apply to any action concerning the performance or the termination of an employment contract, although this will be excluded in the case of discrimination (which remains at 5 years) or actions to recover unpaid salary (which is set at 3 years).

# **In** Profile Johanna Johnson

## As an employment lawyer with Australia's leading airline you should always expect the unexpected.

But an employee who stole a passenger's chicken suit from their luggage, and then wore it as they walked across the tarmac to the plane, is just one of those things that is difficult to anticipate!

And time spent on the client side brings a whole new perspective as Johanna Johnson explains.

"I loved my time with the airline, and also the other secondment I took, because I was put in the client's shoes. You see the politics and often complex internal structures that have to be negotiated – all something you would not see normally when you are dealing with just your main client contact."

"And a secondment teaches you to answer the client's question – clearly, quickly and in a way that makes sense for them in the context of their business," she added.

Born in Perth, but brought up in Sydney, Johanna trained in Australia with a firm that later became absorbed into one of the major global law firms, and during her training, employment law was her first of three seats.

"I liked employment law for a number of reasons. Firstly, I could really relate to it – I was an employee myself; plus labor law and industrial disputes were always in the media and were consistently among the top three issues on the agenda in every election," she explained.

During her four years with the Firm, including a 7-month secondment with the airline, the majority of clients were large industrials. "Because of the size of the workforce and nature of the business, it felt as though they were constantly in court or in front of tribunals. There was never a dull moment!"

A move to Hong Kong working with another major law firm allowed her to begin to take on more of an employment advisory role, in addition to the industrial side of her practice, and expanded her client list to include more financial and banking clients as well as major corporates.

And when her husband's job prompted a move to London after two years, she jumped at the opportunity.

"I joined White & Case five years ago because of the genuinely global nature and high quality of the client base as well as the opportunity to focus on advisory work, which I enjoy. I could also see that in London there was a close-knit employment team, which is connected to a much wider group of dedicated employment lawyers around the world."

"The prospect of working with a truly global employment team on a wide variety of international and cross-border issues was very appealing."

"A big issue that my clients face is the pace of ever-changing regulation, whether driven by the UK Government's 'red-tape challenge', which is having quite an impact on employment laws, or through the drive from Brussels to harmonize European employment laws."

"There's also the complexity that comes with the major cross-border matters that we work on, whether that is around local regulations our clients must meet if they are opening a branch in a new country or the rules they have to be aware of in an acquisition."

Away from work, Johanna has two daughters, three-year-old Alice and one-year-old Lucy, and a husband who leads an equally busy life working for one of the world's major business financial firms.

But she still finds time to tend to her travel fever, which really took hold when newly qualified; she took a year out and visited 21 countries. "Now, though, it's at a different pace and involves a lot more nap time for everyone. Though I still look out the window of the plane to see if I can see anyone wearing a chicken suit."

Johanna Johnson is an Associate in our London Employment & Benefits team.
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# News in Brief

## China

### Amendments to Labor Contract Law

On 28 December 2012, the Standing Committee of the National People's Congress of China ("NPC") released amendments to the Labor Contract Law (the "Amendments"), which will take effect on 1 July 2013. After the Labor Contract Law was introduced in 2008, dispatched labor (the hire of workers through an agency) has become an important form of employment in China, sometimes preferred by employers in order to lower labor cost and circumvent certain obligations under the Labor Contract Law arising from direct employment. The Amendments were set out to restrict the overuse of dispatched employees. The key provisions in the Amendments are summarized below:

- A labor dispatching agency has to meet more stringent qualification requirements to obtain necessary licenses for its operation. For example, the minimum registered capital will be raised from RMB 500,000 to RMB 2,000,000 and the Amendments impose certain requirements on the operational capability of a labor dispatching agency. Previously licensed dispatching agencies have one year after the Amendments take effect to meet such requirements.

- The current Labor Contract Law contains an "equal pay" principle under which dispatched employees are entitled to the same compensation as directly-hired, employees in the same position. The Amendments further clarify that the same compensation refers to the payment structure, which would include basic salary, bonus and benefits. The "equal pay" principle is also required to be incorporated in any labor contract between a dispatched employee and the dispatching agent and the dispatch service agreement between an employer and a dispatching agency.

- The Labor Contract Law already contains restrictions on the use of dispatched labor. Under the current law, an employer can only hire dispatched employees for positions that are temporary, auxiliary or as substitutes to directly hired employees (although the words "temporary, auxiliary or substitutive" were not defined in the past). The Amendments provide clarification on the circumstances when hiring a dispatched employee is considered permissible, including:

  - **temporary:** a position that lasts for no more than six months is considered temporary;

  - **auxiliary:** a position providing services for the people carrying out the main business of a company is considered auxiliary; or

  - **substitutive:** a position that becomes available for a period of time because an employee is taking leave for vacation, study or other reasons.

### Supreme Court's New Guidance on Labor Disputes

On 31 December 2012, the Supreme People's Court of China released 'Interpretations of the Supreme People's Court on Several Issues on the Application of Law in Hearing the Cases Involving Labor Disputes (IV)' (the "**Interpretations**"), which took effect on 1 February 2013. The Interpretations provide practical guidance on a number of issues often debated in labor disputes. The judicial interpretations promulgated by the Supreme People's Court of China are binding on all courts in China.

- **aggregation of service years:** Under the current Labor Contract Law, if an employee entered into a labor contract with a new company for a reason beyond his or her control without receiving any severance payment from the previous employer, the total number of years of service with the previous employer will be aggregated in the calculation of the total number of years of service for the new employer. As a result, if such employee is dismissed by the new employer, he or she will be entitled to a severance payment based on the total number of years of service including the number of years served with the previous employer. The Interpretations clarify the circumstances where a transfer is deemed to be beyond an employee's control. Such circumstances include mergers and acquisitions and assignment, among others.

- **post-employment non-competition agreement:** A company has to make payment to a former employee in consideration of any post-employment non-competition obligation prescribed in the applicable employment agreement or confidentiality agreement. Such consideration shall be no less than the higher of: (a) 30 percent of the average monthly pay of the employee in the 12 months prior to his or her termination; and (b) the local minimum salary ("**Non-competition consideration**"). During the non-competition period, a former employee with non-competition obligation is entitled to three additional months' Non-competition consideration damages if the company elects to terminate the non-competition arrangement. A court could issue an injunction to enforce a non-competition agreement in addition to the monetary damages.

- **oral amendment to labor contract:** An oral amendment to a written labor contract will be held valid as long as both parties have actually performed the verbally modified contract for more than one month and the verbally modified contract does not violate any applicable law.

- **foreigners without work permits:** Foreigners without a work permit, even if they are under an employment contract, will not have their labor relationship with employers recognized by the court.

# **News** in Brief contd.

## Czech Republic

### Introduction of 7 percent solidarity surcharge

With effect from 1 January 2013, for a limited period of three years, a solidarity surcharge of 7 percent (in addition to the standard rate) will be imposed on employees whose gross annual salary exceeds CZK 1,242,432 (€49,700). This solidarity surcharge shall not be classed as "tax", and may cause uncertainty for those employees who are entitled to credit on tax paid (tax credit). Taxpayers subject to the solidarity tax increase would have to file a tax return.

### Cap for payment of insurance premiums for public health insurance

The cap for the assessment base for the payment of insurance premiums for public health insurance has been removed. Previously, only those employees whose gross annual salary exceeded CZK 1,800,000 (€72,000) were required to make payment of insurance premiums for public health insurance. This cap has now been removed so that all employees are required to make payment of insurance premiums for public health insurance. This will remain the case up until 2015.

### Retirees—removal of basic tax allowance

Retired persons who have taxable income will no longer be eligible for the annual basic tax allowance of CZK 25,000 (€1,000). This change will continue to apply up until 2015.

## Germany

### Certificates of incapacity for work—an employer's request

The general rule under the Continued Payment Act is that an employee must inform his or her employer immediately if he or she is unable to work and how long he or she is expected to be unfit for work. If the employee is ill for more than three days, the employee must submit a medical certificate of incapacity for work (sick note) to the employer by no later than the next working day. The employer can demand that sick notes are submitted earlier. Until the German Federal Labor Court's recent decision below, it has not been clear whether an employer must have a specific reason for demanding that sick notes are submitted earlier.

The Court has clarified in a recent case the position regarding when an employer may request evidence from the employee of his or her incapacity to work. The Court has held that an employer may request (without reason) an employee to provide a doctor's certificate confirming his or her incapacity to work on the first day of any sickness absence.

The facts of the above case are as follows: the Claimant worked as a journalist at the defendant company. The Claimant went on sick leave on 20 November 2010. When she returned to work the following day, the Defendant requested that she provide a doctor's certificate confirming her incapacity to work on the first day of any sickness absence from then on. The Claimant argued that the Defendant could only request her to provide a doctor's certificate on the first day of any sickness absence provided that such request could be reasonably justified. The Court dismissed her claim and held that an employer has discretion to request an employee to provide a doctor's certificate confirming his or her incapacity to work on the first day of any sickness absence.

### "Mini-jobbers"—important changes

The "mini-job" scheme in Germany allows employees to earn up to €400 each month tax free. Employees can have as many mini-jobs as they want up to the limit of €400. As of 1 January 2013, the provisions relating to so-called mini-jobs have been amended. Now, "mini-jobbers" who earn up to €450 per month will be exempt from tax and social insurance payments.

Further, mini-jobbers are now subject to pension insurance contributions with an option to be granted exemption in future. An opt out system will automatically apply to those mini-jobbers who earn between €400 and €450 per month. If a mini-jobber does not opt-out, the employer shall deduct contributions for the pension insurance from his or her salary. The German Government is expecting that 90% of affected employees will opt out from pension insurance contributions in 2013. Nevertheless, employers should be aware of the above changes and reflect them in their payroll system.

## Hungary

### Introduction of new Labor Code

A new Labor Code entered into force on 1 July 2012. Broadly speaking, employers have welcomed the changes; however, the new Labor Code has been criticized by trade unions for its restrictions on employee representation. Most provisions of the new Labor Code took effect on 1 July 2012, save for those relating to secondment, holiday, termination payment and sickness absence.

The following changes are of particular note:

1. **place of work:** Under the new Labor Code, an employer may only make unilateral changes to an employee's terms and conditions of employment for a period not exceeding 44 calendar days (previously 110 calendar days).

*continued overleaf*

2. **holiday:** Under the new Labor Code, all holidays must be taken in the calendar year when they are due (unless the employment agreement provides otherwise). The new Labor Code also allows employees to take additional holiday where certain circumstances apply. According to the guidelines published by the Labor Authority, compliance with rules relating to holiday and rest periods will be one of the main focus areas for labor inspections in 2013.

3. **absence:** Previously, if an employee was absent for any period, he or she would have been entitled to receive payment equal to the amount he or she would have earned during such period. Under the new Labor Code, such payment is calculated based on a new formula, which takes into account certain performance-based payments such as commission.

4. **contracts of employment:** Any provisions in an employment contract relating to the old Labor Code will be declared invalid if they contravene any rules under the new Labor Code.

## Poland

### Recent labor law developments

On 14 December 2012, a comprehensive draft of amendments to the Polish Labor Code provisions on working hours was prepared by the Minister of Labor and Social Policy.

The following proposed changes are of particular note:

1. **introduction of flexible working hours:** The proposed amendments expressly provide for the possibility of starting work at various times on individual days, in which case commencing work during the same "employment day" (i.e., before the end of the 24-hour period after work began the preceding day) would not be classed as overtime, as is the case at the moment.

2. **extension of the reference period from four to 12 months:** The proposed amendments introduce the possibility of extending the "employment" reference period from four months to 12 months.

3. **extension of unpaid breaks:** Currently, the regular break time an employer must introduce is 60 minutes. According to the proposed amendments, this break time can be made longer upon an employee's request.

4. **introduction of an interrupted working time system in the workplace:** Under the interrupted working time system, an employee may take no more than one break of up to five hours during the working day. This break does not form part of the employee's daily working hours. Currently, this interrupted working time system can only be introduced on the basis of a collective bargaining agreement (save for a few exceptions). Under the proposed amendments, it will be possible to implement the interrupted working time system under an agreement with a trade union or employee representative.

5. **overtime:** It has been proposed that the overtime bonus be reduced from 100% to 80% (for night work, work on Sundays or on another free day) and from 50% to 30% (for overtime work in other situations).

6. **compensation for work performed on days off:** currently, if employees are required to work on days which they are not contracted to work, they will be entitled to take an additional day's annual leave. If it is not possible for the employee to take an additional day's annual leave, he or she will instead be paid compensation in respect of work performed on days he or she is not contracted to work.

The principal assumption of the above planned amendments is to make the provisions on working hours more flexible and to mitigate the negative effects of the economic slowdown in Poland.

### Sole shareholders of a limited liability company

Under Polish law, an employment contract cannot be entered into between a one-person limited liability company and the sole member of management board who is also the sole shareholder. This contractual arrangement would be declared invalid because the employment contract would be deprived of the basic element of an employment relationship, namely subordination. Where the employee and the employer are the same person, it will not be possible for the employee to supply services under the employment contract for the benefit of the employer.

The problem described above does not apply to civil law contracts. The Supreme Court recently confirmed that, although an employment contract between a one-person limited liability company and the sole member of management board who is also the sole shareholder is not admissible, civil law contracts (e.g., service agreements or management contracts) are valid and lawful.

## Romania

### Mandatory pre-trial mediation

From 1 February 2013, disputes arising in connection with an individual's employment will be subject to mandatory pre-trial mediation. All parties will be required to attend mediation with a certified mediator. It is not compulsory for the dispute to be settled by mediation, and following mediation, the parties may still submit the matter to the Romanian courts. However, written confirmation that the parties have attended mediation is required from the certified mediator before the claim can be heard before the Romanian courts.

# **News** in Brief contd.

This requirement is intended to decrease the number of petty claims brought before the Romanian courts. However, there has been heavy criticism that pre-trial mediation will curtail access to justice and fail to produce the expected results. Further, under current legislation, parties can already participate in alternative dispute resolution before the matter proceeds to the Romanian courts.

Moreover, it remains to be seen whether or not lawyers will be expected to undergo specific training in connection with mandatory pre-trial mediation.

## Russia

### Amendment to the Russian Labor Code

On 3 December 2012, a law amending the Russian Labor Code and Civil Procedure Code came into force. The law introduces the concept of "professional standards", which sets out the qualifications that an employee will need to perform certain professional activities. The Russian Government shall be responsible for its implementation. Employers must now consider what "professional standards" apply when assigning salary and wage grades to employees. Where employees receive employee benefits and compensation in connection with the performance of certain hazardous activities, the "professional standards" applied to these activities must comply with the special qualification guidelines approved by the Russian Government.

### Quotas for work permits

On 30 November 2012, the Ministry of Labor and Social Protection approved work permit quotas for 2013. It has been confirmed that in 2013, 101,645 work permits can be issued in Moscow and 154,088 work permits in St. Petersburg.

## Slovakia

### Amendment to the Slovak Labor Code in force

On 1 January 2013, the amendment to the Slovak Labor Code entered into force (the "**Amendment**"). The following changes are of particular note:

1. the shortening of fixed-term employment contracts so that they may be agreed for up to two years and extended or re-entered two times within such period before such employment becomes permanent;
2. more flexible notice periods where the employer can agree with the employee, a longer period of notice than the statutory notice period;
3. restored participation of employee representatives in the termination of employment, where the employer is obliged to discuss a termination notice or immediate termination of employment with employee representatives in advance;
4. changes related to severance pay where severance pay is now payable either on conclusion of a termination agreement or upon the service of notice of termination;
5. revision of the limitation of compensation for loss of salary in the case of invalid termination (maximum compensation is increased to up to 36 months' earnings);
6. removal of the union's obligation to demonstrate a sufficient membership base for its representation of all employees;
7. obligatory paid leave for employee representatives;
8. revised definition of "dependent" work in an effort to expand the employment regulation to numerous forms of work relationships (such as sole trader); and
9. prohibition of contracted out arrangements through agreements with employee representatives.

### Amendment to the Slovak Act on Collective Bargaining

The Slovak Ministry of Labor, Social Affairs and Family (the "Ministry") has drafted an amendment to the Act on Collective Bargaining (the "Collective Bargaining Amendment"), which removes the requirement for an employer to consent to the extension of a higher grade collective bargaining agreement.

Currently, under certain conditions, the Ministry can extend a higher grade collective bargaining agreement, which covers enterprises united in the respective employer's association as per industry, to all enterprises engaged in the same industry. This extension will only take effect if the employer has given consent and is not already party to a higher grade collective bargaining agreement.

Firstly, under the Collective Bargaining Amendment, an employer will no longer have to consent to an extension of a higher level collective agreement. Instead, an employer may submit an objection to the extension to the Ministry, to be considered by a committee comprising of persons representing the employer, its employees, the Ministry and the Slovak Statistical Office.

Secondly, the Collective Bargaining Amendment proposes that the extension of a higher grade collective bargaining agreement shall not apply to the following categories of employer:

- an employer who is already bound by higher grade collective agreement;
- an employer who has been declared bankrupt or in liquidation;
- an employer who has less than 20 employees or where disabled employees represent 10% of its workforce;
- an employer who has been affected by an extraordinary accident; and
- an employer who has been operating for less than 18 months.

The Collective Bargaining Amendment is being reviewed and still subject to change. If enacted, it should enter into force on 1 July 2013.

*continued overleaf*

## Sweden

### Changes to rules regarding fixed-term contracts for temporary workers

In 2007, new rules on temporary employment were introduced to Sweden's employee protection law, which allow employers to hire as many people as they want on so-called general fixed-term contracts for up to two years. Employers are not obliged to justify the fixed-term nature of the contracts and may use fixed-term contracts for temporary workers, seasonal workers and for workers on probationary periods of up to six months.

In March 2010, the Swedish Confederation of Professional Employees, TCO, reported Sweden to the European Commission, arguing the new rules were in breach of the European Union's fixed-term work directive. The European Commission argued that the Swedish rules lacked provisions to limit the risk that different forms of fixed-term employments are combined in such a way as to circumvent the time-limits in the Employment Protection Act 1982 (the "**EPA**").

Under the current provisions in the EPA, an employment is considered to become an indefinite employment if the employee, during a five-year period, has been employed with the employer on a general fixed-term employment for a total of more than two years. Given that the time of the fixed-term employments is counted within a five-year period, the employer can combine different forms of employments under the current EPA to avoid the employment transforming into an indefinite employment.

In order to limit abuse of the current rules, the Ministry of Employment has suggested a complementary conversion rule, whereby a general fixed-term employment becomes an indefinite employment if the employee has had successive probationary or fixed-term employments and the term of the general fixed-term employment exceeds two years. Therefore, the conversion rule operates so that the five-year period does not apply if the employee has had successive fixed-term employments.

The amendment was due to come in to force on 1 July 2013; however, it has recently been withdrawn following concerns by the Swedish Government that it could affect an employer's willingness to hire an employee for a temporary position. This decision has been met with fierce criticism resulting in the fact that Sweden may be forced to appear before the European Court of Justice.

## Turkey

### New amendments to regulations governing employee and employer's unions and confederations

The New Law No. 6356 on Trade Unions and Collective Bargaining Agreements (the "New Law") entered into force on 7 November 2012. The New Law regulates the procedures and principles regarding the establishment, management, operation, inspection, running and organization of trade unions and employer confederations. The New Law further establishes the procedures and principles for entering into collective bargaining agreements, for settling disputes amicably and for strike and lock-out action.

The New Law regulates union rights and freedoms, the right of collective bargaining and free labor negotiations by taking into account common international standard and on the basis of principles of a liberal and democratic society. In preparing the New Law, the European Union and International Labor Union "ILO" requirements, the structural problems of the working life, the judicial precedents and criticisms of the proposed rights were taken into consideration.

In Turkey, trade unions can only be established in relation to "business lines" designated by the law. Under the New Law, the number of business lines has been reduced. Framework contract and group collective bargaining agreements are defined for the first time in the New Law. Further, trade unions are now permitted to enter into collective bargaining negotiations only if:

- 3% of the employees working in the relevant business line are members of such trade union;
- more than 50% of the employees in the relevant work place are members of such trade union; and
- more than 40% of the employees in the relevant enterprise are members of such trade union.

The New Law aims to regulate activities of trade unions and employer confederations, and it also aims to determine issues related to collective labor agreements. The New Law provides the establishment principles, the organs, the revenues and auditing principles of trade unions and employer confederations, sets provisions regarding the membership to these organizations, provisions about the activities of these union organizations and general principles of collective bargaining agreement and strike and lock-out action; it also applies to the running of confederations and designates the issues related to collective labor agreements.

# Upcoming Events

## USA

### Multiple employer plans

On 25 May, 2012, the United States Department of Labor (the "DOL") issued two significant advisory opinions on "open" multiple employer plans, effectively finding that, among other things, many such plans are out of compliance with ERISA's reporting requirements.

Generally, a multiple employer plan (MEP) is a retirement plan jointly sponsored by multiple unaffiliated employers, such as members of a trade association. By contrast, open MEPs are retirement plans offered by an independent provider for adoption by any employer, regardless of the relationship (or lack thereof) between the various employers. In either case, MEPs are administered as a single plan, thereby reducing the administrative burdens of any individual employer.

However, in the advisory opinions, the DOL found that MEPs may only be administered as a single plan under ERISA where the relevant employers share some level of commonality beyond the mere provision of benefits or adherence to the same plan documents. The sponsors of the open MEPs at issue in the advisory opinions do not constitute a bona-fide group or association, and accordingly, the advisory opinions conclude that these open MEPs are nothing more than a group of single employer plans being administered by a third-party provider. In regard to each plan, then, each individual employer is responsible for filing a separate Form 5500, obtaining a fidelity bond, and, if applicable, submitting audited financials for the plan assets.

Guidance from the Internal Revenue Service (IRS), however, does not impose a commonality requirement for tax purposes. These same open MEPs, then, are still entitled to special tax treatment under the US tax code and still enjoy the administrative convenience of filing tax returns as a single plan. This inconsistency in treatment has been noted by the Government Accountability Office (GAO) and acknowledged by both the DOL and the IRS, which have discussed coordinating guidance on open MEPs.

In the meantime, though the advisory opinions technically only apply to the individual facts and circumstances submitted to the DOL, individual employers participating in an open MEP should closely evaluate the DOL advisory opinions for potential liability and to ensure future compliance with ERISA and tax reporting and disclosure requirements.

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