CorporateLiveWire

LABOUR & EMPLOYMENT LAW 2017

VIRTUAL ROUND TABLE

www.corporatelivewire.com



Introduction & Contents

Labour & Employment Roundtable features five experts who outline the latest regulatory changes and interesting developments in their jurisdiction. Our chosen experts provide a helpful insight into employee retention strategies, termination process, and legal requirements for under-represented groups in the work force. Other highlighted topics include the impact of globalisation, social media, and whistleblowing. Featured countries are: Italy, Mexico, United Kingdom and United States.

James Drakeford
Editor In Chief



6 1. Have there been any recent regulatory changes or interesting developments?

8 2. Can you outline the current labour market conditions in your jurisdiction?

9 3. What impact has globalisation had on labour and employment trends?

11 4. In what ways are new data privacy and social media issues affecting your approach to employment law and how do you advise clients on these matters?

13 5. What are the legal requirements for companies to accommodate under-represented groups in the work force? Are there any additional measures companies should consider implementing?

14 6. What legal issues do employers often overlook during a termination process?

16 7. What is the law for workers compensation in your jurisdiction and what does it cover?

17 8. Which dispute resolution method do you find you most commonly recommend to employers and why?

19 9. Are there any effective employee retention strategies an organisation can implement?

21 10. What trends are you seeing with regards to whistleblowing cases?

23 11. What does the gender pay gap look like in your jurisdiction and is there any attempt being made to reduce it?

24 12. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

SHOOK HARDY & BACON

GRIMALDI STUDIO LEGALE

REDFERN LEGAL

ALLEN & OVERY

CREEL
CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ®

MEET THE EXPERTS



Angelo Zambelli - Grimaldi Studio Legale
T: +39 02 30309390
E: azambelli@grimaldilex.com
W: www.grimaldilex.com

Angelo Zambelli is a co-managing partner and Executive Committee's member of the firm, and leads the Employment and Industrial Relations department of Grimaldi Studio Legale, a multi-practice law firm with offices in Milan, Rome, Brussels, London, Lugano and Bari.

He has built an outstanding reputation in employment and labour law, industrial relations and issues relating to agency contracts and labour law disputes, acquiring in-depth knowledge of the planning and implementation of extraordinary finance operations and restructuring plans, including the reorganisation and downsizing of subsidiaries of Italian and international groups. He works alongside clients, advising them on the handling of complicated industrial relations matters. He often represents companies during negotiations. Effusive client feedback and impressive deal activity have seen Angelo Zambelli rise to the top of the rankings. He is particularly well regarded for his expertise in union negotiations, and is also highlighted for his commercial awareness and his client-focused approach.

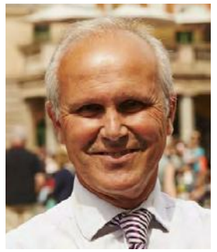


Francisco Peniche - Creel, Garcia-Cuellar, Aiza y Enriquezi
T: +52 55 4748-0670
E: francisco.peniche@creel.mx
W: www.allenovery.com

Francisco Peniche is a partner with Creel, García-Cuéllar, Aiza y Enríquez, S.C., in Mexico City, where he heads the Labor and Employment practice area. He advises clients on labor and employment matters, including but not limited to hiring, transfer and termination of executives, employment matters related to corporate transactions, reorganizations and negotiation and execution of collective bargaining agreements. He also represents clients in major downsizings and was recently engaged for several opinions in connection with the application of Data Privacy laws to employers in Mexico.

His recent experience includes representing 4 Finance, a leader in digital consumer finance, in the analysis and implementation of their labor and employment structure in Mexico; the Canadian Government through the Canadian Embassy in Mexico in the individual employment litigation filed against the Embassy in Mexico; Bostik Mexicana, a subsidiary of Bostik, a leading global adhesive specialist in industrial manufacturing, construction and consumer markets, on all of their labor and employment matters; Coexpan, manufacturer of rigid plastic sheets that provides solutions to packaging industry, in their RIF and employment restructure in Mexico.

Francisco has authored several articles in specialized publications for international companies and has been guest speaker in local and foreign seminars on labor and employment law and data privacy implications in employment relationships. Francisco has been recognized by Chambers and Partners Latin America 2016 and is ranked in the Labor and Employment practice area.

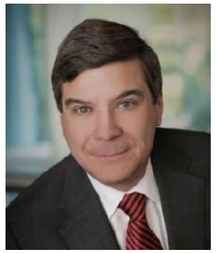


Tom Redfern - Redfern Legal LLP
T: +44 (0) 203 617 9271
E: tredfern@redfernlegal.com
W: www.redfernlegal.com

Tom has 36 years' experience as a solicitor. Over half that time has been spent in house with large and medium sizes companies and the rest in private practice.

Redfern Legal, which Tom founded 10 years ago, is based in central London.

Tom advises on all employment areas. Clients regularly look to him for commercial and practical advice and opinions when presenting employment issues. He likes to keep things simple where that is possible. He finds it beneficial to act for both employers and employees in order to be aware of the other side's arguments.



William Martucci - Shook, Hardy & Bacon L.L.P
T: +1 202 783 8400
E: wmartucci@shb.com
W: www.shb.com

William Martucci, a partner at Shook Hardy & Bacon in Washington, DC, is a national litigator and global employment strategist for a number of Fortune 500 companies. Chambers USA America's Leading Lawyers for Business notes, Bill Martucci garnered overwhelming feedback for "his great knowledge, his ability to relate well to clients, and winning personality in the courtroom." Clients say: "His trial skills and work ethic are second to none. His vigorous and passionate defense of clients and creative utilization of innovative strategies earns this national practitioner star status." "A phenomenal litigator and a great lawyer… lauded for his comprehensive knowledge of business law and expertise in class action litigation. Bill Martucci is worth having on any dream team." A graduate of Georgetown University, he is included in the Best Lawyers in America for business and employment litigation. He teaches Multinational Business Policy and the Global Workplace at Georgetown.



Karen Seward - Allen & Overy
T: +44 (0) 20 3088 3936
E: karen.seward@allenovery.com
W: www.allenovery.com

Whether it is a strategic employment issue, a highly sensitive crisis or risk management problem, or complicated litigation, Karen Seward is the person to know. Her expertise ranges from boardroom business to social media challenges in the workplace. She is highly regarded by her peers and clients, which span financial institutions, global corporates, blue chip multinationals and law firms.

Chambers UK 2017 (Employment) notes that Karen is "*an impressive individual*" who "*is the grand master of cutting directly to the heart of an issue*." Commentators hold her in high regard, with one noting: "*she is extremely effective. When you're on the other side of her arguments, you can really feel the force of them*." Legal 500 2016 (Employment) describes her as '*formidable and no-nonsense*'.

1. Have there been any recent regulatory changes or interesting developments?

Shook: With the new administration coming into office as of 20 January 2017, many aspects of national labour and employment policy are subject to substantial change in America.

Grimaldi: The key changes include the reforms enacted in 2015 which impacted almost all areas of employment law in Italy – in particular, the protection of employees in unfair dismissal and the industrial relations systems.

In fact, the economic crisis that was faced since 2008 has led the Government to enact a very significant reform of the protections of the newly hired employees (hired from 7 March 2015) in unfair dismissal cases, reducing the cases of reinstatement in the event of unfair dismissal and providing the newly hired employees with a progressive increase of protection during the employment relationship, with an indemnity that will increase along with the employees' length of service.

In particular, the Legislative Decree has introduced a "dual track system": in the event of unfair dismissal the newly hired employees are subject to the regulations recently entered into force, whilst to the employees hired prior to the enforceability of the same the previous and more protective labour regulations continue to apply.

In addition, the reform enacted by the Government in 2015 also restricted the use of CIG (Wage Guarantee Fund) which was largely asked by the Unions during the bargaining processes within reorganisations: this restriction has indeed entailed a change in the industrial relations as the Unions are no more able to ask the employer to use this cushioning system in a significant number of situations – as it happened in the past – as a matter of negotiation.

Creel: In the last five years the Labour and Employment legal framework has changed substantially and it is expected that this trend will continue in the following years.

Among the most important amendments to the Mexican labour and employment laws are the following:

2012 Amendment to the Federal Labour Law ("FLL"): We can highlight the inclusion of new rules related with the Outsourcing/Insourcing structures; the prohibition of child labour under 14 years old working out of the nuclear family; the recognition of new employment modalities, including specific temporary contracts; inclusion of trial/probation period; and the limitation of back pay in employment trials.

2016 constitutional reform: On 13 October 2016, the Senate approved the reform to articles 107 and 123 of the Mexico´s Federal Constitution, and subsequently on 4 November 2016, the Congress passed such approval.

The constitutional reform to the mentioned articles constitute a substantial modification to the nature of the current labour and employment courts which as of today hanged from the Executive branch instead of the Judicial Branch (as most of the other legal fields). As of today the Mexican labour courts are not part of the judiciary system, rather they are considered to be part of the Executive branch.

The reform includes the disappearance of the Labour Conciliation and Arbitration Boards (current bodies in charge of the labour and employment administration of justice) and consequently the creation of Federal Labour Tribunals hanging from the Federal Judicial Power.



Likewise the reform includes the creation of conciliation/mediation facilities that will provide a pre-trial service for plaintiffs and defendants. Although the reform states that such conciliation/mediation will be mandatory for the parties, it is yet to be determined the effectiveness or sanctions in case parties fail to comply with such pre-trial process.

Furthermore the reform includes the creation of a public decentralised agency that will be in charge of labour maters including the registration of unions and the collective bargaining agreements.

We highlight that for this reform to become effective it must be approved by the majority of the State Congresses.[1]

2017 Income tax amendment: Although formally this is not a modification to the labour and employment framework, starting in 2017 outsource services will have to comply with new regulations or otherwise the deductibility of payments might be jeopardised.

1 As of the day in which this article was written only 8 local/estate congress had approved the constitutional reform.

Allen: One of the most important developments in years is the introduction of the Gender Pay Gap Reporting Regulations, which come into force in April 2017. This regime will require employers with 250 or more employees to publish on their website the mean and median pay and bonus gaps between men and women. In addition, this data must be supplemented by the percentage of men and women who receive bonuses, and into which salary quartiles they fall.

For the first time employers will have a diversity shop window, through which candidates can see through and existing staff can see out. Come April 2018 (the long stop date by which the data must be published), there will be a flurry of activity from within the business to present the best possible narrative on the numbers. Of equal concern will be the other stakeholders: the media seeking out good copy; employees (backed by aggressive claimant lawyers) fishing for statistics and data upon which to base an equal pay claim, or to tie up an employer's resources with burdensome subject access requests. And then there will be the competitors with a better story to tell, who will be instructing the head hunters with a shopping list for talent.

2. Can you outline the current labour market conditions in your jurisdiction?

Shook: Currently, the economy is doing well and unemployment is low. It remains to be seen what precisely will happen with the new administration with regard to the labour market.

Creel: Mexico is characterised for being a country with a wide open, growing economy, based on international trade agreements executed with other countries. In recent years the employment rate has grown as a result of foreign investment.

Notwithstanding the foregoing, the result on the United Sates presidential election has produced an environment of economic uncertainty[1], especially since one of the campaign statements of the winning candidates was to denounce (or at least renegotiate) the North American Free Trade Agreement, better known as "NAFTA".

Mexico has been considered a country where informal jobs abound. However, in recent years Federal Authorities have implemented different measures in order to fight this issue, such as the fiscal amendment of 2012, where the Fiscal Incorporation Regime was created for individuals, in order to duly formalise the small taxpayers with incomes less than two million pesos per year, granting them various benefits in order to formalise their jobs; and the Decree Amending to the Income tax Law to enter into force on 1 January 2017, in which a tax relief is granted for companies that have an income less than five million pesos per year.

Redfern: (i) The unemployment rate in the UK remained at 4.8%, down from 5.2% for a year earlier in the three months to October 2016. It has not been lower since July to September 2005.

(ii) EU law is responsible for introducing many employment laws into the UK including minimum paid holiday and rest breaks.

(iii) There are many areas of UK employment law that do not derive from EU legislation. These include unfair dismissal protection, the national minimum wage, and unlawful deductions of pay.

(iv) The Office of National Statistics says the number of UK workers on zero-hours contracts has leapt 20% in a year to more than 900,000, indicating that insecure employment has become a permanent and growing feature of the labour market.

(v) The recent Uber case highlights the grey area that exists for many workers where an employer engages on a self-employed basis. If the relationship turns out on the facts to be one of employer/employee instead, the costs of engagement increase significantly.

(vi) There is a Minimum Wage and a Living Wage that an employer must pay a worker.

(vii) Migration can have a considerable impact on the labour market. At the moment, EU citizens have free movement. It is uncertain whether this will change after Brexit, but it seems possible there will be controls introduced at least at the unskilled level of work.

(viii) The Apprenticeship Levy will be a levy on UK employers to fund new apprenticeships. The levy will be charged at a rate of 0.5% of an employer's pay bill provided the annual pay bill is £3 million plus. It starts in April 2017.

(ix) Around 30% of UK employees are members of unions, with women more likely to be in a union than men. Union membership has fallen steadily over the last 20 years.

(x) Despite equal pay legislation, gender still affects wage rates. Even though the pay gap between men and women is closing, women still earn approximately 75-80% of the level of men.

1 Mexican peso devaluated close to 30% on election date.

3. What impact has globalisation had on labour and employment trends?

Shook: The long-embraced idea of globalisation based on market principles as a very positive trend is now in question due to Brexit, developments in the United States (particularly related to the new administration), and other developments worldwide. Globalisation has led to many positive effects: it has expanded employment throughout the world; it has created strong corporate social responsibility; and it has led to a stronger sense of workplace dignity, including through the work of labour relations organisations and non-governmental organisations (NGOs).

Grimaldi: Due to globalisation, multinationals are generally looking to apply uniformly benefits and compensation plans for all their personnel across all subsidiaries. This brings the need for a due analysis of the compliance of such benefits and compensation plans with local laws. In fact, the different national legislation in various countries, especially in terms of social contributions and tax payment, has an impact on their application. In this regards, some new welfare measures for employees have been implemented in the last year in order to redistribute wealth to employees also by lowering taxes on specific amounts.

Creel: As a globalisation outcome, Mexico has celebrated 10 free trade agreements with 45 countries, 32 agreements for the promotion and reciprocal protection investments with 33 countries. It is actively involved in multilateral and regional organisations and forums such as the World Trade Organization (WTO), the Asia-Pacific Economic Cooperation (APEC), the Organization for Economic Co-operation and Development (OECD).

The active role that Mexico has played in the last years developed an important foreign investment that has supported Mexico in its path to an economic consolidation. As a result of this, job creation has significantly increased.

However, as stated above, the recent result on the presidential election of the United States has produced an uncertainty with regard to the trade world markets, affecting mostly one of the major trade agreements executed by México, United States, and Canada.

Redfern: *International trade* and globalisation have had a significant downward impact on the pay of the unskilled. In contrast, the skilled, especially those in the service sector, are generally less adversely affected by global competition. The recent financial crisis has meant that the financial services sector has experienced difficulties in terms of pay, but the skills gap and resultant pay gap is unlikely to narrow in any significant way.

Globalisation has seen an increase in people coming to live and work in the UK. There have been record numbers of EU citizens coming to live and work in the UK and this is one of the two main reasons why the Brexit vote occurred, the other being to recover sovereignty for the UK.

The costs of globalisation are:

- The wages in the UK are high in global terms, and thus the UK is unable to compete in many sectors such as manufacture of consumer goods or other goods where the labour costs are a significant element of the price. Thus British workers are losing their jobs when companies move abroad or fail to compete.
- Open to risks outside of the control of the UK government, i.e. International capital flows and crisis.



The benefits of globalisation are:

- English is the language of the internet and international business and commerce
- Globalisation has helped to elevate London into the world's financial centre for the European Time zone. With a large and wide ranging financial services sector including banking, insurance.
- A large number of UK companies sell overseas for which 'Britishness' is part of the appeal
- UK Educational institutions benefit from many overseas students.
- Availability of a wide range of produce and goods to the UK consumer at low prices.

Steps to counter the negatives of globalisation:

- Increasing skill levels of the workforce to raise productivity
- Develop a modern industrial strategy for the global market place
- Securing UK energy supply and investing in sustainable renewable energy technologies
- Improving transport links in growth areas of the country.
- Investing in new science and technology.

4. In what ways are new data privacy and social media issues affecting your approach to employment law and how do you advise clients on these matters?

Shook: The topic of data privacy and social media constitutes one of the hottest areas in American employment law. The National Labor Relations Board ("NLRB") has issued several rulings in cases relating to this topic, and both the NLRB and the courts are grappling with the balancing of interests between privacy rights and the far-reaching and ever-public realm of social media. This topic is still evolving, and will likely continue to see significant activity in this area, particularly concerning cyber bullying.

Corporate employers are well advised to explicitly prohibit cyber bullying and to be respectful of the distinctions between private and public aspects of social medial usage. This is a developing area which raises sensitive and newly emerging legal considerations.

Grimaldi: As far as social media is concerned, in recent years there has been an increase of case law related to the use of social networks by employees.

In the absence of any legislation regarding the use of social media by employees, and considering its increasing prevalence, our suggestion to clients, especially multinational companies, is to implement policies addressing its use, which can help when taking disciplinary action against an employee.

Similarly, the implementation of policies regarding the processing of personal data and the use of electronic mail systems may be of help in the event of misconduct of the employee in the use of email account provided by the Company.

Creel: Mexican Data Privacy Law formally named Mexico's Federal Law on the Protection of Personal Data in the Possession of Private Parties, was enacted on 2010 and even though it contained a new set of rules and obligations for parties "treating" with data of individuals, in our opinion Mexican companies and employers were not substantially against the law and are complying with its terms.

Although when the law was published there was a debate amongst attorneys on whether the provisions of the law applied to companies in their employment relationships, the reality is that most companies took the conservative approach and complied with the new legal frame. From a labour and employment perspective usually our advice to clients is limited to assist our clients in preparing the data privacy notice for candidates or employees.

Allen: From a large employer's perspective, which may be required to service hundreds of data protection subject access requests (DSARs) each week, the difference in approach of the Information Commissioner's Office (ICO) on the one hand, and case law on the other, can be problematic. The ICO takes the view that requests for data are purpose-blind and must be serviced whatever the employee's motive. Conversely, the Courts have taken a more robust approach and have placed some limits on an employer's duty to respond, confirming that they do not need to comply with those that are solely a pre-litigation disclosure tool, and that only a "reasonable and proportionate" search for personal data is necessary.

We advise our clients to think strategically about responses, and to consider a matrix of factors including:

- the long position, including litigation strategy;
- whether the data will come out in litigation in any event, and whether there is any advantage to delaying disclosure;



- imply context to assist with scoping the request;
- think about how non-cooperation will be viewed by the ICO; and
- think about whether non-cooperation may be viewed as a whistleblowing detriment or discrimination victimisation.

With 18 months to go until the General Data Protection Regulation comes into force with its penalties of up to 2% of annual worldwide turnover for some breaches, employers are currently working hard to put the necessary infrastructure in place to minimise risks in this area.

With regard to social media, whilst it has certainly made an impact in the workplace by making misconduct in that space very visible, the law remains unchanged. Employers have updated various policies to ensure that employees are made aware that work-related (and even some non-work-related) comments and conduct may be subject to workplace rules, particularly where they bring the company or individuals into disrepute. On the positive side, many employers are encouraging employees to promote the business through social media and are providing training to maximise the advantages and minimise the pitfalls.

5. What are the legal requirements for companies to accommodate under-represented groups in the work force? Are there any additional measures companies should consider implementing?

Shook: In the United States, the Office of Federal Contract Compliance Programs ("OFCCP") monitors, through the Department of Labor, the progress of various work groups based on their employment by federal contractors and subcontractors. The OFCCP works to hold federal contractors and subcontractors responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, colour, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran. The work and scope of the OFCCP may change significantly under the new administration.

Additionally, at the state level, there are continuous initiatives attempting to encourage transparency in pay. For example, in Massachusetts, the new Pay Equity Act requires employers to pay men and women at the same rate for "comparable work." This requires employers to evaluate each job and evaluate what is inherently valuable about that job, to ensure men and women are being compensated lawfully. This is a growing trend in America.

Allen: The UK's Equality Act 2010 permits two types of positive action for under-represented groups. This applies to a wide range of protected characteristics including age, disability, gender, race, religion or belief, and sexual orientation.

The first is a general positive action, which makes provision for an employer to take action (which is lawful but not mandatory) to:

- enable or encourage people who share a protected characteristic to overcome a disadvantage connected to the characteristic;
- meet the needs of people who share a protected characteristic where those needs are different to those of people who do not have the characteristic; or
- enable or encourage people who share a protected characteristic to participate in an activity in which their participation is disproportionately low.

Examples of this type of permitted positive action include setting targets for increasing participation of the targeted group, and providing mentoring.

The second type of positive action is permitted in recruitment and promotion, and this is far more controversial. This allows (not compels) employers to give preferential treatment to job candidates at the point of selection. Special treatment is only allowed if both candidates are equally qualified and if the person treated favourably is from an underrepresented group or suffers a disadvantage. The objective must be to overcome or minimise the disadvantage or to encourage participation by a particular group.

For example, the police service employs a disproportionately low number of people from ethnic minorities, which in some places is unreflective of the community they serve. Preferential treatment would be permitted where there was a tie break in terms of suitability and one candidate was from an ethnic minority background.

This rule does not permit a situation where, for example, women are underrepresented on the board of a company, and a woman is appointed where the man is the better qualified candidate. If a woman was selected in those circumstances, then the man would have a good claim for unlawful sex discrimination.

6. What legal issues do employers often overlook during a termination process?

Shook: Often, employers in the United States overlook the general expectation that, while not legally required, employees should receive appropriate notice of any performance issues, have the opportunity to respond, and have the opportunity for any of their own concerns to be raised. Likewise, although not required, employers on occasion overlook that many expect employees to be provided progressive discipline. For example, in a more ordinary situation of poor performance, an employee would receive a performance improvement plan ("PIP"), followed by counselling, followed by a formal warning, followed by some sort of suspension coupled with a final written warning, and finally culminating in termination.

Grimaldi: Our multinational clients are interested in knowing the potential termination costs. The main difficulty faced by clients and especially potential investors during the last few years has been the great uncertainty on severance costs in the event of unlawful dismissal (especially in case of dismissals for economic reason). In fact, the dismissal legislation until the aforementioned Jobs Act (that, as said, will continue to apply to "old" employees), provided the judge with a large discretionary power in deciding the amount of the severance payment for unlawful dismissal. This was indeed an important constraint in employing staff in Italy. Such difficulties are expected to be directly overcome as a result of the entering into force of the new labour reform above mentioned that provides less protective regulations in the event of unlawful dismissal of newly-hired employees and certainty on severance payments.

Creel: It is very important to highlight that in Mexico the principle of "employment at-will" is not legally recognised. Employment relationships in Mexico are governed by the "job stability" principle which basically means that unless there is a legal specific cause (as provide in the FLL) employers cannot terminate employees without triggering the risk of a severance payment or a claim for reinstatement.

Considering the above employment terminations in Mexico are a very common hot topic and shall be addressed carefully. Whenever an employer wishes to terminate employees, it is required to verify whether or not there is a legal cause for the termination and depending on this analysis the termination will follow a specific route.

It is also worth mentioning that the FLL does not consider employers and employees to be on a plane field, this is, the law is totally leaned on protecting the employees, as an example of this the law contains a provision in which it is stated that in case of doubt, the authorities shall use the most favourable interpretation for the employee.

Most employers in Mexico are very aware of the above principles and understand the liabilities that any employment termination might trigger, nonetheless for newly created companies or companies supervised legally by experts overseas usually tend to "dismiss" these principles which translate in very complicated litigation.

In this context, we refer to the severance payment that employees are entitled to receive. First of all, the FLL provides that in case of a wrongful termination (without a just cause) the employee will be entitled to either claim the payment of the mandatory severance or to be reinstated. Mandatory severance payment is equal to: a) three months of daily total compensation; b) 20 days of daily total compensation, and c) seniority premium.



Based on the above and considering the potential costs that litigation might carry, it is highly recommended that employers in Mexico look for expert advice whenever they face an employment termination.

Redfern: (i) Reading the contract properly and making sure all related documents are to hand e.g., staff handbook, to make sure you understand the employee's proper entitlement.
(ii) Calculating the expiry of the notice period for termination incorrectly. We have a recent example of a client wanting to terminate an employee on the final day of the trial period. The client ignored the notice period (probably because it was in a different clause) and wrongly interpreted the end of a three months trial period as being the same day of the month as the start date.
(iii) Counting the statutory notice period as part of the two years' service when deciding how late to leave giving an employee notice of termination when endeavouring to ensure the employee is not deemed to have two years' continuous service.
(iv) Putting the notice to terminate in writing for evidence purposes.
(v) Needing a Settlement Agreement even if the employee's service is less than 2 years in order to protect against statutory claims in respect of termination.
(vi) Post termination restrictions – to be enforceable, the company must not be in breach of its obligations to the employee.
(vii) Checking for an employee's medical conditions to be as sure as possible that the employee will not have a claim relating to disability.
(viii) The fact that a tribunal can order reinstatement if the employee wins in a tribunal for unfair dismissal.

7. What is the law for workers compensation in your jurisdiction and what does it cover?

Shook: American workers' compensation is broad in its protection. It covers injuries that arise out of and in the course of employment in a very expansive manner. While expansive, the American workers' compensation framework is seen as a balancing process in that the employee gives up his or her right to bring litigation against the employer in exchange for a schedule of remedies provided by workers' compensation.

Creel: In Mexico, the FLL regulates the employment relationships between employer and employees. Regarding the benefits that employees are entitled to the FLL provides only minimum mandatory benefits.

Some of these mandatory benefits include: Christmas bonus equal to at least 15 days of daily salary, and must be paid before 20 December of every year. Likewise, employees are entitled to a mandatory vacation period that in no case should be less than six working days, and that will increase annually two days, until it reaches 12, for every subsequent year. After the fourth year, the vacations will increase two days for every five year of services rendered. Additionally, the FLL provides a minimum vacation premium that should not be less than 25% of the salaries corresponding to vacations.

It is important to mention that although some employers in Mexico pay the minimum benefits provided by the FLL, most of international companies that have opened shop in Mexico pay above the minimum benefits and provide employees with compensation packages similar to what they pay in other countries.

Unionised employees benefits agreed between the union and the employer shall be described within the particular collective bargaining agreement. Common practice is that companies with an active union representation will pay above the minimum benefits granted in the FLL.

Redfern: (i) The National Minimum Wage is the minimum pay per hour for workers aged 24 and under. The amount depends on age but will be £7.05 from April 2017 for those aged 21-24.
(ii) The National Living Wage is higher than the National Minimum Wage – workers get it if they are over 25. This will be £7.50 from April 2017.
(iii) It doesn't matter how small an employer is, employers still have to pay the correct minimum wage.
(iv) All employees have the right to a statement of particulars (contract of employment) to include:

- how much and how often an employee will get paid
- hours of work (and if employees will have to work Sundays, nights and overtime
- holiday entitlement (and if that includes public holidays).

(v) Auto enrolment – most UK employers are obliged to put in place a qualifying workplace pension scheme and automatically enrol their qualifying workers. Employers then have to make contributions to their workers' pensions every pay period. The current minimum is 1% of basic pay to increase to 3% of basic pay on 6 April 2019 provided the employee pays in too.
(vi) Statutory sick pay of £88.45 for up to 28 weeks of absence due to sickness. An employee needs to be off work for four days or more continuously to get this. The employer may have a company sick pay scheme.
(vii) Maternity pay of 90% of average weekly pay for the first six weeks and then £139.58 for next 33 weeks. The employer may have a company maternity policy.
(viii) Paternity pay of £139.58 for up to two weeks.

8. Which dispute resolution method do you find you most commonly recommend to employers and why?

Shook: Alternative dispute resolution (ADR) is a dynamic part of the American workplace and litigation environment. Increasingly, arbitration is the method most favoured by and recommended to fair-sized companies. Companies continue to incorporate arbitration policies and requirements within their application forms and employment agreements. Additionally, many courts have implemented mandated mediation requirements in an effort to promote early resolution of litigants' disputes. Mediation is the most common ADR approach utilised to resolve workplace disputes and employment discrimination litigation, including claims of wrongful or unfair dismissal, harassment, and retaliation.

Grimaldi: In Italy the most common dispute resolution method used is conciliation. Ever since the 2008 financial crisis there has been an increase in disputes, particularly regarding unfair dismissal – currently the largest source of dispute in Italy. In response to this trend, the Government introduced a new "quick" settlement agreement applicable only to "newly hired" employees (i.e. hired after 7 March 2015) consisting in an offer made by the employer to the employee – within 60 days from the date of the dismissal – of a predetermined amount set forth by the law to be immediately paid by the employer via a 'cash cheque'. This quick settlement offer would be the most recommended course of action for cases concerning newly hired employees as the amount granted is not subject to tax or social security contributions.

As far as the other alternative dispute resolution methods are concerned, it has to be highlighted that in Italy as of today – there is a draft of law currently under discussion – mediation cannot be used for employment disputes. With regards to arbitration, we have not registered an increase in its use.

Allen: For every situation, we would advise our clients to consider the full range of options from settlement to mediation to litigation, and these will vary depending on circumstances. It is usually in both parties' interests to settle and we would always encourage this provided it was appropriate. There may be occasions where the employer, as a matter of principle, wants to litigate to send the right message to interested parties. This strategy might be appropriate where the employer is accused of discrimination in circumstances where none exists. Much thought will go into the strategy to reach the best outcome for our client.

Redfern: The best solution in most instances is to sit down and talk to an employee on an informal basis to try and resolve the problem. There are guidelines set down by ACAS for disputes. So flexibility in the approach is limited once formal procedures need to be followed. If either the employee or the employer does not follow the Acas Code of Practice on disciplinary and grievance procedures and the employee goes to an employment tribunal, the result of the employee's claim could be affected. In this situation a tribunal can adjust the amount of compensation awarded by up to 25%. Help can be sought from a third-party to solve disputes between an employee and the employer. The main ways an employee can do this are through:

Mediation: This is when an independent and impartial third party discusses a problem with the employee and the employer to try and find a solution. This is useful where the business is small and there is a need for a more objective view.

Conciliation: Conciliation is similar to mediation but is



normally used when the employee believes they may be entitled to make a claim to an employment tribunal or have already made a claim to an employment tribunal.

Arbitration: Arbitration involves an impartial outsider being asked to make a decision on a dispute. The arbitrator makes a firm decision on a case based on the evidence presented by the parties. It is private rather than public and includes more flexibility.

9. Are there any effective employee retention strategies an organisation can implement?

Shook: The attraction and retention of global talent remains a dynamic issue. Increasingly, there are various approaches taken by companies to advance retention. For example, American companies are ever-attuned to making the work environment friendly to families and flexible to work time. The workplace has also become less formal and more collaborative. And, employers are continuing to increase their commitment to providing bonuses based on the length of an employee's tenure and exceptional performance.

Creel: While the Mexican employment market is no stranger to new challenges such as the "millennial generation", the reality in Mexico is that for many of the positions the retention principle is mostly seek by the employees who search for stability in their professional development.
It is also important to highlight that international companies in Mexico have established, what is becoming a normal trend, retention packages and benefits such as equity award plans either in a form of stock options or restrictive units. Nonetheless, it is worth mentioning that these types of programs are usually not granted across the board to all employees.

The apparent economic situation of the country has allowed for employees to have different options, which translates in the need of companies to generate working environments suitable for new hires and competitive. While it may sound very generic the best retention program for employees in Mexico is based on working environment and potential professional growth.

Redfern: (i) *Performance.* Studies confirm that people have a deep desire to feel they're succeeding and that their talents and capabilities are being used in a way that makes a difference to the business. When people sense their actions are fulfilling this desire, they begin to develop a sense of belonging and a feeling that your company is their company.

Human beings are often happiest when they're in the process of achieving a goal. Clear, achievable objectives that gauge personal, team and company performance provide the feedback employees need to confirm they're making valuable contributions and accomplishing desirable goals.

(ii) *Loyalty/feeling respect.* True loyalty is not an enforced requirement but an earned response to the trust, respect and commitment shown to the employees. When you demonstrate loyalty to your employees, they'll reciprocate with commitment and loyalty to your business. People don't begin their employment as loyal employees, but will develop loyalty over time as they're trusted, respected and appreciated.

(iii) *Share options.* Offering meaningful stock options both attracts better, more talented employees and helps keep them for the long term. The Company stock value hinges on company performance, which, of course, is a direct by-product of employee achievement.

(iv) *Annual Bonus.* Rewarding an employee with additional remuneration geared to performance and paid out annually means an employee has to wait to time an exit if they do not want to lose this money.

(v) *Notice periods and non-compete obligations in the employment contract.* These are a kind of handcuffs on the employee because these clauses are not necessarily going to receive the attention they merit till they may need to be enforced.



(vi) *Competitive advantage. People want to work for a winner.* What sets your company apart from your competition? How are you – and as a result, your employees – making a difference in your industry, in your community, and for your customers? Take the time to identify and inform your clients and your employees about your unique competitive advantage.

(vii) *Communication and dialogue.* Having a communications process that is structured to inform, emphasize and reaffirm to employees that their workplace contributions are having an impact.

10. What trends are you seeing with regards to whistleblowing cases?

Shook: Whistleblowing cases are certainly increasing, as are retaliation cases arising from adverse employment action taken against an employee in response to the employee's opposition to or raising of potentially discriminatory practices. Retaliation cases are likely the highest area of activity in terms of cases initially filed with the EEOC and then later brought as a lawsuit. Often, retaliation claims are added to a discrimination claim in litigation.

In terms of whistleblowing cases specifically, the issues about corporate practices are increasingly challenging. The public company sector is already monitored by the SEC under the Dodd-Frank Act. More generally, whistleblowers are a source of increased litigation activity.

Grimaldi: The widescale reforms enacted during the last few years have significantly changed the employment legislation in Italy. However, there are still big steps to go, such as the introduction of the whistleblowing legislation in the private sector and a smart working legislation, both currently under debate in the Italian Parliament.

As far as whistleblowing is concerned, it is important to highlight that for a long time in Italy there was not a specific legislation on whistleblowing. This is now slowly changing. In fact, Law 190/2012 introduced a specific legislation on this matter, although it only refers to civil servants. In addition, Legislative Decree no. 72/2015 (implementing the Directive 2013/36/EU) – that entered into force in June 2015 – has introduced the obligation for the banks and the financial institutions, as well as for their parent companies, to adopt specific procedures for the internal reporting by the personnel of acts or facts that may constitute a violation of the relevant activity. The introduction of a specific legislation on this matter would indeed determine an increase of case law on whistleblowing that are currently quite rare and usually based on the violation of the general principles under Italian law of the duty of care and loyalty.

Creel: In Mexico, whistleblowing cases have hugely increased in the last few years, and as a consequence, it has been possible to investigate unlawful acts carried out in companies. Most of the whistleblowing programs contain a non-retaliation principle as employee must not be treated unfairly or lose their job for using the program. Generally, this type of practice is done anonymously, so the employee can be certain that no retaliation will be made against him/her.

In Mexico this topic has recently begun to be regulated by the Federal Regulations for Health and Safety in Work Establishments, which is applicable to work establishments with more than 50 employees. According to these Regulations, the company is obligated to provide reliable and confidential methods for the receipt of complaints regarding any practice opposed to an utmost work environment and to report any labour violence; carry out evaluations in regards to work environment; take appropriate preventive measures in order to avoid practices opposed to an utmost work environment and acts of workplace violence.

Allen: The financial services sector is setting the trend in terms of reinvigorating whistleblowing arrangements in an effort to encourage those who are privy to malpractice to come forward to the employer or go directly to the regulator, safe in the knowledge that there will not be retaliation for making a disclosure. The new whistleblowing regime is very wide reaching and almost anything can be a "reportable concern", and almost anybody can be a whistleblower. One of the significant



changes is to require in-scope employers to appoint a director or equivalent as a Whistleblowing Champion to oversee the integrity, independence and effectiveness of arrangements, thereby elevating whistleblowing to a board issue.

Case-wise, the trend seems to be along similar lines in that the courts are keen to find that a disclosure is protected if at all possible. One of the recent changes to the Public Interest Disclosure Act 1998 (PIDA) was to require disclosures to be in the public interest to stem the tide of disclosures relating to workers' employment contracts. This came about as a result of a case called *Parkins v Sodexho [2002]*, which had the effect of bringing personal interest, as opposed to public interest, cases within the scope of PIDA. So far the cases decided under the new rules have not been limited to protection in the public interest, or have interpreted this concept very widely. For example, the Employment Appeals Tribunal (EAT) held that a small group of 100 managers is sufficient to satisfy the public interest test. Another EAT decision found that a dispute between an employer and its employees on their terms and conditions was also capable of being in the public interest.

11. What does the gender pay gap look like in your jurisdiction and is there any attempt being made to reduce it?

Shook: Reports are widespread that the gender pay gap in the United States is approximately 20% – i.e., the average woman's unadjusted salary is generally cited as approximately 80% of the average man's salary. States are continuing to introduce legislation to remedy the gender pay gap. One recent example is Massachusetts' Pay Equity Act, which mandates that employers pay men and women at the same rate for "comparable work." This requires employers to look at each job and evaluate what is inherently valuable about that job, to ensure men and women are being compensated lawfully.

Creel: In Mexico, the FLL regulates equality rights in Article 3 of, which states that… "It cannot be possible to establish conditions that may imply discrimination among workers on grounds of ethnic or national origin, gender, age, disabilities, social status, health conditions, religion, immigration status, opinions, sexual preferences, marital status or any other that may violate human dignity."

According to information provided by the ILO, in Mexico it is estimated that the gender wage gap is between 15 and 20% approximately between women and men that perform the same job. That is, women earn between 75 and 80% of what men earn.

Some of the measures that Mexico is trying to perform, is by a formulation of a national policy for the prevention of discrimination in employment and taking into consideration some principles, such as the equal treatment between women and men, and as well as equality with respect to remuneration for work of equal value for all.

In that regard, the ILO recommends that every member State should become aware about this issue, salary surveys have to be promoted, as well as to ensure that this information on the pay gap between men and women reaches the society, legislators and leading authorities in the political, labour, and governmental world, without ignoring the civil society, whose role is fundamental to this matter.

Allen: The provisional results for the 2016 UK gender pay gap are (when part-time employees are included) 18.1%. The gap decreased from 19.3% in 2015, the largest year-on-year drop since 2010. This is also the lowest gender pay gap since the ONS survey began in 1997, when the gap for all employees was 27.5%. As employers have been preparing for the new gender pay gap regime outlined in question 1 above, it would appear that this has had a direct impact on the numbers.

12. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Shook: Before the most recent change of government and the new administration, the thought would have been that the United States would see increased regulation and increased reporting requirements with respect to workplace composition, pay practices, and related matters. With the new administration, however, those regulatory matters are likely to be much less expansive. Indeed, there is likely to be a substantial effort to reduce regulations in the American workplace.

Nonetheless, there will continue to be litigation in the courts based on a variety of employment-related theories, including discrimination, retaliation, harassment, whistleblowing, and wage and hour violations. The propensity of individuals to bring litigation is such that it has become the cultural norm and is a significant dimension of the American litigation environment.

Both in reality and in an ideal world, employers throughout the world who employ workers in the United States are likely to become increasingly ever-thoughtful about the dignity of individuals and appropriate corporate practices.

Creel: Labour and employment legal frame in Mexico has been reformed in recent years, and it is hoped that all these efforts to improve Mexican labour justice will soon be fruitful, benefiting all those who could be immersed in conflicts or situations regarding this matter.

It is expected that in the next year the bill to articles 107 and 123 of the Mexican constitution will be approved by the majority of the State Congresses, promoting a radical change to the Mexican labour justice, since this will no longer depend on the Executive Power, since it is going to be dependent to the Judicial Power, where positive changes are expected in terms of agility in labour lawsuits, in greater transparency within the jurisdictional authorities, and in a direct relationship between unions and employees affiliated with it , through a real and direct representation.

In an ideal world we would love to have an impartiality justice, according to the highest ethical standards, where both employees and employers have the same possibility of obtaining a favourable result, taking into consideration that the plane in which they are located both sides is not always equitable.

Some of the changes we would like to see (not that we expect them) would be concerning the transparency of the judicial authorities, since we have known that in many situations public officials have been corrupted in the exercise of their functions; for that reason we require a greater interest from the maximum authorities.

