LABOUR & EMPLOYMENT

ANNUAL REVIEW **2017**



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LABOUR & EMPLOYMENT

JULY 2017 • ANNUAL REVIEW



Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in labour & employment.

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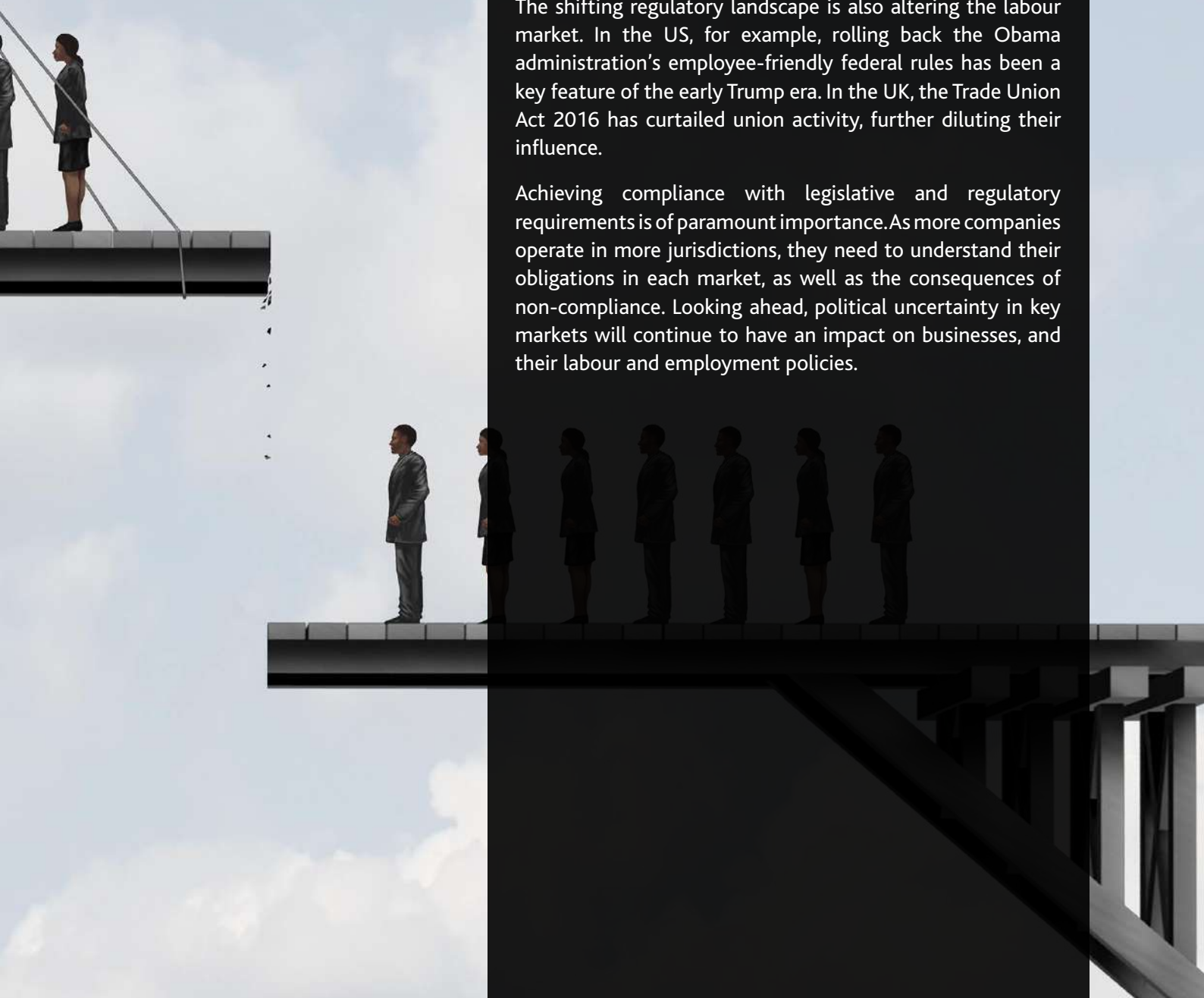
INTRODUCTION

Despite the march of isolationism and protectionism highlighted by the UK's 'Brexit' vote and the election of Donald Trump in the US, globalisation of the world's labour market continues at pace.

The modern working demographic is in a state of flux. As more and more millennials enter the job market, employee expectations are shifting. As such, companies must be willing to be flexible in determining compensation packages and providing the work-life balance that employees now prioritise. In an increasingly competitive global economy, companies need to do more to retain their key talent. Employee friendly incentive schemes can make a difference.

The shifting regulatory landscape is also altering the labour market. In the US, for example, rolling back the Obama administration's employee-friendly federal rules has been a key feature of the early Trump era. In the UK, the Trade Union Act 2016 has curtailed union activity, further diluting their influence.

Achieving compliance with legislative and regulatory requirements is of paramount importance. As more companies operate in more jurisdictions, they need to understand their obligations in each market, as well as the consequences of non-compliance. Looking ahead, political uncertainty in key markets will continue to have an impact on businesses, and their labour and employment policies.





UNITED STATES

RICHARD WILLIAM KIDD
KIRKLAND & ELLIS LLP

Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN THE US OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

KIDD: The Trump administration continues to rollback Obama-era, employee-friendly federal rules, including a law increasing the minimum salary level in order for certain employees to be exempt from federal overtime laws, which would have resulted in significant pay increases for many employees; guidance aimed at expanding joint and several liability for employment law violations committed by company business partners such as franchisees, contractors and staffing agencies; and rules aimed at requiring labour organisers, consultants and attorneys to disclose contacts with employers in furtherance of union avoidance efforts. By contrast, states and cities have sought to enhance worker protections by, among other things, prohibiting or restricting employers from enquiring about past compensation and criminal convictions, and placing employee-friendly limitations on the enforceability of restrictive covenants. We expect states and cities to continue increasing employee protections, thereby creating a web of complex federal, state and local laws.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN THE US AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

KIDD: The percentage of US workers who are members of a labour union stands at an all-time low – only 10.2 percent of the workforce, according to recent statistics. By comparison, 34.8 percent of the workforce were members of a union in the 1950s. Since 2015, four additional states have passed 'right-to-work' legislation, bringing the total to 28 states. Right-to-work laws prohibit union security clauses in collective bargaining agreements, which generally require employees represented by a union to join the union or be fired. Employees in a right-to-work state may decline to pay union dues and refuse to be a member of the certified union without consequence. Nevertheless, even as membership levels decline, when employees in 2016 voted on whether to join a union, unions won 73 percent of all National Labor Relations Board conducted representation elections, although the median size of a new bargaining unit was only 22 members.



Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN THE US?

KIDD: Wage and hour class and collective actions under federal and state laws have grown year-after-year in the last 15 years by approximately 450 percent. In 2016, this trend levelled off, as the number of claims did not significantly increase from 2015. Whether this stabilisation will continue in 2017 remains to be seen. However, we expect these types of claims to continue to flood the federal and state dockets as states and cities become more proactive in increasing minimum wage laws and passing other employee-friendly wage and hour protections. Further, the plaintiffs' bar has increasingly been focused on independent contractor misclassifications and, as a result, we have already seen some high-profile companies become embroiled in litigation with significant settlement sums in the seven to nine-figure range. We have also seen a heightened focus on joint-employer liability, especially in the context of franchisee-franchisor liability and the use of staffing agencies.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

KIDD: When restructuring, companies must evaluate whether layoffs will trigger any plant closing or mass layoff notice requirements and whether employment contracts or company policies contain any notice or severance obligations. Also, given the myriad anti-discrimination laws, companies need to ensure that the process of selecting employees for layoff is free from both intentional and unintentional discrimination. On intentional discrimination, companies should instruct managers to evaluate individuals on performance, merit and business needs, rather than any protected classifications. By contrast, unintentional discrimination, known as 'disparate impact', occurs when facially neutral decisions disproportionately impact a protected class of individuals. Counsel should run a disparate impact analysis to check for such discrimination. Typically, when conducting layoffs, companies will offer severance in exchange for a release to ensure that any potential liabilities are waived because the litigation cost of a single claim can often outweigh the cost of a severance programme.



Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

KIDD: Employers should balance company-friendly and employee-friendly incentives to stay. Company-friendly incentives can take the form of restrictive covenants and incentive compensation, tied to multi-year vesting. When considering restrictive covenants, counsel should be consulted to ensure that forms are tailored to meet jurisdictional requirements and are competitive for the industry. With states increasingly regulating restrictive covenants, a one-size-fits-all agreement is not workable. Companies should also focus on retention through employee-friendly incentives. These tend to take the form of challenging employees in their job, treating them fairly and transparently in promotion situations and treating them like professionals. With regard to employee-friendly incentives, a growing number of companies are implementing work-from-home policies and other flexible work arrangements, reconsidering their paid time off and leave policies – Netflix made headlines when it announced one year of paid maternity and paternity leave – and offering unlimited vacation, provided work is being completed.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

KIDD: Changes to the advisory and regulatory landscape applicable to US public companies have created new, complex challenges to rewarding employees. Recognising the increased influence of proxy advisory firms, media scrutiny and enhanced SEC disclosure, companies seek to design compensation programmes to satisfy their preferences. Frequently, this results in compensation committees feeling compelled to limit rewards programmes to a narrow suite of generally-known alternatives, rather than designing customised programmes to suit specific growth objectives. Additionally, increased reliance on compensation consultants, coupled with compensation committee independence requirements, has put incentive design into the hands of individuals who are removed from company operations and often ill-equipped to craft programmes to address specific business needs. Notwithstanding the current preferences of the proxy-reading public, the focus of compensation and benefits programmes should remain unchanged: companies must design employee total rewards to recruit, retain and motivate employees to drive company performance for the benefit of shareholders.

"Changes to the advisory and regulatory landscape applicable to US public companies have created new, complex challenges to rewarding employees."

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

KIDD: On 18 April 2017, president Trump signed an executive order directing various federal government officials to suggest reforms as soon as practicable to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries. President Trump also directed them to propose new rules and guidance for preventing fraud and abuse of work visas. When signing the executive order, president Trump voiced concern over the current H-1B process, which is a random lottery. Traditionally, the H-1B programme has allowed companies to temporarily employ foreign workers in occupations that require the application of a body of highly specialised knowledge, such as science, engineering and information technology, and a bachelor's degree or higher in the specific specialty, or its equivalent. This year, approximately 199,000 applications were received for 85,000 available visas. It remains to be seen what type of legislative and administrative reform will result from the executive order.

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CANADA

FRANCOIS GARNEAU
MILLER THOMSON LLP



Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN CANADA OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

GARNEAU: This year, Canadian legislators have been particularly prolific compared to judges, and we expect changes in the employment standards of at least four provinces. After two years of independent review, and despite the polar opposite views of economists on the subject, the Ontario government unveiled the proposed amendments to the Employment Standards Act and Labour Relations Act at the end of May 2017, which include a rise of the minimum wage to $15 an hour by 2019. In Quebec, wages have been raised from $10.75 an hour to $11.25 an hour, as of 1 May 2017, which is the highest annual increase since 2010. Finally, in Alberta, the New Democrat government drafted much needed amendments to the province's workplace legislation, last updated in 1988. These amendments are expected to come into force in January 2018 and even though they are quite modest, their objective is to achieve a more fair and family friendly workplace.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN CANADA AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

GARNEAU: On the one hand, the right to unionise has been extended by provincial laws or court decisions to new groups of employees that were historically denied the right to unionise, including first level managers and foremen. In a recent decision, the Administrative Labour Tribunal of Quebec, ruling on the validity of a section of the Labour Code excluding managers from the right to unionise, opened the door to such unionisation by considering that the section was violating the constitutional right of freedom of association. The Tribunal notably acknowledged the fact that now, first-level managers are generally stuck between 'the tree and the bark'. Also, in Alberta, dependant contractors will have the right to create unions pursuant to the proposed amendments to employment standards. On the other hand, the power of the unions appears to be somewhat undermined by government incursions in the collective bargaining process of a certain category of employees. This was especially the case in early May 2017, when the Quebec government passed a special law



forcing the return to work of more than 175,000 construction workers then on strike following the collapse of the collective bargaining process. The Quebec government unilaterally decreed a salary increase of 1.8 percent, extended the bargaining period and left the final decision on other employment conditions to be determined by an arbitrator should negotiations fail. This was seen by many as an unwarranted intrusion in the collective bargaining process at the expense of the parties.

Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN CANADA?

GARNEAU: Reasonable accommodation in the workplace for religious reasons continues to be a contentious issue in Canada. In Quebec, the government is still struggling to enact legislation providing guidance to employers when dealing with such request. Also, the upcoming legalisation in Canada of the recreational use of cannabis and related products is going to confront employers with even more requests to accommodate the use of these drugs for medicinal purposes and to enact rules concerning the use of such products in and out of the workplace.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

GARNEAU: Many cases were rendered countrywide reminding employers that any attempt to contract out of local employment standards was futile since such clauses were void and unenforceable; whether the employer complied with such standards after-the-fact was considered irrelevant. Also, over and above the limits set by employment standards, other courts reinforced the principle that the contractual language of the parties should not be interfered with. Employers should then always be careful in the drafting of their agreements with employees.



"Over recent years, employees have become extremely concerned by their ability to manage their professional commitments without adversely impacting their personal and family life."

Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

GARNEAU: This quote from Richard Branson has never been truer: 'take care of your employees and they'll take care of your business'. Indeed, over recent years, employees have become extremely concerned by their ability to manage their professional commitments without adversely impacting their personal and family life. This is particularly true for employees of the younger generation who expect their employer to be sensitive to their need to reconcile job and family and who will not hesitate to look for employment elsewhere if they feel their employer is only paying lip service to this principle. This is notably why the proposed or anticipated amendments to employment standards in various areas of Canada aim to create a better work-life balance and a better environment of work.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

GARNEAU: Recent events in Quebec demonstrate the difficulty of justifying director and executive remuneration. Following the announcement of the Bombardier 2016 directors' and executive compensation, the multinational aircraft and train manufacturer came under extremely close public, governmental and media scrutiny. It should be remembered that just a few months before, the Quebec government had injected more than a billion dollars of taxpayer money to bail out Bombardier. Not only did Bombardier eliminate many positions in Quebec to send them to other countries, but it substantially increased the remuneration paid to its top executives and its chairman of the board. This provoked a wave of public protests and calls for the government to intervene and forced the company to delay the implementation of some of the increases. These kinds of issues will not relent unless a shift occurs in the mind of employers and their board of directors. Indeed, as companies keep making decisions with the sole view of ensuring growth in profits, they are slowly but surely losing the trust of both the public and governments. Thus, it will become more difficult for major companies to approach governments for funding or subsidies if there is no corresponding oversight on executive compensation.

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

GARNEAU: Multinational companies operating in Canada will soon face challenges in connection with the expected legislation allowing consumption of cannabis for recreational use in Canada. Indeed, such legislation will create a shift in Canadian society as to how cannabis in the workplace will be perceived. Employers will have to be proactive and clearly communicate to employees their expectations about the interaction between cannabis use and workplace behaviours. They will also have to adjust and redefine their local policies related to drug use, as the idea of a smoke break may now have an entirely different meaning. It has to be noted that the use of illegal substances resulted recently in another landmark decision of the Supreme Court of Canada where it reaffirmed the right of employers to take proactive safety-related risk mitigation and management measures when implementing and enforcing alcohol and drug policies. Thus, employers have the right to require employees to disclose any drug abuse issues and background prior to workplace incidents. They are also able to discipline their employees for failure to comply with such policies.



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MEXICO

FRANCISCO PENICHE BEGUERISSE
CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRIQUEZ, S.C.



Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN MEXICO OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

PENICHE: In February 2017, a constitutional amendment was approved by Congress. Its main features included the announcement that conciliation and arbitration labour boards are to be replaced by labour courts. These new courts will belong to the judiciary branch instead of the executive, as was the case with the older board. Furthermore, unions that enter into collective bargaining agreements must prove that they represent the employees. Finally, prior to litigation, parties must go through a new conciliatory procedure. These modifications must be enforced by February 2018. New reforms to tax legislation provide additional obligations that must be complied with by the parties in subcontracting structures.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN MEXICO AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

PENICHE: Even though unions retain considerable influence in Mexico, according to the official information provided by the Mexican Labour Ministry, as of June 2017, Mexico reached a historical period of 44 months without an effective strike in the federal jurisdiction. Despite this apparent labour peace, strikes continue to exist in other jurisdictions. Based on a monthly report, there were 72 effective strikes before the Local Conciliation and Arbitration Labour Board in Mexico City, in April 2017.



Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN MEXICO?

PENICHE: Notwithstanding the most recurrent subjects, which continue to be employees challenging the justification of their termination of employment, and compliance with specific employment benefits, Mexico is starting to see an increase in new actions exercised by former employees such as: joint or direct liability over subcontracted employees of those entities which implement outsourcing or insourcing structures; payment of profit sharing; discrimination; and harassment at work.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

PENICHE: Companies in the process of restructuring must consider that employment in Mexico is based on the 'stability at work' principle, as opposed to 'employment at will'. In terms of this principle, employers can only terminate employment under specific causes provided in the Mexican Federal Labour Law, which do not include restructuring, downsizing and so on. Any downsizing process not properly organised and formalised might trigger the risk of terminated employees claiming either reinstatement or payment of statutory severance. Furthermore, Mexican labour law also follows the acquired right principle. In this regard, any detrimental modification to employees' salaries or benefits could trigger justified grounds for employees to terminate the relationship and with payment of severance provided by law.



Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

PENICHE: In Mexico there is a clear trend toward innovation. This includes innovation in processes, products and compensation structures. Managing key talent has become more important than ever for companies in Mexico. It is crucial that key talent feels valued and motivated. As such, companies in Mexico are establishing realistic and achievable goals. Likewise, they are increasing the use of compensation structures that imply long-term retention and loyalty goals such as stock options, restricted stock units, phantom stock and so on. Another increasing trend is the use of flexibility rules at work, which might include home office schemes, flexible working schedules, and casual dress codes, among others, including an 'emotional' salary in the financial component of an employees' compensation.

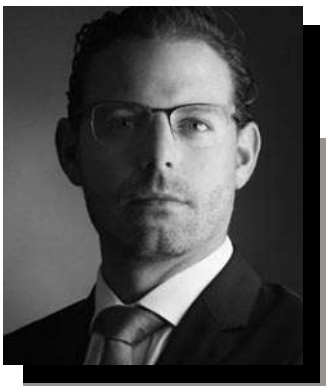
PENICHE: Due to economic difficulties and an increasingly competitive and unpredictable market, it might be harder for employers to guarantee a higher compensation for executives, primarily because offering variable compensation packages which reward employees based on individual, team or organisational performance can simultaneously ensure good compensation packages for high performers and motivate employees to work toward the achievement of their goals. Companies must take into account that in terms of Mexican labour law, any benefit granted to employees might be considered as part of their total compensation for severance purposes. Another element which must be considered is whether the compensation package is comparable to the market for the specific industry. If a company lacks the economic resources to compete with the salaries paid by competitors, it would be wise to analyse alternatives to offer non-financial incentives such as work flexibility, self-determined working schedules, remote working schemes, as well as academic or recreational leaves of absence.

"Employers are obliged to hire a workforce which is, at minimum, 90 percent Mexican, with some exceptions."

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

PENICHE: As more and more international players from different industries and jurisdictions invest in Mexico, it is important that they bear in mind that Mexican labour laws are very employee protective and are not as flexible as other jurisdictions. Though there have been many legislative changes to welcome foreign investors from all industries into Mexico, unfortunately labour legislation has failed to update at the same pace. For example, employers are obliged to hire a workforce which is, at minimum, 90 percent Mexican, with some exceptions. Additionally, foreigners performing remunerated activities in Mexico require a visa; and there are specific obligations for Mexican employees rendering services abroad under the jurisdiction of Mexican labour law. If employers fail to comply with these requirements, they might be subject to substantial economic penalties.

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ARGENTINA

ENRIQUE M. STILE
MARVAL, O'FARRELL & MAIRAL



Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN ARGENTINA OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

STILE: Over the past 12 years, Argentina has seen high inflation, increasing numbers of lawsuits, salary increases and high union activity. Judges appointed during this period have also created court precedents that are very favourable to employees and unions. This has created a very high employment cost which has triggered rightsizings and the closure of many businesses. The new government is trying to create better employment conditions to attract investments, generate local employment and become more competitive. This is proving difficult, however, because the main political party, currently in the opposition, derives much of its votes from workers and does not support open market reforms. Regardless, the government is slowly enacting reforms to reduce employment costs and create a more predictable cost structure.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN ARGENTINA AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

STILE: Unions are very powerful in South America and many union leaders have entered the political arena, becoming presidents in Brazil, Venezuela, Bolivia and others. There are many former union leaders who are currently governors of states and counties or have become members of the Congress. Union leaders who come into power gain the majority of their votes with promises of improving employment conditions and salary increases. Due to very high inflation in recent years, unions have been gaining a lot of power negotiating salary increases. Unions have also been very active in order to avoid massive layoffs and they have even helped employers to reduce costs when there were critical situations.

Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN ARGENTINA?

STILE: Due to the existence of a big informal economy, which is a consequence of high employment costs and taxes, there are many regulations penalising the lack of or deficient registration of employment. These regulations provide the right for a constructive dismissal at any



time for lack of or deficient registration of an employment relationship and the possibility of claiming severance pay for termination without cause, as well as very high penalties. These penalties could, in certain cases, triple employee severance packages. Most of the lawyers representing employees hope for these kinds of situations as they will provide an easy case to win.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

STILE: In companies where employees are represented by a union it is advisable to negotiate and reach an agreement with the union before starting the process. Although it would be possible to rightsize or shut a company down without reaching an agreement with the union representing the affected employees, they make the process lengthier and much more expensive. Unions may also help to reduce costs to avoid massive layoffs by assisting the employer in the transition of a crisis period. The agreement with the union will be very important because it will grant the employer a framework agreement to execute enforceable release agreements and avoid future litigation. If the affected employees are neither framed nor represented by a union, it is advisable to file termination and release agreements at the Labour Ministry to avoid future litigation. Additional amounts should be granted to employees to obtain their consent to execute a release. Employees from contractors, third parties or outsourced services affected by the decision may decide to sue the principal employer on a joint or direct basis.

Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

STILE: Work on a preventive basis and analyse the granting of benefits very carefully. Written policies and documents clarifying the rights and obligations in a very clear way are also advisable as in case of doubt, Argentine judges are obliged to make the interpretation in the most favourable sense to the employee. For multinational companies, it is



"Training courses for expats, to understand local culture, would reduce personal bad experiences as well as potential lawsuits."

advisable to translate policies and documents to local language. Training courses for expats, to understand local culture, would reduce personal bad experiences as well as potential lawsuits. It is important to monitor the environment of the company as if there is any negative situation which is not solved in time, the union will probably take advantage to obtain benefits and gain more power and representation. Training courses should be carried out on the following topics: compliance, harassment, mobbing and discrimination, as many employees are unaware of their consequences. Companies should be aware of data protection and intimacy rights regulations as in some cases, for example, monitoring of emails without express consent may lead to criminal charges.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

STILE: In countries with very high inflation, like Argentina, it is difficult to grant other incentives in a compensation package other than keeping salaries adjusted with inflation. In the past, and due to very strict foreign exchange control regulation and distortions of the market, one of the most attractive benefits was the payment of salaries in US dollars. Today, with no significant variation in the value of the currency, this practice has been discontinued, except for the payment of bonuses and share incentive plans. Granting a performance bonus or a bonus subject to achieving certain goals is a common market practice. Companies have been focusing on granting non-remunerative benefits as a way of retaining employees and keeping them motivated. Employers compete with work-life balance benefits rather than salaries to attract talent. These benefits are, among others, working from home, extended maternity and paternity leave, working until midday on Fridays, training courses, trips abroad to improve language or skills, pro bono and social responsibility activities. Benefits that could be replacing a cost, such as a company car or unlimited use of a cell phone, are considered remuneration and therefore are not an attractive benefit as employees would prefer cash compensation.

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

STILE: Many countries, like Argentina, apply the territoriality principle and therefore the expatriate assignment will be governed by Argentine employment regulations. Foreign law could also apply but only when it grants benefits for the worker. This territoriality principle also applies to tax and social security regulations and the foreign worker must contribute to the Argentine social security system with payroll contributions, in addition to paying income tax and other taxes in their home country. This situation implies a higher cost as most expats want to contribute to their home country's system, so the employer may end up contributing in excess for this purpose. There are some countries and regions with which Argentina has executed social security and tax treaty agreements. Foreign workers should be trained in cultural and social relationships as certain customs or words common in other countries may be rude in Argentina.

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UNITED KINGDOM

JONATHAN FENN
SLAUGHTER AND MAY



Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN THE UK OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

FENN: The last 12 months have seen substantial political upheaval in the UK, starting with the Brexit referendum and continuing with the recent general election. The government has committed to convert EU employment law into UK law, although some changes may be needed to legislation which envisages the UK being part of the EU, such as that governing European Works Councils. Whilst it is unlikely that the government will look to make any substantive changes to EU-derived employment law immediately following Brexit, it is unclear for how long that position will continue. In light of this upheaval, there has been relatively little new employment law implemented this year. One noteworthy new development was the introduction of annual gender pay gap reporting in April 2017. Employers with at least 250 employees are now required to publish specific data about the pay and bonuses of their male and female employees, in the hope that this will address the UK's gender pay gap, which is currently 18.1 percent.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN THE UK AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

FENN: The UK labour market is currently in a period of uncertainty. The recent general election result has cast doubt on the Conservative Party's manifesto commitment to deliver "the greatest expansion in workers' rights by any Conservative government in history". More fundamentally, the implications of Brexit for employment are not yet clear. Trade unions have less influence in the UK than in many other European jurisdictions. Although recognised trade unions have a right to be consulted about key workforce issues, they do not have the power to block the employer's proposals. Their main weapon is industrial action. However, the Trade Union Act 2016 now places greater restrictions on industrial action. The key provisions of the Act came into force in March 2017; these include a 50 percent turnout threshold for there to be a valid ballot on industrial action and an additional 40 percent support threshold from union members for industrial action in key sectors such as health, education, fire, transport and border security.



Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN THE UK?

FENN: Employment-related litigation has been in decline in the UK since 2013, when a new fee regime was introduced for employment tribunal claims. This resulted in a 70 percent decrease in claims, prompting the trade union Unison to challenge the regime on the basis that it has hindered access to justice. The Supreme Court is due to rule on the challenge imminently. In the meantime, a key theme which has emerged in the past 12 months is for individuals within the so-called 'gig economy' to challenge their employment status. These individuals are typically engaged on a self-employed basis, but many are now claiming to be 'workers'. This entitles them to certain basic rights, including paid holiday and the National Living Wage. The issue gained enough traction for the government to commission the Taylor Review to consider the implications of new models of working on the rights and responsibilities of workers and employers. The Taylor Review concluded on 11th July 2017 and its final report contains some significant recommendations for reform, which the government is now considering.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

FENN: Companies looking to restructure their workforce will typically need to undertake a consultation process with employee representatives, to explain the need for the restructuring and the impact on employees. There is a statutory regime to be followed, with minimum consultation periods – typically 30 or 45 days – and financial penalties for failure to comply. If the employer needs to make redundancies, it will also need to follow a fair process if it is to avoid liability for unfair dismissal. The employees may be entitled to statutory or contractual redundancy pay. Reducing payroll costs may be achieved by outsourcing certain functions, which could involve a transfer of undertakings (TUPE). Employers will also need to consider if any adjustment to benefits is permitted under the contract of employment, otherwise they may face breach of contract claims if employees do not accept the change. Employers also need



to make sure their benefit change proposals do not discriminate on a prohibited basis, such as by age or sex.

Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

FENN: In the current climate of uncertainty, employers need to make their workers feel secure and valued. Employee engagement is a hot topic in the UK at the moment. The government had proposed that listed companies should have some form of employee representation at board level and that employees should have the right to request information about the future direction of the company. Although it is unclear whether either of these proposals will be taken forward following the recent general election result, companies may decide to increase employee engagement on a voluntary basis. Brexit is also playing a big role in workplace morale, with many EU nationals feeling concerned about their job security and future right to work in the UK. There is also some evidence that EU nationals feel more vulnerable to discrimination since the referendum. Employers that do not offer appropriate support and engagement with these employees may face significant workforce issues in the coming months and years.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

FENN: There has been concern for some time within the UK that executive pay has reached excessive levels, and is out of sync with both corporate performance and pay for the wider workforce. Following legislative changes in 2013, listed companies must now seek binding shareholder approval for their executive remuneration policy, which then constrains how, and how much, they can pay their directors. It is also possible that listed companies will soon be required to disclose the ratio between executive and average employee pay. Remuneration design has therefore become a particularly sensitive issue. Many factors must be taken into account, including legal and regulatory restraints, the need for shareholder engagement, market forces, institutional investor guidance and tax planning. The current trend is towards simpler pay structures comprising salary, cash bonus with stretching targets based on wider performance criteria, and deferred stock vesting over a genuinely long-term period, increasingly at least five years.

"For multinational companies with a UK presence, Brexit will have a huge impact."

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

FENN: For multinational companies with a UK presence, Brexit will have a huge impact. It can in one sense be seen as a move away from globalisation, rather than its continuance. Much will depend on what trade deals the UK develops with the EU and the rest of the world, and what requirements those trade deals impose in terms of employment laws and social policy. Companies that have adopted global human resources and remuneration policies will need to keep them under review, to ensure they keep pace with the changing legal landscape. Companies with European works councils will need to consider how those will operate post-Brexit. Whatever legal requirements are put in place, companies may decide that there are good industrial relations reasons to continue to include their UK employees in such arrangements.

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FRANCE

GRÉGORY CHASTAGNOL
FROMONT BRIENS



Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN FRANCE OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

CHASTAGNOL: Four notable bills have been enforced over the last 12 months. The Sapin II Act, which came into force in December 2016, implemented specific protections for whistleblowers. Companies employing more than 50 employees must establish an in-house whistleblowing procedure. Equally, specific procedures and protections are defined for companies in the banking and financial sectors. Under the Justice Modernization Act, enacted in November 2016, employees, interns and applicants may now launch class actions against their employer in the event that they encounter discrimination. The Labour Act, enacted in August 2016, and related decrees in 2017, implemented several changes. Company agreements now prevail on collective bargaining agreements and supplementary regulations in all working time matters. Work comity, employees' delegates, and health, safety and work-conditions comity may now be merged in a single delegation, under conditions depending on the number of employees. Social dialogue and conclusion of collective agreements has been deeply reviewed. Economic grounds of dismissal have been clarified. A 'right to log out/to disconnect' has been implemented, ensuring executives a right to turn-of their professional mobile. Medical examination and incapacity procedures have also been amended. In May 2016, the Macron decree on litigation procedures was enacted, which stipulated that procedures before employment tribunals and the court of appeal in employment matters have been deeply amended, in a more formal way. Finally, withholding tax, which was supposed to be implemented on 1 January 2018, has now been postponed to 1 January 2019.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN FRANCE AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

CHASTAGNOL: Labour relations were strained in the second half of 2016, after the enforcement of the Labour Act in August, which had been considered as insufficiently negotiated with unions. Now, relations seem to be more constructive. Unions have been invited by the new government to several meetings in order to prepare the next Labour Act, which is supposed to come into force during the summer. The last union representation vote saw the election of CFDT, a progressive union, as the first trade union in the private



sector. Until 2016, the CGT union was the most representative union. However, in the coming months, strikes are to be expected, as next summer, a new Labour Act is to be enforced. This next Labour Act is supposed to go further in modernising employment relations and several unions plan to fight it. The enforcement of a damages threshold, which is forecasted by the government, will be a hot topic.

Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN FRANCE?

CHASTAGNOL: France has seen a number of trends over the past five years, including co-employment, harassment, discrimination, and fixed-day forfeits. Now that the Supreme Court has strengthened its appreciation of these matters, litigation around the subject will likely decrease. Litigation is now often about termination of contract, be it unfair or unlawful dismissal, defaults in dismissal procedure or judicial termination of the contract because of employer fault. This is the historical litigation in the employment arena, and potentially one of the most expensive. Others include working time, breaches of fixed day forfeits, performance of contract, training obligation, health and safety, professional diseases and accidents, burn out and the right to log out.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES

CHASTAGNOL: The main issue to be tackled before resizing the workforce is the economic justification for the restructuring. Depending of the number of employees and the number of forecast redundancies, relevant procedures must be identified. For companies employing more than 1000 employees, forecasting more than 50 redundancies and closing a site may be a very heavy procedure, and breaches of the procedure may void redundancies. Reducing payroll costs, and adjusting pensions and benefits, might require negotiation with employees and unions. Breaches of French regulations or procedures on these matters may lead to individual litigation alleging unfair dismissal, void dismissal, damages for unequal treatment or discrimination and back-pay demands. Companies must also potentially deal with collective litigations



MIGHT ARISE IN SUCH CIRCUMSTANCES?

– for example, suspension of the project, cancellation of decisions taken and the obstruction of employees' representatives.

Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

CHASTAGNOL: Broadly speaking, our advice is to be careful on the general work organisation, and namely the management of working time and remuneration. Does the company comply with mandatory regulations and conventional stipulations on working time? Does the company need to conclude a company agreement to regulate its workforce? Is the workforce fully adapted to the company's needs? Or might the company save money by reorganising its workforce, for example, paying less overtime or fully using the workforce? How are executives managing their working time? Are forfeits used? If yes, are they regularly concluded and followed up? Is the remuneration scheme adapted to the company's needs and targets? For similar positions in the company, are employees equally treated over remuneration packages and benefits? Are the remuneration schemes defined and explained to employees? How? Are the schemes flexible enough? Does the company use relevant exempted remuneration schemes? Another important subject is health and safety. Current discussions on the right to log out, professional burn out or 'bore-out' might lead to a revival of discussions around working conditions and health at work.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

CHASTAGNOL: We would not say it is more difficult to reward executives and employees, but remuneration packages and benefits certainly tend to be more and more formal. Jurisdictions' refusal of discretionary bonuses, and regulations on equal treatment and discrimination, oblige companies to precisely define their bonus and benefits schemes. Exempted remuneration tools also require a specific formalisation, and meeting certain legal conditions. As such, it is important to precisely define remuneration packages, in the company's and employees' best interest, without restricting the company's ability to adapt to its environment.

"It is important to precisely define remuneration packages, in the company's and employees' best interest, without restricting the company's ability to adapt to its environment."

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

CHASTAGNOL: Social security regulations are unified within Europe for cross-border workers, which facilitates multi-state or cross-border employment. EU regulations on freedom of movement for workers, freedom to provide services and freedom of establishment, also facilitates cross-border employment within Europe, and the employment or secondment of EU citizens in France. Despite these EU regulations, the French government has recently strengthened formalities regarding the employment of foreign workers, and secondment. The employment of foreign workers, as well as the secondment of employees in France, are indeed submitted to formal obligations, and namely to declarations – regarding Swiss, EEC and EU citizens – or authorisations of work, which may be heavy. Cross-border employment from EU states will certainly become more controlled, as the current government is committed to the fight against fraud.

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SPAIN

SONIA CORTÉS
ABDON PEDRAJAS & MOLERO



Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN SPAIN OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

CORTÉS: The most relevant development in Spanish employment law relates to severance for the termination of temporary employment agreements. The European Court of Justice (ECJ) reviewed a case involving an individual who had been working for the Spanish public administration for seven years through a number of temporary contracts. The High Court of Justice of Madrid submitted a preliminary ruling whereby it requested the ECJ determine whether this employee had been discriminated against compared to permanent employees, in light of the principle of non discrimination included in Clause 4 of the Framework Agreement that provides that in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract. The Court noted the different severance compensation entitlement afforded by Spanish law to permanent employees and replacement employees, and stated that the mere circumstance that a contract is of a temporary nature does not constitute an objective ground for unequal employment conditions. The ECJ concluded that Spanish law is discriminatory in that fixed-term employees should be entitled to severance compensation equal to that afforded to permanent workers terminated on objective grounds. Given that the ECJ does not address the fact that other fixed-term contracts are entitled to a higher compensation for termination, raises the argument that this interpretation may extend to other temporary employment contracts that could also be entitled to the regular severance of permanent employment termination for objective grounds. This has obviously caused controversy and new legislation may be enacted to address this. Another significant development is the broadening of the case law criteria as regards employers' right to workplace video surveillance. Under this interpretation, employees' prior consent is not required to place video cameras in the workplace because an employer's right to monitor is inherent to their authority to monitor compliance and that mere information suffices.



Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN SPAIN AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

CORTÉS: The 2012 labour reform provided a stronger effect to company-wide collective bargaining agreements, thus reducing the scope of district and national bargaining. Besides, given the difficult economic situation that Spain faced during the years of crisis, the government dramatically reduced public subsidies to both trade unions and employers' associations. Additionally, the number of employees affiliated with unions has considerably decreased throughout the years of crisis. The percentage of affiliations may be in the range of 14 to 16 percent now. Consequently, unions have lost influence in labour relations.

Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN SPAIN?

CORTÉS: The main issues continue to be misclassification of employees as independent contractors and outsourcing structures where outsourced employees continue to work in the principal's business organisation. These structures are fought by law since they are seen as preventing employment rights – lower social security coverage and lower salaries. Also recurrent for executive employment relationships are claims against rights for unvested stock options when a substantial part of the vesting term has elapsed, and for a pro rata bonus, if the executive is terminated before year end, both in the event of unjustified termination, which is more than often declared by courts in Spain.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND

CORTÉS: Collective redundancies are subject to a very strict legal procedure. Failure to follow this procedure may result in the project being declared null and void, thus entitling the employees to reinstatement. Therefore, it is extremely important to comply with the procedure, particularly including an open and proactive consultation process and delivering appropriate documentation on the grounds and on the selection criteria of allowing the works council to assess the issue at hand. A very relevant issue in this respect is assessing thresholds for collective redundancy, since under an ECJ decision,



BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

these should be addressed with reference to the work site, as provided in the relevant EU Directive, and with reference to the company as a whole, as provided by Spanish law.

Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

CORTÉS: Good human resources management involves providing a good work environment and a clear and transparent work expectation, so that employees feel part of the project. This includes providing comprehensive job descriptions, clear performance management and evaluation tools, promotion expectations and training opportunities. Short-term and long-term incentive plans, with a variety of remuneration opportunities, including stock options, RSU, life and accident insurance, among others, are key to retaining talent. Managers also appreciate management liability insurance. From a legal viewpoint, the company should ascertain it has appropriate anti-harassment and anti-discrimination policies and awareness programmes, as well as health and safety measures, such as work environment assessments to avoid any harassment, discrimination or burnout risks at their earliest stage. Employees currently value flexibility at work policies, including opportunities to work from home and flexible time. Work-life balance tools are also highly valued. Spanish law, for instance, offers employees the opportunity to apply for reduced working time with equal reduction of salary. However, retaining talent also involves devoting time and care so that employees feel both valued and at ease, including listening to their contributions and concerns, being flexible at work, valuing their contributions and providing good promotion expectations through specific career plans.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT

CORTÉS: The current legal framework provides employers more flexibility to implement new remuneration schemes and to change employment terms. There are currently more tools and plans to reward employees. Still, it is strongly advisable to review incentive plans carefully in the light of Spanish law to insert the relevant wording so as to avoid unexpected implications. For instance, plans should specifically provide that no payments shall be due for pending long-term incentives even upon objective business grounds or unfair termination, in order to avoid employees becoming entitled to compensation

"Good human resources management involves providing a good work environment and a clear and transparent work expectation, so that employees feel part of the project."

WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

for partially accrued long-term incentives. Considering increases in life expectancy, executives currently value contributions to retirement plans, particularly when this is combined with a better tax treatment. On the other hand, young specialised executives value specialised training. Finally, there is a trend toward new remuneration models where a percentage of fixed salary is reduced, as opposed to variable remuneration; this is aimed at further remunerating an employee's effort rather than their ability to take on goals.

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

CORTÉS: Despite globalisation, employment continues to be regulated by one piece of legislation at a time. Therefore, it is important to consider that certain legal mandatory provisions may apply in addition to those provided for in company policies. Finally, although the European Union aims at achieving a certain level of harmonisation, there are still important differences in each Member State, in terms of laws and legal practice. Therefore, companies must consider the need to abide by the law in order to apply policies consistently.

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ITALY

GUIDO CALLEGARI
DE BERTI JACCHIA FRANCHINI FORLANI



Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN ITALY OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

CALLEGARI: The most notable development is the so-called 'Jobs Act', which is a set of decrees issued in 2015 with a view to reforming many of the most important pieces of Italian legislation governing employment. Among the key regulations which were reviewed by the government, it is worth mentioning those regarding unemployment wages, individual dismissals, collective dismissals, 'shock absorbers' and social relief connected to fixed-term employment contracts. Moreover, in 2017, parliament approved a new Act improving the existing legislation governing self-employment and introducing new regulation for smart working.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN ITALY AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

CALLEGARI: Labour relations in Italy still convey the attitude of the trade unions and the slant of the social conflicts of the 70s. The affiliation of workers with the unions, however, is not increasing and frequently companies, mostly subsidiaries of foreign groups, have no unions members among their workforce. As a result, on the one hand the unions are keen to increase their visibility and on the other, they put pressure on the government and the legislator to adopt measures aimed at strengthening their contractual power. The support of the unions, however, is normally sought by workers in situations which could affect their employment, and this increased during the years of the global downturn.



Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN ITALY?

CALLEGARI: Dismissals still represent the most recurring and important theme in employment related litigation in Italy. However, labour and employment litigation in general has undergone a significant reduction in terms of the number of cases brought before the labour courts. Litigation concerning unfair dismissals has followed this trend, probably due to the impact of the 'Jobs Act' and the silent pressure applied by the labour offices and the labour courts to settle cases. Conversely, litigation on themes other than dismissals, including requalification of employment contracts and employment versus self-employment, discrimination in the workplace and the rights of employees concerning their personal data, are slightly increasing.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

CALLEGARI: All these are highly regulated matters in Italy. In general terms, a failure to comply with such formalities as imposed by the law or by the collective bargaining agreements may result in the legal process of resizing the workforce being declared null and void, as well as in legal actions brought against the employer by trade unions and by each employee concerned. If the resizing involves a mass redundancy and a collective dismissal, a prior consultation with the trade unions is required. Such a consultation should be aimed not only at allowing for collective dismissal, but also at activating social relief for the employees to be made redundant, including the payment of an unemployment wage, as stipulated by the Italian legislation. The adjustment of salaries and other benefits is a rather difficult goal to be achieved, and is to be negotiated on an individual basis.



Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

CALLEGARI: People are the most important resource for any employer. According to the position, the skills and the abilities of each of them, employees should be heavily involved in the running of the business of which they are fundamental players. The vision of the company is to be shared with and by the key talents, who should be granted not only an adequate remuneration, but also an exciting career path in line with their professional expectations. Measures aimed at ensuring a good work-life balance are appreciated, especially by millennials.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

CALLEGARI: Today, much more than in the past, money alone is not enough to adequately reward executives and employees. On the one hand, it is essential to make key employees and executives eligible to participate in incentive plans and, as to the major groups, to stock option plans and plans aimed at granting them financial instruments. In terms of benefits, a company car, a smart phone and other electronic devices, along with free access to connection services, are a must. Free of charges services such as babysitting and scholarship for children or transportation cards are appreciated mainly by employees with small fixed salaries. Granting these kinds of benefits was recently encouraged by the Italian tax legislation.

"Today, much more than in the past, money alone is not enough to adequately reward executives and employees."

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

CALLEGARI: The main challenge would be that of developing a really globalised culture by improving the knowledge of the cultures of origin of foreign workers and removing, where they still exist, barriers grounded on discrimination.

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FINLAND

JP ALHO
KROGERUS ATTORNEYS LTD



Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN FINLAND OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

ALHO: A new chapter of the Finnish labour market began with the endorsement and signing of the Competitiveness Pact between the Finnish government and labour market organisations. This nationwide labour market pact aims to improve the competitiveness of labour and businesses, create new jobs, support fiscal adjustment and promote local collective bargaining practices. The Competitiveness Pact will affect the Finnish labour market as a whole, for example, there will be no general rise in wages, nor will the annual working time be extended by 24 hours without additional remuneration. Furthermore, the Finnish labour legislation is currently in a state of flux. As of January 2017, several amendments were adjusted in order to reduce obstacles from new hires. Also, a pension reform entered into force and, as a result, the minimum retirement age was raised from 63 to 65.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN FINLAND AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

ALHO: Collective bargaining agreements (CBA) play an important role in Finnish working life as employment can be affected by CBAs, both directly and indirectly. In addition to being a member of an employers' organisation, an employer may also have an obligation to comply with the minimum terms of a CBA that has been declared as 'generally binding' in the relevant field of business. Thus, certain terms and conditions of employment may arise from a CBA simply because the employer operates in a specific field of business. In total, 85 percent of employees in the private sector are covered by CBAs. Hence, the Finnish labour market is strongly characterised by the influence of generally binding CBAs. However, unlike in other Scandinavian countries, the unions or work councils are not holding that important role at the workplace with regard to cooperation.



Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN FINLAND?

ALHO: There has been an increasing number of discrimination claims. Traditionally, cases of discrimination in the workplace have been tackled as civil claims, however, in recent years, a growing number of victims have sought relief from the work discrimination provision in the Finnish Criminal Code. Furthermore, a recent ruling from the Finnish Supreme Court highlights the prohibition of gender-based discrimination regarding the right to consecutive paid maternity leave. In addition, the nature of so-called 'zero hour workers' – those who have flexible working hours between 0-40 hours per week – and framework employment agreements have raised a considerable amount of debate recently as the law does not regulate these agreements. However, the long-awaited first rulings from the Finnish Supreme Court highlighted the legal status of these increasingly general models of employment in the labour market.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

ALHO: In short, resizing the workforce in Finland is fairly simple and safe provided, however, that the strict and formal procedure is followed. Basically, an employee may be dismissed based on financial and production related grounds if the work to be offered has substantially and permanently diminished. As regards the procedure, if the employer regularly employs at least 20 employees, it is required to enter into a formal cooperation consultation process with its employees or their representatives prior to taking any measures that may lead to redundancies. Thus, if the redundancy decisions are made only after fulfilling the formal cooperation obligation, the employer is, in general, allowed to make organisational, financial and production-related decisions rather freely. On the other hand, during employment the employer has a limited right to unilaterally alter the terms of the employment relationship to the detriment of the employee. Adjusting pension benefits is not possible either, as in Finland the pension system is statutory and cannot be amended by either party.



Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

ALHO: When companies design their organisational culture and implement a compensation programme that reflects company goals, values and business strategy, they may expect to experience a better alignment of executives and employees. Meaningful work and clear goals, supportive management, positive work environment, as well as growth opportunities are the factors that have a positive impact on the company's future image and employer brand. It should also be noted that as financial incentives play an important role in retention, non-financial incentives engage employees in ways that money is incapable of doing – praise from a manager, consistent practice regarding promotions and a chance to lead projects can be more effective motivators when the main objective is to retain people. However, companies must be aware of the relevant legislation from time to time as equality-related issues, among others, may arise.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

ALHO: To a certain extent it has become more difficult to reward executives and employees, as nowadays non-financial incentives have a more substantial impact on employee satisfaction and motivation than traditional financial incentives. Employees often rate other aspects, such as recognition and flexibility, more highly than monetary compensation. The right compensation strategy ensures that employees are rewarded fairly and in the most effective way for the company, for example, in terms of retention rate and job satisfaction. However, problems may arise if the same compensation structure has been in place for a long period of time so that it has become a binding term of employment due to an established practice. First of all, in such a case it would be difficult for the employer to unilaterally amend the plan, but also it is unlikely that it further motivates employees. Therefore, the recommendation is to make incentive plans for a fixed period and always reserve the right to amend or discontinue it.

"The recommendation is to make incentive plans for a fixed period and always reserve the right to amend or discontinue it."

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

ALHO: The main challenge relates to the equal treatment of employees and prohibition of unfair benefit at the cost of foreign workers. Therefore, certain minimum provisions and protective employment regulation apply also to foreign workers who have been temporarily posted to Finland whenever they are more advantageous than the legislation otherwise applicable. Also, based on recent EU regulation, the formal obligations of the posting and the contracting employer have been tightened. In addition, multinational consolidated companies operating in Finland may also encounter other HR challenges regarding, for instance, formal cooperation. This means that a company headquartered outside of Finland should refrain from making any direct or indirect decisions that could impact on the personnel headcount prior to the local consultation obligation being fulfilled, if the Finnish company or subsidiary regularly employs at least 20 people.

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JP Alho has over 20 years of in-depth experience in advising in labour law, including employment disputes and matters related to the protection of privacy and information security. He is recognised in major international publications as a highly esteemed professional and a leader in his field. His clientele consist mainly of international corporations, mostly from the UK and US. He is praised by his clients for his analytical and straight to the point advice and his solid practical solutions. He has written books on CEO contracts and shareholder agreements (SHA).



RUSSIAN FEDERATION

ALEXANDER E. KARPUKHIN
ORIENT PARTNERS

Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN THE RUSSIAN FEDERATION OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

KARPUKHIN: The main changes to labour and employment legislation over the last year relate to salary payment procedures, which do not influence the overall picture. An important development was the extension of the statute of limitation as regards salary and other payments, from three months to one year. Another notable issue is that the Russian Ministry of Labor's professional standards became obligatory as of 1 July 2016. The professional standard is a list of requirements and qualifications which apply to certain categories of jobs, such as doctors and accountants. Of course, the most important change to be noted is one which occurred a little bit earlier – the prohibition of leased labour in Russia, including secondment and outsourcing, which came into force on 1 January 2016. The only exception is human resources agencies that provide a leased workforce professionally, as well as the assignment of employees to affiliates.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN THE RUSSIAN FEDERATION AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

KARPUKHIN: The role of trade unions in Russia today is insignificant in comparison with Soviet times, when they were an official part of the state system. All the major state-owned companies, and those with soviet legacy, have trade unions which mostly deal with generic employee support in the same manner as they did 30 to 40 years ago – for example, organising holidays for employees, and assisting with summer vacations for employees and their families. Most unions are members of the state-influenced Federation of Independent Trade Unions of Russia, which is a high-level unions association supported and financed by the government. On a state level, industrial trade unions are participating in some legislation-making activities, such as advising on bills which may relate to employees' rights. At the same time, apolitical trade union representatives, even those supported by the government,



actively resist any changes to legislation aimed at diminishing the rights of employees and guarantees. Independent trade unions act for some foreign companies in Russia, especially in automotive and hypermarket industries. However, their current actions are not on a big scale, essentially consisting of local disputes and arguments with employers. Furthermore, no heavy industrial actions or strikes have been seen in recent years. Working councils are not common and are generally implemented in some foreign industrial facilities in Russia.

Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN THE RUSSIAN FEDERATION?

KARPUKHIN: The majority of employment litigation in Russia relates to unfair dismissal cases. With local employment law being very formalistic, it is very easy for an employee to find a mistake in a dismissal process and then challenge it in court. Another popular category of case is disputes related to the payment of salaries and bonuses. Employment cases in Russia are heard by courts of common jurisdiction, the judges of which are extremely busy yet not especially skilful in terms of knowledge of the law. This leads to deterioration in the quality of the court's decisions.



"All HR matters in Russia tend to be highly documented, with HR managers often working in close contact with lawyers."

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

KARPUKHIN: Staff reduction in Russia requires two months' notice. Additionally, the employer has to pay severance of two to three months. So, from a business point of view, the cost of removing an employee is around five months salary. Legally, such a process is very bureaucratic and requires ongoing legal and human resources (HR) support. All HR matters in Russia tend to be highly documented, with HR managers often working in close contact with lawyers. As for pension matters, these are not considered in Russian restructurings at all, as corporate pensions are not popular. In terms of state pensions, they are paid by the State Pension Fund with companies not involved. Another notable point is that the employer may not change the employee's functions without his or her consent, which makes staff rotation and other concepts difficult.

Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

KARPUKHIN: Generally speaking, rather than being motivated by money, Russian employees prefer to work at companies with a good culture. Of course, salary is important, but this is not the most important factor according to many employees.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

KARPUKHIN: The main consideration in structuring benefits packages in Russia is taxation, as the tax payments charged may reach up to 30 percent. Also, there are certain regulations which limit the amounts and proportions of bonuses in banks and state companies. Furthermore, the involvement of lawyers in drafting compensation policies is highly advisable to avoid discrimination issues and to ensure correct wording. For example, in the case of a dispute, current court practice requires courts to check if a payment to an employee is fair and justified.

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

KARPUKHIN: On the one hand, we are seeing the globalisation process extending the influence of international corporations. On the other, especially in Russia and some other big countries, we can see the opposite process of deglobalisation in certain areas important to the state, such as oil and gas, and aerospace. In these areas, all the multinational projects are under strict control and any foreign influence or advice is not welcome. As far as Russia is concerned, engaging foreign specialists is still very difficult, although they were simplified for countries nearby. Another challenge is the bureaucracy associated with running companies in Russia, with numerous regulations to consider and many documents to sign. The most bureaucratic areas are tax, accounting and human resources.

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Alexander Karpukhin advises on a full scope of labour and employment matters, including ongoing advisory support, litigation matters, executive compensation and trade union relations. Mr Karpukhin also advises on general corporate and commercial matters, as well as M&A. He is well known for his previous labour and employment work with Baker & McKenzie and Dewey & LeBoeuf. Mr Karpukhin constantly advises and represents clients in court disputes in the field of labour and employment, assists in contract terms negotiations between employers and executives, and supports clients in their ongoing dealings with various labour matters.



JAPAN

KUNIHIRO SUMIDA
ATSUMI & SAKAI



Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN JAPAN OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

SUMIDA: A recent major change in the field of employment law has been improving assistance to workers to allow a better balance of work and family care, childcare and family nursing support. In accordance with such a trend, amendments to the Employment Insurance Act and other laws relating to the expansion of childcare leave, family nursing leave, the prevention of maternity harassment, child birth, childcare and family nursing leave took place on 1 January 2017. These amendments provide a number of measures, such as making it easier to take childcare leave, by, for example, expanding childcare leave to fixed-termed contractors and increasing their ability to take childcare leave. The amendment also made it easier for employees to take family nursing leave, by, for example, increasing opportunities for employees to take family nursing leave and preventing overtime work. The amendment also requires management to foster a working environment which prevents superiors or others from inhibiting employees from taking time off for pregnancy, child birth, childcare and family nursing leave. The government has provided guidelines which require business operators to introduce work rules that provide related policies and prevent harmful acts while educating workers about these measures and policies.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN JAPAN AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

SUMIDA: In general, unions engage in collective agreements with employers which regulate key matters of employment, such as wages, working hours, holidays and the re-employment of elderly employees. Collective agreements may also regulate the relationship between employers and unions, and are used in labour management consultation or for prior consent before significant decisions are made, for example, redundancies, closure or transfer of business. Although labour unions are expected to play key roles in certain processes of collective bargaining, their authority has waned over the last few decades. Since the relationship between unions and employers is often peaceful and



cooperative, it seems that unions are losing their bargaining power with employers, which may explain the drop in union membership.

Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN JAPAN?

SUMIDA: A major theme in employment litigation in Japan is wrongful termination of employment. Compared to the US, Japanese labour laws do not provide for 'at-will' employment and thus termination of employment requires particular procedures be followed in any termination. Although termination rules are enshrined in law, the requirements are not clearly defined. For example, one of the requirements is a "reasonable or justifiable reason for termination", but it is difficult for employers to determine what would be reasonable or justifiable for a termination since a court takes into account various factors to determine whether a termination is reasonable or justifiable. This often makes it difficult to predict a court decision.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

SUMIDA: The process of restructuring is quite complicated and costly. In the case of resizing the workforce, for example, employers may terminate employees for compelling reasons, such as a strong economic or reasonable operational necessity. Furthermore, the Supreme Court has established three additional requirements in order to lay off employees: efforts must be made to avoid a resizing; there must be a rational selection of personnel; and there must be an agreement between staff and management. Complying with these requirements can be a heavy burden for employers. The key elements in moving forward are determining the type of package to offer, how to select employees in a non-discriminatory manner and when each phase should start. Failure to satisfy these requirements risks invalidating any restructuring measures. In other words, any termination, reduction of payroll costs and adjustment of benefits shall be invalidated



"In general, Japanese labour laws provide for flexibility in hiring foreign workers."

and employers will be obliged to return to the situation before the restructuring.

Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

SUMIDA: It is advisable to introduce compensation systems which reflect the performance of employees, such as stock options or incentivised compensation. However, when such an introduction involves disadvantageous changes, such as reducing the wages of existing employees, then the law requires particular processes be followed, such as obtaining the individual consent of employees or altering the company's internal working rules by providing employees with the chance to exchange opinions and have an employee representative formalise the decision. Failure to do so will invalidate any change in the compensation system.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

SUMIDA: Japanese labour laws provide flexibility in structuring rewards. The traditional lifetime commitment that employees used to make to an employer has changed and workers are switching jobs to seek better employment conditions. Naturally, companies are providing rewards which link positions to the performance of employees. When a company implements a reward system which weighs the performance of employees, the appraisal process needs to be carefully considered, as this may cause a large decrease in the employee's remuneration, which is disadvantageous for the employee. Japanese labour law is quite sensitive to disadvantageous outcomes and such an outcome could be invalidated due to the improper operation of management. Therefore, clear criteria in evaluating performance and frequent and fair discussion regarding performance would be key aspects of any programme. Additionally, labour laws provide for the minimum base salary which must be paid monthly and prohibits employee base salaries falling below a certain amount. Therefore, when creating a combination of base salary and incentive based bonus, the base salary amount should be checked to ensure it does not fall below the required minimum salary as prescribed by law.

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

SUMIDA: In general, Japanese labour laws provide for flexibility in hiring foreign workers. Moreover, employers are prohibited from taking discriminatory action with respect to wages, working hours or other working conditions by reason of nationality, creed or the social status of any worker. Various types of legal engagements with foreign workers exist, such as seconding workers from a company abroad to headquarters in Japan and hiring foreign workers in Japan as local employees. The key requirement for a non-Japanese employee is obtaining a working visa. Employers that hire a foreign worker without a working visa will be subject to punishment and thus visa status should be checked when a company decides to hire a foreign worker. From a practical point of view, a company can obtain any type of working visa. An employment contract which exceeds five years, the maximum period of a working visa, will be effective in obtaining a working visa. A permanent type of employment contract will also be useful in this regard.



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UNITED ARAB EMIRATES

CHRIS WILLIAMS
BRACEWELL LLP

Q WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN THE UAE OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

WILLIAMS: The past 18 months have seen a number of developments affecting onshore labour relations in the United Arab Emirates (UAE), predominantly in the form of ministerial resolutions. These resolutions have dealt with, among other things, issues such as the implementation of a new standard form employment contract, a requirement for the terms of offer letters to be reflected in an employee's subsequent employment contract and changes to notice provisions under fixed term and unlimited term employment contracts. It is important to note that these resolutions have not caused the principal labour law in the UAE – Federal Law No. 8 of 1980 (as amended) – to be amended. Consequently, where a resolution is in contradiction to the underlying Labour Law it remains to be seen how the courts will deal with the same in the event of disputes occurring.

Q HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN THE UAE AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

WILLIAMS: Trade unions, collective associations and workers' councils are illegal in the UAE. However, it is fair to say that by and large, labour relations across the country are on a sound-footing. Recent developments in respect of ministerial resolutions have shown an increased focus on improving employee protections.

Q ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN THE UAE?

WILLIAMS: Arbitrary dismissal claims, particularly those relating to redundancies or performance related issues, continue to dominate employment litigation in the UAE. Notably, under the Labour Law there is no concept of redundancy. Consequently, it is common practice for employees in the UAE to seek to bring arbitrary dismissal claims where they are terminated for reason of redundancy. While the courts are relatively sympathetic to an employer's right to restructure their



business, we frequently see employers fail to defend cases brought against them for arbitrary dismissal as a consequence of not being able to demonstrate by written record the rationale for the redundancy or that an employer can demonstrate that it had a redundancy policy in place. Equally, we will commonly see employees bring successful arbitrary dismissal claims for performance related issues where the employer has failed to follow their own procedures which it can then demonstrate to the court; this is particularly frustrating where the non-performance of the employee bringing the claim is so apparent. Fortunately, from an employer's perspective, in the UAE the maximum claim for arbitrary dismissal is capped at three months remuneration and it is for the court to determine what is paid, often based on the length of the employee's service. We also see a significant amount of litigation that relates to international businesses placing employees in the UAE – or indeed elsewhere in the GCC – and failing to comply with their obligations under the local employment laws. Ultimately, a lack of planning on this front frequently leads to potentially large claims, particularly where such employees are senior executives and end up, for example, 'double dipping' in respect of end of service gratuity claims and pension contributions where the interplay between the two has not been attended to contractually and in compliance with local law.

Q FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE

WILLIAMS: Most importantly, companies should ensure that any restructuring is done in conjunction with legal advice in order to remain fully compliant with the Labour Law. Companies should ensure that records are kept of every decision made, whether at a board or operational level, to determine the reorganisation. The Labour Law does not recognise the concept of redundancy; as such, there is a risk that any restructuring that ultimately leads to the termination of employees will



WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

be considered by the concerned employees to be an arbitrary dismissal under the Labour Law. Care must be taken to avoid this. Where UAE nationals are involved, an employer must ensure that the Ministry of Human Resources and Emiratisation is involved at an early stage in order to ensure that any dismissals or changes to circumstances are compliant with law. Consideration should be given to entering into settlement agreements with employees who are to be terminated. Where a restructuring does not involve a redundancy process but changes to terms and conditions of employment, care must be taken to ensure that any changes do not remove rights granted under the Labour Law – which cannot be contracted out of – and that employee consent is obtained for such changes where legally necessary.

Q WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

WILLIAMS: From the start, recruit well. Employ experienced and well regarded recruiters who know your industry and, just as importantly, the market and the 'players' in it. Keep ahead of your competitors as a 'destination' place for employees to work and develop their careers. No longer is remuneration the sole driving force for employees; work-life balance, training and career development are all crucial. Be fully aware of issues associated with a multicultural workforce and workplace and use the same to your benefit. Provide a positive working environment and recognise and reward the right behaviour for your organisation.

Q IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

WILLIAMS: The UAE continues to be an expensive place to live and work, albeit its tax regime makes it an appealing place to live for senior executives and professionals, which is reflected in packages that are made available. In a number of industries and sectors, the old 'expat' package, which would have consisted of salary, accommodation, schooling and transport allowances, is increasingly being replaced by a salary only package. Employers need to continue to look at salary packages for junior and mid-level management to ensure that compensation levels are sufficient to enable such employees to remain living and working in the UAE, particularly where such individuals have dependents. Clearly,

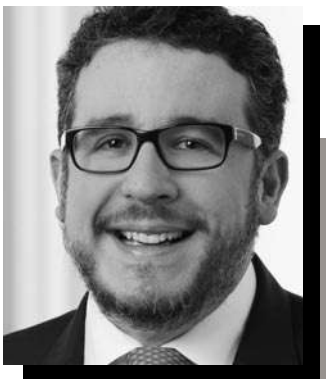
"Be fully aware of issues associated with a multicultural workforce and workplace and use the same to your benefit."

having employees – through share incentive schemes or the like – who buy into the business and its success, is to the benefit of both employer and employees. We are seeing more of this in the UAE, particularly among start-up businesses where 'sweat equity' is key to building and developing a fledging business.

Q AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

WILLIAMS: Ensuring compliance with local laws and regulations, particularly where there are secondments put in place, is key. We see a significant amount of disputes that arise where employers move US or European based employees into Dubai and fail to recognise the obligations that they take on and owe to the employee locally.

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A resident in the UAE since 2008, Chris Williams uses his keen understanding of the region to guide his leadership of Bracewell's Dubai office, as well as his own active corporate practice. He has particular experience in advising on mergers and acquisitions, joint ventures, complex commercial contracts and corporate advisory work, as well as experience advising on labour and employment matters (contentious and non-contentious) and managing litigation disputes in the UAE.



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