Global Employment Lawyer

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# Look out, beware—it's holiday party season!

According to a survey by Challenger, Gray & Christmas Inc., about 88 percent of companies in the US had holiday parties last year. That percentage has been hovering around 90 percent every year since 2011, when only about 68 percent of companies had holiday parties. Barring a major economic crisis in the next few weeks, it is likely that about 90 percent of US companies will again have some type of holiday party this year.

For many companies, having an annual holiday party is part of the culture and tradition of the organization. Company holiday parties provide employees with an opportunity to socialize and celebrate together, and can certainly help boost morale and engender loyalty. At the same time, however, there are risks lurking. Depending on the type of party, and the part of the world you are having it in, there are different types of risks that can come into play.

Even though the percentage of US companies having holiday parties has been relatively high the last few years, many of those companies are spending far less money on those parties than they did prior to 2008. Some companies have saved money by switching from night-time parties with open bars to lunch or afternoon parties. Even if there is access to an open bar, it is less likely that employees will consume excessive amounts of alcohol at lunch or afternoon parties. Other companies that used to invite employee spouses and significant others to their parties now only invite the employees. Although inviting spouses and partners is certainly more expensive, surveys suggest that employees tend to be on "better behavior" when spouses attend. This makes a lot of sense when you consider that—according to a national survey that was conducted in 2013 by Public Policy Polling—nearly 25 percent of employees who make over US$100,000 per year say that holiday parties have led to "romantic connections." Still other companies have saved money and mitigated the risks associated with excessive alcohol consumption by eliminating the open bar or offering a limited number of alcoholic drinks per person.

We asked our partners in other parts of the world to give us a sense of what types of holiday parties their corporate clients are having. In Canada, most year-end holiday parties are still referred to as "Christmas Parties," as opposed to "Holiday Parties," and include spouses and significant others at an evening affair involving dinner. In many cases, a lunch party may also occur, which would not involve spouses. Although alcohol is served at the parties, as a result of social host liability issues, most companies now provide each guest with one free drink and free wine with dinner. Drink tickets need to be purchased for anything else. Some companies will subsidize the cost of the drink tickets but the trend is to move away from subsidization in order to attempt to

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reduce alcohol consumption and the risk of poor behavior and drunk driving. Most companies also offer free taxi chits to ensure people get home safely.

In Spain, most holiday parties this time of the year are held after a work day in December and are limited to the employees. Although there are many types of parties, a common approach is to have a dinner at a restaurant to be followed by a night of dancing and/or music at a disco or pub. Some companies pay the cover charge for the employees to get into the disco or pub, while others do not.

In Poland, similar to Spain, most parties are held after a work day in December. At smaller companies, spouses are generally invited; at larger companies, they are not. If the party is organized in the evening, alcohol is served. Although many companies only have a dinner, a number of the larger companies also have a night of music and dancing.

Regardless of the size and location of your company, here are some steps your company can take to mitigate the risks created by holiday parties: (1) redistribute the company's anti-discrimination and anti-harassment policies the week before the holiday party and remind employees that these policies apply to company-sponsored social events both inside and outside of the office, including the upcoming holiday party, (2) remind employees that any "after party" is not a company-sponsored event, (3) remind supervisors what to do if they learn of or witness any potential violation of the company's policies during the holiday party, (4) consider implementing a dress code that maintains a professional environment, (5) make sure professional bartenders are the only people serving alcoholic beverages and instruct them not to serve people who seem inebriated, (6) have plenty of non-alcoholic drink options and "real" food, (7) leave religion out of the party and just celebrate the holiday season, (8) make sure that the employees do not feel required or pressured to attend (requiring employees to attend could violate employment regulations or give rise to a claim for overtime pay) and (9) provide all guests with a safe way to get home.

From all of your friends at Dentons, we wish you a happy, healthy and prosperous holiday season!

**Brian S. Cousin**
*Editor in Chief*
*Partner, New York*

# Asia Pacific

## Shanghai updates regulations on collective contracts

**By Aoshuang Yang** (Attorney, Shanghai, 大成*)

The original Regulation of Shanghai Municipality on Collective Contracts has been in force for almost eight years. By the end of 2014, collective contracts had been signed by 140,000 enterprises and more than 5.48 million employees in Shanghai. Most employees realized that they could resolve employment disputes through collective bargaining. However, some employers still refused collective consultation. In addition, in some enterprises, collective bargaining has been treated as a burden and formulistic routine that simply wastes the time of employers and employees.

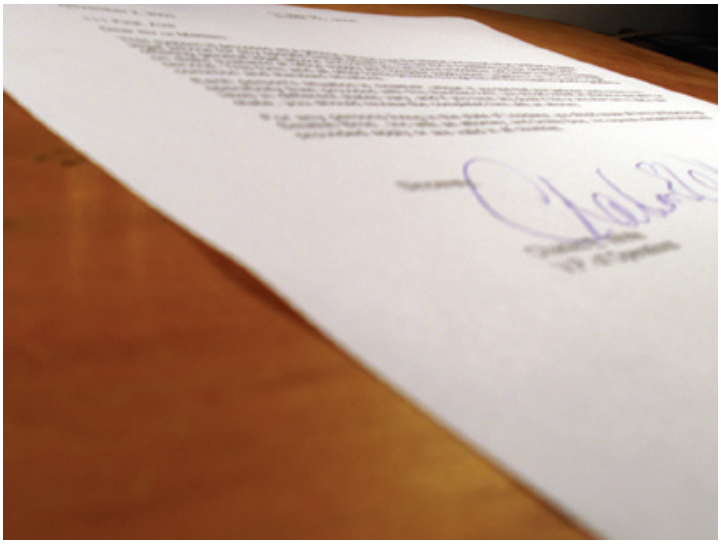
Given this reality, recent updates have been made to the Regulation of Shanghai Municipality on Collective Contracts ("the Amendment"), which was approved by the Standing Committee of Shanghai Municipal People's Congress on June 18, 2015 and took effect on October 1, 2015.

The Amendment materially changes the original Regulation of Shanghai Municipality on Collective Contracts, mainly introducing the following rules:

### Collective bargaining

If an employer refuses or delays the collective bargaining without justified reasons, the Amendment authorizes the federation labor union at the municipal or district level to issue a written opinion and require the employer's cooperation. Where an employer still refuses to collectively consult after receiving the opinion, the federation labor union at the municipal level may display the violation on a municipal public information platform—a portal that provides people with access to business registration, social organization registration and tax registration, among other registration and supervision information.

In addition, the Amendment provides that employees may report to the upper-level labor union, and employers may consult their representatives, to give an instruction when either employees or employers refuse or delay the collective bargaining without justified reasons—or if both parties fail to conclude a collective contract.



Therefore, this Amendment clearly stipulates for the first time the "publicity" that employers will face on the municipal public information platform if they show resistance to orders from the labor authority and opinions of the labor union.

### Wage negotiation

Employers are required to negotiate collectively with their employees' representative or the labor union regarding wage and wage adjustment. The collective bargaining may be conducted by reference to the factors of the employer, the industry and the locality, which include:

a. productivity and economic efficiency of the employer;

b. gross payroll and average wages in the previous year;

c. labor cost level of the employer, and in the particular industry;

d. average salary levels in Shanghai generally, and in the particular industry;

e. wage growth guidelines and wage benchmarks of the labor market;

f. minimum wage standard;

g. consumer price index for urban residents; and

h. any other relevant factors.

The Amendment specifies and clarifies the procedure for wage negotiation, which is always the key point of collective bargaining. These regulations would guide employees to negotiate wages with employers.

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### Sequence of work

To prevent employers or employees from reaching collective agreement by exerting a pressure on the opposing party, the Amendment regulates that, during the collective consultation, an employer and its employees must maintain a regular work order and shall not negatively affect the production, work order or social stability. The Amendment advocates that employers and employees should not settle disputes and reach agreements by an adversarial method but through negotiation.

* In 2015, Dentons announced that it would be combining with Chinese firm 大成, expected later this year.

# Canada

## Constructive dismissal in Canada

**By Catherine Coulter** (Counsel, Ottawa)

Several jurisdictions around the world permit claims for what is known as "constructive dismissal" or "constructive discharge". In some cases those claims arise from statute and in others they arise under common law. This article will discuss constructive dismissal from a Canadian law point of view as well as some of the current issues which relate to it.

### When can an employee claim constructive dismissal?

Generally speaking, Canadian courts will recognize an employee's right to claim constructive dismissal if an employer has made a unilateral and fundamental change to the employee's terms of employment. Fundamental changes can include significant changes to position, duties and responsibilities, compensation and even job location. In addition, the case of an employer treating an employee in such a way so as to render the employment relationship untenable (such as harassing the employee) can be found to constitute constructive dismissal. As well, while unpaid suspensions have in the past been found to be possible triggers for constructive dismissal claims, a recent Supreme Court of Canada case found that even a paid suspension was a trigger for a constructive dismissal claim in a case where it was not reasonable for the employee to be suspended with pay and where the employee was not in agreement with the suspension. In essence, anything which significantly alters an employee's essential terms of employment may constitute constructive dismissal.

### Employers may need to tread carefully

This can of course be problematic for employers who may be seeking to restructure the workforce or even decrease costs. For example, it is often a shock for foreign parent companies to be told that they cannot unilaterally reduce the salaries of employees in their Canadian subsidiaries without concern. That is not to say that it can't be done, but if done it requires a careful plan. Likewise, while some Canadian employment law statutes actually permit employers to send employees out on an unpaid temporary layoff for a short period of time if there is a lack of work or money, some Canadian courts have held that unless employees specifically agreed to be bound

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by those temporary layoff provisions in their employment agreements, the temporary layoff may actually constitute constructive dismissal even though it is permitted by statute. Again, employers need to tread carefully.

## Reducing risk

If an employee believes that he or she has been constructively dismissed, that claim must be asserted very quickly after the fundamental change has been made by the employer, as it will otherwise be assumed that the change was accepted by the employee. Until relatively recently, the employee would then resign and seek damages, with the measure of damages for constructive dismissal being the same as for a wrongful dismissal claim. Luckily for employers however, there have been recent changes in the law which significantly reduce risk.

When an employee has been wrongfully dismissed, he or she is entitled to pay in lieu of notice for a reasonable period of time as dictated by statute, contract and/or the common law. That notice period is notionally intended to take the employee from their prior employment to new employment, and the employee has a corresponding duty to look for another job during the notice period in order to "mitigate" their damages. Given that the measure of damages for constructive dismissal is the same as for wrongful dismissal, there is a corresponding duty on employees claiming constructive dismissal to seek employment in order to mitigate damages. As such, if an employee claims constructive dismissal and the employer invites the employee to return to work during the notice period in order to mitigate damages, the employee generally has a duty to stay in the job until the notice period has ended. This then circumvents the need for a payout by the company to an employee who is no longer on the job. For employers, this is perhaps the single greatest development in the law of constructive dismissal, and it has put employers back on an even playing field with employees.

## Mitigating damages

While employers can now request that an employee remain on the job to mitigate damages after making a constructive dismissal claim, there are legal requirements which go with that. First, the employer must make the invitation to the employee after the employee has formally alleged constructive dismissal. In other words, it is not enough for an employer making a fundamental change to employment terms to advise the employee at the time of the change that they can stay on and work out the notice period if they don't like the change. Rather, a further written invitation to remain on the job must be made after the constructive dismissal claim has been alleged.

Second, there are times when an invitation to remain on the job in order to mitigate damages is not reasonable and will not be required by the courts. One example is the harassment example set out above. If an employee is being harassed on the job, he or she will generally never be required to work out the notice period, in which case damages are the appropriate remedy. Similarly, if an employee is being asked to move a significant distance (for example, from Canada to Europe), the requirement to take the job in Europe and work there through the notice period is not reasonable. As a result, if an employer knows that an employee is unlikely to want to agree to new fundamental terms of employment, it is often best to lay out the new terms before they need to take effect, so that the employee can mitigate damages in their old position. For example, an employee being asked to take a 20 percent pay cut should probably be permitted to work out their notice period at their original rate of pay rather than at the reduced rate of pay.

In summary, while it is possible for employers in Canada to make certain unilateral and fundamental changes to an employee's terms of employment, a careful approach needs to be determined with the assistance of legal counsel so as to protect from a constructive dismissal claim altogether or to prevent a damages payout.

# Canada introduces accessibility laws

**By Anneli LeGault** (Partner, Toronto)

> "Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries..."
>
> *Preamble to the United Nations Convention on the Rights of Persons with Disabilities, ratified by Canada, March 11, 2010*

The province of Ontario promotes itself as one of the first jurisdictions in the world to pass specific legislation establishing goals and timeframes for accessibility. Ontario, Canada's most populous province with almost 43 percent of the country's population and with the largest GDP in Canada, has set the goal of making the province accessible by the year 2025. The province estimates that currently one in seven people (1.85 million residents) have a disability, with that number to increase by 2036 to one in five residents of the province having a disability as the population ages.

The method for achieving accessibility is through amendments made to the Ontario Building Code and passage of an accessibility law, the Accessibility for Ontarians with Disabilities Act (AODA). The AODA consists of specific regulations governing accessible customer service, accessible information and communications, employment, transportation and the built environment.

The AODA affects all businesses with at least one employee in Ontario and can have an extra-territorial effect on a company's non-Canadian operations.

The legislation sets out varying timeframes and requirements depending on the number of employees that an organization employs in the province. In a nutshell, the legislation includes the following basic requirements. An organization that deals with the public needs to train all of its employees and other individuals who provide goods and services to the public on how to provide accessible customer service. An accessible customer service plan must be prepared and made available to the public. A multi-year accessibility plan needs to be developed to outline the company's strategy for preventing and removing barriers for those with accessibility limitations and the plan needs to be posted on a company's website. New websites and significantly refreshed websites will need to be compliant with the Web Content Accessibility Guidelines (WCAG 2.0). The WCAG guidelines are international standards on how to make web content accessible to those with low vision, deafness, hearing loss, blindness, learning disabilities, photosensitivity, limited movement and other barriers to full access. For example, alternate text is required for images and websites need to be navigable exclusively through a keyboard. When designing off-street parking, service counters and waiting areas, accessible parking must be provided and countertops and waiting areas must accommodate those using mobility aids such as scooters, walkers, canes and wheelchairs.

What does this mean for an employer in Ontario? During recruiting, the public needs to be notified that accommodations for job applicants with disabilities will be available. Employees must be provided with appropriate communication supports where necessary and individual accommodation plans must be prepared for employees with disabilities. A return-to-work process for employees off work due to disability who require accommodation must be established. Performance management and career development need to take accessibility needs of employees with disabilities into account.

Because the AODA's focus is on consumers and employees located in the province of Ontario, the law has the potential to affect employees who are not located within the province or even within Canada, provided an organization has at least one employee in the province. The government is

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taking the position that where customer service is being provided to an Ontario consumer, for example, from a call center located outside of Canada, or where a consumer in Ontario needs to phone a foreign location to discuss an online order, the AODA governs the service provider's conduct. Some organizations have trained foreign call center staff who service the province of Ontario.

Where an organization has a global website, which does not specifically target consumers in Ontario, the AODA would not govern. However, where an organization has a specific web page for Ontario consumers or a significant connection with the province of Ontario, the AODA will require the web pages to be WCAG 2.0 compliant, as long as the organization in Ontario has control over the appearance, functionality and content of the website. As such, the AODA may reach far beyond the boundaries of the province of Ontario.

The neighbouring province of Manitoba also recently passed similar legislation, the Accessibility for Manitobans Act. This legislation will also develop accessibility standards with respect to customer service, information and communications, transportation, employment and the built environment. The legislation has identified barrier-free customer service as the first priority.

Organizations providing goods and services to Canadians and organizations employing employees in the provinces of Manitoba and Ontario need to be mindful of these new accessibility requirements.

# Europe

## Introduction of a unified status for "manual" and "intellectual" workers

**By Yolande Meyvis** (Counsel, Brussels)

Historically, there has been a distinction in Belgian labor law between blue-collar workers and the white-collar workers based on whether they performed manual or intellectual labor (articles 2 and 3 of the Act of 3 July 1978 on employment contracts *(Wet van 3 juli 1978 betreffende de arbeidsovereenkomsten / Loi du 3 juillet 1978 relative aux contrats de travail)*). Blue-collar workers were considered as those performing manual work while white-collar workers were those performing intellectual work. The two groups of workers had been afforded different rights depending on their assigned category. Generally speaking, white-collar workers were better off than their blue-collar counterparts.

On July 7, 2011 (judgment no. 125/2011), the Constitutional Court of Belgium *("Grondwettelijk Hof" / "Cour constitutionel")* held that the differences in the treatment between blue-collar and white-collar workers were discriminatory. The Court notably criticized the differences with regard to the notice period in case of dismissal and the absence of a guaranteed salary for the blue-collar

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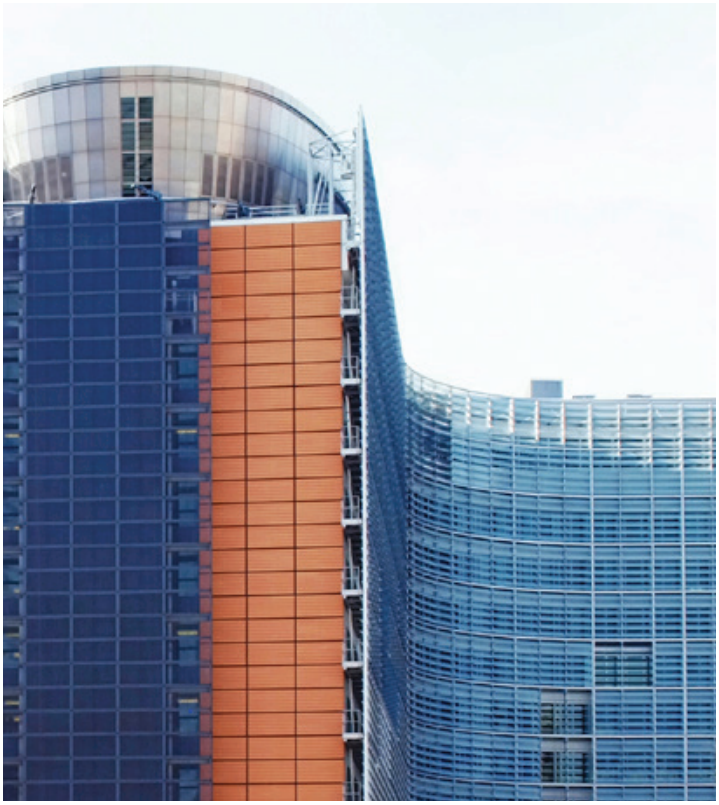
workers' first day of absence due to illness (the so-called: "carenz day" ("carensdag" / " *jour de carence*")). The Court left a period of two years (i.e., until July 8, 2013) for the Belgian legislature to remove these differences in the treatment between the two statutes. After extended negotiations, the Unified Employment Status Act of 26 December 2013 (hereinafter referred as the "Unified Employment Status Act") was adopted and entered into force on January 1, 2014 *(Wet van 26 december 2013 betreffende de invoering van een ennheidsstatuut tussen arbeiders en bedienden inzake de opzeggingstermijnen en de carenzdag en begeleidend maatregelen / Loi du 26 décembre 2013 concernant l'introduction d'un statut unique entre ouvriers et employés en ce qui concerne les délais de préavis et le jour de carence ainsi que de mesures d'accompagnement).*

## New notice periods

The Unified Employment Status Act introduced a new way to calculate the notice period which affects both blue-collar and white-collar workers. The harmonization applies to employment contracts concluded after January 1, 2014. Transitional rules have nevertheless been introduced for contracts concluded before January 1, 2014 and ending before December 31, 2017 (articles 67 to 70 of the Unified Employment Status Act). The transitional calculation constitutes a mixture of the old rules and the new rules.



As for the workers engaged after January 1, 2014, the notice periods where the worker is terminated are fixed as follows:

| Seniority | Notice period by the employer | Notice period by the worker |
|---|---|---|
| **0 < 3 months** | 2 weeks | 1 week |
| **3 < 6 months** | 4 weeks | 2 weeks |
| **6 < 9 months** | 6 weeks | 3 weeks |
| **9 < 12 months** | 7 weeks | 3 weeks |
| **12 < 15 months** | 8 weeks | 4 weeks |
| **15 < 18 months** | 9 weeks | 4 weeks |
| **18 < 21 months** | 10 weeks | 5 weeks |
| **21 < 24 months** | 11 weeks | 5 weeks |
| **As of 3rd year** | 12 weeks | 6 weeks |
| **As of 4th year** | 13 weeks | 6 weeks |
| **As of 5th year** | 15 weeks | 79 weeks |
| **As of 6th year** | 18 weeks | 9 weeks |
| **As of 7th year** | 21 weeks | 10 weeks |
| **As of 8th year** | 24 weeks | 12 weeks |
| **As of 9th year** | 27 weeks | 13 weeks |
| **As of 10th year** | 30 weeks | 13 weeks |
| **As of 11th year** | 33 weeks | 13 weeks |
| **As of 12th year** | 36 weeks | 13 weeks |
| **As of 13th year** | 39 weeks | 13 weeks |
| **As of 14th year** | 42 weeks | 13 weeks |
| **As of 15th year** | 45 weeks | 13 weeks |
| **As of 16th year** | 48 weeks | 13 weeks |
| **As of 17th year** | 51 weeks | 13 weeks |
| **As of 18th year** | 54 weeks | 13 weeks |
| **As of 19th year** | 57 weeks | 13 weeks |
| **As of 20th year** | 60 weeks | 13 weeks |
| **As of 21st year** | 62 weeks | 13 weeks |
| **As of 22nd year** | 63 weeks | 13 weeks |
| **As of 23rd year** | 64 weeks | 13 weeks |
| **Per additional year** | One additional week per year | Maximum of 13 weeks |

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As we can see from the table on the previous page, the notice period is solely based on the length of the employment (i.e., seniority of the worker) and is calculated in weeks. Under the previous rules, the notice period used to vary based on the worker's level of remuneration or age. Furthermore, the notice period under the previous rules was calculated in days for the blue-collar worker and in months for the white-collar worker.

### "Carenz" day

Another important reform brought by the Unified Employment Status Act is the removal of the "carenz day." Contrary to the white-collar worker, the blue-collar worker was not entitled to a guaranteed salary by the employer for his first day of illness (articles 61 to 66 of the Unified Employment Status Act). From now on, this legal difference, qualified as discriminatory by the Constitutional Court, has ceased to exist. However on the other hand, the new regime reinforces the employer's control over its employees in case of illness (i.e., new check-ups on workers taking medical leave, obligation of the worker to immediately inform the employer, etc.) (article 61 of the Unified of Employment Status Act).

## Employment of foreign nationals specialized staff in Cyprus

**By Richard Scharlat** (Partner, New York) and **Yaniv Habari** (Managing Director, Y. Habari & Co. LLC, Nicosia, Cyprus*)

The employment of foreign workers in Cyprus has increased sharply over the recent years following the accession of Cyprus to the EU in 2004, and more importantly, the need for specialized, and highly qualified staff for the many industries that over the last decade have found Cyprus to be an ideal business environment. Examples include the finance industry, with the thriving Forex trading market, internet gambling and even more recently, the oil and gas industry following the discovery of hydrocarbon reserves in the Exclusive Economic Zone of Cyprus.

In terms of experience and technical know-how, Cyprus is still at an infant stage in the oil and gas market, so it is reasonable to expect that companies seeking to exploit the natural reserves will definitely need, and most likely want, to employ foreign specialised staff. In addition, surrounding the exploration, extraction and refining of the raw materials, there is a market made up of a wide network of companies that constitute a tightly knit infrastructure of ancillary services whose sole purpose is to support the oil and gas market. It is therefore evident that in order for the Cyprus oil and gas sector to maintain itself and subsequently benefit, it must compensate for its lack of expertise and know-how by allowing foreign companies to employ foreign staff.

### Cyprus employment law

Cyprus employment law is a mixture of statutory and case law. The Constitution guarantees certain fundamental rights relating to employment, such as the right to work, to strike and to equal treatment. There are a number of employment law legislations, the most important of which is the Termination of Employment Law of 1967 which regulates all the basic matters relevant to the Termination of Employment, such as, the grounds for which an employer may lawfully terminate the employment of an employee without notice, or the notice and compensation an employee is entitled to, as well as other related employment rights.

The employment relationship between employer and employee is governed by standard contract law principles, statutory rights and obligations which supplement them where appropriate. An employment contract may be of a fixed term or indefinite duration. Where the employment is under a fixed-term contract, this is considered to be automatically terminated upon the expiration of the specific fixed term. Nevertheless, case law supports the assumption that successive renewals or extensions of a fixed-term contract, as well as an overall employment period exceeding 30 months, will lead the Court to a finding of a contract of indefinite duration, irrespective of the terms of the agreement.

Minimum wage in Cyprus is protected by the Minimum Wage Ministerial Order, which determines the minimum wage allowed under the law depending on the occupation and work the employee is expected to perform.

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In Cyprus it is customary for employers to reward their employees with a 13th or 14th month of salary as a bonus for their annual service to the company. Even though this salary is not protected by law, it is normally covered by a collective agreement or individual contract or any other agreement regarding the terms of employment. Where there is no written agreement, the provision of 13th and/or 14th month salary is regulated by the business practice.

### Foreign workers

To protect certain rights to social insurance and other employment considerations, a foreign company cannot hire employees without having been officially registered within the territory of the Republic of Cyprus according to the relevant law. A foreign employer may operate through a local branch or register a local company depending on the type of the economic activity that is to be performed.

Cyprus employment law provides protection to foreign nationals in terms of non-discrimination. Under Cyprus employment law there is no distinction between a local or foreign worker, and, as such, there can be no discrimination in the terms and conditions of employment.

The granting of work permits for foreign workers is governed by the Aliens and Immigration Legislation, as well as by the decisions of the Council of Ministers and the Ministerial Committee. The competent authority for granting entry permits and temporary or permanent residence permits is the Civil Registry and Migration Department of the Ministry of Interior. All non-EU residents are required to apply for a residence and work permit prior to travelling to Cyprus if they intend to reside or work in Cyprus.

Generally, the criteria for the approval of a work permit are the following:

1. Unavailability of suitably qualified local or EU personnel who satisfy the specific needs of the employers;

2. Saving and better utilization of the local or EU labor force;

3. An improvement in working conditions at the workplace;

4. Terms and conditions of employment of foreign nationals should be the same as those of Cypriots citizens; and

5. In cases where work permits are recommended for the employment of foreign nationals with special skills and knowledge which Cypriots or EU nationals do not possess, the employer shall be obliged to name a Cypriot national who will be trained during the period of the foreign national's employment.

## Agency employment in the Czech Republic

**By Tomas Bilek** (Partner, Prague)

When pursuing business activities in the Czech Republic, companies often use, in addition to their regular employees, services provided by employment agencies that provide their own employees to them. Agency employment represents a so-called economic lease of a labor force where an employment agency assigns ("seconds") for consideration its own employees to work for another employer ("user") for an agreed period of time. Employment agencies typically do not have all professions required by the user—therefore they need to perform an employee search for the user in the market first, and subsequently they employ and second them to the user for an agreed period of time.

The user then assigns work tasks to such agency employees and organizes work for them and generally treats them as regular employees, with the exception that the user is not authorized to take acts vis-à-vis such agency employees aimed at modification or termination of their employment relationship. Throughout the entire term of secondment, the salary (wage) is paid to agency employees by the employment agency as their actual employer.

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* Y. Habari & Co. LLC is a boutique corporate and commercial law firm established in Cyprus. The lead advocate of the firm is Yaniv Habari. The firm undertakes all corporate law services including litigation, company incorporations, fiduciary services, employment law, and company liquidations.

The demand for agency employees keeps growing. Large production and logistics corporations now have up to 20 percent of their employees from employment agencies. Although agency employees typically work in positions requiring only a low level of qualification, companies requiring a higher level of qualification of employees, including a relevant track record (job experience), have also become accustomed to using services provided by employment agencies. This applies, for example, to companies operating in the pharmaceutical industry, where seconded employees usually work as business representatives and in managerial positions.

The legal regulation applicable to agency employment contained in the Czech Labor Code is rather brief (merely three sections) and this has caused a number of unclear issues and problems in practice. In particular, there are issues of ensuring such labor and wage conditions applicable to agency employees, which may not be worse than the conditions applicable to regular employees working in a comparable position; methods of early termination of the temporary assignment of an agency employee and issues of settlement between the agency and the user associated therewith; and many others.

It should also be mentioned that the Ministry of Labor and Social Affairs is planning to impose more stringent rules on agency employment; for example, to introduce a 15 percent limit for the share of agency employees in an enterprise, or a ban of serial employment contracts for a definite period of time applicable to agency employees, or a change in evidencing the financial eligibility of employment agencies, including the introduction of a duty to pay a security deposit.

As agency employment is a topic closely monitored by Czech employers, the Prague office of Dentons, specifically its Employment Law practice group, is going to organize a seminar on issues associated with agency employment for its clients in November 2015.

# Non-competition after termination covenants in Spain

**By Juan Alonso** (Partner, Barcelona) and **Daniel Tojo** (Associate, Madrid)

Non-competition after termination covenants (also known as non-compete clauses) are one of the most common provisions incorporated into labor contracts in Spain, particularly in the case of senior managers' special employment relationships or ordinary employees who occupy positions of responsibility. The aforementioned covenant is regulated under article 21 of the Employment Act *(Estatuto de los Trabajadores)*.

In this sense, before including this covenant into a labor contract, several issues must be taken into account in order to avoid potential issues regarding the validity, the removal or the payment of the covenant.

This brief piece provides some key aspects that should be taken into consideration regarding non-competition covenants, and establishes some differences between this non-compete clause and other similar ones commonly incorporated into employment contracts.

## What is a non-competition after termination covenant? Requirements and potential repercussions of non-compliance

The validity of the post-contractual non-compete agreement relies on the fulfillment of the following requirements, and we discuss the first three in more detail below:

- It must be agreed between the parties (company and employee) and it must also be in writing.
- The company must have a real industrial or commercial interest that would justify the inclusion of the covenant into the labor relationship.
- An adequate compensation must be provided to the employee as consideration for the non-competition restriction after the employment contract is terminated.
- The length of the covenant shall be limited up to a maximum of two years for technical or highly qualified employees, and six months for other employees.

## Mutual agreement in writing

Regarding the first requirement, Spanish case law has established that a covenant exclusively conditioned on the willingness of the company is null and void, because the

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effectiveness of the agreement is left to the discretion of only one party, contravening article 1256 of the Spanish Civil Code *(Código Civil)*. Consequently, any clause stating that the covenant could be unilaterally revoked will be null and void.

In this sense, the only way to eliminate the validity of the covenant once it has been agreed to would be by mutual agreement of the parties. Therefore, a negotiation process should be carried out. Furthermore, the agreement stating the revocation of the covenant should be made in writing, in order to avoid potential disputes regarding the applicability of the covenant.

In general terms, the covenant will be enforceable during its established duration. In the case where the former employee would fail to comply with it, the following consequences would arise:

- The former employee will have to reimburse the company the compensation received.
- The former employee could also have to pay compensation for damages incurred as a result of the breach of said covenant, in case this would have been agreed in the covenant and in the event that the damages caused would be connected to the employee's breach of such covenant.

Furthermore, in the event that the company would fail to comply with the mentioned requirements, the covenant will lose its enforceability and therefore the employee's "professional freedom" will be restored. The employee could also make a claim for damages compensation to the company as a result of the covenant's breach by the employer.

### Real industrial or commercial interest

Moreover, the company must evidence a genuine proprietary industrial or commercial interest which requires protection and which therefore would justify the establishment of the non-competition after termination covenant. In other words, as established by the Supreme Court of Spain, the company must evidence it would suffer damages as a result of the employee carrying out the activity that the covenant specifically attempts to temporarily prohibit. In practice, this requirement is clearly visible in the cases of employees who hold critical positions and possess valuable expertise to the employer's competitors, and especially in the cases of companies that belong to very dynamic and competitive sectors (e.g., IT companies).

### Adequate consideration

Regarding the third requirement, the compensation must always be specified; otherwise, the covenant will be null and void. Spanish law does not define what an adequate compensation is, but labor case law has determined that an adequate compensation will depend on the specific circumstances of the employee, as well as on the period and scope of the non-competition restriction. In practice, the minimum amount will be 50–60 percent of the employee's fixed salary; however, such amount could be increased depending, for instance, on the geographical scope of the restriction.

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Furthermore, the monetary amount and the way in which this compensation will be paid must be included in writing. From a practical point of view, there are many different ways of paying this amount, such as establishing a fixed amount when the covenant is signed. However, it must be noted that in the case where the mentioned payment method would be chosen, the amount could either not be sufficient (less than the 50 percent previously mentioned) or very high by the time the contract is terminated. Therefore, in order to avoid such risk, it would be advisable to include a section within the covenant stating that an amount equivalent to 50–60 percent of the fixed gross remuneration that the employee has been receiving at the time of termination of the contract will be provided as compensation.

In sum, it is absolutely crucial to observe that the mentioned requirements are met before entering a non-competition after termination covenant. Otherwise, such clause would be considered null and void and, therefore, it would be non-enforceable.

### Is a non-solicitation covenant subject to the same requirements as a non-competition after termination covenant?

Employment contracts often include non-solicitation covenants as a part of a non-competition after termination clause. The non-solicitation covenant applicable to employees, suppliers or customers is not specifically regulated under Spanish law, but it can be agreed between the parties. Since some authors consider that the restriction on solicitation after termination of employment is a form of no competition, such non-solicitation covenant should comply with the requirements established for non-competition after termination covenants mentioned above, including adequate compensation. Otherwise, there is a high risk of nullity.

### Difference between non-competition after termination covenant, permanency covenant and exclusivity covenant

A non-competition after termination covenant should never be confused with a permanency covenant (although they are both covered under the same Employment Act article) since a permanency covenant involves the obligation of staying in the company for some amount of time (no more than two years) when the employee has received a professional specialization paid by the employer to implement certain projects or perform a specific job. Furthermore, as in a non-competition after termination covenant, if an employee breaches a permanency covenant, they must pay a damages compensation which amounts, generally, to the price of the professional training paid by the employer.

Moreover, exclusivity clauses prohibit the employee from working at other companies while the employment contract is in force. The consideration of the exclusivity clause must amount to at least 10 percent of the employee's fixed remuneration. However, in the event that the mentioned remuneration would exceed 10 percent of the minimum salary under the applicable Collective Bargaining Agreement, such compensation could be "absorbed"—in other words, the 10 percent could be included in the fixed remuneration. However, such provision should always be included in the employment contract in order to be enforceable.

In sum, although the aforementioned covenants are similar in that they all restrict the "professional freedom" of the employee, there are several differences that one must bear in mind. In this sense, the permanency covenant must not be compensated, as it obliges the employee to stay in the company for a certain period of time, as opposed to the non-competition after termination and the exclusivity covenants, which must be remunerated and do not oblige the employee to remain at the company. Finally, only the non-competition after termination covenant comes into force once the employment contract has been terminated.

# United Kingdom

## Strike out? UK issues proposals to curb strikes

**By Sarah Beeby** (Senior Associate, Milton Keynes) and **Helen Jenkins** (Trainee Solicitor, Milton Keynes)

Plans to modernise London's underground (known as "the Tube") to offer a 24-hour weekend service on selected lines has resulted in London being held to ransom as Tube staff walked out in a series of strikes during August 2015. Servicing one of the busiest cities in the world, the Tube has more than three million users every day. Strike action on the Tube therefore causes travel chaos, with London brought to a near standstill as people struggle to find alternative transportation and many avoid travelling into the capital altogether.

Given the significant level of disruption caused by such industrial action (particularly where essential services are affected) and the seemingly increased frequency of such action, the UK Conservative government has issued proposals to legislate aimed at making it more difficult for strike action to take place in the UK. The "Trade Union Bill" as it is known, is therefore intended to prevent what the government describes as "disruptive and undemocratic strike action."

The Trade Union Bill includes the following key provisions:

1. Unless more than 50 percent of a union's eligible members vote, the ballot will not be valid and no strike can legally occur.

2. Where the strike affects "essential public services," which is likely to include education, health, fire, transport and infrastructure, at least 40 percent of the members entitled to vote, need to vote in favor of the strike. If not, no strike can legally occur.

3. Introducing a four-month time limit for taking industrial action after the ballot has occurred. If action is not taken within this time frame, another ballot will have to be held.

4. Introducing an opt-in process, whereby union members must intentionally state that they want to pay a political levy. This is the opposite of the current position, where the levy is automatically taken from an employee's pay unless they take the positive step of opting out.

5. Ending the practice of "check off," where union members' subscriptions for union membership are taken directly from their salary and are administered by their employer. Members will instead have to make alternative arrangements for paying their subscription to the union directly.

6. Lifting the current ban on employers using agency workers to cover when their own employees are striking.

7. Requiring unions to give at least 14 days' notice of strike action to employers.

The unions consider that the proposals are an attack on them, aimed at weakening their membership and hindering their legitimate right to strike. However, requiring a high turnout of members to vote in favor of a strike ensures that whatever action the union takes is representative of the views of the majority of its members. It may involve unions having to think about ways to increase members' engagement levels, but ultimately those bodies exist to represent the views of their members. It also means that, when a union does take action, it will have a much more compelling and representative mandate. The four-month time limit means that unions will have to check again with their members, where a dispute is more drawn out, to ensure that their views remain the same. This again means that action will only be taken when the members feel strongly. The notice requirement and the ability to hire agency workers mean that employers will be able to ensure that disruption is kept to a minimum.

It is important to remember that these proposals are not yet law, as they are still at the bill stage. However, given the majority Conservative government, it seems likely that the Trade Union Bill will get the support it needs in order to become law in a form that is close to the current proposals.

# United States

## Employers beware—US Department of Labor issues a shot across the bow to those using independent contractors

**By Peter Stockburger** (Managing Associate, San Diego), **Jim McNeill** (Partner, San Diego)

Does your business engage independent contractors? If so, the Wage and Hour Division (WHD) of the US Department of Labor (DOL) is putting you on notice that your business may be in the agency's cross hairs. In a 15-page "administrator's interpretation" issued on July 15, 2015, WHD Administrator David Weil made clear that his agency, which in large part oversees the enforcement of the Fair Labor Standards Act (FLSA), views "[m]ost workers" as "employees" under the FLSA.

Although this new guidance appears to cast a large shadow on the independent contractor business model, it does not break any new ground substantively. It instead provides employers with a clear roadmap as to how the DOL views the existing "economic realities" test for independent contractor status and its relevant factors, which include: (1) the extent to which the work performed is an integral part of the putative employer's business; (2) whether the worker's managerial skills affect his or her opportunity for profit and loss; (3) the relative investments in facilities and equipment by the worker and the putative employer; (4) the worker's skill and initiative; (5) the permanency of the worker's relationship with the putative employer; and (6) the nature and degree of control by the putative employer. The critical inquiry for the WHD in determining whether a worker is an independent contractor, according to Administrator Weil, should be whether the worker is genuinely in business for himself or herself, or instead is economically dependent upon the putative employer. To guide that assessment, the WHD advises that the six "economic realities factors" should not be "analyzed mechanically or in a vacuum," and that no one factor should be given too much weight.

This new guidance represents a larger effort by the DOL and the Obama administration to curb misclassification in the workplace, and comes on the heels of several high-profile cases in which companies have either lost or

settled misclassification claims. It also follows the DOL's recent proposed rule to revise the regulations regulating overtime exemptions under the FLSA. This, coupled with the WHD's "Misclassification Initiative" with state governments and the Internal Revenue Service, leaves little doubt that misclassification issues will be a central DOL focus moving forward.

Perhaps most important for the future is the open question about whether the DOL's strict dichotomy between "employee" and "independent contractor" suggested by this WHD guidance accurately describes newly emerging working relationships, including those in the so-called "sharing economy." According to the WHD, although employers may choose to give their workers alternative titles such as "owners," "partners" or "members," such titles are not dispositive. What matters to the DOL is instead the economic reality of the relationship and whether the worker is truly economically dependent on the employer.

It is also important for employers to keep the new WHD guidance in context. Courts are not required to follow DOL guidance, as the Second Circuit recently demonstrated in a case involving unpaid interns. Employers also face a patchwork of different federal and state tests when determining whether to classify a worker as an independent contractor or an employee, and these tests often overlap. The test for federal employment discrimination laws, for example, is different than the test used for the FLSA. And states often apply different tests (even within the same state) to determine independent contractor status in relation to workers' compensation, employment discrimination law protection and unemployment insurance issues. The WHD's new guidance is just one piece of that regulatory puzzle, and is only reflective of the current administration's view on public enforcement actions. That said, employers can expect to see a rise in private litigation attempting to use the new WHD guidance as a tool to persuade courts to adopt a more expansive view of "employee" under state and federal law.

Whether auditing your current employee classifications or defending against a private or public enforcement action, the Global Employment and Labor practice group at Dentons is ready to help you navigate this complicated area of the law.

# Thanks to the following lawyers at Dentons who have contributed to this publication:


**Juan Alonso**
Partner, Barcelona
D +34 93 24 13 840
juanignacio.alonso@dentons.com

**R. Daniel Beale**
Partner, Atlanta
D +1 404 527 8489
dan.beale@dentons.com

**Sarah Beeby**
Senior Associate, Milton Keynes
D +44 20 7320 4096
sarah.beeby@dentons.com

**Tomas Bilek**
Partner, Prague
D +420 236 082 226
tomas.bilek@dentons.com

**Catherine Coulter**
Counsel, Ottawa
D +1 613 783 9660
catherine.coulter@dentons.com

**Brian Cousin**
Partner, New York
D +1 212 398 5776
brian.cousin@dentons.com

**Yaniv Habari**
Managing Director, Y. Habari & Co. LLC
Nicosia, Cyprus
D +357 (22) 260 336
Info@yhabarillc.com

**Helen Jenkins**
Trainee Solicitor, Milton Keynes
D +44 20 7320 5442
helen.jenkins@dentons.com

**Anneli LeGault**
Partner, Toronto
D +1 416 863 4450
anneli.legault@dentons.com

**Jim S. McNeill**
Partner, San Diego
D +1 213 243 6202
jim.mcneill@dentons.com

**Yolande Meyvis**
Counsel, Brussels
D +32 2 552 29 31
yolande.meyvis@dentons.com

**Richard Scharlat**
Partner, New York
D +1 212 768 6854
richard.scharlat@dentons.com

**Peter Stockburger**
Associate, San Diego
D +1 619 595 8018
peter.stockburger@dentons.com

**Daniel Tojo**
Associate, Madrid
D +34 91 43 63 325
daniel.tojo@dentons.com

**Aoshuang Yang** (大成)
Attorney, Shanghai
D + 1 212 768 6710
aoshuang.yang@dachenglaw.com

# About Dentons' Global Employment and Labor practice

Dentons has more than 220 employment, immigration and benefits lawyers located in 50 locations spanning 28 countries who focus their efforts on employment and labor counseling and litigation, immigration issues and benefits matters. With our global presence and contacts, we are one of only a few law firms that can provide multinational businesses with a coordinated solution to all their employment and benefits needs throughout the world. Some examples:

Financial software and services company. A team from China, Hong Kong, Poland, Germany, Canada, France, Spain and the US provided global employment representation, including coordination of the opening of an office in China; various global employment matters involving Poland, Hong Kong, Korea, and Mexico; global non-compete project involving the US, China, Hong Kong, Canada, Spain, France and Russia; and corporate and corporate governance advice in Germany.

Major international manufacturer. A team from China, UAE, Germany and the US provided employment representation and coordination of global representation in employment and corporate matters, including in China, the United Arab Emirates, Germany and Hungary; advice regarding resolution of a highly sensitive and completely confidential US employment matter; and advice regarding other confidential employment matters, including FCPA issues.

Leading manufacturer of paper-related products. Our Spanish team took the lead on this multinational matter with potential impacts in Germany and worldwide, regarding the closing of a manufacturing plant in Spain affecting 75 out of 81 employees.

Major conglomerate. A team from the UAE, Oman, Qatar, Kuwait, Egypt, Saudi Arabia and Jordan provided advice on implementing a whistleblowing external reporting hotline and reporting system, for its staff employees in certain countries (UAE, Oman, Qatar, Kuwait, Egypt, Saudi Arabia, Bahrain and Jordan) to report any violations of the company's compliance policy through a third-party company, who will provide anonymous reports to the client covering reported issues.

Major airline. UK lawyers working with our Paris office advised on employment implications of transferring contracts within the UK and to France, and dealing with the collective redundancy process for 20–100 employees and negotiating exit packages.

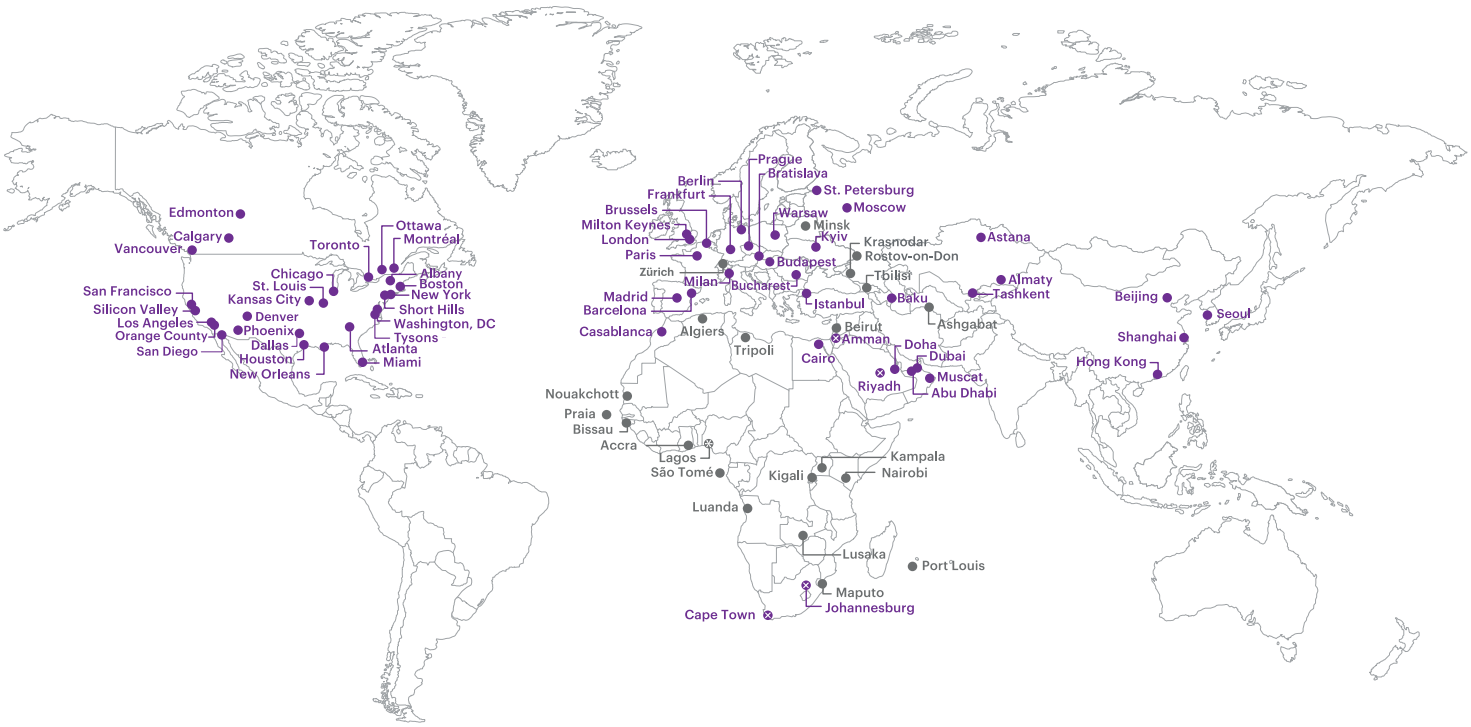
Pharmaceutical laboratory. French team led the cross-border restructuring and collective litigations before administrative and employment courts for an Irish laboratory specialized in feminine health and skin care, in employment law matters with respect to its acquisition of the ethical pharmaceuticals unit of a US consumer product manufacturer and on the related cross-border restructuring in Europe.

Major railway system. German lawyers working with colleagues in France, the US, Canada, Dubai, Spain and Poland provided advice regarding the form of long-term incentive agreements for the higher corporate managers in 12 different countries, and other employment law-related questions.

# About Dentons

Dentons is a global law firm driven to provide a competitive edge in an increasingly complex and interconnected world. A top 20 firm on the Acritas 2014 Global Elite Brand Index, Dentons is committed to challenging the status quo in delivering consistent and uncompromising quality in new and inventive ways. Dentons' clients now benefit from 3,000 lawyers and professionals in more than 80 locations spanning 50-plus countries. With a legacy of legal experience that dates back to 1742 and builds on the strengths of our foundational firms—Salans, Fraser Milner Casgrain (FMC), SNR Denton and McKenna Long & Aldridge—the Firm serves the local, regional and global needs of private and public clients. www.dentons.com.

# Our locations




**Legend**

Offices and associate offices[x]

Associate firms and special alliances*