DechertOnPoint

July 2012 / Issue 2

A legal update from Dechert's Labor and Employment Group

In this Issue

International Employment Law Review

Welcome to the latest issue of the *International Employment Law Review*. In this edition, we examine the most significant employment law developments of the year thus far in Belgium, England and Wales, France, Germany, Luxembourg, Russia and the United States, focusing on both new legislation and case law developments.

BELGIUM

LEGISLATION

The "European" vacation or "supplementary vacation at the beginning or at the recommencement of activity"

The November 4, 2003 Directive 2003/88/EU obliges EU member states to take the necessary measures to provide that all workers are entitled to at least four weeks of paid vacation per year.

Because the existing Belgian legislation on paid vacation is based on a system whereby workers build up their entitlement to paid vacation in a given year (the so-called "vacation year") on the basis of the performance of work in the previous calendar year (during the so-called "vacation service year"), the European Commission held on November 24, 2011 that Belgium had failed to correctly implement directive 2003/88/EC.

On March 29, 2012, Belgium introduced a new law creating an entitlement to paid vacation for:

- workers starting their salaried occupation and who did not accrue entitlement to paid vacation by performing work in the previous calendar year; and
- workers who recommence working after a prolonged period of unemployment, sickness or leave of absence.

As from April 1, 2012, after an initial three-month period of work, those workers will be entitled to one week's paid vacation at the end of each period of three months' work.

The salary paid for those days of supplementary vacation will be deducted from the supplementary vacation pay (the so-called "double vacation pay") normally payable in the year following the year during which the supplementary vacation days were taken.

May 31, 2012 Royal Decree introduces extended parental leave

Beginning on June 1, 2012, a May 31, 2012 Royal Decree implementing directive 2010/18/EU extends the duration of parental leave from three months to four months.

However, only a worker whose child was born or adopted on or after March 8, 2012 will be entitled to an allowance during that fourth month.

A worker whose child was born or adopted before March 8, 2012 can also claim a period of four months' parental leave but will only be entitled to an allowance during the first three months of their parental leave.

The ability to split the period of four months' parental leave over one, two, three or four months of full time leave, periods of two months of 50% leave, or periods of five months of 20% leave, remains unchanged.

Dechert LLP

The May 31, 2012 Royal Decree also allows a worker to request in writing submitted at the latest three weeks prior to the end of the period of parental leave an adapted work schedule. The "adaptation" may include both the terms of work regime and the timing of the beginning and end of the workday. Employers must consider the request and the reasons put forward by the employee concerning the combination of work and family, and reply to the request within one week before the end of the period of parental leave. In a reply, employers must indicate how the request was assessed. Employers may only refuse the requested adaptation if it justifies its decision what is the standard.

Private use of the company iPad gives rise to the payment of social security contributions

The Belgian National Office of Social Security has adapted its regulations to allow for the taxation of iPad benefits. According to the new regulations, the (taxable) advantage resulting from the private use of an iPad or other tablet computer put at a worker's free disposal by the employer is €15 per month. This is the same amount assigned to the private use of a laptop computer put at the worker's disposal free of charge. This amount is subject to employer and employee social security contributions. If a worker has both a laptop computer and an iPad at his disposal and uses both regularly for professional and private purposes, an advantage in kind will have to be declared for each instrument in the amount of €15 per month or total of €30.

Regulations governing the determination of the applicable social security legislation changes

Since June 28, 2012, when a worker simultaneously works in two or more EU member states for employers who are located in two different member states (one of which being the state of residence of the worker), the worker will be subject to the social security legislation of the member state in which the registered office or place of business of the undertaking or employer is situated other than the member state of residence, if he does not perform substantial activities in his state of residence. Previously, these workers were automatically subject to the legislation of their state of residence.

The threshold for performing "substantial activities" is set at 25% of the total working time and/or remuneration.

In practice this means that a worker, residing in Belgium, working in Belgium for 20% of his time for a Belgian employer and working 80% in France for a French employer, will become subject to the French social security scheme.

However, if a worker is employed by two or more employers of which at least two have their registered seat of business in a different state than his state of residence, the worker will remain subject to the social security scheme of his state of residence whether or not he performs activities in his state of residence.

CASE LAW

Sick time during vacation does not count toward vacation

On June 21, 2012, the European Court of Justice (ECJ) gave a preliminary ruling regarding the right of an employee to take the vacation days during which he was ill at another time. The ECJ court held that a system whereby a worker loses the vacation days he was unable to enjoy because of illness is contrary to article 7.1 of Directive 2003/88/EU.

The preliminary question was referred to the ECJ by the Spanish Supreme Court where the national law prevents a worker who falls ill during his vacation from being entitled to reclaim his vacation days at another time.

Because Spanish and Belgian law are similar and both state that if a worker falls ill during his vacation, he cannot recover his "lost" days of vacation, it is likely that Belgian workers will be encouraged by the decision and claim additional days of vacation in lieu of those "lost" to sickness on the basis of the decision of the ECJ.

Insourcing without transfer of any material assets may constitute a transfer of undertaking

On May 7, 2012, the Belgian Supreme Court held that when essential assets used for the performance of services are not property of the service provider, but were put at the disposal of the service provider by the service purchaser, there may be a transfer of undertaking for the purposes of Directive 2001/23/EC of March 12, 2001. The case presented to the court concerned the termination of a catering service agreement entered into by a school for the provision of meals to students and staff with the school's own premises, followed by an "insourcing" of the catering activities by the school.

ENGLAND AND WALES

LEGISLATION

Two-year qualifying period for unfair dismissal

On April 6, 2012, the qualifying period for unfair dismissal increased from one to two years. However, the new two-year qualifying period will only apply to employees whose employment begins on or after 6 April 2012. Those who are already in employment before that date will retain the current one-year qualifying period.

The change comprises part of the government's wide-ranging initiative to improve business confidence and boost economic growth. However, as a result, we are likely to see an increase in claims where the qualifying period does not apply, such as automatic unfair dismissal (for example relating to asserting a statutory right or taking maternity leave), whistle-blowing and discrimination claims.

Changes to employment tribunal procedure

Following the Government's consultation of last year on employment tribunal reform, the Government has sought to introduce changes to tribunal procedure in order to speed up the tribunal process and ease the burden on the tribunal system. As a result, with effect from April 6, 2012, unfair dismissal proceedings will now be heard by an employment judge sitting alone (unless the judge considers that they should be heard by a full tribunal). Witness statements will now ordinarily be taken as read, unless the tribunal directs otherwise.

Increase in deposit orders and costs orders

Following its consultation of last year, the Government has also introduced measures to tackle the number of weak and vexatious claims. If a tribunal considers that all or part of a claim (or response) has little reasonable prospect of success, the maximum deposit that it can order a claimant to pay has increased from £500 to £1,000. The maximum costs order that the tribunal can award where a claimant has acted abusively or unreasonably, or their claim is misconceived, has also increased two-fold from £10,000 to £20,000. The government also plans to introduce charging fees to bring a claim, but this will be implemented in 2013 at the earliest.

CASE LAW

Territorial scope of unfair dismissal

The Supreme Court has held that an employee whose place of work was Libya at the time of his dismissal, but whose employment had strong connection to Great Britain, was entitled to bring a claim for unfair dismissal under the Employment Rights Act 1996. In cases where the employee's place of work is not Great Britain, the correct question to ask is whether the connection with Great Britain is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim (*Ravat v Halliburton Manufacturing and Services Ltd*).

Effective date of termination

The Employment Appeal Tribunal (EAT) held that when an employee sent a letter clearly indicating her immediate resignation, her effective date of termination (EDT) was the date on which her letter was opened and date-stamped at her employer's offices. The letter need not actually have been read by any named addressee. This contrasts with the Supreme Court's decision (in *Gisda Cyf v Barratt*) that the employee's EDT, when summarily dismissed by his or her employer, is the date when the employee actually reads the letter or has a reasonable opportunity to discover its contents (*Horwood v Lincolnshire County Council*).

Employment status

The EAT has held that a lapdancer was an employee of Stringfellows and remitted proceedings for an employment tribunal to hear her claim for unfair dismissal. It is only employees — not the self-employed — who have the right to claim unfair dismissal. Ms. Quashie was a lapdancer at Stringfellows who was dismissed following allegations of drug dealing. She brought a claim in the Employment Tribunal for unfair dismissal, but her claim was dismissed at a Pre-Hearing Review on the basis that she was self-employed. Ms. Quashie appealed. Having applied the test in *Ready-Mixed Concrete Ltd v Minister of Pensions and National Insurance*, and having found there was a requirement for personal service and a sufficient degree of control, the EAT held that the employment judge had erred in holding that there was no mutuality of obligation between the parties (*Quashie v Stringfellows Restaurants Ltd*).

In a separate case, the Court of Appeal agreed with the EAT that, on the facts of the case, a fixed-share Limited Liability Partnership (LLP) member was not an employee. The fixed-share LLP member had to contribute capital, had a prospect of a share of profits depending upon the performance of the LLP in any particular accounting year, had a prospect of a share in the surplus assets on a winding up and had a voice in the management of the affairs of the LLP. As a result, the individual in question was a true partner in the LLP rather than its employee (*Tiffin v Lester Aldridge LLP*).

Redundancy selection pools of one can be fair

The EAT upheld a tribunal's decision that it was not unfair for an employer to place just one employee in a selection pool for redundancy where it was ceasing operations in China and the claimant was the only China-based employee. The EAT held that the decision to limit the pool to just the China-based employees was logical and was reasonably open to the employer and that decisions as to pools and selection criteria are matters for the employer, and a tribunal should rarely interfere with them (*Halpin v Sandpiper Books Ltd*).

In a subsequent case, the EAT confirmed that employers can choose a redundancy pool that is the same size as the number of redundancies to be made, but must be careful when doing so as tribunals will carefully scrutinise such decisions. In that case, a redundancy dismissal was unfair where the employer used a selection pool of just one employee, as the other employees did similar work, the claimant's work had been praised and there was only a minimal risk of losing clients if other employees were dismissed and their work redistributed (*Capita Hartshead Ltd v Byard*).

Subjective criteria and suitable alternative employment

For a redundancy dismissal to be fair, an employer must offer any available suitable alternative employment to the at-risk employee. In making a decision as to whether to appoint an at risk employee to an alternative role, the EAT has confirmed that an employer has substantial flexibility when assessing the individual's suitability for the alternative role and it may use subjective criteria. Good faith consideration of an employee's qualities are not normally liable to be dissected by an employment tribunal, which may not understand the commercial basis for the criteria (*Samsung Electronics (UK) Ltd v Monte-D'Cruz*).

Age discrimination

The Supreme Court has held that a law firm had identified legitimate aims (staff retention, workforce planning and dignity) which could potentially justify its compulsory retirement of a partner at the age of 65. The court held that direct age discrimination must be justified by reference to social policy objectives: the individual aims of a firm are not necessarily sufficient. However, it held that the three aims identified by the firm amounted to social policy objectives for this purpose (*Seldon v Clarkson Wright and Jakes (a partnership)*).

The Supreme Court has held that an employee whose impending retirement meant that he could not obtain a law degree, and thereby benefit from increased status and salary, was put at a disadvantage on grounds of age. If not justified, the requirement to obtain a degree would constitute indirect age discrimination. The court rejected the notion that it was not age, but impending retirement, which prevented the employee from obtaining the benefits associated with completing a degree, pointing out that retirement was inextricably linked with age (*Homer v Chief Constable of West Yorkshire Police*).

The Court of Appeal has upheld an employment tribunal's decision that the dismissal of a redundant Chief Executive without proper consultation to avoid his qualification for an enhanced pension was not unlawful age discrimination because the treatment was justified. While the Court of Appeal accepted that an employer could not justify the treatment solely on grounds of saving costs, on the unusual facts of the case, the Chief Executive's dismissal could not be characterised as having been solely aimed at saving costs; it was also due to the redundancy of his role (which was a legitimate aim). The dismissal had been a proportionate means of achieving the legitimate aim and was therefore justified (*Woodcock v Cumbria Primary Care Trust*).

Sexual harassment

The EAT has upheld a tribunal's decision that an employee was not discriminated against or harassed when her manager accused her of lying about a miscarriage. Although the manager's comments referred to pregnancy and were offensive they were not made "on the ground of" the employee's sex

(because the tribunal found the reason for the comments was not pregnancy, but to emphasise the employee's alleged dishonesty).

In reaching its decision, the tribunal referred to an out-of-date version of the SDA 1975. At the relevant time, the Act did not require harassment to be "on the ground of" a woman's sex, but rather to "relate to" sex. It was common ground before the EAT that the tribunal's error was not material. This is perhaps unfortunate. Whether something "relates to" sex is, arguably, a far broader concept (*Warby v Wunda Group plc*).

FRANCE

LEGISLATION

Announcement made by the Government: 13 June 2012: Creation of local government agencies

Further to the recent elections and the creation of a new ministry in charge of industry recovery (Redressement productif), on June 13, 2012 the Government announced that in all of the 22 French regions a government agent (Commissaire) will be appointed. The Commissaire's role will be to assist companies with fewer than 300 employees when they face difficulties. While these agents replace agents appointed by the previous government who had a similar role, the objective is for the Commissaire to have a more proactive role when these companies have to reorganize themselves, with the specific aim of preserving employment.

Telework more precisely regulated: Law n°2012-387 of 22 March 2012

Law n°2012-387 of March 22, 2012 created a new section in the French Labor code to regulate telework. The new legal provisions define the way to introduce telework and also organize telework. The employer is not able to impose this new work arrangement on its employees. Instead, the employer must obtain the written consent of the employees concerned. In the consent form, the employer is required to set out the terms and conditions for a return to office work. It is also important to stress that prior to introducing telework the works council as well as the health and safety committee must be consulted. Finally, the employer will now have the obligation to ensure that the employee's residence is suitable for telework prior to implementing telework with a given employee.

CASE LAW

Video surveillance: Cass. Soc. 10 January 2012, n° 10-23.482

A company providing janitorial services faced a dispute with its employees with respect to time effectively worked at the client's plant. During the course of the litigation, the employer used video recordings from the plant to prove its case. The French Supreme Court decided that, because the janitorial services company had failed to inform its employees that there was a video recording system in place and as a consequence not informed its employees that it could be used to monitor their activities, it was prevented from using the recordings as evidence in the working time litigation. Companies which have employees working on other companies' sites where there are video surveillance systems must therefore inform their employees of the presence of such equipment and, as the case may be, comply with the works council and health and safety committee consultation process.

Redeployment of disabled employees: Cass. Soc. 7 March 2012, n°11-11.311

French law does not establish a general duty to accommodate disabled persons as exists in some other countries. However, it does require employers to redeploy an employee declared disabled by the company doctor to an appropriate job. In such a case, the employer is charged with the difficult task of looking for a redeployment position within the legal entity employing the disabled employee. The employer must check that the job position to be offered to the employee fits with the professional skills of the employee. If the job position offered as redeployment requires initial training, it by definition, does not fit with the employee's skill set. If there is no appropriate job position available for the employee, the employer may dismiss the employee concerned.

A limit to the redeployment obligation in case of redundancy: Cass. Soc. 10 May 2012, n° 11-12.469

To challenge the validity of redundancies implemented in companies belonging to a worldwide group, the easy way has been, for a long time, to raise a possible breach by the employer of its redeployment obligation. French courts require an employer that is about to make an employee redundant to search all available positions worldwide and offer those positions before

terminating the employee. The courts have stressed that the employer has the obligation to provide employees with appropriate training to adapt to such a new position. On May 10, 2012, the French Supreme Court clarified the extent of the employer's obligations in an important new decision. In this case, the employee challenged the validity of her redundancy arguing that her employer did not offer her redeployment to an available position in Germany. The French Supreme Court reasoned that, because the employee did not have any knowledge of the German language, she did not have the ability to perform the job in Germany. It is a first step in a common sense direction, but we will need to wait for other decisions to ascertain that this will be a systematic argument to avoid offering job positions abroad.

Working time: more constraints for annual day packages: Cass. Soc. 31 January 2012, n° 10-17.593 ; 31 January 2012, n° 10-19.807 and 28 February 2012, n° 10-27.839

France is well known for its 35-hour work week. However, practitioners know that there are exceptions. Annual day packages were considered for a while as the most optimum and flexible mode for the computation of the working time for executive employees. However, the French Supreme Court — influenced by the criticisms of the European Comity of Social Rights — recently adopted a position which aims at more strictly regulating the use of such day packages. Indeed, this mode of computation of working time was criticized because it was considered as a way to allow the employer to conduct no monitoring of the effective daily and weekly working time of its employees. As such, it was perceived as preventing compliance with the rules and regulations on health and safety. In three decisions rendered in 2012, the Supreme Court reminded employers of the terms and conditions for valid use of annual day packages: (i) the possibility of using an annual day package should be provided by a collective bargaining agreement; (ii) the collective bargaining agreement must provide certain provisions aiming at ensuring the health and safety of the employees subject to an annual day package (i.e., monitoring of working day, rest time, etc.); and (iii) the terms and conditions of the annual day package must be provided in writing in agreements entered into with each concerned employee — a reference to the terms and conditions of a collective agreement is not sufficient. Should these conditions not be met, the annual day package could be considered null and void. The consequences can be dramatic. Indeed, the affected employees would then be entitled to claim payment for any time worked beyond 35 hours a week as overtime. The absence of a written clause providing for an annual day package alone may be a sufficient proof of the employer's intention to avoid the application of the provisions on working time, and would expose the employer potentially to criminal sanctions.

GERMANY

LEGISLATION

Increase of the so called compensatory public charge (Ausgleichsabgabe) for companies that do not employ the required ratio of disabled employees

According to Sec. 71 German Social Act IX (*Sozialgesetzbuch IX*) companies with more than 20 employees are required to also employ severely disabled persons. Companies with between 20 and 39 employees must employ at least one severely disabled person, companies with between 40 and 59 employees at least two severely disabled persons and companies with 60 or more employees must employ severely disabled persons in a ratio of at least 5% of their total workforce. If the employer does not comply with this obligation, it must pay a so-called compensatory public charge (*Ausgleichsabgabe*), the amount of which depends on the actual compliance rate. As of January 1, 2012, the compensatory public charges have been increased as follows:

Compliance Rate	Before (Monthly)	Now (Monthly)
3 < 5 %	€105	€115
2 < 3 %	€180	€200
0 < 2 %	€260	€290

The legislative procedure for changing the German Data Protection Act provisions dealing with the protection of personal data of employees is nearly final

The German Data Protection Law is based on the principle that any collection or use of personal data is forbidden unless German written law specifically

allows it. With respect to personal data collected and processed within an employment relationship, the current version of the German Data Protection Act (GDPA) contains a sweeping clause (Sec. 32 GDPA) that creates uncertainty as to what kind of data collection and processing is permissible. The German government has therefore prepared a draft amendment to the GDPA that was submitted to the legislative authority on December 15, 2010. The new provisions of the GDPA are expected to be enacted during the third quarter of 2012. The contemplated new regulations are intended to more specifically regulate the rights and obligations of the employer with respect to the collection and processing of personal data of not only employees, but also of job applicants. Further, the new provisions will deal with the right to use video surveillance in non-public areas, the legal implications with regard to an employer's use of the employer's telecommunication services and other particular areas of data protection arising within employment relationships. An important change that is supposed to come with the implementation of the new regulations is the so called "*Konzernprivileg*," i.e., the right to transfer an employee's personal data across affiliated companies to the extent that such transfer is based on a legitimate interest by the involved group companies.

CASE LAW

Obligation to return company car during a garden leave period can be validly agreed (German Federal Labor Court decision dated 21 March 2012 – 5 AZR 651/10)

Company cars, i.e., a car leased by the company and placed at the disposal of its employees are very popular and a common benefit granted to, and expected by, German senior employees as part of their employment compensation package. Employment contracts often require the employee to return the company car during the garden leave period (paid release from duties during the notice period) following a termination at the company's request. Until the ruling by the Federal Labor Court dated March 21, 2012, there has been an open question about whether the obligation to return the company car during a gardening leave can be validly agreed in the employment agreement, in particular where the employee was entitled to use the company car also for private purposes. The Federal Labor Court has now ruled that such a clause can be validly included in the employment agreement. However, the court pointed out that, before revoking the employee's right to use the company car, the employer must consider the individual circumstances and the interests of the employee. As a consequence, the employer may have to give appropriate notice to the employee with respect to the return obligation.

The termination of an employee because of an HIV infection does not generally constitute discrimination or violation of the General Equal Treatment Act (AGG) (Higher Labor Court of Berlin-Brandenburg, decision dated 13 January 2012 – 6 Sa 2159/11)

The Higher Labor Court of Berlin-Brandenburg had to decide a case where a pharmaceutical company terminated the employment contract of an employee who was infected with HIV. The employer argued that the employee was part of the drug production division of the company and that the company had established that employees with any disease may not be employed in the division. The dismissed employee challenged the termination arguing that the termination constitutes discrimination based on his disability, HIV, and violates the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*). The court dismissed the employee's claim. The court reasoned that the company's interest in avoiding any impairment of the drug production justified the unequal treatment of employees with a disease and employees without a disease. The court however did not take any position on the question of whether an asymptomatic HIV infection constitutes a disability within meaning of the German General Equal Treatment Act. The court's ruling has been appealed by the employee and is now with the Federal Labor Court (BAG).

Bonus payments and terminated employment contracts (German Federal Labor Court, decision dated 18 January 2012 – 10 AZR 612/10)

German case law related to bonus payments is currently in a state of flux. In particular, the question of whether bonus payments can be made conditional upon the continued existence of the employment relationship has been subject of a number of decisions lately. German law distinguishes between three types of bonus payments. The first type of bonus payment can be considered as deferred compensation for past performance, i.e., a performance bonus. Payments of this type cannot be made conditional on the continued existence of the employment relationship because they are considered as promised

compensation for a performance in the past (e.g., a target-linked performance bonus). The second type is a bonus that is paid exclusively to foster future company loyalty (*Betriebstreue*) of the individual employee (e.g., a holiday allowance). Since the focus of these kinds of bonus payments is future performance, it is permissible to make such payments conditional on the existence of the employment relationship on the due date of the payment.

The third kind of bonus payment combines the elements of compensation for a past performance and a bonus for company loyalty ("*Klauseln mit Mischcharakter*" — hybrid bonus clauses). The German Federal Labor Court has now held that a contractual limitation requiring the continued existence of the employment relationship at the due date is not valid insofar as such bonus is compensation for a past performance. According to the German Federal Labor Court such contractual limitations are only acceptable in clauses that are intended to exclusively foster future company loyalty. The court thus deviated from most of its previous rulings where it had held that a claim for a bonus payment under such a hybrid clause can be made conditional on the continued existence of the employment contract.

LUXEMBOURG

LEGISLATION

Creation of the Agency for the Development of Employment

Following passage of a new law on July 18, 2012, the former Administration for Employment (*Administration de l'emploi*) has been replaced by the Agency for the Development of Employment (*Agence pour le développement de l'emploi*).

Fast-track procedure for salary compensation claims in case of insolvency of the employer

The April 19, 2012[1] amendment of the Labour Code now allows the Employment Compensation Scheme (*Fonds pour l'Emploi*), following the insolvency of the employer, to advance up to 75% of the minimum amount which is guaranteed by the Employment Compensation Scheme upon simple notification by the employee. This procedure intends to be a short-cut for salary compensation claims by employees in the framework of an insolvency of the employer.

Enactment of teleworking collective agreement

The Luxembourg collective agreement dated July 15, 2011 relating to the legal status of teleworking has been given general binding effect through its publication in the Luxembourg official gazette (*Mémorial*) and enactment by Grand-Ducal Regulation of March 1, 2012.

Teleworking entitles employees to work either from home or from other premises and to connect via technology and communication means with the employer without being physically present on the premises of the employer.

CASE LAW

SMS notification by sick employee of absence is valid

In a decision dated December 15, 2011, the Luxembourg Court of Appeals determined that the notification of absence made by the sick employee on the first day of absence through a short message system (SMS) is valid. The Luxembourg Court of Appeals held that "in the era of modern communication means, informing the employer through SMS, phone call, email or fax constitutes a valid notification of the employee's inability to come to work."

Deadline for receipt of medical certificate

The Luxembourg Court of Appeals has said that the delivery of a medical certificate in the mailbox of the employer presumes its receipt by the employer the day following such delivery, "a mailbox being in principle checked every day and even though it would not be the case, or the mailbox would not be checked by the employer himself, the employer could not rely on his own failure in the event the certificate would not be in his hands within the prescribed period."

Automatic termination of contract

On March 1, 2012, the Luxembourg Court of Appeals confirmed that, in accordance with Article 125-4 of the Luxembourg Labour Code, an employment contract will automatically terminate when the Luxembourg health insurance ceases to pay salary compensation to the employee (after 52 weeks over a period of 104 weeks).

[1] Law of 19 April 2012 amending articles L.126-1 and L.541-1 of the Luxembourg Labour Code.

The Luxembourg Court of Appeals ruled in this case that even though the employee resumed work following his long absence, no new employment contract was formed after the automatic termination of the first employment contract as it argued that "in the mind of the parties, it was simply execution of a contract which they considered to be still in force."

RUSSIA

LEGISLATION

Changes to Employer Insurance Contributions to the Russian Pension Fund

In accordance with Federal Law of the Russian Federation No. 379-FZ of December 3, 2011, "On Amendments to Certain Legislative Acts of the Russian Federation Establishing Rates for Insurance Contributions to State Extra-Budgetary Funds" (the Law), since January 1, 2012, the rates for insurance contributions to the Russian Pension Fund have been changed, the list of employers exempted and employers obliged to pay insurance contributions to the Russian Pension Fund in respect of foreign employees has been updated.

In 2011, employer contributions to the three extra-budgetary funds to which employers make such contributions amounted to a total of 34% of salary: 26% to the Russian Pension Fund, 2.9% to the Social Insurance Fund (SIF), and 5.1% to the Compulsory Medical Insurance Fund (CMIF). The changes introduced by the Law relate to the rates of contribution to the Russian Pension Fund. No changes have been introduced to the contribution rates to either the SIF or the CMIF.

Effective January 1, 2012, the rate for employer insurance contributions to the Russian Pension Fund decreased from 26% to 22%, and the procedure for collecting payments also changed. The threshold for annual salary subject to contributions is now 512,000 rubles compared to the previous 463,000 rubles. For salaries of up to 512,000 rubles, contributions are due at the rate of 22%. Salaries in excess of 512,000 rubles are subject to a rate of 10%. This 10% rate is a novelty (there was no such requirement in 2011). As a result, notwithstanding the fact that the rate for the insurance contributions has decreased (from 26% to 22%) and the threshold for annual salaries subject to contributions has increased (from 463,000 rubles to 512,000 rubles), in many cases where the salaries of the employees exceed the 512,000 ruble threshold and are subject to the additional 10% rate, the total amount of employer contributions to the Russian Pension Fund in respect of such employees has significantly increased.

That said, the Law sets out a list of organizations exempt from paying this 10% rate on salaries in excess of 512,000 rubles per year. In particular, this exempt list includes pharmacies using the simplified tax system, non-profit institutions engaged in social services, R&D, education, healthcare, culture and arts, popular sports (excluding professional sports), as well as charitable organizations that also apply the simplified system of taxation. The exemption is also granted to engineering companies except parties to contracts with bodies in charge of special economic zones (SEZs) to supply certain types of services.

Finally, effective January 1, 2012, employers are required to insure their employees who are foreign citizens temporarily resident in the Russian Federation and working under an employment contract with a definite term of more than six months or with an indefinite term. Highly skilled workers are exempt from this provision. In 2012, insurance contributions for foreigners are only to be paid to the Pension Fund; no employer contributions are required on behalf of foreign employees to either the SIF or the CMIF.

UNITED STATES

U.S. SUPREME COURT DECISIONS

"Outside salesman" exemption under Fair Labor Standards Act includes pharmaceutical representatives

On June 18, 2012, the U.S. Supreme Court ruled that the "outside salesman" exemption to the overtime pay requirements of the Fair Labor Standards Act (FLSA) applies to pharmaceutical sales representatives, or "detailers," "whose primary purpose is to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs in appropriate cases." *Christopher v. SmithKline Beecham Corp.*, No. 11-204 (June 18, 2012). The FLSA's "outside salesman" exemption covers workers "employed...in the capacity of an outside salesman." 29 U. S. C. §213(a)(1). The Department of Labor (DOL) has issued regulations clarifying that the exemption covers "any employee...[w]hose primary duty is...making sales... and [w]ho is customarily and regularly engaged

away from the employer's place of business in performing such primary duty." 29 CFR §§541.500. The major issue before the Court was how to interpret the term "sales" for the purpose of this exemption since the employees at issue did not actually engage in or enter into binding financial transactions with the physicians they contacted. Although the FLSA defines the term to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition," 29 U. S. C. §203(k), the DOL contended that the exemption applied only to employees whose activities involved the transfer of title of property. In an opinion written by Justice Alito, the five-member majority of the Court rejected this interpretation, holding that while agency interpretations such as the DOL's are generally afforded substantial deference, no deference was warranted in this case because the DOL's stance conflicted with the plain language of the FLSA, which defines the term "sale" to include "consignment for sale," a transaction that involves no transfer of title. The Court also focused on the fact that detailers had for several decades been classified as exempt by pharmaceutical companies and the DOL had never taken issue with the practice. Ultimately, the Court concluded that the pharmaceutical representative job fit into the "other disposition" category of the DOL's definition, therefore qualifying these employees as outside salesmen covered by the exemption.

Employers must prepare for changes after Court upholds key features of Patient Protection and Affordable Care Act

As Dechert has reported previously (*See* April 2010 *DechertOnPoint* "The Impact of Health Care Reform on Group Health Plans"), the federal Patient Protection and Affordable Care Act (PPACA), passed in 2010 and colloquially known as "Obamacare," is a sweeping reform that imposes extensive new obligations on employers. On June 28, 2012, the U.S. Supreme Court upheld the PPACA's "individual mandate" provision, thereby ensuring that, unless repealed by Congress, the PPACA's requirements will continue to take effect. Among the requirements of the law are numerous components that directly impact employers, including the Act's requirement that most employers provide health care coverage to full-time employees and their dependents by 2014 or pay a penalty. Now that the future of the PPACA has become clearer, employers must evaluate the impact of the law on their businesses and prepare to comply with the Act's provisions as they take effect.

Arizona law imposing criminal penalties on unlawful aliens seeking work held invalid

In *Arizona v. United States*, No. 11-182 (June 25, 2012), the U.S. Supreme Court reaffirmed the preeminent role of the federal government in regulating immigration and alien status issues. In its decision, the Court struck down a number of provisions of an Arizona law designed to "address pressing issues related to the large number of aliens within [the state's] borders who do not have a right to be in this country." Among the components of the law invalidated by the Court was a provision making it s crime for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." According to the Court, this provision was inconsistent with federal law, which imposes criminal and civil penalties on employers who knowingly hire unlawful aliens, but imposes only civil sanctions on employees. Congress, the Court held, "made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment" and the Arizona law impermissibly created an obstacle to the federal regulatory scheme.

Lawsuits against state employers under the Family and Medical Leave Act's "self-care" provision are barred by sovereign immunity

In *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327 (2012), the Supreme Court held that Congress exceeded its authority under Section 5 of the 14th Amendment by subjecting states to private lawsuits under the "self care" provision of the FMLA. The FMLA's "self-care" provision grants eligible employees the right to take leave when they are unable to work due to their own serious health condition. Relying on this provision, Daniel Coleman brought suit against his former employer, the Maryland Court of Appeals, asserting that he was discharged following his request for sick leave. Coleman's complaint was dismissed on the ground that it was barred by Maryland's sovereign immunity.

Under the federal system, states as sovereigns are generally immune from damage suits. Congress may abrogate state immunity, however, to remedy or prevent conduct contravening the 14th Amendment's substantive provisions. Finding that there was no evidence that the FMLA's "self-care" leave provision was passed as a remedial measure to combat gender discrimination in the workplace, a divided U.S. Supreme Court affirmed the lower

courts' rulings that state employees are barred from suing their employers for alleged violations of the "self-care" provision of the FMLA. According to the Court, the self-care provision was included solely to address the economic impact of illness on working families and single parents. In contrast, the Supreme Court previously held that Congress properly abrogated state immunity with respect to the FMLA's "family care" provision, which grants eligible employees leave to care for a covered family member with a serious health condition. *See Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003). There, the Court's holding rested on evidence that states had family leave policies that discriminated on the basis of sex. The Supreme Court has not yet ruled on whether states can be sued by employees for violations of the FMLA's "bonding leave" provision.

Court recognizes "ministerial exception" to dismiss teacher's ADA claim against religious school

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court recognized for the first time the that the First Amendment's free exercise and establishment clauses create a "ministerial exception" that precludes the application of employment discrimination laws to the employment relationship between religious institutions and their "ministers." In the case, the Equal Employment Opportunity Commission (EEOC) asserted an Americans with Disabilities Act (ADA) claim on behalf of Cheryl Perich, a former elementary school teacher at a parochial school when, after completing a disability-related leave, Hosanna-Tabor refused to reinstate Perich, encouraged Perich to resign, and ultimately terminated Perich when she refused to resign and threatened to sue. Hosanna-Tabor argued the suit was barred under the "ministerial exception" because religious institutions have a First Amendment right to terminate ministers without interference. The District Court agreed with the school, but the Sixth Circuit vacated and remanded, finding that Perich, who performed both secular and religious teaching duties, did not qualify as a "minister" under the exception.

In a unanimous decision, the Court, in an opinion by Chief Justice Roberts, held that the ministerial exception is essential to protect religious institutions' ability to choose their ministers free from interference. The Court refused, however, to "adopt a rigid formula for deciding when an employee qualifies as a minister" but determined the exception applied to Perich relying on facts including that (1) Perich's formal title was "Minister of Religion, Commissioned"; (2) the substance reflected in that title; (3) Perich's use of the title of minister in correspondence and by claiming ministerial tax deductions; and (4) Perich's performance of important religious duties at work to determine she was a minister. In fact, it appears the Supreme Court Justices disagree about the scope of this exception. In his concurrence, Justices Thomas expressed reservations about secular courts ever second-guessing a religious organization's designations of an employee as a minister pursuant to this exception. In another concurrence, however, Justices Alito and Kagan opined that the ministerial exception should be applied only to employees who serve religious organizations in positions of substantial importance pursuant to a functional test.

OTHER FEDERAL DEVELOPMENTS

EEOC issues regulations regarding disparate impact claims under Age Discrimination in Employment Act

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the U.S. Supreme Court concluded that disparate impact claims — claims that an employer's facially neutral policy and practice have an adverse impact on older workers — are cognizable under the Age Discrimination in Employment Act (ADEA), provided that liability is precluded when the impact is based on a "reasonable factor other than age." In response to this decision, the U.S. Equal Employment Opportunity Commission (EEOC) issued proposed regulations in March 2008. These regulations finally became law on April 30, 2012. Pursuant to the EEOC's regulations, a plaintiff challenging an employer's actions based on a disparate impact theory "is responsible for isolating and identifying the specific employment practice that allegedly causes any observed statistical disparities." However, "whenever the 'reasonable factor other than age' defense is raised, the employer bears the burdens of production and persuasion to demonstrate the defense."

The regulations further state that "a reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances." The regulations also include a non-exhaustive list of factors that may be considered in determining whether a practice is based on a reasonable factor other than age. Considerations

that are relevant to whether a practice is based on a reasonable factor other than age include, but are not limited to: (i) the extent to which the factor is related to the employer's stated business purpose; (ii) the extent to which the employer defined the factor accurately and applied the factor fairly and accurately; (iii) the extent to which the employer limited supervisors' discretion to assess employees subjectively; (iv) the extent to which the employer assessed the adverse impact of its employment practice on older workers; and (v) the degree of the harm to individuals within the protected age group and the extent to which the employer took steps to reduce the harm.

EEOC issues new guidance on use of criminal history information

On April 25, 2012, the EEOC, which is charged with enforcing many of federal anti-discrimination laws, issued a new "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964." This Guidance replaced the agency's long-standing guidance on the subject originally issued in 1987.

The new guidance discusses how use of criminal records in making employment decisions may result in discrimination, and recommends "best practices" to avoid liability. Among the guidance EEOC has provided are that: a) an arrest record standing alone may not be used to deny an employment opportunity; b) a blanket policy against hiring persons with criminal convictions likely violates Title VII; c) if an employer uniformly applies a policy or practice that excludes individuals with criminal histories from employment opportunities, and the policy or practice has a disparate impact based on race or national origin, etc., the employer will be required to prove that the policy or practice is job-related and consistent with business necessity; d) in order for an employer to justify a criminal conduct exclusion practice/policy, EEOC will require the employer to show that the policy effectively links specific criminal conduct and its dangers with the risks inherent in the duties of a particular position; and e) even if an employer proves that its policy/practice is job-related and consistent with business necessity, the employer may still have violated Title VII if there is a less discriminatory alternate practice that meets the employer's legitimate goals.

While the EEOC will enforce the guidance as written, courts may consider but are not bound by the guidance, and whether they will agree with it remains to be seen. Critics have contended that certain of EEOC's positions in the Guidance extend beyond what the current law requires.

NLRB holds that mandatory waivers of collective actions are unlawful

On January 3, 2012, the National Labor Relations Board (NLRB) held in *D.R. Horton, Inc.*, No. 12-CA-25764, that arbitration agreements requiring employees to waive the right to file joint, class, or collective claims violate the National Labor Relations Act (NLRA). In its decision, the NLRB ruled that while mandating arbitration does not by itself violate the NLRA, an employer acts unlawfully "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing join, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial." "Such an agreement," the NLRB stated, "unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable." The case has been appealed and is awaiting a decision. Not surprisingly, the ruling has engendered controversy, with opponents arguing that the decision is plainly inconsistent with the Supreme Court's recent rulings favoring arbitration agreements, including its decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). Several recent judicial decisions have cast doubt on the validity of the *Horton* decision. For instance, in *De Oliveira v. Citicorp North America, Inc.*, No. 8:12–cv–251–T–26TGW (M.D. Fla. May 18, 2012), a federal judge enforced an agreement compelling individual arbitration of claims under the Fair Labor Standards Act, holding that Supreme Court and 11th Circuit precedent required enforcement of arbitration agreements as long as such agreements do not waive any substantive statutory rights.

Administrative law judge rules that Facebook posts can be protected concerted activity under the NLRA

Following guidance issued by the NLRB's acting General Counsel in a series of memoranda addressing the application of the NLRA to social media such as Facebook and Twitter, an NLRB administrative law judge held in *Design Technology Group, LLC*, Case 20-CA-35511 (April 27, 2012), that statements made on Facebook can be considered protected concerted activity under Section 7 of the

NLRA. The judge ruled that San Francisco clothing store Bettie Page must reinstate three employees fired after criticizing their manager and discussing work-related issues via Facebook. While the store gave numerous other reasons for the terminations, the judge ultimately held that the employees were fired because of the Facebook posts, and since these posts addressed employees' terms and conditions of employment, they were protected activity under the NLRA.

EEOC determines that Title VII protects transgendered individuals

In *Macy v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 0120120821, the EEOC determined that the complaint of a transgender female employee of the federal Bureau of Alcohol, Tobacco and Firearms that she was discriminated on based on her gender identity, change of sex, and/or her transgender status was cognizable under Title VII of the Civil Rights Act of 1964. The EEOC reasoned that Title VII protects against discrimination based on sex and that complaints based on "sex stereotyping," "gender transition/change of sex," and "gender identity" were all different ways of stating a claim of discrimination "based on . . . sex." The EEOC determined that discrimination against a person because he or she is transgender is related to the sex of the victim. This is true, the Commission held, regardless of whether the basis for the discrimination is that that the employer believes the transgender person fails to conform to gender stereotypes, is uncomfortable with the person's transition, or doesn't like the person identifying as transgender. Analogizing to religion, the EEOC pointed out that it would surely be religious discrimination to make an adverse employment decision because a person converted to a different religion. Such a claim would not require a showing that the employer acted because of some particular religious stereotype, but would just require a demonstration that the employer improperly used religion to make an employment decision. The EEOC noted that this decision does not create a new "class" of people that are covered under Title VII — just applies the plain language of the statute to practical situations. While the EEOC's decision is not binding with respect to claims brought by non-federal employees, it may be viewed as persuasive given the EEOC's role in enforcing federal anti-discrimination laws. Additionally, the ruling is consistent with many decisions from the U.S. federal courts, including the Eleventh Circuit's decision in *Glenn v. Bumbry*, 663 F.3d 1312 (11th Cir. 2011).

STATE LAW DEVELOPMENTS

California Supreme Court clarifies employers' meal and rest break obligations under state law

Due to its very employee-friendly wage-and-hour laws, California has long been a hotbed for class action litigation against employers. In a much anticipated decision, the California Supreme Court in *Brinker v. Superior Court*, 273 P.3d 513 (Cal. 2012), provided guidance to employers as to the nature and timing of an employer's obligation to provide meal and rest periods in the state. The court interpreted the state's law to require that employers provide a meal break for all hourly employees no later than the end of each fifth hour of work during a shift. That is, employers must provide a first meal break no later than the end of the employee's fifth hour of work and a second meal break no later than the end of an employee's tenth hour of work. However, the court rejected the plaintiffs' argument that employers are required to police their employees to ensure that the meal break is actually taken. Instead, an employer satisfies its obligation if it (1) relieves the employee of all duties, (2) relinquishes control over the employee's activities and permits them an opportunity to take an uninterrupted 30-minute meal break, and (3) does not discourage them from doing so. If the employee continues to work, however, and the employer knows or reasonably should know that the work continues, the employer will be required to pay for the meal break. As for rest breaks required under the applicable wage order, an employer must make rest breaks available for every 4 hours of work or major fraction thereof (interpreted to mean greater than 2 hours), unless the total daily shift is less than 3.5 hours, in which case no rest break is required. Under this interpretation, employers must provide 10 minutes of rest for shifts from 3.5 to 6 hours, 20 minutes of rest for shifts of more than 6 to 10 hours, and 30 minutes of rest for shifts of more than 10 to 14 hours. Employers must use good faith efforts to schedule rest breaks in the middle of each period. Meal and rest breaks do not have to be taken in a particular sequence.

States move to prohibit discrimination based on unemployment status

In an attempt to aid workers struggling to find work amidst the ongoing economic downturn, the legislatures of several states have introduced laws prohibiting employers from discriminating against job applicants based on their status as being or having been unemployed. Recently, the District of

Columbia became the first jurisdiction to enact such a prohibition into law. DC's law, the Unemployed Anti-Discrimination Act of 2012 (UAFA), forbids employers and employment agencies from discriminating against job applicants on the basis of their unemployment status. The UADA does not provide a private right of action to those seeking protection, but does allow for remedies to be assessed by the District of Columbia Office of Human Rights if violations are found. While DC's ordinance is the first broad prohibition to become law, many similar laws will likely be introduced, as unemployment discrimination is becoming an increasingly important issue to legislators. There are currently four federal bills pending before the U.S. Congress that would function similarly to the UADA, and numerous states are considering similar statutes. In addition, New Jersey and Oregon have enacted laws regarding discrimination against unemployment status in job advertisements.

Illinois bans employers from requiring access to Facebook passwords, other states likely to follow

On May 22, 2012, Illinois became the first state to prohibit employers from requiring employees and potential applicants to hand over passwords to social media websites. Illinois' statute, which amended the state's Privacy in the Workplace Act, states that "it shall be unlawful for any employer to request or require any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website." The law clarifies that it shall not be interpreted to limit an employer's right to " promulgate and maintain lawful workplace policies governing the use of the employer's electronic equipment, including policies regarding...social networking site use" and to "monitor usage of the employer's electronic equipment."

While Illinois' law is the first to go into effect, it is not likely to be the last. Currently, California, Ohio, Texas, Maryland, Washington, and New York have introduced similar bills prohibiting the practice, which has become an increasingly common way for employers to try to prevent employees from using social media to disclose confidential information or otherwise harm an employer's business. Despite this legitimate concern, the general consensus among legislators appears to be that employees and applicants are entitled to privacy, even in the realm of quasi-public social media forums, and should not be forced to yield passwords without consent.

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