BEERG

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EUROPEAN LABOUR LAW BRIEFING

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EDITORIAL:

I thought we would take an alphabetic run through this edition's contributions. Those skipping the Editorial and consequently confused by seeing Australia's name leading off a European Labour Law Bulletin should not be too surprised. Australia retains its flag bearing the Union Jack, undoubtedly loves the Queen, drives on the correct side of the road, and now critically for European immersion, participates in the garish Eurovision Song Contest (and almost won!).

We have new country contributions from the United Arab Emirates, the Kingdom of Saudi Arabia and Ukraine. The UAE article focuses on the subject of end of service gratuity payments - something which frequently catches international companies out in the region. The update on Saudi Arabia on the role of women in the workplace is extremely interesting and reminds us to observe cultural and legal differences, even if perhaps we do not always agree with the restrictions imposed.

Ukraine's new Labour Code has been fourteen years in the making (and counting). Progress in the last few years has been understandably slow, with invasion and constant military action in Ukraine by Russia and extreme and persistent corruption in Ukraine's government. Meet the new boss - same as the old boss.

Germany's contribution highlights a very topical issue - employment rights in the digital revolution in the workplace. A year ago, the German Ministry of Labor and Social Affairs started a dialogue referred to, in somewhat Orwellian fashion, as "Work 4.0". This follows the eras of Work 1.0 - Work 3.0 covering the industrial revolution through to the welfare state, automation and globalisation.

I hope to see some of you at the BEERG meeting in Sitges in a few weeks. If not, enjoy the summer!

Neville Turner
ELLB Editor

AUSTRALIA:

AUSTRALIAN LABOUR LAW REFORMS RELATING TO LABOUR HIRING AND MIGRANT WORKERS SET TO PLAY KEY ROLE IN UPCOMING AUSTRALIAN FEDERAL ELECTION

An Australian Senate inquiry into the exploitation of temporary visa workers has recommended a number of reforms to the Fair Work Act 2009 (Cth). These recommendations, if implemented, would impose licensing requirements on labour hire companies and additional burdens on employers of temporary visa workers. These recommendations, and a number of other key recommendations, are strongly opposed by the Coalition government, which holds a majority in the lower house but a minority in the Senate.

A number of other reforms, aimed at protecting foreign and other vulnerable workers and increasing penalties for non-compliance by companies, are the subject of the Fair Work Amendment (Protecting Australian Workers) Bill 2016 (the "Bill"), which is currently before a Senate Committee. These reforms are likely to be at the forefront of the labor party's campaign in this year's federal election. Further, the Coalition government is threatening a double dissolution election if laws resurrecting the Australian Building and Construction Commission are not passed by the Senate.

Senate inquiry recommendations

The Inquiry made a number of wide-ranging recommendations in its Labor-Greens-backed majority report. The most important of these include:

- requiring labour hire companies, including those based overseas, to be licensed and maintaining a public registry of licensees;
- imposing a $4,000 levy per sponsored worker on employers who sponsor the 457 visas of skilled foreign workers;
- imposing quotas of a "one-for-one" employment of foreign and Australian tertiary graduates and requiring sponsors of trade visas to demonstrate that apprentices represent at least 25% of their workforce;

- clarifying that temporary workers have the same rights as Australian workers in their visas;
- stronger regulation of franchisors (including allowing franchisors to terminate a franchise agreement without notice where there are reasonable grounds for believing that serious contraventions of the Fair Work Act have occurred);
- protection of whistleblower temporary workers who report exploitation (by forbidding the Fair Work Ombudsman from identifying them to the Department of Immigration and Border Protection and by ensuring visa breaches do not necessarily void employment contracts); and
- independent review by the Fair Work Ombudsman.

The Inquiry also made recommendations for the review of the penalty, accessorial liability and sham contracting provisions under the Fair Work Act, some of which are the subject of provisions in the Bill. Although made under the premise of reviewing the conditions of temporary workers, many recommendations make it more difficult in practice for Australian businesses to employ foreign workers and protect Australian workers from foreign competition. The Coalition minority in the Senate has voiced strong opposition to many of the key recommendations, stating that a review of the issue (and the Bill) by the Government is already in progress.

Fair Work Amendment (Protecting Australian Workers) Bill 2016

The Bill, which is currently before a Senate Committee, also contains provisions concerning foreign and other vulnerable workers. Key provisions of the Bill include a clarification that the Fair Work Act applies to all employees regardless of the employee's visa status, reform of provisions relating to sham contracting and increasing penalties for non-compliance by employers.

If the Bill passes, maximum civil penalties will be increased to three times the current maximum (from $54,000 to $162,000 for corporations) in cases of intentional breaches of the Act. In addition, the Courts will be empowered to make directors of phoenix companies liable for unpaid employee entitlements and to disqualify persons from managing a company under the Corporations Act 2001 (Cth) for breaches of certain civil contraventions of the Fair Work Act.

New criminal offences will also be inserted mirroring the offences concerning slavery and slavery-like conditions found in the federal Criminal Code.

What this means for employers:

Similar law reform proposals concerning migrant workers and labour hire arrangements have been the subject of vigorous political debate internationally, most notably in the United States. It is uncertain which, if any, of the proposals for reform will be implemented in Australia but they will certainly form a key part of the political discussion if a double-dissolution election occurs this year.

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DIRECTIONS TO ATTEND MEDICAL ASSESSMENTS: EMPLOYER'S RIGHTS

The right to order an employee to attend a medical assessment is a common topic of workplace disputes in Australia. Balancing an employee's right to privacy against an employer's obligations relating to safety in the workplace can be a dicey subject, as recent cases have shown.

Employees and their trade union representatives have not been backward in challenging employer directions to attend medical assessments in circumstances where an employee's illness or injury, often combined with extensive sickness absences, has given the employer reason to question the employee's fitness for work.

The issue is that where there is no contractual right to direct an employee to see a doctor, can the employer lawfully require them to do so?

Under Australian law, employers have a legal duty to ensure the health and safety of workers. Arising from that duty, it has long been recognised that:

(a) in some circumstances, employers will have the right to direct their employees to attend medical examinations to determine that they are fit to safely perform their duties, provided that the employer's direction is reasonable; and

(b) where an employee refuses a reasonable direction to attend a medical examination, the employer may have a valid reason to dismiss them.

A recent decision of the Australian employment umpire - the Fair Work Commission - has given employers in Australia some guidance about when they are entitled to direct an ill or injured employee to see a doctor before they can return to work.

In that case, the employee had taken one day of sick leave. He later provided his employer with a medical certificate that said he was suffering depression and was receiving treatment. In response, the employer directed the applicant not to come to work until he attended a medical examination with a company doctor, to confirm that he could do his job safely. The employee refused to attend the medical examination and the employer ultimately dismissed him, for reasons including his failure to attend the medical examination.

The Commission held that the employer had no reasonable basis (in the present circumstances) to assume that the employee had any illness that related to his capacity to perform the inherent requirements of his job. This was particularly so where the employee had only been absent for one day, and where he was receiving treatment for his illness.

The Commission provided the following guidance as to when it might be reasonable for an employer to direct an employee to attend a medical examination:

Is there a genuine basis for requiring the medical examination, such as long absences from work, or absences without evidence of an injury or illness that relates to the employee's ability to perform the inherent requirements of their job?
Has the employee already provided adequate medical information to explain absences and demonstrated their fitness to perform their duties?

Is the industry or workplace particularly dangerous or risky? (For example, in Australian cases involving coal mines and other high risk workplaces, it has often been found to be reasonable for an employer to require a medical assessment of fitness.)

Are there legitimate concerns that the employee's illness/injury could impact on others in the workplace?

The Commission also emphasised that where a medical assessment is required, the medical practitioner should be clearly advised of the employer's concerns, which must be focused on the inherent requirements of the job and the employee's ability to perform them.

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CHINA:

SIGNIFICANT CHANGES TO CHINA'S FAMILY PLANNING LAW WILL IMPACT EMPLOYEE LEAVE ENTITLEMENTS

On December 27, 2015, the National People's Congress Standing Committee adopted changes to China's Family Planning Law, which used to encourage couples to marry and give birth later in life (the so called "late marriage and late birth" policy) and to have only one child.

The amendment to the Family Planning Law ("New Law"), which took effect on January 1, 2016, encourages couples to have two children, and eliminates the "late marriage" and "late birth" concepts. These concepts were previously implemented under local regulations by way of providing extra, paid leave for PRC citizens who satisfy the conditions under these policies.

For example, if a female employee gave birth to her first child during marriage at a late age, usually 23 or 24, based on local rules ("late birth"), she usually would be granted additional maternity leave on top of the national 98 days' maternity leave.

Also, in many cities, the husband would be entitled to "paternity leave" if his wife satisfied the "late birth" criteria and/or he satisfied other conditions under the local rules. In addition, couples who married at a late age would be entitled to extra days of marriage leave. Local regulations varied in these requirements.

Over 10 provinces and municipalities (such as Shanghai Municipality, Guangdong Province, Tianjin Municipality, Zhejiang Province, Fujian Province, Sichuan Province, Guangxi Province, Anhui Province, Shanxi Province, Hubei Province, Jiangxi Province, and Ningxia Province) have released new local family planning regulations amending the leave entitlements (mainly, marriage leave, maternity leave, and paternity leave). In essence, they have removed the terms "late marriage," "late birth," or "one child," and have eliminated the additional leave days previously granted for meeting those

conditions. Instead, they provide substitute leave days consistent with the more liberal New Law.

For example, Shanghai's new family planning regulations, effective March 1, 2016, provide:

- 10 days' marriage leave to all employees who legally marry, irrespective of their age of marriage (while previously 7 out of the 10 days of the marriage leave were provided only to employees who satisfied the "late marriage" criteria);
- additional 30 days' maternity leave (on top of the national 98 days' maternity leave) as long as the employees' childbirth complies with the law (which would apply to the birth of the second child and is irrespective of whether the employee is having a "late birth"); and
- 10 days' paternity leave (as opposed to the previous 3 days provided only to employees whose wife had a "late birth").

In summary, under the new Shanghai rules, more people would be entitled to the extra days of leave with fewer strings attached and in some areas (such as paternity leave), more leave days are provided.

Key Take-Away Points:
Companies operating in multiple cities need to keep track of the new local regulations affecting the above-mentioned leave entitlements in locations where they operate. In addition, companies need to be aware of how these leave entitlements are applied, especially when they overlap with national holidays or weekends.

COURT RULED TERMINATION UNLAWFUL EVEN IN OFFICE SHUT DOWN SITUATION

The Beijing No.3 Intermediate People's Court recently ruled that an employer's termination of an employee on "major change" grounds was unlawful even though there was an office closure, and ordered statutory damages, compensation for unused annual leave and underpaid wages totalled around RMB 66,000.

An employee was hired by an oil company ("Company") as the sales director of the Company's sales department, working from the Beijing sales office. The Company notified the employee, via email, of its decision to immediately shut down the Beijing sales office due to enterprise development strategies and corporate restructuring.

Later the Company unilaterally terminated the employee's employment after he completed his work handover procedure and was in negotiation with the Company for mutual termination. The employee then sued the Company and claimed reinstatement.

The court found that the shutdown of the Beijing sales office just affected certain geographic job functions of the employee but had not resulted in the elimination of his entire job function, thereby not satisfying the criteria for a "major change of the objective circumstances". Therefore, the court ruled the termination unlawful. Although the employee originally sued for reinstatement, the employee reportedly amended his claim to ask for monetary damages instead, after the court found several emails of the employee's which demonstrated his intention for mutual termination.

Key Take-Away Points
This case indicates that an office shutdown may not necessarily constitute a "major change" for the purposes of justifying a unilateral termination under Article 40(3) of the Employment Contract Law, if the employee's job function is not entirely eliminated as a result of the shutdown. It also demonstrates that if the company can prove the employee's intention to accept mutual termination, it could help to defend against a reinstatement claim, thereby avoiding the worst case scenario in a lawsuit (i.e., being ordered to taking the employee back).

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GERMANY:

DISMISSAL FOR OPERATIONAL REASONS IN THE CASE OF A VACANCY ABROAD

In principle, notice of dismissal for operational reasons cannot be given if it is possible to give the affected employee another comparable vacant position in the company. In this case, an employer is not, however, obligated to offer a job in a business or business unit located abroad. This was again confirmed in a recent decision by the German Federal Labor Court.

This case concerned a bank with its headquarters in Turkey. It also had a few branches in Germany. These branches were closed on 30 April 2011. A Turkish employee of one of these branches was assigned to work as a director of the foreign business department in an office in Istanbul, but he did not take up the position.

After warning the employee twice on grounds of refusal to work, the bank terminated the employment relationship for cause (without notice) by letter of 31 May 2011, or, as an alternative in case the termination for cause was deemed to be invalid, for convenience (with the ordinary notice period). The employee objected to the termination, arguing that the termination for cause on grounds of conduct was invalid because the bank was not able to assign him work in Turkey by virtue of its right to issue instructions.

In his opinion, his employer was also not entitled to issue a notice of termination of employment for operational reasons because it first would have had to issue a notice of termination pending a change of contract, as a less severe measure, with the purpose of employing him as head of the Turkish branch. The lower courts allowed the employee's claim. In the proceedings before the Federal Labor Court, the only issue was the validity of the ordinary termination (with notice).

The Second Senat considered the transfer to Turkey invalid because in ordering this the employer overstepped the limits of its authority to issue instructions. The judges also ruled, however, that the ordinary termination was necessary for operational reasons because it was not possible to continue the employment relationship with the employee in Germany. The employer's obligation arising from the Act on Protection Against Unfair

Dismissal to continue to employ the employee in a vacant position in order to avoid termination does not apply to jobs abroad.

The Federal Labor Court pointed out that the bank did not act in a "self-contradictory manner" by primarily relying on the employee's refusal to work in Turkey as instructed, but alternatively justifying the termination for convenience by stating that it was not necessary to employ him there. For one thing, the employee was affected by the elimination of the need for employment in Germany only if the transfer to Turkey were deemed invalid. For another, the assumption of the bank that it had a transfer right is readily compatible with its denial of an obligation to transfer. (Federal Labor Court of 24 September 2015– 2 AZR 3/14)

WORKING WHEN AND WHERE IT IS CONVENIENT

A year ago, the German Ministry of Labor and Social Affairs started the dialogue "Work 4.0" and raised the question of whether it is necessary, in view of the current technological trends, social developments and changes in the labor market, to create a new working model or concept.

What exactly is behind the term "Work 4.0"?

In using these words, the Ministry links the term to "Industry 4.0", the catch-phase for the fourth industrial revolution. It describes the historical development of the world of work in this context as follows:

- Work 1.0 refers to the beginning of the industrial society at the end of the 18th century.
- Work 2.0 describes the emergence of the welfare state and the beginning of mass production at the end of the 19th century.
- Work 3.0 covers assembly line production and the development of trade unionism and the social market economy. The term includes, however, further automation through information technology and electronics. Work 3.0 also describes the advancing globalisation.
- Work 4.0, finally, means work in the era of digitalisation and the increasing importance of the Internet.

Work 4.0 will be better connected, more digitalised and more flexible than any other historical phase before. How the future world of work will be organised, exactly, is still unclear, however. It is already apparent now that, in many areas of work, temporal and spatial boundaries are "blurring", because laptops, tablets and smartphones with email and Internet access have become standard in the world of work.

This brings advantages and disadvantages for all those involved. For employees, this means, first of all, that a working day no longer ends when they leave the employer's premises. In a survey by the Forsa Institute, half of the people in work said that they regularly have to be available for line managers, customers and coworkers after office hours even now.

Beside these onerous components, however, the possibility of flexible work offers employees considerably more self-determination with regard to their work. Work can often be performed at home, for example, so it is easier for employees to incorporate family needs into their day-to-day work.

By working at home, it is possible to avoid the rush-hour traffic, and appointments with builders and plumbers can be smoothly integrated in the daily routine. Against this background, even managerial positions can be reconciled more often with part-time jobs.

Employers benefit from this way of working, on the one hand, by the fact that it is easier to have work done quickly and travelling times can be used more effectively. Moreover, employees who live far from their place of work or can rarely be on-site due to family matters can be better integrated – an important aspect in the context of the existing shortage of skilled workers. On the other hand, the employer can supervise the employees only to a limited degree and has to place more trust in them.

In the following, we will outline whether and how modern forms of work can be implemented in compliance with the existing laws and where German labor law is reaching its limits. The questions to be answered are therefore:

What labor law particularities should be heeded with regard to Work 4.0? How much flexibility is compatible with existing laws?

1. Flexible Working Hours

As a rule, employers are entitled to specify at their due discretion when their employees have to work if no contractual, works or collective bargaining agreement exists. Insofar, flexible working is generally possible, but an employer has to comply with the statutory requirements, especially those under the German Working Hours Act (Arbeitszeitgesetz, ArbZG):

Maximum Working Hours
First, it is provided for under § 3 of the Working Hours Act that workers may not, as a rule, work more than eight hours on working days. It is possible to extend the maximum working hours to up to ten per working day if an average of eight hours per working day is not exceeded within six calendar months or within 24 weeks.

Clearly more flexible working would be possible if the law-makers abolished the maximum hours per day and instead merely provided for maximum weekly working hours—this is what also employers' associations demand.

Rest Periods
According to § 5 (1) of the Working Hours Act, employees must have an uninterrupted rest period of at least eleven hours after the end of their working day before they resume their work. If an employee works at home late in the evening, this means in fact that he may resume his work only eleven hours later and thus possibly may not be allowed to appear at his place of work as early in the morning as usual.

According to the wording of the Act, the obligation to rest for eleven hours applies even if the interruption of the rest period is only for a short time such as a short telephone call in the evening. It is disputed, however, whether the rest period starts to run anew each time in such situations. From a legal point of view, the idea of interrupting work in the

afternoon, for family matters, for example, and resuming it in the evening is therefore often not possible in practice.

The rest periods required by law are intended for employment relationships that are organised in the traditional way. If, for example, core working hours are provided for and/or an employee's physical presence is in fact required, provisions like this can be reasonable, because rest periods include, among other things, necessary home-to-office and make-ready times for the employee. For mobile work, however, these rigid rest periods are counterproductive and outdated.

Work on Weekends and Public Holidays
First, it should be noted that Saturdays are working days in terms of the Working Hours Act. Unless otherwise agreed, employers may order that work be performed on Saturdays, and employees may perform their work on these days.

Sundays and public holidays are more of a problem, because the Working Hours Act protects rest on Sundays and public holidays. Without an official permit, work is possible on these days only in exceptional cases – namely for occupations specified under § 10 of the Working Hours Act (e.g., emergency and rescue services, nursing services, restaurant operations). These public law provisions are also mandatory for employees. Therefore, they may not simply boot up their laptop and do preparatory or follow-up work, although this is often reality today.

These statutory regulations should also be put to the test in the interests of making work as flexible as possible and achieving a self-determined work life balance for the employees.

Remuneration
If it is agreed that an employee can work flexible hours, work on weekends or work in the evening should also be remunerated. It should be heeded when drafting employment contracts that no extra payments will be rendered for work performed voluntarily—thus not requested by the employer—at night and on weekends.

2. Flexible Places of Work

Not only working hours can be organised flexibly. The era of current digitalisation opens up the opportunity for many professions that also the place where the work is to be performed can, at least in theory, be freely chosen. The home-office topic has been discussed for many years. Now, however, the trend is that work is also performed while travelling, at the pool, in the café or at similar places (the so-called "mobile office").

Unless otherwise agreed, the question of where an employee has to perform his work is subject to the employer's authority to issue instructions. There is no general entitlement to work in a home office or a mobile office, however. A clear contractual agreement is therefore recommended.

Liability
An important question regarding work from a home or mobile office is who is liable if the employer's property is damaged. If the damage is caused by the employee himself, the principles of limited employee liability apply. The employee is only fully liable for intent or gross negligence. In the event of slight negligence, the employer is liable for the damage; in the event of ordinary negligence, the damage is shared pro rata by the parties.

If the work is performed from a mobile office, there is an increased risk that third parties, thus family members, for example, damage the company's property. It is disputed who will be liable then. What seems to make most sense is to regulate this by contract. The employee should be expressly obligated to store the company's property in such way that it cannot be damaged, for example by family members. If the employee does not do this, he will be fully liable.

Data Privacy Protection
In terms of data protection law, there are only few particularities to be considered for mobile work, because this is still to be considered internal data processing. The employer is, however, generally obligated to take the necessary measures to warrant data security and might therefore be required to take special precautions for the mobile work. The employee should, for example, be bound by contract to protect personal data in the mobile office against loss. For work performed while travelling, privacy shield foils should be obligatory for electronic devices. Employees should take care not to disclose any business secrets during business calls in public.

Occupational Health and Safety
The Occupational Health and Safety Act (Arbeitsschutzgesetz, ArbSchG) applies also to mobile work. The employer must thus organise the work, also work performed in this form, in such a way that a risk to the life or health of the worker is avoided to the greatest possible extent. For this purpose, the company must carry out a risk assessment (§§ 3 et seqq. of the Occupational Health and Safety Act). Where an employee works from a home office, the company should, above all, have a contractual right of access to the employee's domicile granted. It should be noted that such rights of access cannot be enforced to an unrestricted extent and at any time. They can be granted only in individual cases and after prior agreement with the employee.

Bring Your Own Device (BYOD)
A question that often arises with respect to mobile work is to what extent it makes sense to allow employees to use their own mobile devices, such as private smartphones, for their work. Apart from the possible problems involved in the integration of such devices in the internal network of the company, it is also a problem for an employer that the data will not always be readily available for the company if they are stored on a private end device. If this is being considered, it should therefore be ensured that business and private data are separated on these devices. Moreover, the company should ensure that business secrets are sufficiently protected also on an employee's end device.

3. Issues Relating to the Works Constitution Act

In the context described above, the works council has codetermination rights primarily in three areas:

- Section 87 (1) No. 2 of the Works Constitution Act: codetermination right of the works council regarding the scheduling of the daily working hours and the breaks;
- Section 87 (1) No. 3 of the Works Constitution Act: codetermination right regarding the temporary increase or decrease of usual working hours;
- Section 87 (1) No. 6 of the Works Constitution Act: codetermination right regarding the introduction and application of technical installations intended to monitor the conduct or work of the employees.

It should be noted in view of § 87 (1) No. 6 of the Works Constitution Act that many of the mobile end devices used in mobile offices are suitable for monitoring the employees' conduct. An employee can, for example, easily be located or monitored as to whether he has worked his full working hours via his smartphone.

In summary, it can be noted that the works council has codetermination rights in respect of many areas of work concerning the mobile office. The extent to which flexible solutions can be agreed on in a company thus also depends on the relevant works council. Rethinking will often be necessary here, not least also in the interests of the employees.

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IRELAND:

THE CONCEPT OF "REASONABLE ACCOMMODATION" UNDER IRISH EMPLOYMENT EQUALITY LAW

The High Court recently affirmed a decision of the Labour Court which had awarded an employee €40,000 compensation on the basis that her employer had failed to engage in any meaningful way with the concept of "reasonable accommodation" under the Employment Equality Act, 1998 - 2015 (the "Equality Acts").

The decision in Nano Nagle School v Daly provides helpful guidance regarding the steps which employers need to take to ensure that they are meeting their statutory obligation to provide reasonable accommodation to employees/prospective employees with a disability.

The Equality Acts provide that an employer is not required to recruit, promote, retain or provide training or experience to an individual if he/she "is not fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed".

Before the Labour Court, the employer had argued that the above quoted section did not require an employer to continue an employee in employment who was not fully capable of undertaking the job which he/she was employed to do. Before the High Court, the employer modified its position and conceded that the statutory obligation could require the stripping out of tasks peripheral to the original job.

The concept of reasonable accommodation is elaborated upon in the Equality Acts which also provide that a person with a disability "is fully competent to undertake, and fully capable of undertaking, any duties, if, the person would be so fully competent and capable on reasonable accommodation (referred to as "appropriate measures") being provided by the person's employer". The Act goes on to define the term "appropriate

measures" as including the adaptation of premises and equipment, patterns of working time, distribution of tasks etc.

By way of factual background, the plaintiff in this case had been employed as a special-needs assistant (SNA) by a school. Following an accident, she became paralysed from the waist down and wheelchair bound. She was referred for various occupational health assessments and the school arranged for a number of risk assessments to be conducted.

An occupational therapist had determined that Ms. Daly could carry out 9 of the 16 duties of an SNA or return to work as a floating SNA which would obviously have necessitated the reorganisation of other SNAs' duties.

The school maintained that there was no position of floating SNA, albeit that any potential redistribution of tasks to other SNA's was not discussed with them. In essence, therefore, the school insisted that Ms. Daly be able to perform all of the duties attached to her role as an SNA.

The High Court concluded that the school's interpretation of the concept of reasonable accommodation was erroneous stating that if such a position were correct "it would seem difficult to envisage any circumstances in which a person suffering from a disability could be reasonably accommodated". The High Court agreed with the Labour Court that the school had not fulfilled its obligations under the Act in not having considered a redistribution of Ms. Daly's tasks.

This case provides employers with an important reminder of, their obligation to reasonably accommodate individuals with a disability and the specific steps which should be taken to ensure that the statutory obligation is satisfied.

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DECRIMINALISATION IN EMPLOYMENT

Legislative Decree no. 8 of 15th January 2016 (implementing Law no. 67 of 28th April 2014), in force since 6th February 2016, decriminalised several employment and compulsory social security contribution related offences.

Art. 2 paragraph 2 letter a) of Law no. 67/2014 gave the Government the task of converting all employment and compulsory social security contribution offences into administrative offences, which are solely punishable with a fine or a penalty.

Only work health & safety offences are expressly excluded from the conversion into administrative offences, in accordance with the annex of the same delegating decree (Art. 1 paragraph 3 of Legislative Decree no. 8/2016).

There are three areas of decriminalisation:

- Social security (with the exception of the payment of withholding tax and false declarations or fraudulent acts in order to obtain welfare services);
- Outsourcing (unlawful temporary agency work, unlawful secondments and contracting work out unlawfully);
- The labour market (abusive exercise of labour intermediary activities and of personnel recruitment, the violation of the compulsory outplacement of blind masseur-physiotherapists, unlawful mediation in assisting workers and gender discrimination).

LEGISLATIVE CHANGES: DRAFT LAW ON SELF-EMPLOYMENT AND SMART WORKING

During Session no. 102 of 28th January 2016, the Council of Ministers approved a draft law (DDL no. 2233 - still under discussion in Parliament and which is expected to be approved by the end of May), which made provisions for the protection of non-entrepreneurial self-employment, as well as provisions aimed at favouring the flexible structuring of employment working hours and places of work.

The most important changes are as follows:

Should a self-employed worker give birth to a child, she will be able to receive maternity allowance, while continuing to work, for two months prior to the date of birth and the three months that follow. Furthermore, it will be possible to obtain parental leave of six months in the first three years of the child's life.

The pregnancy, sickness or injury of self-employed workers will not entail the termination of the work contract, the performance of which remains suspended, without any entitlement to pay, for a period not exceeding 150 days in the calendar year.

In case of sickness and injury that is serious enough to prevent the performance of the professional services for a further 60 days, the payment of the social security contributions and the insurance premiums will be suspended for the entire duration of the illness and the injury up to a maximum of 2 years.

The arrears can then be recovered, for social security purposes, by means of instalments for a period equal to three times the period for which the professional services were suspended.

The expenses incurred for vocational training activity can be completely deducted from taxes within an annual limit of Euro 10,000. Also deductible in full are the charges incurred for coverage provided by insurance or other forms of cover against failures to pay for the self-employment services rendered.

The clauses which give the principal the power to unilaterally amend contractual terms and conditions, to terminate the contract without adequate notice and which set payment terms exceeding 60 days will all be prohibited.

Finally, a specific bundle of laws has been introduced which aims at governing a new way of performing work under an employment contract: flexible working. This consists of providing services under an employment contract which can be performed, in part, at the company's premises and, in part, outside of such premises, solely limited by a maximum duration of daily and weekly working hours as provided for by the law and the collective bargaining agreement.

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EMPLOYER'S CONTROL ON EMPLOYEE'S ACTIVITY: REFORM OF ARTICLE 4 ITALIAN WORKERS' STATUTE OF RIGHTS

Under Italian employment law, the control over the employee's activity has been forbidden for years. This means that the employer could not implement any technical, mechanical, audiovisual system that – even if implemented for other reasons - allowed the control on the employees' working activity.

Article 4 of the Italian Workers' Statute of Rights (Law no. 300/1970) prevented the use of any technical or mechanical control over the employee's activity: the employers could not use any video cameras, mechanical systems, software, and any other device that could let the employer acknowledge if and how the employees were working during the working time.

The employer could use this kind of systems only for technical, organisational reasons and for reasons linked to the safety at work, but only after having reached an agreement with Unions. These kind of systems were usually allowed to protect the Company's properties (like video cameras filming the cash registers for avoiding thefts).

Last September 2015, the Italian Jobs Act amended Article 4 of the Italian Worker's Statute of Rights, and some significant changes were introduced. Pursuant to the new legislation, the regulation of the use of audiovisual systems and any other device through which the employer can control the employee's activity remained unchanged: these systems can be implemented only for productive and organisation reasons and for protection of the Company's properties with the green light of Unions representatives.

Moreover, the new Article 4 Law 300/1970 allows the employers to process and use all information obtained from devices given to employees for performing the working activity such as GPS in company's car, the mobile's app used for working reasons, the security pass, the laptop, the iPad or similar IT equipment used by the employees for working reasons.

The big revolution of this new regime consists in the fact that the employer can use the information obtained from these devices for any purpose linked to the employment relationship, and this means that the companies can use the information, for example, for evaluating the employee's performance and for disciplinary issues.

This is a strong reform under Italian law: what previously was absolutely forbidden, like checking the employee's activity through the work equipment, is now allowed. The employer can keep under control the employees' mobile phones, GPS, personal computers and laptops and all information obtained are valid and useful for evaluating the employees' performance, also from the poor performances process point of view, as well as for disciplinary procedures.

The only employers' obligation is to inform in advance the employees about the use of the equipment they are going to implement. Therefore the companies should draft new internal policies, duly published and delivered to the employees, in which they clearly and fully explain how the work equipment will be used and which information the employer will obtain from it and the aim of such control.

This new regime has not been universally adopted by Italian companies yet, because employers are perhaps still waiting for the first Judge's interpretation, which will clarify some interpretative doubts still existing, with reference for example to what can be considered as work equipment, and how to implement any control on equipment used for private purposes after the working time.

At this time, no Italian Judge has had the opportunity to pronounce on this matter, therefore the employers are now slowly and reluctantly implementing this discipline, from one side with the desire to change the rules, but on the other side with the fear of the Judges' contrary decisions, that could lead to convictions of paying damages to the employees.

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NETHERLANDS:

POSTING OF WORKERS IN THE NETHERLANDS: NOT DUTY-FREE

The Dutch government proposes that it will impose new and rather far-reaching duties on companies receiving posted workers in the Netherlands. Host companies will become co-responsible for posted workers earning the wages they are entitled to.

Like other European governments, the Dutch government is in the process of implementing Directive 2014/67/EU (the "Enforcement Directive") in national legislation. Ultimately by 18 June 2016, the Enforcement Directive must have been implemented. Given the contents of the Enforcement Directive, it is no surprise that the Dutch government intends to impose several new duties on (international) service providers through the proposed Employment Terms for Posted Workers in the European Union Act (Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie, the "Proposed Act").

Examples are the duty to have certain employment related documentation available at the posted worker's work place, the duty to appoint a contact person in the Netherlands,

and the duty to identify itself, the posted worker, and the contact person with the Dutch Department of Social Affairs & Employment (the "Department"), before the posted work starts his/her work. So far, nothing unexpected.

However, in the Proposed Act the Dutch government wishes to implement more measures (i.e. to "gold plate") than those mentioned in the Enforcement Directive. This will also, and mainly, affect the receiving companies.

The Proposed Act includes a duty for the receiving company to examine the information which has been provided by the service provider to the Department, and to inform the Department of any misstatements. Noncompliance by the receiving company can attract a fine of up to € 20,250.

The government takes this opportunity to "clarify" the meaning of "minimum wage" for posted workers, as mentioned in the Posted Workers Directive (96/71/EU). In essence, the government wants the Dutch interpretation of minimum wage to include all wage elements as mentioned in the ECJ's judgment in Sähköalojen ammattiliitto v. Elektrobudowa (ECLI:EU:C:2015:86).

This is remarkable, as the ECJ stressed in Elektrobudowa that the interpretation of "minimum wage" in the Posted Workers Directive is a matter for the law of the Member States.

The ECJ assessed the wage elements that were at issue in Elektrobudowa in the specific Finnish context of that case. It seems odd that the Dutch government interprets this judgment as if it were to give a standard interpretation of "minimum wage" for all Member States.

Nevertheless, the Proposed Act will increase the wage level of posted workers, as it will include elements such as overtime fees, vacation payments, end of year bonuses, and expense allowances, provided that these elements form part of a collective labour agreement which has been declared universally binding ("erga omnes"). Any payments received by the posted worker in consideration of travel from the home country to the posting country, housing and food cannot be included in the calculation of the minimum wage.

These changes are specifically relevant in the Dutch context, as the Proposed Act, in combination with the Labour Market Fraud (Bogus Schemes) Act (Wet aanpak schijnconstructies), which entered into effect in July 2015, will allow for posted workers in the Netherlands to not only claim the "minimum wage" at the Dutch courts but also to claim payment of this wage from the receiving company, if certain conditions are met.

In short, receiving companies are liable for payment of the posted worker's wages, unless they can show that they are not to blame for the fact that the posted worker has not been paid in full by its employer (the service provider). Whether the receiving company was not to blame, is a fact-sensitive matter.

It has been made clear by the legislator that the receiving company should act proactively and take measures to ensure that the posted worker receives the right payment. If, for example, the receiving company paid a price to the service provider that was not realistic in comparison with the (right) wage of the posted worker, the receiving company is not free from blame.

Should the Proposed Act be adopted, and there are no indications that this will not happen, companies receiving posted workers in the Netherlands will have to take measures to ensure that posted workers receive the wage they are entitled to under Dutch law. Receiving posted workers is not duty-free, despite its international context.

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SAUDI ARABIA:

WOMEN IN THE WORKPLACE

The employment of women both foreign and national in the Kingdom of Saudi Arabia has long been the subject of debate and examination by the Ministry of Labour. The Ministry of Labour has long aimed at increasing the rate of KSA female participation in the workforce. There have been misconceptions on the ability of women to work in the Kingdom and it is important to note that the amended labour law has a number of provisions which are expected to encourage women working. In this article we examine the main regulations on the employment of women as well as the amended labour law provisions.

Women are permitted to work in KSA in accordance with cultural and religious norms which require that female employees are segregated from male colleagues in the workplace, with separate facilities, work stations and work place entrances. It is worth noting that observing such regulations can sometimes be conditions of a property lease for the use of office premises. These restrictions remain important to observe as the Ministry of Labour has power to inspect the premises and order a temporary closure for remedial purposes.

Restrictions on Roles
In terms of the roles women can fulfil in the workplace there are no formal restrictions in place apart from an obligation on an employer to ensure the health and safety of all employees including female employees. There is also a prohibition in the amended article 149 of the KSA Labour Code on the employment of a female employee in hazardous and detrimental jobs, with the Minister of Labour having authority to decide which professions would be hazardous and detrimental for a female employee to be engaged in.

There are twenty-four prohibited site roles that are hazardous and detrimental, such as working within mines and quarries, sewage, construction work or renovation and anything that requires working on a scaffold or heights. Women are also prohibited from working in asphalt production roles, car repair workshops, forges and many other related roles. The key being the physical element of such work which is regarded as overly strenuous for women. Women can hold administrative positions within organisations operating in such sectors. Their ability to hold professional roles within such sectors such as engineering or project management is less clear and would require further examination of the working conditions and interaction on site.

Greater Female Participation

Notwithstanding the potential restrictions on women outlined above, the Ministry of Labour has actively sought to increase female participation in the workplace by issuing regulations regarding the employment of women in factories, theme parks, retail outlets and more controversially ordering that all retail outlets for female lingerie should be staffed entirely by Saudi Arabian women.

These regulations have enabled employers to feel more confident about employing women and placing them within the work environment. It is also notable that amongst the new fines introduced in October 2015 to support enforcement of the amended KSA Labour Code, there is a fine applicable to female employees individually for not wearing the headscarf in the workplace as appropriate. This new fine can be analysed as an acknowledgement that in certain roles or environments there may be greater interface between female employees and the public (for example at checkout counters in supermarkets). It is also notable that due to the number of female teachers at all levels of education, the workforce female participation rate in KSA is higher than in certain other parts of the GCC.

Remote working has also been promoted to encourage women to work with the Ministry of Labour permitting remote working female employees to be counted under Nitiqat in accordance with the employer's Nitiqat rating. The Human Resources Development Fund also has a subsidy programme for employers operating remote working for women under which funds for training and reimbursement of salary costs can be granted.

Family Friendly Rights under the Amended Labour Code

Even prior to amendment, the KSA Labour Code contained a number of provisions which protected female employees who took maternity leave such as the provision prohibiting termination of employment or the issue of a warning during maternity leave, or due to the employee's maternity or illness resulting from maternity and childbirth.

Under the amended Labour Code, female employees are now entitled to maternity leave with full pay for ten weeks (regardless of length of service), compared to a four-week paid leave prior to the amendments. Further, if the new born infant is ill or has special needs, she is entitled to an additional fully paid leave of one month leave commencing after expiration of the core maternity leave period.

Another key amendment is to bring the leave entitlement for a Muslim female employee whose husband passes away in line with the Islamic requirement. Muslim female employees are now entitled to the prescribed period of "Iddah" of four months and ten days from the husband's death date, to comply with the Shariah Law.

Moving Forward

The KSA authorities and Ministry of Labour in particular are clearly keen to create job opportunities for women and there is anecdotal evidence that recruitment of female employees has worked extremely well for large multinationals; of note is the Tata/GE venture to create a call centre staffed entirely by women. The economic need for KSA women to participate in the workplace is growing and they have a key contribution to the development of the Kingdom.

In the coming years, we expect to see greater measures to encourage women to work including the encouragement of part time work. The Ministry of Labour has been holding

workshops in key centres across the Kingdom to inform women of their rights to work and it has also conducted a social media campaign to promote their employment.

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UAE – United Arab Emirates:

END OF SERVICE GRATUITY

End of Service Gratuity (Gratuity) is a statutory severance pay across most Middle Eastern jurisdictions and one which is conceptually analysed as akin to a retirement savings scheme or pension scheme.

This article explores some of the common pitfalls and tricky issues which arise in relation to statutory Gratuity in the United Arab Emirates (UAE) under Federal Law No.8 of 1980 Regarding the Organisation of Labour Relations, as amended (UAE Labour Law). This is, however, a regional issue and many of the points flagged below will apply equally across the Middle East.

Potential Pitfalls when Calculating Gratuity
The UAE Labour Law sets out a prescriptive formula for calculating Gratuity and whilst it does not expressly state that this benefit is payable in relation only to service in the UAE this is certainly the accepted position. However, many employers often inadvertently recognise non-UAE employment service through contractual agreement, for example where an employee is an international transfer from another jurisdiction within the business. It may be possible to recognise seniority but contractual provisions should be carefully worded so that the Gratuity benefit is not thereby enhanced.

Another area for consideration is where an employee receives commission or bonus payments during the employment. The UAE Labour Law provides that Gratuity should be calculated on the basis of remuneration excluding all benefits in kind and any type of allowance. This wording leaves the position of commission or bonus payments potentially ambiguous and whether or not such payments should be taken into consideration when calculating Gratuity will very much depend on the particular details of any commission or bonus scheme.

Gratuity as an Inherent Employee Entitlement
Employers new to the Middle East can sometimes be surprised at the inherent nature of the entitlement to Gratuity and that it is, generally speaking, payable regardless of whether the employee resigns (albeit sometimes subject to reductions, explained below) or is dismissed (other than for gross misconduct).

Gratuity may be subject to reductions where an employee resigns from his/her employment depending on the type of contract and the employee's length of service.

However, once an employee's service reaches 5 years, they will be entitled to their full Gratuity payment, notwithstanding that they have resigned from their employment.

No Gratuity is payable where an employee's employment is terminated for one of the exhaustive list of gross misconduct reasons set out under Article 120 of the UAE Labour Law. However, this Article is generally reserved for the most serious acts of gross misconduct, often involving a criminal element, and in practice it is extremely difficult to validly terminate on this basis.

More commonly, in cases of poor performance or misconduct, employers will terminate on notice for, what is referred to under the UAE Labour Law as, a "valid" reason. In such circumstances, the employee is entitled to their full Gratuity, notwithstanding that the reason for the termination of their employment is their poor performance or misconduct, for example.

Interaction with Pensions – GCC Nationals
The UAE has in place reciprocal pension arrangements with other GCC countries The aim of this legislation is to ensure that a GCC national receives the same treatment or benefit with regard to state pension as he would have had if he worked in his home country, in accordance with the laws of his home country.

There are minimum and maximum earning levels for such pension contributions to be made and a GCC national is potentially entitled to Gratuity on any basic salary earned in excess of the maximum earnings level for pension contributions. On a contractual basis, employers should take care not to inadvertently grant such GCC employees Gratuity in addition to contributions into the state pension scheme.
Interaction with Pensions - Non GCC Nationals

Under the UAE Labour Law, it is possible for an employer to contribute into a pension scheme for the employee in lieu of the obligation to pay Gratuity. On termination of employment, the employee can choose to receive either pension or Gratuity, whichever is more favourable to him/her.

In our experience, it is often difficult for employers to establish that contributions made into a pension scheme on the employee's behalf validly replace the right to Gratuity, particularly where such contributions are made into an international pension scheme.

The UAE Courts appear to be reluctant to accept that contributions into an international pension scheme are more beneficial to an employee than Gratuity as an employee will generally only receive the pension benefit once he/she reaches the relevant retirement age, whereas Gratuity is payable immediately.

Nonetheless, employers may wish to offer pension benefits as a means of retention or, increasingly, because it is market practice to do so (particularly for senior or C-suite level employees and internationally mobile employees).

Where such a benefit is provided, the risk of having to provide both Gratuity and the pension benefit may be mitigated through contractual provisions to ensure a double benefit is not provided; essentially through securing clear employee consent to the pension being in lieu of Gratuity and also agreed claw back of contributions if Gratuity is later claimed by the employee.

The rules of any pension scheme or savings scheme should also be reviewed and the administrator or provider of the scheme consulted to ensure that the schedule rules themselves can protect the employer as much as possible.

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UKRAINE:

UKRAINE TO GET NEW LABOUR CODE AFTER 14 YEARS OF DRAFTING

The present situation in Ukraine gives our society many challenges. The Ukrainian economy suffered significantly as a result of two years of instability, military and political escalation. Depreciating Ukrainian currency value led to an increase in redundancies and the unemployment rate grew. The situation is aggravated by inefficient labour legislation, which gives no remedies to address the realities of the labour market in Ukraine. The current Labor Code is an archaic set of laws dating back to 1972, which does not correspond either to the present economic environment, or to the needs of participants in employment relations.

The new Labour Code had been drafted for more than 14 years already. Ukraine expected it to be adopted in 2007 and later in 2013, but unsuccessfully. In November 2015, a new draft of the Labour Code (the "New LC") was approved on the first reading by the Verkhovna Rada of Ukraine (Ukrainian parliament) and forwarded to respective specialised Committee for finalisation. On the wave of reforms in Ukraine and being pushed by society, we expect Verkhovna Rada to adopt the New Labour Code in 2016.

When it happens, Ukraine will experience some changes in labour legislation, which are claimed to be designed to find and set the balance between the needs of employees and business, facing economic and social realities in Ukraine.

The New Labour Code suggests concluding written employment agreements with all employees. Current legislation does not oblige parties to conclude written employment agreements. It is deemed that employment relations start when employees get access to work. On the contrary, the New Labour Code will require conclusion of written employment agreements, which should bring a benefit to employees as all covenants of the parties are recorded on paper. Those who are already employed without written agreements should bring it in compliance with new laws during 6-12 months.

At the same time, the New Labour Code provides for abolishing of employment *contracts* (special forms of employment agreement, stipulated by Ukrainian labour legislation). Employers will be deprived from concluding contracts instead of agreements. At present, an employment contract allows the application of specific regulation to some aspects of employment relations.

For instance, the contract may provide for extra responsibilities of the parties and additional (other than those stipulated by law), grounds for termination. The Legislator decided that significant issues of employment relations such as grounds for termination, volume of rights and obligations should be governed exclusively by law, not by the parties. Hence, all employment contracts effective on the date of adopting of the New Labour Code shall be treated as fixed-term employment agreements and all (additional) commitments, which contradict the law, shall be deemed invalid.

One of the progressive changes in the recruitment process is that the employer receives a legal right to collect information on the candidate's previous work experience before employing, pursuant to consent of the candidate.

The New Labour Code also amends regulations on termination of employment. An Employer will be able to dismiss a single mother for failure or pure performance of her labour duties. Today such employees are totally protected from dismissal upon the employer's initiative and they may abuse this privilege bringing harm to working processes and business goals of the employer. Thus, employers consider such a step as reasonable and justified.

Another novelty is that an employer shall be able to dismiss an employee due to emergency or unforeseen events, such as military invention, natural disasters, etc.

Also, the New Labour Code provides for an option of temporary suspension of employment relations in special cases, e.g. while an employee is performing state or social duties.

The concept of flexibility in employment relations is reflected in two more novelties in the New Labour Code. Soon new types of flexible working regimes will be introduced: divided working hours, remote working, self-scheduled working regime will be available to employees.

Redundancy procedure gets more flexible as well. The New Labour Code stipulates an optional approach to notification of employees on future redundancy. The general notification period shall remain two months as it is now. Together with that, an employer may reduce the notification period to one month, provided that he shall compensate an employee one average wage for application a short-term notice.

Also, the New Labour Code extends the general limitation period for judicial recourse from 3 months to 1 year, giving employees an opportunity to wider exercise of their right to protect the violated rights and interests.

Even if it is difficult now to foresee the extent of benefit of the New Labour Code, we believe that substitution of old USSR-styled legislation is always a step forward for Ukraine.

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UNITED KINGDOM:

THE LAST WORD ON HOLIDAY PAY?

On 22 February 2016, the Employment Appeal Tribunal gave judgment in the important holiday pay case of British Gas Trading v Lock, the last in a series of cases which had similar outcomes. Permission to appeal was granted but it provides a useful summary of the law as it now stands.

Commission Payments
The case concerned an employee who was paid partly in commission but only received holiday pay calculated from his basic salary. The EAT, following the guidance of the European Court of Justice, concluded that his commission should have been taken into account in his holiday pay.

The judgment is also noteworthy because it disapproves the earlier Court of Appeal decision in Evans v Malley, a case about commission in which the European law angle was not considered.

Non-Guaranteed Overtime
Although Lock is a case about commission rather than about overtime, it is significant because it reconsidered at length the previous decision of the EAT in Bear Scotland v Fulton. Despite a very strong effort to persuade the court to overturn its earlier decision, the EAT declined to do so. This is no great surprise but reinforces the growing sense that Bear Scotland correctly reflects the law.

Bear Scotland decided that overtime which is compulsory but is not guaranteed by the contract of employment should be included for the purposes of holiday pay, and this is confirmed by Lock.

Voluntary Overtime
Bear Scotland did not directly address the question of overtime which is entirely voluntary but this has recently been considered by the Northern Ireland Court of Appeal which held that this type of overtime should be taken into account for holiday pay purposes as well. Although the judgment is not strictly binding in England and Wales, it will be seen as persuasive and is likely to be followed.

Lock does not deal with the issue of voluntary overtime and so the position remains unchanged. It would seem that all overtime must now be included in holiday pay. The only possible exception is overtime which is paid in very rare circumstances, and is not something which employees expect.

Radius Allowance, Travel Time Payments and Expenses
Bear Scotland also expressly held that radius allowance and travel time pay ought to be taken into account when calculating holiday pay. Lock reinforces this view by approving Bear Scotland.

However, expenses, such as payments for mileage when travelling by car, or the reimbursement of train tickets, do not have to be included. The key distinction appears to be whether tax can be deducted or not. Pay for travelling between assignments is taxable and so it should be included.

Other Payments Intrinsically Linked to Employment Tasks
Lock reinforces not only the conclusion in Bear Scotland, but also its reasoning, which is likely to have consequences for other types of payment. In particular, a payment should be included for holiday pay purposes if there is an "intrinsic link" to tasks which a worker is required to carry out.

There are a number of payments for which it is likely that such an intrinsic link must surely exist:

Standby payment On call payments Acting up payments
Although there have been no specific cases on any of the above payments, the reasoning in Bear Scotland, as followed in Lock, very strongly suggests that they should be included in holiday pay.

Bonuses
There are now few remaining grey areas but one which does exist is certain types of bonuses.

The first type is bonuses which are not paid for performance and so are not intrinsically linked to work done. An example might be a Christmas bonus of a fixed amount paid to all staff annually. This may not have to be included in holiday pay but there are arguments on both sides. Until the matter is resolved, a cautious approach is to include such payments in holiday pay calculations.

Another grey area is discretionary bonuses but there is a significant danger here because many bonuses asserted to be discretionary have been found by courts and tribunals to be terms of the employment contract. If so, they must be included in holiday pay. Caution is urged once again.

The Calculation Period
Except where an employee has regular hours and regular pay, UK law requires holiday pay to be calculated by averaging pay over the twelve weeks prior to taking holiday. This can lead to some strange results. If an employee works a lot of overtime, or earns a lot of commission, immediately before going on holiday, it could mean that the amount of holiday pay owed is artificially inflated.

Although the European courts are strict in other ways, they have not questioned this area of UK law. Both Bear Scotland and Lock have made changes to the law, without affecting this period. Therefore, the legally correct approach is to use a twelve week calculation period although, in our experience, it is relatively rare for employees to challenge it if a different period is utilised instead.

To Which Days of Holiday Does the Law Apply?
These decisions only apply to the first 20 days of paid holiday. They do not apply to the 8 days of additional annual leave or to any further annual leave which is paid above the statutory minimum. In principle, this means that overtime and commission could be excluded from holiday pay after employees have taken 20 days leave in that year, although this is administratively complicated.

More significantly, it is one of many measures which reduce the value of backdated claims, as employees will only be able to claim extra holiday pay for a maximum of 20 days in each year.

Backdated Claims

Other measures to limit backdated claims remain in place and are unaffected by recent cases.

Legislation which came in force in July 2015 limited any new claim for holiday pay to two years. This restriction will continue to apply to any employee who has not already commenced a claim.

Bear Scotland itself included a ruling that backdated claims cannot be brought as a "series of deductions" if there is a three-month gap between deductions. This means that an employee who has a three-month gap between holidays cannot bring a holiday pay claim for any earlier period.

This aspect of Bear Scotland was considered controversial at the time and was expected to be appealed but, in fact, it was not, and the approval of Bear Scotland in Lock gives extra force to this approach. The three-month rule seems likely to remain in place for the foreseeable future.

Finally, a simple way to prevent claims is to ensure that holiday is paid correctly going forward. After three months of receiving full holiday pay, an employee is debarred from bringing a claim.

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