JONES DAY

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EUROPEAN LABOR AND EMPLOYMENT LAW UPDATE

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DISMISSAL OF PREGNANT EMPLOYEE LIKELY TO VIOLATE SPANISH LAW WHETHER OR NOT EMPLOYER IS AWARE OF PREGNANCY AT THE TIME OF DECISION

Ms. María José Hernández Victoria, in the Superior Court of Justice of Madrid, signaled in a recent judgment (Rec. 1049/08) that it is time for the Spanish Supreme Court to make clear that the dismissal of a pregnant employee violates Article 55 of the Spanish labor law, even if neither the employer nor the employee is aware of the pregnancy at the time of the dismissal decision. The high court previously recognized a distinction between situations where the employer was aware of the pregnancy of the employee being terminated and situations where the employer had no such knowledge. In the latter case, it considered that the employer could not be acting in violation of the protections afforded to pregnant women, and thus it upheld termination of pregnant women in such circumstances. This distinction has been criticized on the grounds that pregnancy should be protected irrespective of the employer's knowledge, because of the importance of protecting the future child by securing the economic situation of the mother.

UPDATE: MOVEMENT TOWARD A GERMAN MINIMUM WAGE LAW?

The German government adopted a draft Minimum Working Conditions Act on July 16, 2008. The purpose of this legislative initiative is to protect employees of industries where only a small portion of employees are unionized and as a result do not benefit from collective agreements setting minimum working conditions.

The proposed legislation envisions the creation of a permanent Main Committee whose role will be to investigate and decide whether minimum wages have to be determined as minimum working conditions. In addition, it will be its role to set the specific amount of minimum wages. The Main Committee will be composed of six

independent experts who by virtue of their experience are in a position to assess the economic and social consequences of minimum working conditions. The Main Committee shall be assisted by Technical Committees composed of employers and employees from affected industries.

Up to now, minimum wages have been set solely by collective bargaining agreements. In general, the provisions of these agreements apply only to employers (as members of an employer association) and employees (as members of a trade union) that are parties to these agreements. In some industries, it is possible by government order to have a collective agreement setting binding minimum conditions for an entire industry sector.

There is uncertainty as to whether this legislative initiative will be successful. First, the law needs to be approved by the Federal Council of Germany to take effect. Second, the law raises issues of German constitutional law because it arguably undermines the union's constitutionally recognized autonomy to negotiate industrywide minimum wages. We will report further.

LIVING WITH THE FRENCH 35-HOUR WORKWEEK (THE SEQUEL)

Now more than ever, labor and employment initiatives are on the agenda of the Sarkozy government, with the objective of providing more flexibility to working time. The most recent example is the law dated August 20, 2008, reforming, in particular, regulations on (i) overtime, as well as (ii) the computation of annual working time.

NEW REGULATIONS ON OVERTIME

Thus far, overtime can be performed within the limit of an annual quota set by collective bargaining agreements (either at the level of the activity sector in an industry or at the company level) or, in the absence of a collective bargaining agreement, by means of an administrative decree, which has set the maximum overtime quota at 220 working hours per employee per year (the "Quota"). Additional overtime—on top of the Quota—can be performed upon prior (i) authorization from the government labor agency, which can always refuse to grant authorization, and (ii) consultation with the employee representatives (when such representatives exist in the company).

As of the date of publication of the August law (*i.e.*, as of August 21, 2008), employers will be able to require additional overtime—on top of the Quota—without having to obtain the prior approval of the government labor agency. Employers will still be required to consult with the employee representatives, however.

Employees performing overtime within the limit of the Quota will now receive conventional overtime pay, but without the compensatory time off that used to accompany it. Overtime hours beyond the Quota will entail compensatory time off in addition to monetary compensation.

NEW REGULATIONS ON ANNUAL WORKING-TIME COMPUTATION

French law allows employees (mainly management-level employees) who perform their duties in an autonomous manner to have their working time computed by reference to a set number of working days per year, as opposed to a set number of working hours per week. The number of working days is set by collective bargaining agreements (either at the level of the activity sector in an industry or at the company level). So far, the maximum working-time limit has been set by law at 218 working days per year, preventing employers from setting a higher number of working days, even with the prior consent of employees.

As of the date of publication of the August law (*i.e.,* as of August 21, 2008), employees will be entitled to request to work more than the number of working days to which they are subject, within an overall limit set at 235 working days per year. Employers will be entitled to exceed this limit, up to an absolute maximum number of 285 working days, by negotiating and entering into companywide collective bargaining agreements.

Days worked beyond 218 days per year will be treated as overtime and will entail a 10 percent minimum premium over the normal salary rate.

NEW INFORMATION AND CONSULTATION OBLIGATIONS IN BELGIUM

In 2002, the European authorities adopted Directive 2002/14 establishing a general framework for informing and consulting employees in the European Community. According to the choice made by the Member States, such information and consultation procedure applies to undertakings employing at least 50 or at least 20 employees.

In several Member States, such as the Netherlands and Luxembourg, such information and consultation procedures were already in place, even in companies employing fewer than 20 employees. In Belgium, however, this Directive has only now been implemented by the Act of April 23, 2008, providing for compliance with an information and consultation procedure for companies employing between 50 and 100 employees. Furthermore, a national collective bargaining agreement was concluded on February 27, 2008,

implementing the Directive in companies employing fewer than 50 workers and in which a trade union delegation has been established.

These developments do not affect companies employing more than 100 employees, to which existing regulations will continue to apply. In such a case, the works council must be informed and consulted prior to the taking of decisions likely to lead to substantial changes in the work organization or the contractual relations with employees, such as mergers or sales of assets. However, in companies employing between 50 and 100 employees, as in the past, no works council needs to be established, but the powers of the Committees for Prevention and Protection at Work (which, as in the past, must be established in companies employing at least 50 employees) will be extended so that they are given certain additional economic, social, and financial information by the employer. Moreover, the Committees must be informed of and consulted regarding possible restructuring decisions that may affect labor conditions and actual and future employment. If a trade union delegation exists along with the Committees for Prevention and Protection at Work, the union will deal with the social issues, whereas the Committees will receive the economic and financial information.

Finally, companies established in Belgium employing between 20 and 50 employees are not required to establish a works council or a Committee for Prevention and Protection at Work. However, a trade union delegation can exist if this is provided for by a collective bargaining agreement concluded at an industrywide level. If such trade union delegation exists, it will receive the information provided for in the European Directive, and it will be informed and consulted in case of important changes of structure envisaged by the company. In companies where no such trade delegation has been installed, the relevant joint committees may decide how the workers of such companies will be informed and consulted.

Companies having registered offices in Belgium will have to keep in mind these new rules with regard to the information and consultation of employees, especially if a modification of the structure of the company is envisaged, which could have an impact on the Belgian workforce.

ITALIAN SUPREME COURT RULES ON EMPLOYER LIABILITY IN THE FACE OF CONTRIBUTORY NEGLIGENCE BY EMPLOYEES

A recent decision of the Italian Supreme Court (No. 9817 of April 14, 2008) states that in industrial accidents, the contributory negligence of the injured employee can be taken into account in order to reduce the amount of the damages awarded. In adopting this decision, the Italian Supreme Court has applied the general provisions of Article 1227 of the Italian Civil Code, which states that when the contributory negligence of the injured individual arises, the amount of the compensation to be paid "is reduced with respect to the importance of the negligent conduct and of the consequences arising from the same."

This ruling can provide employers with a helpful defense in claims for damages arising from industrial accidents. Its practical application may in some cases imply a considerable reduction of the amount of compensation due to injured employees. It should be noted, however, that in accordance with the Italian rules of civil procedure, such a reduction can be considered by the court only if, during the trial, the defendant employer has specifically alleged contributory negligence of the injured employee.

EUROPEAN COURT OF JUSTICE RULES THAT DISABILITY DISCRIMINATION BY ASSOCIATION IS UNLAWFUL

The European Court of Justice ("ECJ") issued its ruling in the case of *Coleman v Attridge Law & Steve Law* (ECT C-303/06), in which Ms. Coleman sought to bring a claim that she had been discriminated against by her employer contrary to the U.K.'s Disability Discrimination Act 1995 ("DDA") because of her responsibilities relating to the care of her disabled son. The problem for Ms. Coleman was that the DDA is drafted so as to provide protection only to individuals who are themselves disabled and does not on its face authorize claims brought by nondisabled employees, even where, as in the present case, those claims relate to treatment received by that employee on the grounds of another's disability.

Ms. Coleman argued that this restrictive approach was inconsistent with the requirements of the EC Equal Treatment Framework Directive (the "Directive"), and the ECJ agreed. The Directive protects against discrimination "on the grounds of" disability, and the "ground" that serves as the basis of the discrimination that an employee such as Ms. Coleman suffered continues to be disability.

Although this concept of associational discrimination is far from new (it has for many years been accepted that it is unlawful to discriminate against one person on the grounds of another person's race, for example, by refusing to serve a white customer in a bar because he or she is accompanied by a black friend), it has never before been applied in disability discrimination cases.

This decision is likely to have a substantial impact on the way in which employers will be required to manage employees who fall into this category.

ECJ REAFFIRMS INDIRECT DISCRIMINATION CHALLENGES IN PAY SCHEMES

Challenges to "indirect discrimination," that is, to facially neutral practices that have a disproportionate adverse impact on women and other disadvantaged groups—long a staple of U.S. employment discrimination law—are fast winning recognition in Europe. A recent highlight is the European Court of Justice ("ECJ")'s ruling in *Voß v. Land Berlin*, Case C-300/06, on December 6, 2007.

In the case at hand, a part-time Berlin public school teacher claimed she was a victim of indirect discrimination on account of gender because hours that constitute overtime for part-timers but would be regular working hours for full-time teachers were not compensated as favorably as they would be in the case of full-time teachers—a disparity that worked disproportionately to the disadvantage of women, because 88 percent of the part-time teachers in Berlin were female. In its preliminary decision, the ECJ ruled that this disparity was a form of gender discrimination in pay in violation of Article 141(1) of the EC Treaty, which provides that "[e]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied." In the court's view, Article 141(1) prohibits indirect discrimination in pay, provided that (a) the percentage of affected female individuals is significantly higher than the percentage of male individuals, and (b) the differentiation is not justified by factors having nothing to do with gender.

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