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EUROPEAN LABOR & EMPLOYMENT LAW UPDATE

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LAWYERS' WAITING TIME, OVERTIME, AND TRAVEL TIME ARE COMPENSABLE WORKING TIME

The Spanish Supreme Court has struck down a provision of Spanish law treating time spent by lawyers moving from one place to another and lawyers' waiting time as nonworking time for purposes of Spanish and European maximum-hours laws (Rec. Ordinario, N° 7/2007, sentence dated Dec. 26, 2008). This development will take on greater significance should Spanish labor authorities aggressively investigate working time in law firms and identify associates who work beyond the maximum hours set by law without receiving overtime compensation.

SPANISH EMPLOYERS MAY TOLL "PROCEDURAL SALARIES" BY ACKNOWLEDGING AN UNFAIR DISMISSAL, EVEN AT THE LAST MINUTE BEFORE ORAL HEARING

Spanish employers have the option of acknowledging that the dismissal of an employee is unfair and offering the dismissed employee severance pay plus any salary accrued from the date of dismissal until the date of such acknowledgment. If the employee does not accept the amount offered, the employer can escrow this amount with the Labor Court. The employer's acknowledgment stops the accrual of

"procedural salary," which is salary that accrues between the date of dismissal and the Labor Court's decision declaring the dismissal unfair.

The Spanish Supreme Court (Rec. Casación Unificación de Doctrina, N° 3566/2007, sentence dated Nov. 3, 2008) has clarified that the employer's acknowledgment of the dismissal as unfair can be communicated to the employee at any time up until the completion of an administrative conciliation before the Court, just before the beginning of the oral hearing. Under this ruling, the employer has a last chance before the oral hearing to attempt to reach a settlement or, if one cannot be reached, to eliminate any "procedural salary."

NEW EU DIRECTIVE ON TEMPORARY AGENCY WORKERS PUBLISHED

Member States have until December 2011 to implement the provisions of the new EU Directive on Temporary Agency Workers. This Directive establishes that temporary agency workers will have the right to the same basic working and employment conditions that comparable permanent employees have; they will have to be informed about permanent employment opportunities in the company; and they must be given equal access to workplace facilities such as canteens, child care services, and transport. There are more than 8 million agency workers in the EU, with approximately 20 percent of these (1.8 million) based in the U.K. The average U.K.-based agency worker earns 32 percent less than the average permanent worker (according to a study conducted by the University of Leeds in May 2008).

The Directive is part of a general campaign at the EU level to protect workers who are employed on an atypical basis. Legislation already exists to ensure equal treatment for those employed on fixed-term contracts or on a part-time basis. The Directive allows Member States to make their own decisions about when agency workers will become eligible for equal working and employment conditions. In the U.K., temporary workers will acquire this right only after 12 weeks on the job. The Confederation of British Industry estimates that around half of all temporary placements last for longer than 12 weeks, and therefore the Directive will significantly affect the way in which companies conduct their business. We can expect the number of agency workers to fall sharply and for assignments to shorten as businesses seek to ensure that agency workers do not accrue rights under the Directive. There may also be a spillover effect for other workers who see their compensation and benefits packages eroded as part of a campaign by employers to keep constraints on their fixed costs.

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EMPLOYEES ON SICK LEAVE TO GET PAID HOLIDAY

The European Court of Justice ("ECJ") has issued its decision in the case of *Stringer and others v HM Revenue and Customs* C-520/06. Henceforth, a worker who is on sick leave, and therefore not working, still accrues the right to paid annual leave. In addition, workers on sick leave who have been unable to take their annual leave before the end of the leave year must be allowed to carry over the untaken leave into the next leave year. The ECJ also ruled that it is for Member States to decide whether a worker can take annual leave during a period of sick leave, but the consequence of not allowing it will be that the holiday entitlement simply racks up and will have to be allowed to be taken or paid out on the employee's return to work or the termination of employment.

The UK Working Time Regulations will need amending to allow those on sick leave to carry annual leave into the next leave year. In the long term, this decision could prove expensive for some employers, as workers on long-term sick leave will accrue holiday pay even when they are receiving sick pay or permanent health insurance benefits.

CRISIS MEASURES IN BELGIUM

The Belgian government is concerned about unemployment growth because of the ongoing financial crisis. Therefore, it has introduced a set of measures that allow companies to cut personnel costs with as few layoffs as possible.

The Act on Employment in Times of Crisis (which expires on January 1, 2010, although it can be extended until June 30, 2010) provides for the following options:

1. WORKING TIME REDUCTION

An employer can conclude a collective bargaining agreement with the trade unions to reduce the working time in the company by one-fifth or one-quarter. If certain formalities are respected, this entitles the employer to a reduction in social security contributions.

2. CRISIS TIME CREDIT

Under the "crisis time credit," the employer and the employee can agree to reduce the employee's working time by one-fifth or by half, for a duration of up to six months. The employee is not paid for the reduced hours, but receives replacement income (up to €442.57 gross per month) from the government.

This measure is available only to companies that are "operating in difficult circumstances"—*i.e.*, that have experienced a 20 percent decrease in turnover or production in the last quarter—or that have put at least 20 percent of their blue-collar workers on temporary unemployment. It also requires a collective bargaining agreement (industrywide or at the company level) or, in lieu thereof, a special company plan. Once these conditions are fulfilled, the employee's agreement is not necessary.

3. CRISIS UNEMPLOYMENT

The new system of "crisis unemployment," *i.e.,* temporary unemployment, applies only to white-collar workers and is similar to the existing temporary unemployment program for blue-collar workers. Under this system, the employee's employment is fully or partially suspended, for a duration of up to, respectively, 16 or 26 weeks.

During the period of crisis unemployment, the employee receives unemployment benefits of 70 to 75 percent of his salary (limited to about €1,650 gross per month). In addition, the employer must pay a supplement to these benefits, the amount of which varies by industry and by company.

GERMAN MINIMUM-WAGE LAW ENACTED

After more than a year of deliberations, Germany has finally adopted minimum-wage legislation. There are three categories of affected industries or workers:

1. INDUSTRIES WITH A HIGH DEGREE OF UNIONIZATION AND COLLECTIVE BARGAINING

The minimum-wage provisions of collective bargaining agreements in six additional industrial sectors have been declared to be generally binding for all employers of the respective industries, whether or not the employer is a member of an employers' association. These newly applicable industries include nursing services, education and training, security, the industrial laundry sector, special mining, and waste removal. They were added to a list that included the delivery service, building-cleaning, and construction sectors.

An estimated 3 million employees are covered in these nine industries with generally binding minimum wages as set forth in the collective bargaining agreements for the industry.

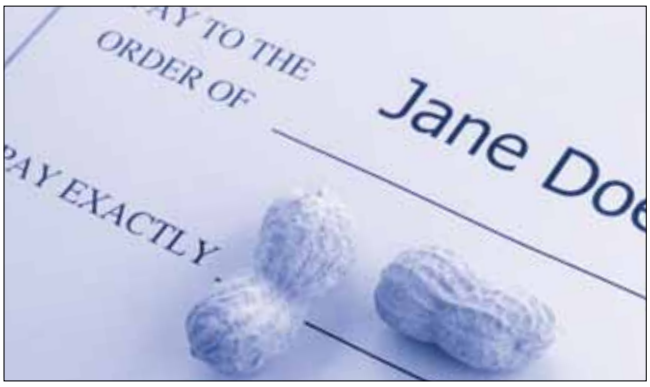
2. INDUSTRIES WITH A LOW DEGREE OF UNIONIZATION AND COLLECTIVE BARGAINING

For industries with low union density and limited collective bargaining, Germany has now enacted the Minimum Working Conditions Act. Minimum wages are set by the government for industry sectors determined to have employees in need of such statutory protection. This provision for government-set minimum wages is highly controversial because the German Works Constitution Act grants unions and employers' associations freedom to agree on binding working conditions. Litigation is likely to resolve tensions between this new statutory scheme and the contractual autonomy of parties to collective bargaining agreements.

3. TEMPORARY AGENCY EMPLOYEES

A third legislative initiative consists of setting minimum wages with respect to employees who work for temporary employment agencies.

Minimum wages vary among the 20 EU Member States with minimum-wage schemes, from €0.65 per hour in Bulgaria to €9.49 per hour in Luxembourg, which can be partly explained by different costs of living. Only five countries have implemented a minimum-wage standard exceeding €7.50, which is the level recommended by the German unions. Due to the financial crisis, it is unlikely that many countries will increase the currently set levels in 2009.



ITALIAN SUPREME COURT RULING REGARDING NONECONOMIC DAMAGES AND ITS CONSEQUENCES FOR LABOR CLAIMS

The Italian Supreme Court has announced significant limits on the recovery of noneconomic damages for labor claims. In its decision in *Sezioni Unite* (Civil Division, *Sezioni Unite*, Nov. 11, 2008, N° 26972), the Court made clear that noneconomic damages may be awarded only if: (1) they are caused by the illegitimate conduct of the offender, and (2) such conduct involves the violation of a specific individual right protected by law (for instance, health and safety, reputation, freedom, personal dignity). The Supreme Court, in particular, criticized decisions that, omitting the second of these requirements, had awarded damages in situations where an individual right was not protected by law, such as for offenses against "happiness" or "peaceful living."

This decision has clear implications for "mobbing"/harassment cases and for the recent proliferation of labor claims for noneconomic damages filed against employers on grounds that may not satisfy the second of the Supreme Court's requirements.

FRENCH RULES BOLSTERING PROTECTIONS FOR THE OLDER WORKER

A few years ago, the French government encouraged older employees to retire as soon as they could benefit from a full-rate pension. The purpose of this program was to open up the employment market to younger workers to alleviate widespread unemployment. The government is now modifying this approach, as the employment rate of older employees has dramatically fallen over the last few years and pensions do not always suffice to provide a decent standard of living for retirees. Older employees have therefore become a new priority for the French government.

The most recent example of this new emphasis can be found in the Social Security Finance Law for 2009 (the "Law"), dated December 17, 2008, which has since come into force. The Law contains the following key measures:

(i) Mandatory collective bargaining concerning the employment of older employees;

(ii) Restrictions imposed on employers wanting older employees to retire before age 70; and

(iii) Increased possibilities for older employees to perform a compensated professional activity while on retirement.

MANDATORY COLLECTIVE BARGAINING

Working conditions for older workers now comprise a mandatory item for collective bargaining. This negotiation must cover a three-year period and address such topics as the forward-looking management of careers as well as professional training. The French Labor Administration may decide to "extend" to nonunion employers any sectorwide agreements negotiated in this context.

In the absence of extended sectorwide agreements, companies with at least 50 employees, or that are part of a group having at least 50 employees, will have to negotiate and enter into a collective bargaining agreement with union delegates on the employment of older employees. If no agreement is reached, companies will have to set up and implement an action plan on this same topic. The agreement or action plan will need to cover a three-year period and contain very specific measures, such as the precise number of older employees the company undertakes to maintain in its employ or to recruit in the three-year period, the precise measures aimed at maintaining the older employees in its employ or facilitating their recruitment, and the details on the modalities of implementing these measures.

By 2010, the failure by a company to implement a collective bargaining agreement or action plan in favor of the older employees will require payment to the social security agency in charge of older employees of a penalty of 1 percent of the total compensation (inclusive, in particular, of salaries, bonuses, and paid vacation indemnities) paid to all of its employees during the time period for which it has not been covered by such agreement or action plan.

RESTRICTIONS ON MANDATORY RETIREMENT BEFORE AGE 70

The Law also limits the ability of employers to require mandatory retirement of employees before the age of 70. In theory, French employers are authorized to require employees age 65 and above to retire, but only if they will receive a full-rate pension. In practice, the Law allows employees to oppose such unilateral decision by the employer. As of January 1,

2010, employers will have to ask each employee reaching the age of 65, in writing, whether he or she intends to retire at 65. In the case of an employee's refusal to retire, the employer will have no choice but to maintain the employee in its employ for one year. This process continues every year until the employee reaches 70. Once the employee reaches the age of 70, he or she is subject to mandatory retirement if that is desired by the employer.

GREATER LATITUDE TO PERFORM COMPENSATED PROFESSIONAL ACTIVITY DURING RETIREMENT

Under prior law, retired employees were significantly restricted in their ability to continue working during retirement. In particular, they risked losing the benefit of their pensions in cases where the compensation they received exceeded a low ceiling set by law.

The new law modifies this restriction by allowing employees who have a full-rate pension to perform compensated professional activity regardless of the level of compensation, without suffering a reduction in their pension payments.

EU'S NEW EUROPEAN WORKS COUNCIL DIRECTIVE

Today about 820 European works councils exist, representing roughly 14.5 million employees.

If there is one particular reason the EU felt there was a need to recast and update Directive 94/45/EC, it is that the information rights of the European works councils have been considered too weak in their present form. To strengthen employee representation rights, new final wording was adopted on May 6, 2009, and published in the *Official Journal* as Directive 2009/38/EC.

As it did in its previous wording, the Directive is to apply primarily to "Community-scale groups of undertakings," *i.e.*, groups with at least 1,000 employees within the EU Member States, with at least two group undertakings in different Member States, and at least 150 employees in each of at least two different Member States. A similar definition applies to individual "Community-scale undertakings."

Among the changes is a new definition of the term "information." The Directive specifies that data must be transmitted to the employee representatives in a timely and appropriate manner to enable them to undertake an in-depth assessment of the possible impact of company proposals.

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The authority of the European works councils and the scope of information that needs to be provided to employee representatives are limited to "transnational" issues. This critical term is now defined as those matters that concern Community-scale undertakings or the group of undertakings as a whole, or at least two undertakings or establishments in two different Member States. According to recitals in the amended Directive, this includes matters which are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States.

Like any other Directive, the new Works Council Directive will require transposition into national law. The deadline is June 5, 2011.

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