France

Employees and Digital Devices Outside Working Hours

New rules have come into force concerning employees' rights to disconnect from digital devices outside normal working time. From 1 January 2017, all relevant employers must negotiate on the employees' right to have periods where they are disconnected from digital working devices and on the implementation processes which regulate the use of such devices. If no company-wide collective bargaining agreement is reached, they must adopt an internal policy. A "relevant employer" for these purposes is one where union representatives are recognised for mandatory annual negotiations.

The term "right to disconnect", the devices that it covers and the time periods when it may be exercised are not defined by the new law. However, the term can be described as the right for each employee to elect not to stay remotely connected to a professional digital tool (smartphone, laptop, iPad, etc.) during rest periods, sickness and holidays, and more generally outside of working time. The implementation processes of this right will necessarily be subject to specific conditions for management-level employees (those whose working time is computed in annual days since they are not subject to hourly schedules, and may therefore not claim for a right to disconnect during predetermined time slots).

In respect of collective bargaining agreements that calculate working time by reference to days in the year, the new law requires that specific implementation processes must be in place in order for the employees to fully benefit from this right. Failing this, the employer must issue a written notice and deliver it to each of the concerned employees.

Germany

Termination for Breach of US Regulatory Rules Not Permissible

The New York State Department of Financial Services ("NYDFS") required Commerzbank to terminate the employment of a Germany-based employee on the basis that he played "a central role" in the breaching of US sanctions.

Commerzbank has a subsidiary in New York City, but the employee in question had never worked there. The NYDFS had audited the bank's transactions and found that

Commerzbank had carried out US-dollar clearing transactions on behalf of foreign financial institutions (e.g., in Iran and Sudan) which the authority regarded as being in violation of US economic sanction rules.

In a settlement between Commerzbank and the NYDFS ("Consent Order") of 2015, Commerzbank committed to pay a US$1.45 billion penalty, install a monitoring system for banking law violations and terminate the employment relationships of four employees who "played a central role" in these incriminated transactions. The plaintiff was one of those.

In the employment litigation, it remained unclear whether the employee had violated his contractual duties or whether he had acted in line with the bank's policies and the instructions of his superior. The German labour court would not endorse a termination "based on pressure" from the US authority. German law acknowledges that under strict preconditions, the termination of an employee "based on pressure" may be justified because important customers or fellow employees so demand. The court, however, ruled that this is not comparable as: (i) the New York branch had committed the act (i.e., not the employer) and (ii) the deterrent effect was intended by a foreign authority, which is not subject to German law.

The facts of this case are narrow, but the decision generated considerable attention in the German media. So far, German labour courts have refused to apply non-German laws on employment relationships. In light of increasing globalisation, and with many regulatory and sanctions laws having reach far beyond domestic borders, there may be other cases like this in the future.

United Kingdom

Gender Pay Gap Reporting Laws Update

A reminder that the government has published its final draft form of the Gender Pay Gap Regulations, which come into force on 6 April 2017. The Regulations oblige relevant employers to report on their gender pay gap on an annual basis, with the first gender pay reports to be published no later than 4 April 2018, based on pay as at the first "snapshot" date of 5 April 2017.

Employers with 250 or more employees on the snapshot date of 5 April must publish an annual report on their gender pay gap. The Regulations do not require group companies to aggregate numbers across different subsidiaries, and as such each group company needs only to report in relation to the employees it employs.

The following gender pay information must be published by reference to 5 April each year:

- the difference between the mean hourly rate of pay for full-pay relevant male and female employees;
- the difference between the median hourly rate of pay for full-pay relevant male and female employees;
- the difference between the mean bonus pay for relevant male and female employees;
- the difference between the median bonus pay for relevant male and female employees;
- the proportions of relevant male and female employees who were paid bonus pay in the relevant 12-month period; and
- the proportions of male and female employees in four, equal sized, notional quartile pay bands.

The first gender pay reports must be published no later than 4 April 2018, based on

hourly pay rates as at the first "snapshot date" of 5 April 2017 and bonuses paid between 6 April 2016 and 5 April 2017. Reports will need to be made annually thereafter.

Relevant employers need to publish their gender pay reports on their websites, which must be available for three years and in a manner accessible to its employees and the public. It must be accompanied by a written statement of accuracy, signed by a director or an "equivalent" in the case of a body corporate. Employers must also upload reports to a website designated by the Secretary of State, along with the name and job title of the person who signed the statement of accuracy. The Equality and Human Rights Commission has said it will regard any failure to provide a report as an unlawful act under the Equality Act 2010.

The Regulations contain no legal obligation to explain the data contained in the gender pay reports. However, given that data evidencing a gender pay gap is likely to garner media interest and potentially impact an employer's reputation, it is advisable to provide some narrative to explain the context in which the gender pay gap arose and how the employer is seeking to remedy it. Any apparent discrepancies may also be explained or given context.

The take-away points are that employers should: (i) review current practice prior to 5 April 2017 in order to understand what gender pay gaps may exist in within their organisation—identifying the rationale for such differentials will be important in order to evaluate any risks and policy going forward; (ii) ensure that all relevant data can be collected through their payroll systems; and (iii) formulate a communications plan before publishing the report to ensure information is presented in a contextualised and comprehensive manner.

European Labour & Employment Practice Contacts

Amsterdam
Marielle Daudt

Brussels
Chantal Biernaux

Düsseldorf
Markus Kappenhagen

Frankfurt
Georg Mikes

London
Mark Taylor

Madrid
Jesús Gimeno

Milan
Adelio Riva
Luca Allevi

Munich
Friederike Göbbels

Paris
Jean-Michel Bobillo
Emmanuelle Rivez-Domont

United States
Michael J. Gray
Matthew W. Lampe

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