JONES DAY | **European Labour & Employment Update**
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In this edition, we report from around Europe on some interesting case law developments that affect the way employers manage their employees. The range of issues covered shows that, despite the breadth of directives issued by the European Commission, local implementation remains a key factor when doing business across Europe.

France

Social Reforms Announced by Emmanuel Macron's Government

A bill aimed at enabling the government to legislate on many areas of labour and employment law (and tax matters) through government ordinances—as opposed to the longer process before French Parliament—has been adopted by the Parliament in early August, approved by the French Constitutional Court in early September, and will be shortly enacted mid-September. The bill provides several key areas for the adoption of ordinances by the government.

The government has issued these ordinances, and they are likely to be adopted around the end of September. These ordinances will bring various changes to labour and employment regulations in France, mostly intended to provide flexibility and to simplify and rationalize those regulations. Among the key areas concerned will be the following:

Articulation Between Company-Wide and Sector-Wide Collective Bargaining Agreements
This subject is key since it is aimed at giving some flexibility to employers and enabling them to negotiate at the company level in areas which are usually established at the sector level. The government proposes to: (i) define the areas in which company-wide collective bargaining agreements may not override the provisions of sector-wide collective bargaining agreements; (ii) define the areas and conditions under which sector-wide collective bargaining agreements could expressly prohibit amendment by company-wide collective bargaining agreement; and (iii) recognize in other areas the primacy of company-wide collective bargaining agreements.

Simplification of Employee Representative Bodies
The merger of the employee representative bodies at the level of each company (i.e. Staff Delegates, Works Councils and Health and Safety Committees) into a single body (the "Economic and Social Council") is also a key subject. In this context, the draft ordinances define, notably: (i) the conditions for setting up, the headcount thresholds to take into account, the composition, the powers and the functioning of this body, including the information and consultation timeframes, the training, means and processes, the maximum number of successive elective mandates of its members, and the conditions to have recourse to an expert; and (ii) the conditions under which a specific Health and Safety Commission could be added to this body.

Termination of Employment
The scope of assessment for the economic justification of dismissals for economic reasons would be restricted to the national territory even when the company belongs to an international group, except in case of fraud. Currently it extends to all entities worldwide belonging to the business sector of the group in question. The draft ordinances provide for an indemnification scale where dismissals are held to be abusive by a court. This scale will be based on the employee's seniority and the size of the company (e.g. the minimum indemnification for employees with at least two years of seniority would be equal to: (i) three months of gross salary in companies with at least 11 employees; and (ii) between 0.5 and 2.5 months of gross salary in companies with less than 11 employees up to 10 years of seniority and equal to three months of gross salary after 11 years of seniority—compared with the six months' gross salary currently applicable for any company, whatever its workforce. Further, the maximum indemnification would be of 20 months' gross of salary for employees with at least 29 years of service).

Germany

A Post-Contractual Non-Compete Clause that Does Not Provide for the Statutory Non-Compete Compensation Is Void, Even if It Contains a Severability Clause

Under German statutory law, a post-contractual non-compete clause is enforceable only if it provides for adequate compensation. Such compensation must be at least 50 percent of the employee's total remuneration.

Non-compete clauses in the United Kingdom or United States do not typically provide for compensation.

In Germany, once validly agreed (with at least 50 percent compensation provided for), the employer cannot simply waive the post-contractual non-compete obligation with immediate effect. Instead, the employer is released from the duty to pay the agreed compensation only after one year following the written waiver.

In this case decided by the Federal Labor Court, the plaintiff had a post-contractual non-compete clause in her contract which did not provide for any compensation. It did, however, contain a severability clause according to which any unenforceable contractual provision should be deemed replaced by a valid and enforceable one.

The employee observed the post-contractual non-compete obligation and claimed payment of a non-compete compensation in the amount of 50 percent of her last contractual remuneration. She won in the first two instances.

In the final instance, the Federal Labor Court reversed the outcome and decided in the employer's favor—a non-compete clause not providing for any compensation is void and cannot be saved by a severability clause. The employee was denied the compensation.

This decision is certainly good news for those employers who do not pay compensation on purpose in the hope that the employee will abide by the post-contractual non-compete obligation (accepting it would not be enforceable in light of the lack of compensation).

Gender Pay Gap Law Implemented Summer 2017

Germany has implemented a new law targeting pay inequality between men and women. The Pay Transparency Act *(Entgelttransparenzgesetz* or "PTA"*)* prohibits differences due to gender in pay for equal work or work of equal value. Any person who is discriminated against can claim the same salary as a comparable employee of the other gender.

Female and male employees do work of "equal value" if they can be considered to be in a comparable situation regarding their work. The type of work, the qualification requirements for the job and work conditions must be comparable.

The essential new feature of the PTA is the ability to request information—in operations with more than 200 employees, individual employees will be entitled to request information about the criteria and the procedure by which the employer determines salaries, with respect to both their own salary as well as the salary of members of the other gender working in a comparable job.

The ability to claim information exists only if there are at least six employees of the other gender working in a comparable position.

Employers should carefully prepare any response to such information requests. The main consequence of not providing an answer is that the burden of proof switches to the employer if the employee files a lawsuit claiming equal salary. A proper response can avoid this procedural disadvantage for the employer.

With this new law, Germany for the first time has introduced a statutory disclosure obligation with regard to pay differences based on gender. This is especially important because Germany otherwise does not permit discovery and pre-trial disclosure. Companies will have to think strategically about proactive or reactive disclosure and will have to review their compensation models.

The Netherlands

Seminal Decisions on the Transfer of Undertakings and Works Council Consultation in Insolvency Situations

Summer 2017 saw two important judgments at the intersection of employment law and insolvency law in the Netherlands. The Dutch Supreme Court has ruled that the court-appointed trustee must consult the works council if the insolvent company is to be restarted following a bankruptcy. The European Court of Justice ("ECJ") has found that the transfer of undertaking rules apply in case of pre-packaged, or "pre-pack", bankruptcy.

Dutch Supreme Court: Works Council Must be Consulted in Case of Post-Bankruptcy Restart
The Dutch Supreme Court has decided that the works council needs to be consulted in the event a business is restarted following the liquidation of a company. If assets are sold in the context of a business restart and the expectation is that the associated jobs will be preserved, the decision relating to the sale is subject to works council consultation.

In an earlier judgment, the Amsterdam Court of Appeal found that works council consultation rights were incompatible with the trustee's primary task—namely, to collect as much money for the creditors as possible, regardless of whether this is achieved through the company's liquidation or restart. The Supreme Court has ruled otherwise. Recognizing that the trustee must be able to take swift action, however, the Supreme Court allows the trustee to derogate from procedural requirements which normally apply. If time is of the essence, this implies, for example, that the trustee may impose strict deadlines on the works council and that he does not have to submit comprehensive written reasons for the business restart.

ECJ: Transfer of Undertaking Rules Apply in Case of Pre-Packaged Bankruptcy
The case deals with the pre-pack of Estro, at the time the largest childcare provider in the Netherlands.

A pre-pack entails the court-appointed trustee confidentially preparing for the restart of trading by the insolvent company with the court's consent. If successful, the company is subsequently declared bankrupt and immediately restarted. Dutch law provides that transfer of undertaking rules do not apply in the case of bankruptcy.

The question the ECJ had to answer was essentially whether this exception also applies in the case of a pre-pack. The court observed that the pre-pack is not ultimately aimed at liquidating the company, but rather at preparing a restart of its viable parts. In these circumstances, the ECJ found that it cannot be justified that the employees concerned lose their rights under transfer of undertaking rules. As a result, the ECJ decided that these rules continue to apply in the case of a pre-pack.

United Kingdom

Direct Sex Discrimination Not to Pay a Male Employee Enhanced Shared Parental Pay on the Same Basis as Enhanced Maternity Pay

Capita had a number of policies in place relating to pay during periods of maternity and parental leave. Female employees taking maternity leave were entitled to 14 weeks of basic pay followed by 25 weeks of statutory maternity pay ("SMP"). Male employees taking ordinary paternity leave were entitled to two weeks' basic pay for that period, with no further entitlement to additional pay for any period of shared parental leave ("SPL") above the statutory rate for shared parental pay ("SPP"). This policy also applied to female employees taking equivalent leave in their capacity as partner of the mother and shared caretaker of the new baby. Mr Ali took two weeks' paid paternity leave immediately following the birth of his daughter. During that period, his wife was diagnosed with post-natal depression and was medically advised to return to work to assist her recovery. Consequently Mr Ali requested SPL in order to care for his daughter, asking for the 12 further weeks of basic pay given to employees taking maternity leave. When this was refused and his subsequent grievance was rejected, Mr Ali issued proceedings in the Employment Tribunal ("ET"). His main claim was that paying a mother on maternity leave more than a father on SPL amounted to direct sex discrimination.

The government guidance that accompanied the legislation expressed the view that there was no discrimination where employers did not match SPP and enhanced maternity pay schemes. However, here the ET upheld Mr Ali's claim of direct sex discrimination. The tribunal judge found that the initial compulsory maternity leave period of two weeks amounted to "special treatment" designed to aid the mother's recovery after childbirth. However, any maternity leave taken after this two-week period was found to be taken in connection with caring for a newborn child, an activity which was not exclusive to the mother and could be performed by the father. As such, Mr Ali could compare himself to a hypothetical female colleague on maternity leave beyond the first two weeks of compulsory leave. The ET therefore concluded that the difference between the enhanced maternity pay offered to women and the SPP offered to men in the subsequent 12-week period amounted to direct sex discrimination.

While this decision may seem concerning for employers, it is important to note that ET decisions are not binding, and this case is currently being appealed to the Employment Appeals Tribunal ("EAT"). A judge in a recent ET case on a similar issue also reached a very different conclusion. In *Hextall v Chief Constable of Leicestershire Police ET/2601223/15*, the ET judge decided that it was not discriminatory to offer enhanced maternity pay without also offering enhanced SPP. This was on the basis that the correct comparator for a man on SPL was a woman on SPL, rather than a woman on maternity leave. As this case is also being appealed, it remains to be seen what direction the EAT and subsequent courts will take on this issue.

Government Proposals to Reform Employment Practices in the "Gig" Economy

The government appointed Matthew Taylor (a former adviser to the Blair government) to report on

reforms necessary to the workplace to recognise modern workplace practices. His report contained some key proposals, including:

- Place more emphasis on control in the definition of "worker status"
- Treat workers treated as "employed" for the purposes of tax status
- Extend the right to a written statement of terms to workers as well as employees
- Extend written statement of terms to include description of statutory rights
- Give a stand-alone right to compensation if employer has not given written statement
- Preserve continuity of employment where any gap in employment is less than one month, rather than one week
- Improve the information to be given to agency workers
- Increase the reference period for calculating holiday pay (where pay is variable) from 12 weeks to 52 weeks
- Allow holiday pay to be paid on a "rolled up basis"
- Give agency workers the right to request a direct contract with the end user after 12 months on an assignment
- Give those on zero-hours contracts the right to request guaranteed hours after 12 months
- Require employers to set up Information and Consultation arrangements when requested by just 2 percent of the workforce rather than the current 10 percent
- Give HMRC enforcement powers in respect of sick pay and holiday pay as well as minimum wage issues
- Place the burden on the employer in a Tribunal claim to prove that claimant is not an employee/worker
- Allow uplifts in compensation where employer commits subsequent breaches of employment law based on similar working arrangements to those already dealt with by a Tribunal

Time will tell which ones make it to the statute book, but the government has committed to making the workplace fairer for those who may have lacked protection to date.

Spain

No Need to Record Working Hours in Call Cases

The Spanish Supreme Court has determined that a daily record of working hours must be maintained only when employees perform overtime hours. There were dissenting votes which may mean that the Supreme Court revisits this position in future.

The Supreme Court also mentioned that the Workers' Statute lacks clarity in this respect. The Socialist Parliamentary Group has filed a proposal at the Spanish Congress to modify the current regulation, which will be debated in the coming months.

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