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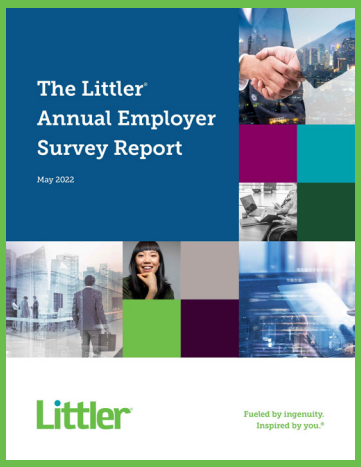

Quarter 2, 2022

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Geida D. Sanlate, Littler Editor

Austria

The Austrian Supreme Court (OGH) Acknowledges Overtime Work Even During Short-Time Work

Precedential Decision by Judiciary or Regulatory Agency

Author: Markus Löscher, Partner – Gerlach Löscher | Littler

In Austria, the daily (and weekly) normal working time is set by law or collective agreement. If working hours exceed these hours, this generally constitutes overtime that is subject to a surcharge. For a long time, it was questionable how to proceed in the case of COVID-related short-time work. The Supreme Court has now answered this question: Overtime resulting from exceeding the daily normal working hours permitted under the collective agreement must be paid separately, even during periods for which COVID-related short-time work has been agreed.

The Austrian Supreme Court (OGH) Rules on Notice Periods for Blue-Collar Workers

Precedential Decision by Judiciary or Regulatory Agency

Author: Michaela Gerlach, Partner – Gerlach Löscher | Littler

In the past, different notice periods applied to blue-collar and white-collar workers in Austria. As of October 1, 2021, the notice periods applicable to blue-collar workers were harmonized with those applicable to white-collar workers (in principle six weeks for employer's notice). However, the provision allows for deviating regulations to be made by collective agreement "for sectors in which seasonal operation predominates." In its most recent ruling, the Supreme Court has now stated that seasonal operation does not predominate in the hotel and catering/hospitality industry. Blue-collar workers in this sector are therefore subject to the (longer) notice periods of white-collar workers.

The Austrian Supreme Court (OGH) Clarifies Question on (Paid) Working Time

Precedential Decision by Judiciary or Regulatory Agency

Author: Jakob Zöchling, Associate – Gerlach Löscher | Littler

Austrian case law on the question of which activities already count (or no longer count) as paid working time is complex and very case-specific. This applies in particular to the question of how changing times are to be assessed. The Supreme Court has now once again clarified some details: If there is an obligation to wear work clothing and if this clothing cannot/may not be taken home, changing times are to be considered working time. On the other hand, the time that the employee needs to take a voluntary shower after work, *i.e.*, not ordered by the employer and not required, for example, for hygienic reasons, does not count as working time.

The Austrian Supreme Court (OGH) Specifies Ruling of the ECJ Regarding Annual Leave Payment

Precedential Decision by Judiciary or Regulatory Agency

Author: Paul Moosmann, Associate – Gerlach Löscher | Littler

As part of the January update, we already reported that the ECJ has ruled that employees are also entitled to monetary compensation for unused annual leave if they terminate their employment without good cause and without observing the notice periods. The Supreme Court has now stated in concrete terms that, in its view, this only has an impact on the minimum leave of four weeks guaranteed under EU law - a domestic leave entitlement exceeding this is not covered by the ruling according to the OGH. It remains to be seen what the ECJ's position on this will be.

National Draft Law on the "Whistleblower Directive" Presented

Proposed Bill or Initiative

Author: Armin Popp, Senior Associate – Gerlach Löscher | Littler

On October 23, 2019, the European Parliament and the Council adopted the "Whistleblower Directive" to protect individuals who report breaches of EU law. This protection is addressed in particular to employees who want to report violations by their employers. This directive would have had to be transposed into national law by the end of 2021. On June 3, 2022, the Austrian Federal Government presented a draft law, which is now being evaluated for six weeks. This draft exceeds the requirements of the "Whistleblower Directive", for example by providing for an extension to violations of national law (*e.g.*, corruption and public procurement law). The new law could be passed in September 2022. Companies are therefore well advised to already assess to what extent they could be affected by this law.

Brazil

End of the COVID-19 Public Health Emergency

New Order or Decree

Authors: Marília Minicucci, Partner – Chiode Minicucci | Littler, and Renata Neeser, Shareholder – Littler

On April 22, 2022, Ordinance GM/MS # 913/2022 (issued by the Ministry of Health) was published, declaring the end of the Public Health Emergency of National Importance resulting from COVID-19, which had been established by Ordinance GM/MS # 188, of February 3, 2020.

The Ordinance became effective 30 days after its publication, affecting labor regulations whose effectiveness was linked to the duration of the (national) public health emergency state, *e.g.*: Law # 14,151/2021 and Law # 14,311/2022, which provided for the onsite work of pregnant employees, Joint Ordinance # 20/2020 and Interministerial Ordinance MTP/MS # 17/2022, both providing for measures to be adopted by employers in the workplace.

Executive Order Creates the Employ + Women and Youth Program

New Order or Decree

Authors: Marília Minicucci, Partner – Chiode Minicucci | Littler, and Renata Neeser, Shareholder – Littler

On May 5, 2022, Executive Order # 1116/2022 was published, creating the "Employ + Women and Youth Program." The Program includes provisions to support early childhood parenting, to make the daily working hours more flexible to support parenthood, to qualify women in strategic areas for professional rise in career, to support women's return to work after the end of maternity leave and to encourage the hiring of young people through apprenticeship programs. Among the benefits provided, companies are authorized to grant a daycare reimbursement, to be established by an individual agreement or by a CBA, devoid of salary nature and without tax and social security incidence. The adoption of this reimbursement exempts the employer from maintaining an appropriate place for the custody and assistance of employees' children during the breastfeeding period.

The EO has also established measures to make the daily working hours more flexible; companies may adopt one or more alternatives, such as part-time work, bank of hours, 12x36 schedule, anticipation of individual annual leave and flexible entry and exit hours. The measures are valid for the first year since the child's birth, adoption, or judicial custody. The EO also allows the suspension of the employment contract (article 476-A, of the Brazilian Labor Code) for (i) qualification of women in strategic areas or (ii) an employee whose wife or partner's maternity leave is over. The Executive Order came into force on May 5 and was, initially, in force for 60 days. In June, it was extended for an equal period and, if it is not converted into law, by the end of this new 60-day period (meaning, by September 14, 2022), it will cease to produce effects.

New Rules on Professional Apprenticeship Programs in Brazil

New Order or Decree

Authors: Marília Minicucci, Partner – Chiode Minicucci | Littler, and Renata Neeser, Shareholder – Littler

On May 5, 2022, two new norms were enacted, regulating professional apprenticeship in Brazil: Decree # 11,061/2022 and Executive Order # 1,116/2022. Among the several changes and additions brought by the above mentioned norms, some (detailed further below) are directly related to the calculation of the legal apprenticeship quota, which is a permanent concern for Brazilian employers of all sizes and industries.

While the quota's percentages have remained unaltered (5% to 15% of the workers in each of the company's establishments, whose roles require professional training), they will no longer be calculated on the total absolute number of employees in such roles, but, rather, on its arithmetic average. The Ministry of Labor and Welfare has not defined the period to be considered for the calculation of the arithmetic average of workers, to date – which they must do, according to the norm itself. The decree also included different types of employees that are not to be considered for purposes of calculating the apprenticeship quota, such as employees hired on an intermittent basis and employees on Social Security leave.

Brazilian Supreme Court Creates Precedent on Mass Dismissals

Precedential Decision by Judiciary or Regulatory Agency

Authors: Marília Minicucci, Partner – Chiode Minicucci | Littler, and Renata Neeser, Shareholder – Littler

On June 8, 2022, the Brazilian Supreme Court ruled a notable case, from 2009, establishing that mass dismissals must always be preceded by a negotiation with the employees' trade union.

Though the Court made it clear that a need for negotiation does not equal a need for authorization by the union, the simple need to involve the trade union has created some discomfort among companies, because, since our Labor Reform in 2017, collective dismissals had been equated with individual employment terminations, which also meant that no prior contact with trade unions was needed.

For now, we are awaiting the publication of the decision, by the Brazilian Supreme Court. So far, they have not even made the full decision available, so one of the things no one knows yet is the Court's definition for "mass dismissals."

Canada

Ontario's Bill 88, Working for Workers Act, 2022 Becomes Law

New Legislation Enacted

Authors: Rhonda B. Levy, Knowledge Management Counsel, and Monty Verlint, Shareholder – Littler

On April 11, 2022, Ontario's Bill 88, Working for Workers Act, 2022 received Royal Assent and became law. Bill 88 enacts the new Digital Platform Workers' Rights Act, 2022 (DPWRA), and amends the Employment Standards Act, 2000 (ESA), the Occupational Health and Safety Act (OHSA), and the Fair Access to Regulated Professions and Compulsory Trades Act, 2006 (FARPCTA). The DPWRA establishes foundational rights and protections for digital workers, *i.e.*, gig workers. The ESA is amended to require most employers to ensure that they have a written policy in place for all employees with respect to electronic monitoring of employees. Included in OHSA amendments is a requirement that employers provide and maintain in good condition a naloxone kit in workplaces where they are aware, or ought to be aware, that there may be a risk of a worker having an opioid overdose. The FARPCTA is amended to require a regulated profession to make a registration decision within 30 business days of receiving an application from a "domestic labor mobility" applicant.

British Columbia's Bill 10 – 2022: Labour Relations Code Amendment Act, 2022 Becomes Law

New Legislation Enacted

Authors: Rhonda B. Levy, Knowledge Management Counsel, and Monty Verlint, Shareholder – Littler

On June 2, 2022, British Columbia's Bill 10 – 2022: Labour Relations Code Amendment Act, 2022 received Royal Assent and became law making significant amendments to the province's Labour Relations Code. Bill 10 provides for two possible paths to union certification (automatic or "card check" certification, or secret ballot vote), with the availability of each path depending on how much support exists within the bargaining unit. Bill 10 also provides employees in the construction sector with the right to switch unions annually.

British Columbia Court of Appeal Confirms Three Taxi Drivers Are Employees

Precedential Decision by Judiciary or Regulatory Agency

Authors: Rhonda B. Levy, Knowledge Management Counsel, and Monty Verlint, Partner – Littler

In a recent case, the British Columbia Court of Appeal upheld a determination by the Employment Standards Tribunal that three taxi drivers were employees. The court rejected the notion that a precise legal test should be applied universally to determine whether an individual is an "employee" or an independent contractor for purposes of the province's Employment Standards Act. It decided that the central question is whether the person is performing services as a "person in business on his own account" and that to make the determination, a nonexhaustive list of factors should be considered in a contextualized manner.

Ontario Court of Appeal Declines to Resolve Whether Employees Laid Off During Pandemic May Claim Constructive Dismissal

Precedential Decision by Judiciary or Regulatory Agency

Authors: Rhonda B. Levy, Knowledge Management Counsel, and Monty Verlint, Partner – Littler

In a recent case, the employee appealed to the Ontario Court of Appeal (OCA) the lower court's decision that Ontario Regulation 228/20 (IDEL Regulation) made under the Employment Standards Act, 2000 precludes an employee who was laid off during the pandemic from claiming constructive dismissal at common law. The lower court decision was decided on a motion under Rule 21.01(1)(a) of the Rules of Civil Procedure brought by the employer for the determination of a question of law before trial. The OCA dismissed the Rule 21 motion and remitted the action for determination before another judge in the lower court leaving the substantive question unresolved.

Ontario Appeal Court Decides Noncompetition Clause in Employment Agreement Governed by Common Law is Unenforceable

Precedential Decision by Judiciary or Regulatory Agency

Authors: Rhonda B. Levy, Knowledge Management Counsel, and Monty Verlint, Partner – Littler

The Ontario Court of Appeal recently dismissed an employer's appeal of an application judge's decision that a noncompetition clause in an employment agreement governed by the common law was unenforceable because it was ambiguous or overbroad.

China

The Supreme People's Court Issued Interpretations on Several Issues Concerning the Application of the Anti-Unfair Competition Law

Precedential Decision by Judiciary or Regulatory Agency

Author: Nancy Zhang, Special Counsel – Littler

On March 17, 2022, the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Anti-Unfair Competition Law of the People's Republic of China" was issued and came into force on March 20, 2022. The Interpretation has a total of 29 articles. According to the revised Anti-Unfair Competition Law, it has made detailed provisions on issues including, counterfeiting and confusion, false propaganda, and online unfair competition.

Opinions on Issues Related to the Connection between Labor and Personnel Dispute Arbitration and Litigation

New Regulation or Official Guidance

Author: Nancy Zhang, Special Counsel – Littler

The Ministry of Human Resources and Social Security and the Supreme People's Court jointly issued the "Opinions on Issues Related to the Connection between Labor and Personnel Dispute Arbitration and Litigation." The Opinions standardize the scope of the final labor arbitration ruling, clarify what remuneration includes, the overtime pay, and the severance. The Opinions also stipulate certain applicable legal standards in labor disputes.

Colombia

New Law for Employment of Currently or Formerly Incarcerated

New Legislation Enacted

Author: Juliana Ramos, Associate – Godoy Córdoba | Littler

Law 2208 of 2022 was enacted to create opportunities for those who have regained their freedom after being in prison, are serving their sentences with work permits, or are in parole so that they may have access to the employment market. Among other things, the law provides: (i) A "second chance stamp" will be granted to companies that incorporate at least one employee who is part of the Law´s target population into their workforce; (ii) An economic benefit for companies who employ workers from the Law's target population under fixed-term or indefinite-term contracts; (iii) When a company's new hirings represent 1% of its payroll, it will only be obligated to pay 80% of the parafiscal contributions during the first year after the new hirings and 90% of the contributions during the second year; and (iv) When the company´s new hirings represent 5% of its payroll, it will only be obligated to pay 60% of the parafiscal contributions during the first year after the new hirings and 80% of the contributions during the second year.

New Statute of Limitations for Actions Based on Labor Harassment

New Legislation Enacted

Author: Juliana Ramos, Associate – Godoy Córdoba | Littler

Law 2209 of 2022 modified Article 18 of Law 1010 of 2006 (Labor Harassment Law), by extending the statute of limitations for actions based on labor harassment from six months to three years after the alleged conduct has occurred.

Use of Technologies in Judicial Proceedings

New Legislation Enacted

Author: Juliana Ramos, Associate – Godoy Córdoba | Littler

Law 2213 of 2022 adopted Decree 806 of 2020 as permanent law and was issued during the Health Emergency as a result of the COVID-19 pandemic. This Decree implemented the use of technologies in judicial proceedings to expedite judicial processes. The law establishes that, except in cases of force majeure, legal and judicial services will be made more flexible to the public with the use of technological and computer tools as a form of access to the administration of justice.

Work from Home Framework Defined

New Order or Decree

Author: Juliana Ramos, Associate – Godoy Córdoba | Littler

Through Decree 649 of 2022, the Ministry of Labor regulated the "work from home" (WFH) framework created by Law 2088 of 2021. The decree's main provisions include: (i) Occasional, exceptional, or special circumstances are defined as extraordinary and temporary situations caused by events that are external to the labor relationship, or specific situations regarding the employee or the employer that allow the employee to render the services in a place different than the usual place of work; (ii) procedures for enabling WFH; (iii) obligations of the employer and employee during WFH; (iv) possibility for employees to provide services from abroad; and (v) WFH may be established under a "hybrid" model in which employees render services both from their homes and in the employer's premises.

Costa Rica

New Law Combats Discrimination Based on Maternity/Paternity and Expands Related Protection

New Legislation Enacted

Author: Marco Arias, Partner – BDS, Member of Littler Global

Law 10.211 in relevant part modifies the Labor Code to combat labor discrimination against women in maternity condition. This new law introduces important changes in terms of leaves of absence and protection of rights related to maternity and paternity. Additionally, it creates a paternity leave for two days per week, for the first four weeks. It is of the utmost importance that employers become familiar with these and take the necessary measures to prepare for their future implementation.

Public Employment Framework Law

New Legislation Enacted

Author: Marco Arias, Partner – BDS, Member of Littler Global

Law 10.159 was enacted to regulate labor relations between the Public Administration and public officials. The law applies to the entire Public Administration, except non-State Public Entities, the Fire Department, and competing institutions or public companies.

Telework Law is Reformed to Guarantee Right to Disconnect

New Legislation Enacted

Author: Marco Arias, Partner – BDS, Member of Littler Global

Article 9 of Law 9738 (Law to Regulate Telework) was reformed in order to oblige employers to guarantee disconnection time for their employees. In this sense, the law requires companies to comply with employee's schedules and not communicate with them after their working shifts.

Denmark

Looking for Another Job Without Being Summarily Dismissed

Precedential Decision by Judiciary or Regulatory Agency

Author: Tina Reissmann, Partner – Labora Legal

The employer (an insurance company) could not summarily dismiss an employee without notice due to a LinkedIn post where he wrote that he was seeking new job challenges and opportunities. The employer could however terminate the employee with his ordinary notice period without risking paying any compensation for unreasonable termination even if the name of the insurance company - or any negative comments - were not mentioned in the post.

No (Additional) Compensation for an Employee Invention

Precedential Decision by Judiciary or Regulatory Agency

Author: Tina Reissmann, Partner – Labora Legal

The Danish Maritime and Commercial High Court has established that an employee was not entitled to additional compensation for an invention. The inventor was, however, not obligated to assign prototypes and drawings to the employer. Under Danish law, employee inventors are entitled to reasonable compensation if the employer requires the assignment of an invention, and the value of the invention exceeds what the employee, given the terms of employment, may reasonably be expected to produce.

When determining the size of the compensation, Danish law stipulates that the following factors should be considered: (i) the value of the invention, (ii) the significance of the invention for the employer, (iii) the employee's terms of employment, and (iv) the significance of the employee's services for the invention. The employee had assigned the invention to the employer for a compensation of EUR 7,000, but with the specific clause in the assignment agreement that this amount could be subsequently challenged at the courts, which the employee then did, claiming he was entitled to a compensation of EUR 240,000. However, the court found that the initial amount of (only) EUR 7,000 was enough.

New Rules on Remote Work

New Regulation or Official Guidance

Author: Tina Reissmann, Partner – Labora Legal

The new working environment rules on the layout of the home workplace recently entered into force. The rules have been modified for employers since the requirements for the layout of the home workplace for screen work now only apply when employees regularly work at home more than two days a week on average. In such a case the employer must ensure that the employee has a table and a chair that enable appropriate working positions, and that there is correct lighting and an adjustable screen separate from the keyboard.

El Salvador

Law Requires Access to Early Childhood Care Centers

New Legislation Enacted

Author: Jaime Solis, Partner – BDS, Member of Littler Global

The "Growing Together for the Comprehensive Protection of Early Childhood, Childhood and Adolescence" law was enacted. This law repeals the Nursery Law and creates an obligation for companies that have more than 100 employees on their payroll to guarantee that the employee's children have access to one of the Early Childhood Care Centers (CAPI).

Sanctions for Failure to Employ Disabled Persons

New Order or Decree

Author: Jaime Solis, Partner – BDS, Member of Littler Global

Chapter XVIII of the Labor Code allows the sanctions for failure to employ one disabled person for every 20 employees on payroll. This provision will enter into effect as of January 1, 2023.

Finland

Implementing EU Directive on Transparent and Predictable Working Conditions in the European Union

New Legislation Enacted

Author: Antti Rajamäki, Special Counsel – Dottir Attorneys Ltd.

A governmental proposal has been issued to implement EU Directive on transparent and predictable working conditions in the European Union. According to the proposal, the following amendments will be made to the legislation: (i) content of the written information regarding working conditions to be given to the employee shall be elaborated; (ii) due to the request of a part-time or fixed-term employee the employer will have to give a justified response on possibilities to increase the regular working hours or the length of employment contract; (iii) regulation to be implemented regarding situations where an employee consent is required to order an employee with variable working hours to do a work shift; and (iv) employer will have every 12 months an obligation to review realization of actual working hours in cases of variable working hours and, if necessary, amend the working hours to correspond the employer's actual need.

The proposal also strengthens current governmental program on entrenchment of working hours in situations of variable working hours. According to the proposal, the amendments should take effect as of August 1, 2022.

Keeping a Work Email Address of a Previous Employee Functional and Monitoring It Ruled as Message Interception

Precedential Decision by Judiciary or Regulatory Agency

Author: Pihla Knaapila, Associate, and Samuel Kääriäinen, Partner and Head of Employment – Dottir Attorneys Ltd.

On May 5, 2022, the Supreme Court ruled on a case in which the employer's representative was found guilty of message interception pursuant to the Criminal Code of Finland. The employer's representative had kept a former employee's work email address functional after the termination of the employee's employment and instructed other employees of the company to monitor the messages sent to and from the email address. The employee had given the employer consent to use the email address during the employee's absences whilst the employment was in force.

However, the employee had not given a separate consent for the use of the email address in connection with the termination of the employment or thereafter.

The Supreme Court ruled that the essential elements of message interception were fulfilled regardless of whether the email messages were opened or not. The Supreme Court considered that the criminal liability lied with the employer's representative as the email address was kept functional and monitored as a result of the representative's actions.

A Weekly Recruitment Letter Insufficient to Fulfill Employer's Redeployment Obligation

Precedential Decision by Judiciary or Regulatory Agency

Authors: Pihla Knaapila, Associate, and Samuel Kääriäinen, Partner and Head of Employment – Dottir Attorneys Ltd.

On May 13, 2022, the Supreme Court ruled that, by sending weekly recruitment letters, the employer had not sufficiently fulfilled its obligation under the Employment Contracts Act to offer other work to the employee during the notice period and therefore, the employer had not had a proper and weighty reason to terminate the employment contract.

The employer had a practice of sending a weekly recruitment letter listing all open positions within the company to all employees working in units with ongoing cooperation negotiations, employees whose employment had already been terminated or changed into a part-time employment and to employees who had been laid off. The Supreme Court ruled that this procedure did not sufficiently fulfill the employer's redeployment obligation since the open positions listed in the recruitment letters were not personally selected based on the employee's education, professional skills, and employment history. Also, the fact that the employee had not returned a competence survey form in connection with the recruitment letter did not release the employer from its obligation to proactively search for and offer other suitable work for the employee during the notice period.

Abolition of the Post of Shop Steward by a Nonunion Employer Ruled as Violation of Employees' Freedom of Association

Precedential Decision by Judiciary or Regulatory Agency

Authors: Pihla Knaapila, Associate, and Samuel Kääriäinen, Partner and Head of Employment – Dottir Attorneys Ltd.

On May 20, 2022, the Supreme Court ruled that the abolition of the post of shop steward fulfilled the essential elements of violation of the freedom of association pursuant to the Criminal Code of Finland.

The representatives of an employer had abolished the post of the shop steward of the company after being notified that the employees had elected a shop steward from amongst them. The Supreme Court considered this to be a violation of the employees' freedom of association regardless of what was the scope of general applicability of the applicable collective bargaining agreement. The Supreme Court prioritized the employees' fundamental right to freedom of association originating from the Constitution of Finland and stated that the right to freedom of association also applies to employees working for an unorganized employer.

Working Hours Clause of an Employment Contract Can Be Weakened by a Collective Agreement Afterwards

Precedential Decision by Judiciary or Regulatory Agency

Authors: Pihla Knaapila, Associate, and Samuel Kääriäinen, Partner and Head of Employment – Dottir Attorneys Ltd.

On June 30, 2022, the Supreme Court ruled on a case regarding a conflict between the working hours clause of an employment contract and the applicable collective agreement.

According to the employee's employment contract as well as the applicable collective agreement, the employee's weekly working time was 37.5 hours. The working hours clause of the applicable collective agreement was later

amended by extending the maximum yearly working hours by 24 hours, and the employer implemented this amendment locally by extending the weekly working hours of the employees by half an hour per week.

According to the Finnish Collective Agreements Act, in case of conflict between any part of an employment contract and an applicable collective agreement, the collective agreement is applied. However, based on the principle of protection of the employee generally applied in employment law, a conflict between different levels of rules governing the terms and conditions of employment should be resolved in favor of the employee. Nevertheless, the Supreme Court ruled that the amended working hours clause of the collective agreement should be applied even though it was not in favor of the employee considering, inter alia, the wording of the amended clause of the collective agreement and the purpose of the Competitiveness Pact concluded by the central labor market organizations on which the amendment of the collective agreement was based.

France

Organization of Labor Relations for Digital Platforms

New Order or Decree

Author: Guillaume Desmoulin, Partner – Fromont Briens | Littler

An order dated April 6, 2022, sets a new framework for labor relations within digital platforms dedicated to the transportation of persons and the delivery of goods by means of a two- or three-wheeled vehicle, motorized or not. Each branch of business determines which association can represent the platforms. The lists of workers' unions have already been published in two orders of June 24, 2022. These organizations (employers' associations and employees' unions) will be able to negotiate and conclude sector-wide collective agreements for a fixed or indefinite period.

These agreements may cover all working conditions, remuneration and performance of professional activity, vocational training, and social guarantees for workers, as well as the start and the termination of commercial relations with the platforms. The text sets out a timetable with mandatory and optional negotiation topics. These agreements are binding for all signatories and their members. It can also be made mandatory for all the platforms and their workers included in its scope, by approval decision taken by the ARPE (Authority of Social Relations of Employment Platforms).

The "Macron Scale" of Indemnification for Unfair Dismissal is Not Contrary to Article 10 of ILO Convention 158

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Fromont Briens | Littler

The "Macron Scale" sets minimum and maximum amounts of indemnification in case of unfair dismissal. The amounts vary depending on the employee's seniority. Employment tribunals are bound by this scale, for all the dismissals notified after September 24, 2017. Fairly quickly, some employment tribunals and courts of appeal rejected the application of this scale, deeming it contrary to Article 10 of Convention 158 of the International Labor Organization and Article 24 of the European Social Charter, which provide for the right to "adequate compensation" or any other "appropriate remedy."

Reiterating the position taken in July 2019, the French Civil Supreme Court has reaffirmed that the scale of indemnification for employees dismissed without cause is not contrary to Article 10 of Convention No. 158 of the ILO. It therefore considers that the French judge cannot set aside, even on a case-by-case basis, the application of the scale with regard to this international convention. It also specified that French law cannot be reviewed for compliance with Article 24 of the European Social Charter, which does not have direct effect.

An Intra-group Transfer Does Not Entail Transfer of Liability

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Fromont Briens | Littler

When the change of employer results from the application of Article L 1224-1 of the French Labor Code, the new employer is bound by the obligations of the former employer. The transferred employee may claim a compensation from the new employer for any damage caused by the former employer due to a breach of its obligations prior to the transfer of the contract. However, this transfer of liabilities does not apply to conventional transfers, especially in cases where the staff is transferred following a loss of a contract.

In such case, the French civil Supreme Court had to rule on a tripartite agreement under which an employee left the position he held in one company in order to join another company belonging to the same group. The purpose of the agreement was to continue the employment contract within another company of the group, with the same seniority, the same qualification, and the same salary. The Court ruled that, in lack of express provision to this effect or voluntary application of French TUPE rules, such agreement does not entail the transfer to the new employer of all the obligations of the former employer. The employee is therefore not entitled to make any claim against the new employer based on breaches attributable to the first employer.

The "Clicwalkers" Do Not Perform a Work Under a Subordinate Relationship

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Fromont Briens | Littler

In a decision dated May 5, 2022, the Criminal Division of the French Supreme Court ruled on the status of "clicwalkers." These individuals collect commercial data in the field, using a free "Click and Walk" application, and receive a gratuity in gift points or cash paid after verification of compliance with the terms of the proposed mission. The criminal chamber has dismissed the existence of a relationship of subordination since (i) the individual is free to abandon the proposed missions during the performance of the service, (ii) the individual does not receive any instruction during this performance, (iii) the company does not have the power to control the correct enforcement of the mission and to sanction the potential breaches, even if the correct performance of the missions is checked by the company which can refuse to pay the envisaged compensation and the reimbursement of the expenses incurred, in case of noncompliant performance. In the absence of subordination, the offense of concealed work is dismissed.

Germany

Significant Tightening of the German Law on the Provision of Evidence

New Legislation Enacted

Author: Lioba Lamers, Associate – vangard | Littler

The German legislator must implement the requirements of the European Directive 2019/1152 (Directive on transparent and predictable Working Conditions) by August 1, 2022. The latest draft bill of the German legislator published in April 2022 plans a significant tightening of the German law on the provision of evidence. According to the draft, employers must hand over to employees a transcript of all essential working conditions, *e.g.*, in the form of the employment contract, signed in original. Electronic form is excluded.

For the first time, employers must pay fines for violations of the Evidence Act. In view of the considerable criticism of this draft, it remains to be seen whether the Evidence Act will actually be tightened to such an extent. Since the law is expected to be enacted at very short notice, employers should monitor the legislative process in order to be prepared, especially amend their standard employment contracts and organize their signature processes. We will keep you updated as to any developments.

Recording of Working Hours and Distribution of the Burden of Presentation and Proof for Overtime Compensation

Precedential Decision by Judiciary or Regulatory Agency

Author: Sabine Vianden, Associate – vangard | Littler

On May 4, 2022, the Federal Labor Court ruled for the first time on the impact of the European Court of Justice's 2019 ruling on the obligation of recording of working hours on German law. The Federal Labor Court is sticking to its previous case law and denying the discussed effects of the ECJ ruling. Employees must show that they have performed work in excess of the normal working hours or that they were prepared to do so on the instructions of the employer and that the employer expressly or impliedly ordered, tolerated, or subsequently approved the overtime worked. For the time being, the status quo remains that in Germany there is neither a direct legal obligation to comprehensively record working hours nor an indirect one with regard to the burden of presentation and proof in overtime litigation. However, it remains to be seen whether the legislature will soon make changes as announced in the coalition agreement.

15-Month Time Limit for Claiming Leave

Precedential Decision by Judiciary or Regulatory Agency

Author: Kim Kleinert, Associate – vangard | Littler

In the event of continued incapacity for work, there is generally a 15-month time limit for claiming leave. In the case of regular vacation entitlements, employers have a duty to provide information about its expiration. In two cases (C 518/20; C 727/20), the European Court of Justice is being asked whether this duty to notify also applies to employees who are on long-term sick leave or are fully incapacitated. In his opinion, ECJ Advocate General Jean Richard de la Tour made it clear that the employer's cooperation is also required in these cases. It is likely that the ECJ will follow this opinion, which is why the decision is eagerly awaited and should be kept in mind by employers in particular.

German Whistleblower Protection Act

Proposed Bill or Initiative

Author: Matthias Pallentin, Senior Associate – vangard | Littler

A new draft bill of the Whistleblower Protection Act (Hinweisgeberschutzgesetz) has been prepared by the Federal Department of Justice. This draft bill is intended to implement the EU Whistleblower Protection Directive 2019/1937 and to establish a Whistleblower protection in German law for the first time. The draft bill introduces the obligation to set up internal reporting channels and follows the corresponding requirements of the Directive. Initially, only employers with at least 250 employees are obliged to set up corresponding channels. Only from December 17, 2023, will this also apply to companies with at least 50 employees.

In addition to other core elements such as comprehensive protection of whistleblowers against all reprisals (such as dismissal, but also any other unequal treatment in connection with the report), the draft includes the fundamental freedom of choice for whistleblowers: Whether a report is made internally to the body set up by the company or externally to the body set up at the Federal Department of Justice. Even though there may still be changes in the further course of legislation, employers are well advised to start dealing with this issue now - especially if they have not yet set up a whistleblowing system. But even employers who already have a whistleblowing channel in place should quickly begin to review it in light of the new requirements.

Hungary

Qualified Staffing Agencies

New Legislation Enacted

Author: Zoltan Csernus, Attorney-at-Law – VJT & Partners Law Firm

The new amendment of the Labor Act introduced the category of qualified staffing agencies. These service providers are regulated by a government's decree and are entitled to place foreign employees as temporary staff in Hungarian companies. An existing staffing agency may apply to be licensed as qualified staffing agency by the competent authority. The applicant has to comply with several conditions, among them at least 500 employees in average for the previous business year, a bank deposit of HUF 50,000,000 (approximately USD 12,722) dedicated to the payment of any potential tax fine, and a status of taxpayer without tax debts certified by the tax authority.

Support for Refugee Employees with Ukrainian Citizenship

New Order or Decree

Author: Zoltan Csernus, Attorney-at-Law – VJT & Partners Law Firm

The government's new decree increased the financial support for employers employing Ukrainian citizens who arrived in Hungary on or after February 24 as refugees. The financial support is for employees who work for at least 20 hours per week and the support is granted for a maximum of 12 months, which period can be prolonged for another 12 months, but only for the period of the employment. The support must be spent on housing and transportation for these employees (specific criteria apply). This decree also included a support program for employers who employ Ukrainian citizens at least 90 days in the time period of 365 days before they apply for state support in line with this decree. The state support for these Ukrainian employees, who were already employed in Hungary before February 24, 2022, is 50% less than for those who came after February 24, 2022.

India

Amendment of Haryana Laws Permitting Engagement of Female Employees at Night in Certain Commercial Establishments

New Legislation Enacted

Authors: Vikram Shroff, Partner and Head of Employment, and Sayantani Saha, Associate – Nishith Desai Associates

The Haryana state government has issued a notification dated May 17, 2022, amending the Punjab Shops and Commercial Establishments Rules, 1958 (in its application to the state of Haryana) permitting engagement of female employees in logistics and warehousing establishments (which have obtained discretionary exemption from labor authorities to operate on a 24x7 basis) at night, between 7 p.m. and 6 a.m., subject to compliance with certain conditions. The provision permitting engagement of female employees at night, subject to certain conditions and with appropriate discretionary exemption from state labor authorities to operate on a 24x7 basis, is also applicable to commercial establishments in Haryana which are IT/ITeS establishments, banking establishments, three (or more) star hotels and 100% export-oriented establishments. Application for grant of such exemption is required to be made at least a month before the date of commencement of such an exemption and shall be granted with validity for one year.

The Haryana state government has also issued a notification dated June 7, 2022, providing additional compliance requirements for engaging female employees at night (between 7 p.m. and 6 a.m.) in IT/ITeS establishments, banking establishments, three (or more) star hotels and 100% export-oriented establishments and logistics and warehousing establishments. These inter alia include a requirement to submit to the Haryana Labor Commissioner (i) a copy of the annual return that is required to be submitted to the local district authorities as per the PoSH Act, (ii) a copy of the written declaration/consent obtained from each female employee who is required to work in any exempted

commercial establishment in Haryana between 7 p.m. and 6 a.m., accepting such engagement, and (iii) half-yearly report (or immediate report, based on intimation) about details of female employees engaged at night in the establishment, besides ensuring compliance with Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH Act), and other health and safety-related requirements.

Exemption to All Shops and Establishments in Tamil Nadu to Operate on a 24x7 Basis on All Days of the Year

New Legislation Enacted

Authors: Vikram Shroff, Partner and Head of Employment, and Sayantani Saha, Associate – Nishith Desai Associates

The Tamil Nadu state government has issued a notification dated June 2, 2022, permitting all shops and establishments in the state of Tamil Nadu (Chennai) to operate on a 24x7 basis on all days of the year for three years with effect from June 5, 2022, subject to certain conditions. The applicable conditions include provision of one week off for all employees in a specified manner, payment of wages including overtime wages to employees' bank accounts and limiting working hours of employees including overtime work to 10.5 hours in a day and 57 hours in a week (eight hours a day and 48 hours a week without overtime).

Engagement of female employees between 8 p.m. and 6 a.m. subject to provision of adequate protection and provision of transport arrangement with notification to such provided at the entrance of the establishment and constitution of internal complaints committee as per the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India. Violation of such conditions for operation on a 24x7 basis will lead to penal action against the employer as per Tamil Nadu Shops and Establishments Act, 1948 which provides for monetary penalties of up to INR 10,000 (approx. US$ 140).

Conditions for Exempting Factories in Haryana and Uttar Pradesh States to Allow Engagement of Female Employees at Night

New Legislation Enacted

Authors: Vikram Shroff, Partner and Head of Employment, and Sayantani Saha, Associate – Nishith Desai Associates

The Uttar Pradesh state government has issued a notification dated May 27, 2022, permitting all factories in Uttar Pradesh to engage female employees in night shifts (between 7 p.m. and 6 a.m.) subject to certain conditions. The Haryana state government has also issued a notification dated June 17, 2022, providing for similar conditions for permitting discretionary exemption to factories in Haryana which seek to engage female employees in night shifts (between 7 p.m. and 6 a.m.). Such conditions include ensuring compliance with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India (PoSH Act).

Besides complying with PoSH Act, there are additional requirements for engaging female employees at night such as obtaining declaration/consent from each female employee engaged in night shift; ensuring female employees are engaged during night shifts maintaining a minimum prescribed strength of female employees; provision of transportation facility (complying with applicable requirements thereto) to female employees working in night shifts from their residence to factory and back; and compliance with other health and safety-related requirements. There are also requirements for employers to submit to the prescribed local labor authorities certain monthly/annual reports as specified in the aforesaid notifications. In Uttar Pradesh, the employment of a female employee cannot be terminated for her refusal to work at night in a factory between 7 p.m. and 6 a.m.

Implementation of Labor Codes Further Delayed

Proposed Bill or Initiative

Authors: Vikram Shroff, Partner and Head of Employment, and Sayantani Saha, Associate – Nishith Desai Associates

There was speculation about the Indian Ministry of Labor and Employment implementing the four new Indian labor codes - Code on Wages, 2019, Code on Social Security, 2020, Industrial Relations Code, 2020 and Occupational Safety, Health and Working Conditions Code, 2020 from July 1, 2022. However, the implementation of the labor codes has been further delayed. Reportedly, 90% of the Indian states have notified draft rules to at least one of the labor codes for public review, although none of the states, nor the central government has notified any of such rules. While some procedural provisions of the Code on Wages, 2019 and Code on Social Security, 2020 have been notified by the Indian Ministry of Labor and Employment, we await notification of the substantive provisions of the four labor codes and rules thereto.

Karnataka Notification on Resuming Creche Facilities in Factories

Important Action by Regulatory Agency

Authors: Vikram Shroff, Partner and Head of Employment, and Sayantani Saha, Associate – Nishith Desai Associates

The Karnataka government has issued a notification dated April 13, 2022, stating that all COVID-19-related protocols/ restrictions applicable to factories in Karnataka have been withdrawn. Accordingly, the Karnataka government has directed the resumption of creche facilities in Karnataka factories, with COVID appropriate measures.

Ireland

Regulations on Gender Pay Gap Reporting Published

New Regulation or Official Guidance

Authors: Niall Pelly, Partner, and Alison Finn, Senior Associate – GQ | Littler

The Employment Equality Act 1998 (Section 20A) (Gender Pay Gap Information) Regulations 2022 (the Regulations) were published on June 3, 2022. Employers will be required to identify a specified "snapshot" date of their employees in June 2022 and then report a set of data points, including: (i) the mean and median gap in hourly pay between male and female employees; (ii) the mean and median gap in hourly pay of part-time male and female employees; (iii) the mean and median gap in hourly pay between male and female employees on temporary contracts; (iv) the mean and median gap in bonus pay between male and female employees; (v) the percentage of male and female employees who received bonus pay; (vi) the percentage of male and female employees who received benefits in kind; and (vii) the percentage of male and female employees in each quartile pay band.

The Regulations provide further explanation on how to calculate the gender pay gap, including how to calculate an employee's hourly remuneration, bonus remuneration and total working hours. The Government has also published a general guidance note and an FAQ for employers on gender pay gap reporting information. For the first two years, the Regulations will only apply to employers with at least 250 employees. In the third year it will apply to those with at least 150 employees, and from the fourth year onwards, will then apply to employers with at least 50 employees.

Extension of Parent's Leave and Benefit to Seven Weeks

New Regulation or Official Guidance

Authors: Niall Pelly, Senior Associate, and Alison Finn, Senior Associate – GQ | Littler

As of July 2022, parent's leave has been extended from five weeks to seven weeks. The additional two weeks of parent's leave will apply to parents of children who are under the age of two in July 2022, or adoptive children who have been placed with their parents for less than two years from July 2022. Parent's benefit has also increased from five weeks to seven weeks for each qualifying parent.

Details of the Work Life Balance and Miscellaneous Provisions Bill 2022 Published

Proposed Bill or Initiative

Authors: Niall Pelly, Partner, and Alison Finn, Senior Associate – GQ | Littler

The Government has published details of the Work Life Balance and Miscellaneous Provisions Bill 2022 (the Bill). The Bill will implement the EU Work-Life Balance Directive, which is due to be transposed by August 2022. It is proposed that the legislation will introduce a right to request flexible working for employees with children of up to 12 years of age (or 16 years where the child has a disability or long-term illness) and those with caring responsibilities. It also proposes to introduce a right for employees to take up to five days' unpaid leave each year to provide medical care for family members or those in their household and proposes to increase the period in which mothers are entitled to take paid time off work to breastfeed.

Italy

Welfare for Employees 2022

New Legislation Enacted

Authors: Carlo Majer, Partner, and Caterina Colombano, Associate – Littler Italy

The government enacted Law Decree No. 50/2022, which provides a one-time payment of EUR 200 for employees hired on an open-ended or fixed-term basis (including those with part-time working hours). This benefit is granted to employees who receive a taxable salary not exceeding EUR 2,692 and who have benefited from the 0.8% exemption on the monthly social contributions due to the INPS (National Institute for Social Security Contributions). Employers will issue the payment in July 2022, unless the employee declares that the allowance would not be beneficial.

The allowance is designed to supplement family incomes and reserved for individuals who meet employment and income requirements. Additionally, the bonus is payable to employees only once, even if they hold more than one employment relationship. It is not transferable nor does it constitute income for tax and social security purposes. The employer can carry over this amount when paying social security contributions.

Personnel Supply Services in Italy

New Legislation Enacted

Authors: Carlo Majer, Partner, and Caterina Colombano, Associate – Littler Italy

In Italy, the supply of personnel in favor of third parties can be legitimately undertaken only by agencies authorized by the Ministry of Labor (so-called agenzie per il lavoro or agenzie di somministrazione) and subject to a series of strict guarantees provided by law and by the national collective agreements applied to the agency and to the "end client" (so-called utilizzatore). The peculiarity of this three-party relationship is that there are two contractual relationships: one between the agency and the leased employee (which is the actual employment relationship), and the other between the agency and the end client, which is a pure business relationship. The agency may hire the leased employee either on an open-ended employment contract (subject to the ordinary rules) or on a fixed-term

basis. The fixed-term employment relationship is again subject to the ordinary discipline of the fixed-term contract with the exception of certain provisions: it is subject, among others, to the duration limits that are indicated by law and by the more common NCLA applied by the agencies (NCLA for Personnel Leasing Agencies). This NCLA provides that the leased employee may not work in favor of the same end client for more than 24 months (unless other terms are provided by collective agreements), considering only for the work performance of tasks of the same level and legal category.

Law No. 51/2002 of May 2022 introduced an important change in the regulation of personnel leasing, extending until June 30, 2024, the possibility for agencies to employ leased employees hired on an open-ended basis on temporary assignments with the end client for periods exceeding 24 months, even if not continuous. Of utmost importance is that the agency notifies the end client of the existence of the open-ended employment relationship between the agency and the employee.

Periodic Report on Gender Equality in the Workplace

New Order or Decree

Authors: Carlo Majer, Partner, and Caterina Colombano, Associate – Littler Italy

Within the implementation of Article No. 46 of the Gender Equal Opportunity Code (so-called Codice per le pari opportunità), the Interministerial Decree of March 29, 2022, (published in the Official Gazette in April 2022), defines the procedures for public and private companies with more than 50 employees to draw a biennial report on gender equality in the workplace. The report must be submitted electronically through the new software available on the Labor Services website, which is operational as of June 23, 2022. For the 2020-2021 biennium, the submission deadline is September 30, 2022. For subsequent years, the deadline will be April 30 of the year following the end of each biennium.

Failure to submit the report - even after a solicitation for regularization by the competent Labor Inspectorate - results in the application of pecuniary administrative fines; if the noncompliance continues for more than 12 months, any social contribution benefits enjoyed by the company are suspended for one year. The National Labor Inspectorate verifies the truthfulness and completeness of the reports, and in case of a false or incomplete report, a fine of EUR 1,000 to EUR 5,000 will be applied.

Dismissal for Objective Reasons

Precedential Decision by Judiciary or Regulatory Agency

Authors: Carlo Majer, Partner, and Caterina Colombano, Associate – Littler Italy

The Constitutional Court in its decision No. 125/2022, published in the Official Gazette in May 2022, declared specific language in Law no. 300/1970 to be unconstitutional. As a result, the word "manifest" as an objective reason for dismissal is expunged from the law. This decision applies to actions brought by employees hired before March 7, 2015, where the workforce consists of more than 15 employees.

In Italy, dismissals that are based on justified objective reasons, such as change in production activity or work organization, are lawful if the employer provides the relevant evidence. Under the old language of the law, a court could find the dismissal to be unlawful – and order remedies, such as reinstatement or indemnity – if there was a "manifest lack of existence" of the objective reasons for the dismissal. For the nonexistence to be "manifest," it had to be evident, self-expressed, and incontrovertible. By removing the requirement for the "lack of existence" to be "manifest," the Constitutional Court's decision makes it easier for dismissed employees to meet a lower standard of proof to be reinstated to the employment.

COVID-19 at Workplace: The Latest News

New Regulation or Official Guidance

Authors: Carlo Majer, Partner, and Caterina Colombano, Associate – Littler Italy

On June 30, 2022, the social parties updated the Protocol for the management of the COVID-19 emergency in the workplace. The protocol provides various key points, including: (i) employer's informational duties to manage COVID-19 risks in the workplace and any measures that can be applied; (ii) access to the workplace can be conditioned on the control of body temperature, always in full compliance with the data protection laws and regulations; (iii) the obligation to ensure adequate cleanliness in corporate premises; (iv) the obligation to comply with hygienic precautions within the workplace, such as hand cleaning; (v) although masks are no longer mandatory in indoor places, with the exception of some areas, the employer must still ensure their availability; (vi) health surveillance must continue to be conducted by the company doctor in cooperation with the employer and other professionals provided for in the H&S workplace legislation; (vii) agile work (*i.e.*, smart working) remains a strongly recommended instrument for the containment of the spread of the virus.

In this regard, Law No. 52/2022, published in May 2022, extended the so-called simplified "smart working" until August 31, 2022.

Kingdom of Saudi Arabia

National Policies for Occupational Health and Safety

New Legislation Enacted

Authors: Sara Khoja, Partner and Head of Employment, and Sarit Thomas, Knowledge Management Counsel – Clyde & Co.

Decision No. 379 of 1443 seeks to establish the national Council for Occupational Safety and Health which will oversee the implementation of national policies for occupational health and safety. The council will seek to undertake the following: (i) Review legislation, regulations, bylaws, programs and any other regulatory tools related to occupational safety and health, and propose necessary amendments; (ii) Work on establishing an effective and comprehensive monitoring and evaluation system; (iii) Working on developing a comprehensive national program for reporting work accidents, injuries and occupation-related diseases, and documenting reports and results of investigations related to them, in coordination with the relevant authorities; (iv) Providing advice and technical support; (v) Working on developing and adopting a governance structure for occupational safety and health at the national level; (vi) Coordinating the roles and responsibilities among the government entities concerned with the occupational safety and health; (vii) Approving the national programs and initiatives related to occupational safety and health; (viii) Enhancing cooperation between employers, workers, and their representatives; (ix) Evaluating the impact and sustainability of occupational safety and health activities; (x) Spread awareness of the importance of occupational safety and health; (xi) Working to develop resources and capabilities in the field of occupational safety and health; and (xii) Reviewing international reports related to occupational safety and health.

Malaysia

Changes Under New Employment Legislation

New Legislation Enacted

Authors: Selvamalar Alagaratnam, Partner, and Teng Wei Hun, Associate – Skrine

The Employment (Amendment) Act 2021 (the Act) was passed on March 30, 2022, and will come into effect on September 1, 2022. The changes include redefining an "apprentice contract" by limiting it to a minimum duration of six months and a maximum duration of 24 months; reducing maximum working hours per week from 48 to 45 hours; increasing paid maternity leave period from 60 to 98 days; allowing paternity leave of seven days; imposing the requirement on employers to obtain prior approval from Director General of Labor before employing a foreign employee; empowering the Director General of Labor to inquire into and decide matters relating to discrimination in employment; providing a procedure for applications of flexible working arrangement by an employee and increasing the fine which the employer is liable to pay relating to sexual harassment complaints from RM10,000 to RM50,000.

The scope of application of the Employment Act post its amendment is as yet unknown as the Ministerial Order that will define the scope will only be made public on September 1, 2022.

Federal Court Rules that Industrial Court is Proper Forum to Decide on Issue of Restrictive Immunity

Precedential Decision by Judiciary or Regulatory Agency

Authors: Selvamalar Alagaratnam, Partner, and Teng Wei Hun, Associate – Skrine

The United States Government (U.S. Government) sought a declaration that it and its embassy are immune from the jurisdiction of the Industrial Court after an unjust dismissal claim was brought by its employee, a security guard at its Malaysian embassy. The High Court ruled that the U.S. Government and its embassy were protected by immunity and prohibited the Industrial Court from adjudicating the employee's claim. The Court of Appeal overturned the High Court's decision and ordered the Industrial Court to proceed to hear the dispute.

The Court of Appeal held that in the case of restrictive immunity, it is not all acts of a sovereign foreign state that are immune from legal action but only those acts that are primarily and peculiarly governmental or diplomatic in nature and character. Actions of a foreign State that are purely of a commercial or private law nature are not immune from legal challenge by those parties affected by it. The U.S. Government filed a further appeal to the Federal Court but was unsuccessful and the Federal Court ordered that the claim should be decided by the Industrial Court as whether restrictive sovereign immunity applied to the U.S. Government depends on the determination and finding of facts of the nature, duties, and job scope of the employee by way of trial.

Relaxation of COVID-19 Standard Operating Procedures

New Regulation or Official Guidance

Authors: Selvamalar Alagaratnam, Partner, and Teng Wei Hun, Associate – Skrine

Vaccination is no longer mandatory. The requirement of vaccination before being allowed to enter premises (such as shops and restaurants) has also been abolished. An individual can now enter premises regardless of status of vaccination except those with "High Risk" status in the MySejahtera application or those under Home Surveillance Order. Masks are mandatory while indoors only and optional when outdoors but encouraged in crowded places. Physical distancing is no longer required but encouraged when not wearing mask. COVID-19 positive individuals are required to quarantine for seven days. However, they have the option of undergoing a supervised COVID-19 test on the fourth day and if they test negative, they may be released from quarantine.

Mexico

Amendments to Mexico's Federal Labor Law

New Legislation Enacted

Authors: Monica Schiaffino, Shareholder, and Valeria Cutipa, Associate – Littler

On April 28, 2022, two decrees amending various articles of the Federal Labor Law were published in the Official Gazette of the Federation. The first decree establishes the obligation of employers to grant employees unpaid leave to participate in "revocation of mandate" process. The second decree establishes that when the nature of the contracted work seriously compromises the health and/or life of employees, the use of technology and innovative work tools must be considered to prevent them.

Norway

Collective Right to Bring Legal Action

New Legislation Enacted

Author: Ole Kristian Olsby, Partner – Homble Olsby | Littler

The collective right to bring an action was reintroduced from July 1, 2022. It allows the unions, in their own name and without consent from the hired personnel, to present legal proceedings against companies claiming that such companies' hiring of personnel from staffing agencies is unlawful. It also entitled the unions to demand negotiation in connection with an allegedly unlawful hiring from staffing agencies. However, the unions will not, in their own name, be able to take legal action concerning the employee's right to permanent employment or compensation. The hired person must still do so in their own name.

Strengthening of Full-Time Employment

Proposed Bill or Initiative

Author: Ole Kristian Olsby, Partner – Homble Olsby | Littler

The government proposed several amendments to reduce part-time work and strengthen the right to full time employment. These include a duty for the employer to document and discuss with the employee representatives the need for part-time positions, mandate for the Labor Inspection Authority to enforce these duties. Furthermore, the proposal includes further strengthening of part-time workers' preferential right to an extended position. The Parliament will process the proposal, probably during the fall of 2023.

Limitations on Hiring from Staffing Agencies

Proposed Bill or Initiative

Author: Ole Kristian Olsby, Partner – Homble Olsby | Littler

The government proposed several amendments to further limit the possibilities of hiring from staffing agencies, expand the types of situations that can count towards the right to permanent employment, as well as reduce the period within which the personnel must be hired before being entitled to permanent employment. The Parliament will review the proposal, probably during the fall of 2023.

Transparent and Predictable Working Conditions

Proposed Bill or Initiative

Author: Ole Kristian Olsby, Partner – Homble Olsby | Littler

The government has issued a consultation paper where they propose to implement a new EU-directive 2019/1152 on transparent and predictable working conditions in the European Union. The proposal includes amendments relating to further requirements for the written employment contract, further rules concerning duration and use of probation period, stricter and clearer requirements concerning prior notification of working time, a right to ask for more predictable and safe work conditions and regulation on what will be considered as applicable if there is no information about an issue on the employment contract. The consultation paper is sent on a public hearing round with deadline for statements on October 20, 2022.

Work and Pay Conditions on Foreign Ships in Norwegian Waters

Proposed Bill or Initiative

Author: Ole Kristian Olsby, Partner – Homble Olsby | Littler

The government has issued a consultation paper where they propose new rules to regulate the (Norwegian) wage and working conditions a crew will be entitled to when foreign ships are in Norwegian waters, as well as the foreign ships that will be comprised by these requirements. The purpose of the proposal is to counteract social dumping, make competition for maritime services in Norwegian waters fairer, and to ensure future recruitment to the maritime sector. The consultation paper is sent on a public hearing round with deadline for statements on August 31, 2022.

Peru

Authorization for the Withdrawal of Pension Funds

New Legislation Enacted

Authors: César Gonzáles Hunt, Partner, and Amable Vasquez Baiocchi, Associate – Philippi Prietocarrizosa Ferrero DU & Uría

On May 21, 2022, Act 31478 was issued, allowing affiliates to a Private Pension Entity to withdraw up to a total of PEN 18,400 (four tax units) from the individual capitalization account of their pension funds. This benefit can be accessed one time only. The withdrawal of funds is intangible except for withholdings derived from alimony debts (up to a maximum of 30%). The specific procedure for this withdrawal was set forth through Resolution 1767-2022/SBS and, in general, states that after the request is made, one tax unit will be deposited each 30 calendar days. On the third deposit, the remaining amount will be delivered in full.

Authorization for the Withdrawal of CTS Funds

New Legislation Enacted

Author: César Gonzáles Hunt, Partner, and Amable Vasquez Baiocchi, Associate – Philippi Prietocarrizosa Ferrero DU & Uría

On May 25, 2022, Act 31480 was published. This act authorizes the withdrawal of the compensation for time of services (CTS), a benefit granted to all employees twice a year for the equivalent of half a remuneration and which is deposited in a bank account that employees have access to only upon the termination of the employment relationship. The possibility of withdrawal is meant to cover economic needs caused by the pandemic and allows the free disposition of 100% of the deposits.

The benefit, that was previously granted until the end of 2021, is now available until December 31, 2023. The Regulation of this Act was published on June 5, 2022, through Supreme Decree 011-2022-TR.

Annual Compensable Leave for Oncological Examinations

New Legislation Enacted

Authors: César Gonzáles Hunt, Partner, and Amable Vasquez Baiocchi, Associate – Philippi Prietocarrizosa Ferrero DU & Uría

Act 31479 published on May 25, 2022, made an addition to the National Cancer Law, to recognize the right of all employees of the private and public sectors to a compensable leave of up to two working days a year to undergo preventive oncological examinations. To access the leave, employees have to coordinate their leave with their employer and show the medical order indicating the examinations to be performed. Afterwards, employees shall present the documents that accredit the medical care received. The opportunity to compensate the hours not worked shall also be agreed.

Addition of Very Serious Infringements in Labor Matters

New Order or Decree

Authors: César Gonzáles Hunt, Partner, and Amable Vasquez Baiocchi, Associate – Philippi Prietocarrizosa Ferrero DU & Uría

On April 21, 2022, the Supreme Decree 004-2022-TR was published, modifying the Regulation of the General Labor Inspection Law, Supreme Decree 019-2006-TR. This Decree set forth two new very serious infringements that can be identified and are subject to a fine by the Labor Inspection Authority (SUNAFIL), in the context of the Sanitary Emergency and the National State of Emergency.

The first one refers to allowing people that do not have the complete COVID-19 vaccination to enter the premises of the work center or stay to provide services in person. The second one is upon the noncompliance of any provision related to people that provide services and do not have the full vaccination against COVID-19, according to the current regulation, in relation to their return to in person activities in work centers.

Protocol for Oversight in Sexual Harassment Matters

New Regulation or Official Guidance

Authors: César Gonzáles Hunt, Partner, and Amable Vasquez Baiocchi, Associate – Philippi Prietocarrizosa Ferrero DU & Uría

The Superintendency Resolution 257-2022-SUNAFIL approves Version 02 of the Protocol for oversight of sexual harassment matters. This new version sets forth certain changes, among which it now expressly includes the protection against sexual harassment for domestic workers, the reinforcement of the nonrevictimization principle and the introduction of the bill of rights of the complainant, among others.

Poland

The "Polish Deal" Already Revised

New Legislation Enacted

Authors: Robert Stępień, Partner, and Jakub Grabowski, Associate – PCS | Littler

The so-called "Polish Deal," the biggest tax and social security reform in recent years entered into force on January 1, 2022. New regulations were controversial from the very beginning, especially due to poor quality of the new legislation's wording, making it vague, over-complicated and even self-contradictory at times.

The regulations have been recently amended. One of the major changes is lowering the first tax rate from 17% to 12%. It is applicable retroactively, from the beginning of 2022. It will require employers to adjust their payroll systems to this change. What is important, although the tax rate is nominally lowered, not all employees will truly benefit from it. For many employees the benefit will be much lower than expected, in some cases net salary will be even lower.

Work-From-Home Will Finally Be a Part of the Employment Code

Proposed Bill or Initiative

Authors: Robert Stępień, Partner, and Jakub Grabowski, Associate – PCS | Littler

The matter of work-from-home (WFH) arrangements (or as it is called in Polish, remote work) has been a hot topic for almost two years since the beginning of COVID-19 pandemic and first lockdowns. For a very long time it has functioned in a legislative limbo, where there was no legal framework for this. A new bill to amend the Employment Code that would introduce appropriate legislation was presented recently, after intensive legislative review, being a new iteration of other already existing propositions. The new bill provides that employers would have to implement WFH policies, employees would have a right to on-demand WFH days and a right to an extra payment that would compensate the costs of working from home.

This time the legislative works are going swift, and new legislation is expected to come into effect in autumn.

Proposed Minimum Wage Will Increase Twice in 2023

Proposed Bill or Initiative

Authors: Robert Stępień, Partner, and Jakub Grabowski, Associate – PCS | Littler

The government proposed new minimum wage for 2023, amidst historically high inflation records in Poland. Current official year over year inflation rate is 15.6% (June 2022), causing low earners to struggle. Government's proposal is to levy this burden on businesses and increase the minimum wage in 2023 twice: PLN 3,383 (approx. USD 750) a month and PLN 22.10 (approx. USD 4.90) per hour, from January 1; and PLN 3,450 (approx. 765 USD) a month and 22,50 PLN (~5 USD) per hour from July 1. This would be the first time in many years that the minimum wage would increase twice a year.

Poland Will Implement EU's Work-Life Balance Directive

Proposed Bill or Initiative

Authors: Robert Stępień, Partner, and Jakub Grabowski, Associate – PCS | Littler

Recently the EU has adopted a so-called "work-life balance directive" (Directive EU 2019/1158 on work-life balance for parents and carers) that must be implemented into domestic law by August 2, 2022. Polish government has drafted a bill to amend the Employment Code, adjusting it to the framework set out in the said directive. The directive provides some new paternity and parental leave, carer's leave, and force majeure leave. The Polish bill is still subject to government's legislative procedures and has not been yet presented before Parliament, so it is very unlikely that Poland will implement these changes on time.

Government's trend is to provide wider protection than offered by the directive and for this reason it takes more time than anticipated. However, employers must be prepared that employees' rights related to absence at work will be strengthened.

Portugal

New CBA Regulations for 2022 (and Beyond?)

Proposed Bill or Initiative

Authors: David Carvalho Martins, Partner and Head of Employment, and Tiago Sequeira Mousinho – DCM | Littler

The government's "Decent Work Agenda" (Agenda do Trabalho Digno) seems to have its greatest impact on collective bargaining regulations. Employers and employees should be aware of the many implications that may arise from the – soon to be published – legislation: First, a CBA may be applicable to quasi-dependent workers; therefore, a large category of service providers (economically dependent) may benefit from an eventually applicable CBA. The DWA also provides for the "similar" conditions for representation of such quasi-dependent workers. "Outsourcing employees" may benefit from the applicable CBA at the company where they are providing their services. Following this perspective, companies may have an applicable CBA without any employee being a member of a trade union. New economical and tax incentives, as well as public procurement benefits programs will soon enter into force for companies/employers who wish to apply, or to celebrate a CBA. Finally, arbitration regime (to an arbitration court) may be applicable to discuss the tenets or objective grounds of notice for termination regarding CBAs.

The Portuguese legislator seems to reinforce the legal regime on CBA regulations, as well as on employee representation. This may challenge, however, EU and Portuguese framework on competition (anti-trust) law, namely on price-fixing prohibitions and cartel-like scenarios that may arise. We will monitor and report on any related developments.

DWA and Digital Labor Markets

Proposed Bill or Initiative

Authors: David Carvalho Martins, Partner and Head of Employment, and Tiago Sequeira Mousinho – DCM | Littler

The government's "Decent Work Agenda" (Agenda do Trabalho Digno) is set to be enacted in July/August and is considered to be the focus of 2022 (so far). One of the many measures to implement addresses the impact of algorithms on labor markets. The DWA settled the presumption that an employment contract exists with a platform operator when there is evidence of a relationship between the platform and the activity provider, as well as between the activity provider and the clients. The DWA also provides for specific duty of information and transparency towards the ACT (Portuguese Authority for Working Conditions), employees and their representatives, about the criteria of algorithms and mechanisms of artificial intelligence used.

On the one hand, the idea is to facilitate the (re)qualification of employment contracts. On the other hand, it is intended to reduce information inequalities in the employment relationship, allowing the employee, in the same way, to know whether possible personal data may or may not be processed (*e.g.*, by instruments, equipment and systems).

Temporary Work

Proposed Bill or Initiative

Authors: David Carvalho Martins, Partner and Head of Employment, and Tiago Sequeira Mousinho – DCM | Littler

The government's "Decent Work Agenda" (Agenda do Trabalho Digno) provides for specific rules on temporary work, including setting limits on the regime. Employees, temporary work agencies and users should be aware of the new framework to be enacted in July/August. Amendments to the temporary work chapter of the Portuguese Labor Code shall include: (i) the rules that prevent succession of use contracts also apply to companies of the same group; (ii) integration of employees into the user company when the worker has been assigned by an unlicensed temporary work agency (ETT); (iii) after four years of temporary assignments by ETT or another of the same group, ETTs are obliged to integrate workers into their staff; and (iv) maximum number of renewals of temporary work contracts is reduced from six to four contracts.

Decent Work Agenda and Work-Life Balance

Proposed Bill or Initiative

Authors: David Carvalho Martins, Partner and Head of Employment, and Tiago Sequeira Mousinho – DCM | Littler

The government's "Decent Work Agenda" (Agenda do Trabalho Digno) provides for new rules on work-life balance. Among other proposals, the DWA seeks to amend the Portuguese Labor Code with respect to leaves, flextime, and adoption leave. The DWA seeks to increase the amount of leave to allow for more sharing between the two parents and doubling the leave time when it is taken part-time. The flextime regime would be expanded for workers with children between three and six years old. Moreover, in adoption situations, the worker would have access to an exclusive leave and allowance.

The legislator has delivered on its promise to progressively adapt the needs inherent in balancing work life and family time.

Puerto Rico

Hot off the Press: New Labor Reform Bill for Puerto Rico

New Legislation Enacted

Authors: Anabel Rodriguez-Alonso, Capital Member, and Irene Viera Matta, Associate – Schuster LLC | Littler

On June 20, 2022, Governor Pedro Pierluisi signed into law Act No. 41-2022, instituting drastic changes to labor and employment laws in Puerto Rico and extending employment rights for employees in the private sector. In doing so, the governor rejected the Financial Oversight and Management Board for Puerto Rico's position that the bill is inconsistent with the fiscal plan. The new law intends to restore certain rights that had been eliminated or reduced by the 2017 Labor Transformation and Flexibility Act (2017 Labor Reform) and, further, to create additional rights for part-timers and students. It is important to note that unless an employer qualifies as a microbusiness or as a small or medium-sized business, it has 30 days to comply with the Act.

Puerto Rico Supreme Court Favors Employers on Business Reorganization and Unjustified Dismissal

Precedential Decision by Judiciary or Regulatory Agency

Authors: Anabel Rodriguez-Alonso, Capital Member, and Irene Viera Matta, Associate – Schuster LLC | Littler

In a recent decision, the Supreme Court of Puerto Rico addressed the standard and level of proof that must be presented by employers when raising as an affirmative defense a corporate reorganization. In the case, the Court ruled that in cases involving unjustified dismissal claims under Act No. 80 of May 30, 1976 (Act 80), the employer is not required to present evidence in a specific way of a bona fide accreditation in order to lawfully prove the existence of a reorganization process or business plan. Accordingly, it should be enough for employers to certify and prove that the business reorganization implemented a valid managerial decision and was not made on a mere whim.

With COVID-19 Numbers on the Rise, Puerto Rico DOH Updates Quarantine and Isolation Guidelines

New Regulation or Official Guidance

Authors: Alberto Tabales-Maldonado, Associate, and Irene Viera Matta, Associate – Schuster LLC | Littler

The Puerto Rico Department of Health (PR DOH) has issued new Guidelines for Case Investigation and Contact Tracing for COVID-19 (Guidelines). These provide updates to previously issued quarantine and isolation guidelines. With COVID-19 positivity rates nearing 30% on the island, employers are struggling to maintain their operations while complying with PR DOH guidelines on quarantine and isolation.

Singapore

Changes to Work Visa Eligibility

New Regulation or Official Guidance

Authors: Trent Sutton, Shareholder, and Isha Malhotra, Of Counsel – Littler

Ministry of Manpower will be raising the qualifying salary and introducing a points-based Complementarity Assessment Framework (COMPASS) for a kind of work visa Employment Pass (EP) applications. COMPASS evaluates EP applications based on a holistic set of individual and firm-related attributes.

A new EP application will be scored on four foundational criteria - Salary, Qualifications, Diversity and Support for Local Employment. There are additional bonus criteria: skills bonus for candidate in job where skills shortages exist and strategic economic priorities bonus for partnership with government on ambitious innovation or internationalization activities. These are substantial changes to Employment Pass application process and will apply progressively from September 1, 2022.

Spain

Technical Guide to Prepare Gender-Sensitive Pay Audits

New Regulation or Official Guidance

Author: Sonia Cortés García, Partner – Abdón Pedrajas | Littler

The Ministry of Equality and the Ministry of Labor and Social Economy jointly published a technical guide to prepare gender-sensitive pay audits. Companies that prepare an equality plan need to include a pay audit as an integral part of the diagnosis. The purpose of the pay audit is to obtain the information necessary to ascertain whether the company's remuneration system applies effectively, across the board and comprehensively, the principle of equality between women and men in relation to pay. It must also make it possible to define what is required in order to avoid, correct, and prevent existing or potential obstacles and difficulties with a view to guaranteeing gender equality in pay and ensuring that the remuneration system is transparent and is properly monitored.

Statutory Provisions on Contributions for Social Security and Unemployment

New Order or Decree

Author: Sonia Cortés García, Partner – Abdón Pedrajas | Littler

The government issued Order PCM/244/2022 of March 30, 2022, implementing statutory provisions on contributions for social security and unemployment. The order determines the minimum and maximum contribution bases and rates, starting on January 1, 2022. The contribution base has been set at EUR 1,166.70 (as the lowest amount) and EUR 4,139.40 (as the maximum). The order also sets contribution rates for categories included in the general system with specific characteristics and for the special social security regimes (self-employed workers or independent contractors, salaried agricultural workers, maritime workers, domestic workers, artists, bullfighting professionals, etc.).

Moreover, a few new elements have been added with respect to the contribution order applicable to fiscal year 2021, including: (i) rules on the contributions of workers who are subject to temporary reductions of working hours or temporary suspensions of contracts under Article 47 bis of the Workers' Statute; and (ii) a 75% reduction to employers' social security contributions for nonoccupational contingencies during periods of temporary incapacity leave (sick leave) for any workers aged 62 or over.

Special Employment Relationship of Persons Engaged in Artistic Activity

New Order or Decree

Author: Sonia Cortés García, Partner – Abdón Pedrajas | Littler

The Royal Decree Law 5/2022, of March 22, amends Art. 2.1 e) of the Workers' Statute, modernizing and broadening the concept of artistic activity. It now refers to cultural activities in the field of performing, audiovisual and musical arts, eliminating the reference to artists in public shows. The severance for these contracts is improved (through the amendment of Art. 10 of Royal Decree 1435/1985, of August 1, 1985). The amount is unified at 12 days for all groups. This amount will be increased to 20 days when the duration of the contract exceeds 18 months.

It also adapts the legislation to the production of artistic expressions in the web environment and the new formulas for dissemination beyond the place of performance and the national territory, such as streaming, online dissemination or podcasting. As an additional guarantee, the application of the rules against the prolonged chaining of contracts provided for in Art. 15 of the Workers' Statute is expressly contemplated. In the area of Social Security, the Royal Decree-Law establishes that cultural professionals will be exempt from the disincentive included in the labor reform for contracts lasting less than 30 days, due to the special nature of artistic, technical, and auxiliary activities in the performing arts, audiovisual and musical activities.

Sweden

Extended Obligation for Employers to Provide Information on Terms of Employment

New Legislation Enacted

Author: Anna Jerndorf, Partner and Head of Employment – TM & Partners

On June 29, 2022, the EU Directive 2019/1152 on Transparent and Predictable Working Conditions (the EU Directive) entered into force. The implementation of the EU Directive in Swedish law significantly increases employers' obligation to provide written information on the main employment terms such as for example information on working hours, overtime compensation, right to education, the company's insurance package offered and rules to be observed when either party wishes to terminate the employment relationship. The EU Directive also means that employees are entitled to hold a second occupation during the employment subject to certain restrictions.

Changes to the Swedish Employment Protection Act

New Legislation Enacted

Author: Anna Jerndorf, Partner and Head of Employment – TM & Partners

On June 30, 2022, changes to the Swedish Employment Protection Act (1982:80) entered into force. The new rules shall be applied by employers as of October 1, 2022. In short, the changes mean that: (i) employers get greater flexibility and better opportunities to adapt skills to operational requirements; (ii) employees get increased security through improved predictability in a variety of terms of employment, such as standard working hours and forms of employment; (iii) employers get increased possibilities to make exceptions to the order of priority rules and lower costs when terminating an employment; (iv) the rules on termination of employment on objective grounds are clearer to increase predictability for employers and employees (objective grounds, as a term, is replaced by objective reasons); (v) employers will no longer bear wage costs in the event of disputes concerning the validity of termination; (vi) general fixed-term employment is replaced by a new form of fixed-term employment that more rapidly transforms into a permanent employment; (vii) in the event of re-regulation of employees' employment rate, employers must follow a specific order of priority and employees will be entitled to an adjustment period of up to three months; and (viii) hiring of temporary staff and full-time work is regulated.

United Arab Emirates

Still No Executive Regulation on Data Protection Law Published

New Regulation or Official Guidance

Author: Dr. Luisa Rödemer, Senior Associate – vangard | Littler

The Federal Data Protection Law No. 45 of 2021 came into effect in the beginning of 2022 containing the first comprehensive legal framework on Data Protection within the United Arab Emirates. With this law, numerous obligations arise for employers especially regarding the personal data of their employees. It is yet to be clarified, when exactly the employer requires the written or electronic confirmation of the employee in order to process their data and when one of the exceptions of the Data Protection Law apply. The Executive Regulation governing such remaining questions was expected in March 2022 but is still not published. Consequently, the implementation deadline for employers (six months as per Art. 29 of the Data Protection Law) has not started yet.

Working Remote in the United Arab Emirates

New Regulation or Official Guidance

Author: Dr. Luisa Rödemer, Senior Associate – vangard | Littler

Working remotely – potentially all over the globe – becomes more and more relevant for employees and employers. The United Arab Emirates created a remote working visa, allowing employees living and being employed outside the United Arab Emirates to work remotely in the country for up to one year. The new labor law with its executive regulation include very flexible regulations on working time, which can be of great influence for allowing employees to work remotely in the United Arab Emirates. It is on the employer to regulate which day of the week shall be the employees' rest day, while only one of such rest days is mandatory. However, special regulations during the holy month of Ramadan must be observed. On the other hand, being employed in the United Arab Emirates and working remotely abroad, it is on the employer to stipulate the working hours.

United Kingdom

Taxation of Off-payroll Working: No Presumption of Employment from Finding of Mutuality of Obligation and Control

Precedential Decision by Judiciary or Regulatory Agency

Authors: Megan Todd-Jones, Associate, and Raoul Parekh, Partner – GQ | Littler

On April 26, 2022, the UK Court of Appeal established the correct approach for determining employment status of general application in both IR35 and employment cases. This approach requires considering all relevant factors including both the words of the full real contract (not a hypothetical one) and the factual reality of the relationship in question when determining employment status. In particular, the Court of Appeal held that the existence of mutuality of obligation and control did not create a presumption that there was a contract of employment.

Appeal Tribunal Confirms Not Unfair to Dismiss Employee Who Refused to Work Due to COVID-19 Safety Concerns

Precedential Decision by Judiciary or Regulatory Agency

Authors: Ben Rouse, Associate, and Raoul Parekh, Partner – GQ | Littler

On May 6, 2022, the UK Employment Appeal Tribunal upheld a decision that the dismissal of an employee who refused to attend the workplace due to COVID-19 safety concerns was not unfair. In UK law, a dismissal will be automatically unfair if an employee is dismissed for refusing to attend the workplace in what they reasonably believe to be circumstances of serious and imminent danger. The EAT confirmed that this test was not met on the specific facts, in part because the employer had taken steps to mitigate the risks from COVID-19 in line with government guidance.

Though specific to its facts the decision is encouraging for employers that took reasonable steps to mitigate against the risk of COVID-19. However, the EAT acknowledged that the pandemic could give rise to a successful claim so it is possible that claims based on different facts may succeed.

Employment Appeal Tribunal Rules Security Testing Processes Did Not Constitute Harassment Based on Religion

Precedential Decision by Judiciary or Regulatory Agency

Authors: James Champness, Senior Associate, and Raoul Parekh, Partner – GQ | Littler

On April 7, 2022, the Employment Appeal Tribunal (EAT) held that an Employment Tribunal had not erred in finding an employer and its third-party security consultant did not harass a Muslim employee by using the phrase "Allahu Akbar" (written in Arabic) on a test package designed to assess the response of security officers to suspect items. The EAT

concluded that this was not directed at the claimant because of his religion and that the phrase was used to link the training to recent (at the time) events in order to make the package more suspicious for training purposes. The tribunal confirmed that while a claimant's perception of whether conduct was harassment is relevant, that perception had to be reasonable in light of the context of the conduct and its purpose and intent.

Tribunal Confirms That "Long COVID" Is Capable of Being a Disability, Giving Rise to Discrimination Protections

Precedential Decision by Judiciary or Regulatory Agency

Authors: Ben Smith, Associate, and Raoul Parekh, Partner – GQ | Littler

On May 27, 2022, the Employment Tribunal confirmed that an employee who was suffering from "long COVID" was disabled for the purposes of UK discrimination law. The employee in the case had been absent from work for around 10 months after developing post-COVID viral fatigue with various symptoms that prevented him from working. He was dismissed on grounds of ill health. This was a preliminary decision solely dealing with the question of whether the claimant was disabled, and the tribunal will now go on to consider if the dismissal was discriminatory. While the decision is specific to its facts, it is a useful reminder for employers that they should not assume that employees with "long COVID" are not disabled. Instead, employers should apply the statutory definition of disability, with support from Occupational Health or other medical professionals as needed, in order to determine if an employee is disabled.

Proposal to Make It Easier for Businesses to Engage Temporary Staff During Industrial Action

Proposed Bill or Initiative

Authors: Jessica Lim, Associate, and Raoul Parekh, Partner – GQ | Littler

In June the UK Government announced proposals to make it easier for employers to engage skilled temporary agency workers to perform the duties of employees who are taking part in industrial action. Under current law, employment businesses such as agencies are prevented from supplying employers with temporary agency workers to perform duties that are normally performed by workers who are on strike or taking industrial action. Under the proposals, employers will still need to ensure that the temporary workers have the necessary skills and/or qualifications to meet health and safety obligations. Draft legislation is expected to be published in the coming weeks and will apply across all sectors in England, Wales, and Scotland.

United States

Impacts of the Dobbs Decision on Employer Benefit Plans

Precedential Decision by Judiciary or Regulatory Agency

Author: Anne Sanchez LaWer, Shareholder – Littler

As predicted, the United States Supreme Court issued its final decision in *Dobbs v. Jackson Women's Health Organization* overturning the landmark 1973 case *Roe v. Wade*, which held the U.S. Constitution protected the right of women to terminate a pregnancy prior to the date of viability. The June 24, 2022, Supreme Court decision holds there is no such Constitutional right and gives the power to regulate the legality of abortions back to the individual states 50 years after Roe. The regulation of abortion at the state level directly impacts the extent to which employers will be able to provide coverage under their health plans, not just for abortion, but for other reproductive health care services.

Just as employers are coming to grips after two years of intense regulatory activity related to COVID-19, the *Dobbs* decision raises the specter of additional and even more complex compliance considerations. Employers will need to evaluate the extent to which state laws restricting abortion may impact their health care plans, privacy practices, leave accommodations, company culture and other employment policies. This will be an extraordinarily difficult task given the number and variety of state laws regulating abortion, open questions concerning the extent to which ERISA

preempts such laws, and the intense social and political climate surrounding this issue. Employers should consult with legal counsel to navigate their federal and state compliance obligations, with the understanding that clear guidance regarding the impact of these laws on employer health plans and employment practices may be years away.

Fifth Circuit Rules that COVID-19 Pandemic Did Not Trigger the "Natural Disaster" Exception to WARN Notice Requirements

Precedential Decision by Judiciary or Regulatory Agency

Authors: Erin A. McNamara, Associate, and Kerry E. Notestine, Shareholder – Littler

In the first such decision from a federal appellate court, the U.S. Court of Appeals for the Fifth Circuit has ruled the COVID-19 pandemic is not a "natural disaster" that exempts employers from providing advance notice of mass layoffs and plant closures under the WARN Act. The court also opined that the natural-disaster exception requires proof of proximate causation, not but-for causation. The court also went on to conclude that Supreme Court and Fifth Circuit precedent equate "direct" causation and "proximate" causation. On that basis, the Fifth Circuit concluded that the DOL regulation's "direct result" provision requires proof of proximate causation.

It is unclear why the Fifth Circuit proceeded to address the type of causation required under the natural-disaster exception after having concluded that COVID-19 did not qualify as a "natural disaster." Based on the court's comment that layoffs are "among the reasonably foreseeable consequences of . . . natural disasters," the court might have found causation to exist in the case if it had determined that COVID-19 qualified as a "natural disaster." There are other COVID-19 layoff cases pending in district courts around the country in which this issue is also likely to be litigated. The US Well decision is binding only in the Fifth Circuit, and even there it may be modified through en banc review or further appeal. Also, the Fifth Circuit case did not address the extent to which the "unforeseeable business circumstances" exception to 60-days WARN notice is available for COVID-19-related layoffs.

Supreme Court Permits Arbitration of Individual PAGA Claims

Precedential Decision by Judiciary or Regulatory Agency

Authors: Laura E. Devane, Associate, and Robert F. Friedman, Shareholder – Littler

The United States Supreme Court's decision in *Viking River Cruises v. Moriana* will dramatically impact employers' rights to enforce arbitration agreements related to claims under California's Private Attorneys General Act (PAGA). This decision, which is a significant win for employers with interests in California, will allow employers to compel arbitration of a PAGA plaintiff's individual PAGA claims. In addition, because a PAGA plaintiff bound to arbitrate lacks standing to prosecute claims on behalf of other aggrieved employees, the remaining PAGA claims must be dismissed.

Viking River Cruises is an important development and marks a sea change in California law, as it makes clear employers can compel employees to arbitrate their individual claims under PAGA, reversing California precedent to the contrary. The key takeaways are as follows: (i) Individual PAGA claims can be arbitrated and Iskanian is overruled to that extent; (ii) "Nonindividual" PAGA claims of other alleged aggrieved employees are not subject to arbitration, but because a PAGA plaintiff compelled to arbitration lacks standing to adjudicate the remaining nonindividual PAGA claims, the remaining PAGA claims should be dismissed; and (iii) Clients are strongly encouraged to examine their arbitration agreements and revise them to permit compelling arbitration of individual PAGA claims, while ensuring the agreement has severability language, which the Court found compelling in its decision.

NLRB General Counsel Continues Push for Extraordinary Remedies

New Regulation or Official Guidance

Authors: James A. Paretti, Jr., Shareholder, and Michael J. Lotito, Shareholder – Littler

On June 23, 2022, National Labor Relations Board General Counsel Jennifer Abruzzo released Memorandum GC 22-06, relating to her efforts "to secure full remedies" in settlements with the Board. This follows on her prior memorandum of September 2021, in which she urged the Board's regional attorneys to pursue aggressively a broad range of remedies in adjudicating unfair labor practices.

Abruzzo's memorandum also indicates that the Board has not adopted some of the remedies that her office purports to have the authority to demand from employers, including training managers and supervisors. She also notes that if an employer allegedly defaults on a settlement, the region should generally ask the Board to order the full remedies sought in the complaint originally, but sometimes it would better effectuate the purposes of the Act to seek the remedies in the settlement agreement. The GC cites, for example, where an employee has waived reinstatement in exchange for front pay or where the Board has not adopted the particular remedy, as noted above. The general counsel's memorandum makes clear that her office will continue to press for aggressive, and at times untested, remedies in unfair labor practice cases. Union and nonunion employers should keep a close eye on developments in this evolving area of the law. Littler's WPI will keep readers advised of relevant developments.

DHS Rule Increases Automatic Extension of Work Authorization for Certain Eligible Renewal Applicants

New Regulation or Official Guidance

Author: Tasneem Zaman, Special Counsel – Littler

On May 4, 2022, the U.S. Department of Homeland Security issued a Temporary Final Rule (TFR) automatically extending the work authorizations for certain renewal applicants listed on the USCIS website. Normally, the DHS regulations provide an automatic extension of 180 days from the expiry date stated on the Employment Authorization Document (EAD). The May 4, 2022, TFR increased the automatic extension from 180 days up to 540 days. The primary objective for the additional 360-day extension is to prevent gaps in work authorization due to the USCIS' significant processing delays for work permit renewal applications.

For dependent spouses in H-4, L2 and E status, an unexpired Form I-94 indicating H-4, E or L-2 nonimmigrant status must accompany Form I-797C when presenting proof of employment authorization for I-9 purposes. It should be noted that applicants under these categories can only receive automatic extensions until the expiry date of their I-94 or up to 540 days, whichever is shorter. Finally, the TFR applies to eligible applicants with pending renewal applications: (i) Filed before May 4, 2022, and the 180-day automatic extension has since expired; (ii) Filed before May 4, 2022, and the 180-day automatic extension has not yet expired; or (iii) Filed between May 4, 2022, and October 26, 2023, inclusive of these dates. If the renewal application is filed after October 26, 2023, the normal 180-day automatic extension period will apply.

Venezuela

Partial Reform of the Organic Law of Science, Technology, and Innovation

New Legislation Enacted

Author: Richard Ruiz, Associate – Littler

On April 1, 2022, the Partial Reform of the Organic Law on Science, Technology, and Innovation came into force. The reform approved by the National Assembly establishes new methodologies and calculation parameters for the obligatory contributions of public or private, national and/or foreign companies that carry out economic activities in Venezuela.

Companies with annual gross income greater than 150,000 times the exchange rate of the highest value set by the Central Bank of Venezuela, will be required to declare, and pay the mandatory contributions to the National Fund for Science, Technology, and Innovation (FONACIT). Said contributions will be estimated monthly according to the gross income of each company and their amount varies according to the commercial and/or industrial sector to which the company belongs, on the other hand, the liquidation and payment of the contributions must be made monthly in Bolivars. In case of noncompliance, companies can be administratively sanctioned for up to the equivalent of 50% of the amount corresponding to the mandatory contribution not declared or paid.

Increase of Tax Unit

New Legislation Enacted

Author: Daniela Arevalo, Associate – Littler

The Integrated National Service of Customs and Tax Administration (SENIAT) announced an increase of the tax unit from VES 0.02 to 0.4. The increase was published in Official Gazette N° 42.359, dated April 20, 2022.

Under the Organic Law of Sport, Physical Activity and Physical Education, companies that have obtained gross income greater than 20,000 tax units (equivalent to VES 8,000) are obliged to pay 1% of their income for the financing of the sport, physical activity, and physical education fund. Additionally, under the labor laws, all penalties expressed in tax units have increased. For example, the Law of the Socialist Cestaticket for Workers establishes that the employer's failure to grant this benefit will result in a fine between 10 tax units (VES 4) and 50 tax units (VES 20) for each affected worker. In the same way, the payment of a salary lower than the mandatory minimum wage is sanctioned with a fine between 120 tax units (VES 48) and 360 tax units (VEF 144).

Banks Integration

Trend

Author: Gabriela Arevalo, Associate – Littler

On June 22, 2022, the Superintendence of Institutions of the Banking Sector issued an official press release reporting the completion of the migration process and integration of the technological platform of the National Bank of Credit (BNC) and Discount Western Bank (BOD). This integration involves the employer substitution of BOD's employees, who now become BNC's employees. Additionally, a total of 2,889,592 accounts were successfully migrated. BOD clients can now make use of the products and services offered through BNC, through electronic banking and points of sale.

Avon Company Stops Producing and Distributing Their Products in Venezuela

Trend

Author: Daniela Arevalo, Associate – Littler

The American company Avon, specialized in the sale of cosmetics, jewelry, perfumes, and toys by catalog, announced that they will stop producing and distributing their products in Venezuela after almost 70 years of operation. According to the Avon statement, which was broadcast on social networks, the company reported that on Tuesday, June 28, 2022, the shares of Avon Cosmetics de Venezuela C.A., were transferred to "a business group of Venezuelan capital," which is not yet known, which will assume the operations and the current payroll of the company.