Third Quarter — 2018

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Featured Article

European Commission's Initiative to Strengthen Whistleblower Protection

Authors: Thomas Griebe, Shareholder & Matthias Pallentin, Associate — vangard, Littler Germany

Whistleblowers: some consider them traitors; others see them as modern heroes. At present, protections for whistleblowers still differ greatly among the 28 member states. Only 10 member states have comprehensive regulations in this area, while other countries offer isolated safeguards or none at all. In a recent **proposal**, the EU Commission seeks to improve (minimum) protections for whistleblowers and, above all, ensure these protections are uniform throughout Europe.

Read Full Article

Australia

Company Liable for Contract Worker's Injuries

Precedential Decision by Judiciary or Regulatory Agency

Authors: Naomi Seddon, Shareholder & Merille Raagas, Counsel — Littler Mendelson, P.C.

On September 6, 2018, the NSW Supreme Court held that a company (Company A) that used a contracted labor hire worker was responsible for the worker's injuries and not the worker's direct employer (Company B), finding that Company A was negligent and that Company B did not have the requisite knowledge or reason to suspect the risk of harm to the worker. Employers using on-demand labor should still ensure the safety of all labor hire workers and contractors in the same manner as their employees, as liability can flow regardless of the employment relationship.

Federal Court Rules Casual Employees May Be Entitled to Annual Leave

Precedential Decision by Judiciary or Regulatory Agency

Authors: Naomi Seddon, Shareholder & Merille Raagas, Counsel — Littler Mendelson, P.C.

On August 24, 2018, the Federal Court confirmed on appeal that, in certain circumstances, casual employees may be entitled to annual leave under s86 of the Fair Work Act. Based on the common law multi-factor test, the Court considered the prevailing nature of the employment, the employer's right to control the work, how the employee is being paid, and hours of work, among other factors. Due to the continuing and indefinite nature of his work, in addition to an agreed pattern and arrangement of work, the employee could not be "casual" and was entitled to annual leave despite his contractual status as a "casual employee."

FWC Considers Boundary Between Work and Personal Relationships in Bullying Claim

Precedential Decision by Judiciary or Regulatory Agency

Authors: Naomi Seddon, Shareholder & Merille Raagas, Counsel — Littler Mendelson, P.C.

On September 11, 2018, the Fair Work Commission denied an application for an order to stop bullying in a case where Employee A had made various comments about Employee B, including questioning the latter's sick leave, work performance and boyfriend's fidelity. As the employees had been friends and regularly socialized outside of work, the FWC found their relationship had

gone beyond a typical professional working relationship. Whilst a blurred relationship does not excuse inappropriate workplace conduct, here, the behavior was not unreasonable or repeated.

Employers Can Reject Medical Certificates in Certain Circumstances

Precedential Decision by Judiciary or Regulatory Agency

Authors: Naomi Seddon, Shareholder & Merille Raagas, Counsel — Littler Mendelson, P.C.

The Fair Work Commission recently held that employers may reject employee medical certificates in situations where the contents are vague. Here, the employee had failed to provide a medical certificate detailing the nature of duties he was not fit to perform; why employee was now fit to resume work when previously he was unfit; the necessary length of time for any modified working arrangements; or a date by which employee could resume his normal duties. The right to reject a medical certificate is likely limited to situations where the employee has been off work for an extended period of time and/or is seeking work restrictions upon their return.

Labor Seeks Changes for Gig Workers

Proposed Bill or Initiative

Authors: Naomi Seddon, Shareholder & Merille Raagas, Counsel — Littler Mendelson, P.C.

On September 20, 2018, the Federal Labor party released its proposal for changes to the Fair Work Act. If elected, Labor promises to introduce changes so gig workers are protected in the same manner as employees. Currently companies who rely on gig workers pay a rate per delivery, but under the proposed changes we could see mandatory hourly rates being implemented of up to AUD 23.66 (AUD18.93 per hour + 25% loading) and see the loss of much of the flexibility and freedom that is currently enjoyed by companies and workers in the industries that rely heavily on independent contractors and on-demand workers.

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Belgium

Law Implementing GDPR Published in Belgian Official Gazette

New Legislation Enacted

Author: Edward Carlier, Partner — Reliance Lawyers

The Belgian Law of July 30, 2018, on the protection of natural persons with regard to the processing of personal data was published in the *Belgian Official Gazette* on September 5, 2018. The law aims to modernize the supervision on data protection, implements the GDPR, and provides derogations for authorities outside the scope of the EU, such as the intelligence and security services.

New Legal Framework on Protection of Business Secrets

New Legislation Enacted

Author: Edward Carlier, Partner — Reliance Lawyers

Belgian Law of July 30, 2018, implements EU Directive of June 8, 2016, on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. The law allows trade secret holders to apply for specific measures, procedures, and remedies to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secrets. Neither the Directive nor the law are intended to limit the use of non-competes nor limit employees' use of experience and skills honestly acquired in the normal course of their employment.

Bonus May Be Subject to Being Employed at Time of Payment, Court Rules

Precedential Decision by Judiciary or Regulatory Agency

Author: Edward Carlier, Partner — Reliance Lawyers

The Brussels Labour Court recently dismissed the claim of a former employee to receive a bonus. The bonus plan, in addition to setting minimum thresholds for performance and length of service, ruled out entitlement to a bonus in case of end of service prior to the date of payment of the bonus. Such a condition was considered valid by the Labour Court. This decision again confirms the importance of adequate wording in bonus plans. Said condition may, however, not be enforceable in situations where payment of a bonus is artificially delayed.

Draft Bill to Increase Minimum Age for Favorable Unemployment Scheme

Proposed Bill or Initiative

Author: Edward Carlier, Partner — Reliance Lawyers

Elder employees that are being made redundant can step into a favorable unemployment scheme, provided they meet some specific conditions in terms of length of career and minimum age. The scheme provides for monthly state-paid unemployment benefits and a monthly additional payment by the ex-employer, until the legal retirement age. A draft bill, if enacted, will increase the minimum age from 56 to 60 for employees being made redundant by companies in economic difficulties or in restructuring, with intended effect as of January 1, 2019.

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Brazil

Brazil's New Data Privacy Law

New Legislation Enacted

Author: Renata Neeser, Shareholder — Littler Mendelson, P.C.

On August 14, 2018, Brazil enacted its first omnibus data protection law, to become effective in February 2020. The new law amends the Brazilian Civil Rights Framework for the internet and is similar to the EU's General Data Protection Regulation (GDPR). Under this law, American companies with operations in Brazil must implement standard contractual clauses or binding corporate rules, or obtain individual consent to transfer personal data from Brazil to their U.S. HQs, as the U.S. is not deemed as offering an "adequate" level of protection, and there is no Privacy Shield Framework between the two countries. Fines for noncompliance may be up to approximately $11 million.

Brazilian Supreme Court Ends Outsourcing Limitations

Precedential Decision by Judiciary or Regulatory Agency

Author: Renata Neeser, Shareholder — Littler Mendelson, P.C.

Brazil's Supreme Court recently ruled that companies may outsource any of their activities, including core business activities. The long-lived dispute stemmed from the labor courts declaring, without any legislative support, that it was illegal to outsource core business and from the continuous expansion of what constituted core business. Although last year's labor law reform allows companies to outsource any activities prospectively, it did not resolve the dispute. With the Supreme Court's ruling, more than 4,000 pending cases where the labor courts ruled that outsourcing was illegal will now be reversed.

eSocial - Deadlines for Second Group of Employers

Upcoming Deadline for Legal Compliance

Author: Renata Neeser, Shareholder — Littler Mendelson, P.C.

All employers in Brazil must be fully registered with eSocial and report on employment, payroll, and health/safety data to the authorities under an implementation schedule. Employers with annual revenue of more than $18 million (first group) started using eSocial in January 2018. Employers with revenues of less than $18 million (second group) must register and submit their payroll information by November 2018. Those with annual revenue between $1 million and $18 million must complete Phase 1 by October 9 (by submitting their operating framework) and start Phase 2 by October 10 (to submit information on workforce, independent contractors, and employment/service agreements).

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Canada

Bill C-74 Receives Royal Assent

New Legislation Enacted

Authors: Monty Verlint, Partner & Rhonda Levy, Knowledge Management Counsel — Littler LLP

Bill C-74, the *Budget Implementation Act, 2018, No. 1,* received Royal Assent on June 21, 2018. Initiatives of interest to employers include allowing part-time or occasional workers to keep 50 cents of their employment insurance benefits for every dollar earned in wages, up to a maximum of 90% of the weekly insurable earnings used to determine the EI benefit. Also, retirement benefits will increase for parents who take time off work to care for children and persons with disabilities, and reductions applied to a survivor's pension for survivors under the age of 45 will be removed.

Blood Drug Concentration Limits to Measure Marijuana "Impairment"

New Legislation Enacted

Authors: Monty Verlint, Partner & Rhonda Levy, Knowledge Management Counsel — Littler LLP

Bill C-46, which authorized the Governor-in-Council to establish blood drug concentration limits to measure "impairment" in the operation of a motor vehicle, received Royal Assent on June 21, 2018. Although the recreational use of marijuana will be legal in Canada effective October 17, 2018, employees will not have the absolute right to use marijuana in the workplace. However, employers may establish an objective standard for marijuana "impairment" in their workplace policies using the blood drug concentration limits.

Ontario Court of Appeal: Guidelines on Enforceability of Termination Clauses

Precedential Decision by Judiciary or Regulatory Agency

Authors: Monty Verlint, Partner & Rhonda Levy, Knowledge Management Counsel — Littler LLP

In June 2018, the Ontario Court of Appeal confirmed that (a) where a termination clause can reasonably be interpreted in more than one way, the interpretation that favors the employee should be preferred; (b) where an employment contract is prepared by the employer on a more or less "take it or leave it" basis, and there is a genuine ambiguity, the more favorable interpretation should be given to the employee; and (c) the question of whether there is an ambiguity is to be determined by an objective evaluation of whether there are two or more reasonable interpretations.

Bill C-81 Introduced by Federal Government 2018 at First Reading

Proposed Bill or Initiative

Authors: Monty Verlint, Partner & Rhonda Levy, Knowledge Management Counsel — Littler LLP

Bill C-81, *an Act to ensure a barrier-free Canada*, which the federal government recently introduced, is now at First Reading. This accessibility law seeks to identify, remove, and prevent "barriers" defined in the Act as "…anything architectural, physical, technological, or attitudinal…that hinders the full and equal participation in society of persons with a physical, mental, intellectual, learning, communication or sensory impairment, or a functional limitation." The law will apply to certain federal-regulated employers and will be enforced through inspections, a complaint process, and financial penalties.

Initiative to Update the Canada Labour Code

Proposed Bill or Initiative

Authors: Monty Verlint, Partner & Rhonda Levy, Knowledge Management Counsel — Littler LLP

The Minister of Employment, Workforce Development and Labour recently announced that robust and modern updates to the Canada Labour Code will be introduced by May 2019, with key focuses on restoring work-life balance and providing better protections to part-time, temporary, and contract workers. The proposed amendments will be informed by the findings on *"What we heard: Modernizing federal labour standards"*, a report that summarizes the views shared during consultations with unions and labor organizations, employers and employer organizations, academics, experts, and advocacy groups.

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Central America

Costa Rica | General Strike by Public Sector Employees Paralyzes Services

Trend

Author: Marco Esteban Arias, Senior Associate — BDS Asesores, Littler Global Costa Rica

As of September 10, 2018, several of the largest unions in Costa Rica have been in an indefinite strike, with no end in sight. The strike has impacted many public services, such as postal service, social security administration (including hospitals and clinics), public education, and many other government services. The strike is against a recent legislative bill to introduce the Valued-Added Tax (VAT), limit some benefits for the public sector, and create new taxes. Currently, a court has declared all but one of the strikes to be illegal. If the illegality is upheld in appeal, employees who remain on strike will have 24 hours to resume labor or face termination.

Nicaragua | Second Increase to Minimum Wage in Six Months Goes into Effect

New Order or Decree

Author: Francisco Cerda, Partner — BDS Asesores, Littler Global Nicaragua

On March 9, 2018, the Nicaraguan Ministry of Labor set the new minimum wages in Nicaragua. The second of two increases became effective on September 1, with a 5.20% hike. This new increase will remain effective until March 2019.

Panama | New Law Grants Protections to Employees with HIV and STDs

New Legislation Enacted

Author: Yeris Nielsen Moreno, Partner — BDS Asesores, Littler Global Panama

Law No. 40, which came into force on August 14, 2018, allows employees suffering from HIV or an STD to request changes in their work conditions, provided they present a medical certificate. The employees are also entitled to up to 144 hours of leave per year based on their medical condition. Notification is voluntary, but if made, employers are required to maintain the matter

confidential. Additionally, employers are forbidden from discriminating against employees based on their health, and cannot terminate employees with HIV/STDs unless for cause and with prior authorization from the Ministry of Labor.

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Colombia

Nature and Destination of Tips

New Legislation Enacted

Author: Marcela Trujillo, Associate — Godoy Córdoba, Littler Global Colombia

On August 3, 2018, Congress enacted Law 1935-2018, to regulate the nature and destination of tips that employees receive from clients for rendering services. Under the law, tips are not considered salary because they do not remunerate for work. Rather, a tip is a client's voluntary payment to recognize the quality of the service received and only the employee who renders the service is entitled to receive it. The law allows employees to agree with the employer on how tips will be distributed.

Working Hours for Guards

New Legislation Enacted

Author: Marcela Trujillo, Associate — Godoy Córdoba, Littler Global Colombia

On July 12, 2018, Congress enacted Law 1920-2018 to regulate the hours of security guards working in the security industry. Under the law, security guards may work up to 12 hours per day without exceeding 60 hours per week. This means that an ordinary work day is eight hours per day and any supplementary work is limited to four additional hours per day.

Lactation Rooms at the Workplace and Their Implementation

New Order or Decree

Author: Marcela Trujillo, Associate — Godoy Córdoba, Littler Global Colombia

The Ministry of Health enacted Resolution 2423 to guarantee breastfeeding employees adequate access to lactation rooms in the workplace to extract milk, preserve it, or feed their child during work hours. Employers in the public and private sectors with more than 50 employees or with a capital of at least 1,500 Colombian minimum legal salaries (approx. USD $400,000) are covered under this law and must register the lactation rooms with the Health Secretary for inspection. January 2019 is the implementation deadline for employers with more than 1,000 employees, and January 2022 is the deadline for employers with less than 1,000 employees.

Constitutional Court's New Interpretation of Employment Stability for Pregnant

and Breastfeeding Employees

Precedential Decision by Judiciary or Regulatory Agency

Author: Marcela Trujillo, Associate — Godoy Córdoba, Littler Global Colombia

Under Colombia labor law, employees who are pregnant or breastfeeding cannot be terminated unilaterally without just cause, and the employer must obtain prior authorization from the Ministry of Labor before the termination. However, the Constitutional Court recently ruled in case No. SU-075 that if the employer is not aware of the pregnancy, the termination of the employment contract will not be presumed discriminatory, and the employer will not be required to pay social security contributions and other labor obligations as when discrimination against a pregnant or breastfeeding employee was the cause for termination.

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Denmark

Act on Protecting Trade Secrets

New Legislation Enacted

Author: Tina Reissmann, Partner — Labora Legal

The new Act on Protecting Trade Secrets is based on an EU-directive, which aims to streamline and strengthen the effort on trade secrets within the EU. Key aspects of the law include: (1) oral secrets can be protected; (2) uncertainty over protection of technical drawings; (3) a six-month time-limit to submit a case to the courts; and (4) uncertainty over applications to obtain a temporary prohibition. The bill underlines the necessity of companies to have a strategy regarding company secrets, especially with the new six-month time-limit for filing claims with the courts.

Secret Recording of Conversation with Employer Sufficient for Summarily Dismissal

Precedential Decision by Judiciary or Regulatory Agency

Author: Tina Reissmann, Partner — Labora Legal

The Danish High Court of Eastern Denmark recently held that it was a serious violation of the employment relationship when an employee recorded a conversation with his employer. Here, an employee was terminated after throwing a computer mouse at the company's CEO during a conversation about salary. Afterwards, the company learned that the employee had recorded the conversation. The Court found that the events at the meeting were not sufficient to summarily dismiss the employee, but the secret recording of the meeting was.

Summarily Dismissal Due to Social Media Post Not Justified

Precedential Decision by Judiciary or Regulatory Agency

Author: Tina Reissmann, Partner — Labora Legal

An employee posted on his private social media account on the way home from vacation: "I have bought 3 cartons of cigarettes. Need one, who is on duty, to take two of those through customs." Of his 300 social media friends, 100 were co-workers at the same employer. Finding that it was not posted in a "closed group", the High Court found the post was a clear violation of the company's policies on behavior on social media, regardless of whether he was violating customs law. Still, the behavior did not qualify as grounds for a summary dismissal, so he could be terminated with the ordinary notice period.

Proposal to Amend Act on Stock Options

Proposed Bill or Initiative

Author: Tina Reissmann, Partner — Labora Legal

The Ministry of Employment has proposed amending the Act on Stock Options. Currently, an employee considered as "good leaver" (terminated due to employer's circumstances) will be entitled to keep his/her stock options rights and receive a proportional "allocation" as though the employee had been employed at the end of the fiscal year. If the bill is passed, such agreements will be annulled when the termination is due to the employer's circumstances and the parties may agree for the employer to buy back stocks. The aim of the bill is to increase flexibility and simplification of these incentive schemes.

#MeToo Legislation Sent to Hearing

Proposed Bill or Initiative

Author: Tina Reissmann, Partner — Labora Legal

Due to the global #MeToo movement, the Ministry of Employment sent a bill to hearing to increase sanctions on breaches to the Act on Equal Treatment to show that the Government regards sexual harassment in the workplace as serious. In an apparent attempt to reject Danish courts' previous rulings, the final note in the bill reads that "It should not be of importance, in the consideration of whether sexual harassment occurred or not, if there were a relaxed work tone or casual work-environment. This is not the employee's choice, whether or not this is the case."

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European Union

Five-Month Delay Does Not Preclude Application of EU 'Acquired Rights Directive'

Precedential Decision by Judiciary or Regulatory Agency

Author: Dónall Breen, Associate — GQ Employment Law LLP, Littler Global United Kingdom

On August 7, 2018, the European Court of Justice ruled that a five-month gap between a music school closing and subsequently opening under new ownership did not preclude application of the Acquired Rights Directive (ARD). The ARD automatically transfers employees from one employer to another when there is a relevant transfer of undertaking. The court ruled that the fact that an undertaking is temporarily closed at the time of the transfer and has no employees may be a relevant factor when assessing if there has been a relevant transfer, but it is not determinative. On these facts, three of the five months were school holidays. Further, because this was an "asset reliant" case (the school and instruments constituted the key 'undertaking' being transferred), the fact that the new owners did not take on the old employees did not preclude the existence of a transfer within the meaning of the ARD.

ECJ Rules on What "Undertaking Controlling the Employer" Means for Collective Redundancy Purposes

Precedential Decision by Judiciary or Regulatory Agency

Author: Mark Callaghan, Associate — GQ Employment Law LLP, Littler Global United Kingdom

Employers who make collective redundancies are under an obligation to inform, consult, and notify affected employees by virtue of European Directive 98/59, whether the decision to make such redundancies was taken by the employer, or by an undertaking controlling the employer. On August 7, 2018, the Court of Justice of the European Union held that a "controlling undertaking" can be one that controls the employer as a matter of fact, even if they do not exert legal control. For example, it might suffice if the undertaking can exercise genuine influence in terms of voting, despite not holding a majority of votes (perhaps due to low participation by members in meetings). However, a third party that contracts with the employer and terminates that contract, resulting in collective redundancies, would not be considered a controlling undertaking.

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Finland

Government Proposal Regarding New Working Hours Act

Proposed Bill or Initiative

Author: Maria Wesander, Counsel — Dottir Attorneys Ltd

A government proposal (HE 158/2018) regarding a new Working Hours Act and related acts was presented to the Finnish parliament in September. If enacted, the law will clarify aspects of the management of independent workers; expand on the flexible working hours scheme; establish a statutory method for accounting for working-time; and amend the current law on period-based work and regular overtime, including on the required consent for additional and overtime work, as well as the scope of such work. Maximum working hours and minimum rest periods based on the EU's Working Time Directive (2003/88/EC) are also proposed.

Government Proposal Regarding Privacy in Working Life Presented to Parliament

Proposed Bill or Initiative

Author: Maria Wesander, Counsel — Dottir Attorneys Ltd

A government proposal (HE 97/2018) to amend the Act on the Protection of Privacy in Working Life (759/2004) was presented to the Finnish parliament in July and is expected to be approved in the autumn of 2018. The main purpose of the proposal is to ensure that Finnish legislation is compliant with the General Data Protection Regulation (EU 2016/679) and, to the extent possible, to maintain the present legislation regarding employees' privacy rights in working life. It also proposes minor changes regarding employers' duties relative to the collection of employees' personal data, the processing of health-related information, and camera surveillance.

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France

New "Essoc" Law

New Legislation Enacted

Author: Guillaume Desmoulin, Partner — Fromont Briens, Littler Global France

Law No. 2018-727 of August 10, 2018, ("Essoc" law, for a State in the service of a society of trust) allows companies to correct a mistake without penalty, provided it is the first involuntary mistake. The law also increases the fines by 50% for breaches and creates a "right to be controlled," which allows a company or an individual to ask to be controlled by an administrative body. The result of the control will then bind the administration until circumstances change or until a new control gives different results. The law also provides other measures to increase legal security.

Law for Freedom to Choose One's Professional Future

New Legislation Enacted

Author: Guillaume Desmoulin, Partner — Fromont Briens, Littler Global France

The Law for Freedom to Choose One's Professional Future, which was enacted in September 2018, covers secondment of employees. Under the law, these employees must work out of national territory. Moreover, declarative obligations may be adjusted with approval from the labor administration for recurring secondments. Although the payment of a stamp disappears, the maximum amount of administrative fines is doubled for non-compliance, and foreign employers who fail to pay their fines may be prohibited from starting the contract.

Law for Gender Pay Equity and Against Sexual Harassment

New Legislation Enacted

Author: Guillaume Desmoulin, Partner — Fromont Briens, Littler Global France

Law No. 2018-703 of August 3, 2018, requires companies employing at least 50 workers to publish an annual report on any salary gap between men and women and take actions to remove the gap. If the results are below the threshold, the company shall take corrective measures, either unilaterally or through collective negotiation. After a three-year implementation window, companies in violation may be subject to financial penalty. The law also reinforces penalties for sexual harassment, which is now defined as including sentiments and behaviors with a sexual or sexist nature, and requires employers to inform employees about the law.

Bill to Combat Fraud Covers Companies Based Abroad or With Operations Abroad

Proposed Bill or Initiative

Author: Guillaume Desmoulin, Partner — Fromont Briens, Littler Global France

Pending under review is a bill to better detect, discover, and punish fraud by reinforcing agents' access to useful information. The bill also seeks to impose administrative penalties against persons participating in fraudulent schemes, and punish third parties in case of silence or refusal to give information to government agencies. The bill sets a specific duty to inform and consult staff representatives about the price of transfers between companies and entities of the same group, including sales of material and immaterial assets, for companies based abroad or with operations abroad.

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Hungary

Every Stipulation of a Contract on Studying Must Be Concluded in Writing

Precedential Decision by Judiciary or Regulatory Agency

Author: Zoltán Csernus, Attorney — VJT & Partners Law Firm

According to the Hungarian Labour Act, the contract on studying must be in writing. Thus the employee is not entitled for more financial support than agreed in the learning contract. Here, the employer and the employee concluded a contract on studying, but failed to stipulate whether the monthly financial support should be a gross or a net amount. Based on a witness' testimony, the employee claimed that the amount must be considered as a net amount. The Hungarian Supreme Court ruled that without written contractual provisions the amount may not be considered – based only on witnesses' testimony – as a net amount.

Employer's Obligation to Provide Adequate Working Conditions

Precedential Decision by Judiciary or Regulatory Agency

Author: Zoltán Csernus, Attorney — VJT & Partners Law Firm

The Hungarian Supreme Court declared that if the employee fails to fulfill his working obligations

as a result of the employer's failure to provide adequate working conditions, the termination with immediate effect based on the employee's behavior is invalid. Here, the employee substituted his colleague within short periods of time in 14 different city districts without adequate information and knowledge about the city districts. Due to three minor administrative breaches, the employee was terminated with immediate effect. Since the breaches resulted from the frequent changes to the employee's obligations and the employer's failure to provide adequate working conditions, the Court declared that the termination is invalid.

Employer's Responsibility in Case of Working Accidents

Precedential Decision by Judiciary or Regulatory Agency

Author: Zoltán Csernus, Attorney — VJT & Partners Law Firm

The definition of the "employer's control" covers all objective facts and circumstances which may be influenced by the employer. When evaluating this, the direct cause of the accident must be examined and the working methods leading to the accident, such as the choice of working method, the work equipment provided to the employees, the number and the skill of the employees, since such things must be provided by the employer and the employer has influence on them.

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India

HIV Act: Ministry of Health and Family Welfare Issues Official Notification

New Legislation Enacted

Author: Manishi Pathak, Partner — Cyril Amarchand Mangaldas

On September 10, 2018, the Ministry of Health and Family Welfare issued notification of the HIV Act, which aims to prevent discrimination against a "protected person," defined as an individual who (a) is HIV positive, or (b) is living or has lived, resided, or cohabited with a person who is HIV-positive. The Act prohibits discrimination and/or unfair treatment of such protected persons on various grounds, including matter of employment or occupation; healthcare services; education; the right to reside, purchase, rent, or otherwise occupy, any property; and opportunity to stand for, or, hold public or private office. Every establishment that maintains HIV-related records of a 'protected person' must adopt data protection measures to ensure confidentiality of information.

Supreme Court of India Decriminalizes Homosexuality

Precedential Decision by Judiciary or Regulatory Agency

Author: Manishi Pathak, Partner — Cyril Amarchand Mangaldas

On September 6, 2018, in a landmark ruling, the Supreme Court of India decriminalized homosexuality. In *Navtej Singh Johar & Ors., v. Union of India*, the Court held that Section 377 of

the Indian Penal Code that criminalized homosexual relationships between LGBT persons was archaic and arbitrary, finding that the criminalization of private, consensual sexual acts between adults (i.e., persons above the age of 18 years who are competent to consent) is violative of Articles 14, 15, 19, and 21 of the Constitution of India. The Court also clarified that consent must be free, which is completely voluntary in nature, devoid of any duress and coercion.

Enhanced Compliance with the Sexual Harassment Act for Indian Companies

New Regulation or Official Guidance

Author: Manishi Pathak, Partner — Cyril Amarchand Mangaldas

On July 31, 2018, the Ministry of Corporate Affairs officially announced new rules known as "Companies (Accounts) Amendment Rules, 2018" (Rules), which require companies to incorporate into their board's report a "statement that the company has complied with provisions relating to the constitution of Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013." However, the aforementioned obligation is not applicable to One Person Company or Small Company.

Important Changes to Minimum Wage Compliances in Delhi

New Regulation or Official Guidance

Author: Manishi Pathak, Partner — Cyril Amarchand Mangaldas

The Minimum Wages (Delhi) Amendment Act, 2017 (Amendment Act), which recently came into force, has made it mandatory for employers to pay wages electronically, except in situations such as a natural disaster, fire, or death of the employer. The Amendment Act has also enhanced the punishment with regard to non-compliance, which has been increased to imprisonment for 3 years and/or fine of INR 50,000 (approx. USD $698) from erstwhile term of 6 months and/or fine of INR 500 (approx. USD $69.80).

Draft Bill for Personal Data Protection

Proposed Bill or Initiative

Author: Manishi Pathak, Partner — Cyril Amarchand Mangaldas

In July 2018, the Committee of Experts on a Data Protection Framework for India submitted the Draft Personal Data Protection Bill, 2018 (Draft Bill) to the Ministry of Electronics and Information Technology (Ministry). Section 16(1) of the Draft Bill allows processing of personal data if such processing is necessary for employment-related matters, subject to certain conditions. The Draft Bill, if enacted, would impose additional obligations on employers for collecting and processing employee data. The Draft Bill has been published on the Ministry's website and awaits feedback from the general public.

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Ireland

Employers Caution: Out-of-Hours Emails and the 48-Hour Working Week

Precedential Decision by Judiciary or Regulatory Agency

Author: Loughlin Deegan, Partner — BryneWallace

The Irish Labour Court case of *Kepak v. Gráinne O'Hara* recently illustrated the risk for an employer when its employee is found to have worked excessive hours. In Ireland, subject to certain prescribed exceptions, an employer is in breach of the Organisation of Working Time Act 1997 if it permits its employee to work more than an average of 48 hours per week. The employee in this case was awarded €7,500 in respect of such a breach because (among other factors) the employee was found to have regularly replied to work-related emails late at night.

Case Law Demonstrates the Importance of Employee Data Protection Policies and IT/Acceptable Usage Policies in Defending Unfair Dismissal Claims

Precedential Decision by Judiciary or Regulatory Agency

Authors: Stephen Kane, Solicitor & Elaine Kelly, Partner — BryneWallace

A recent decision of the Irish Workplace Relations Commission and a decision of the Irish Labour Court highlight the benefit to an employer of having an Employee Data Protection Policy and an IT/Acceptable Usage Policy. In both cases, dismissal for breach of company data protection and IT-related policies was found to be fair. In one case, the complainant was dismissed for having kept a logbook containing highly sensitive personal data of patients. In another case, the employee was dismissed for possession of highly confidential company data, including commercially sensitive financial information and guest personal data.

Recommended Changes to Whistleblowing Legislation

Important Action by Regulatory Agency

Author: Emmet Whelan, Partner — BryneWallace

The Irish Department of Public Expenditure and Reform recently published a report on its statutory review of the Protected Disclosures Act 2014 (Irish whistleblowing legislation). The report suggests a number of changes to whistleblowing legislation, including enlarging the list of prescribed persons (appropriate persons to receive disclosures) and providing guidance to improve the consistency of reporting by public bodies. The report also notes that an amendment to the 2014 Act is likely to be required in due course to transpose an EU Directive on whistleblowing, once the negotiation process has been completed.

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Italy

Amendment to Data Protection Code Incorporates EU's GDPR

New Legislation Enacted

Author: Carlo Majer, Partner — Littler, Italy

As of September 19, 2018, the Italian Data Protection Code has been modified by Legislative Decree no. 101/2018, which implements the EU's GDPR. Italy's legislative body decided not to eliminate completely the previous Data Protection Code, but to review it in light of the GDPR.

Dignity Decree Is Now Law

New Legislation Enacted

Author: Carlo Majer, Partner — Littler, Italy

On July 14, 2018, Decree 87/2018 (known as "Dignity Decree") was signed into law and becomes effective on October 31, 2018, with retroactive effect. The Dignity Decree introduces amendments concerning regimes for temporary agencies and agreements. Concerning fixed-term contracts, the maximum duration is now 24 months, limited to 4 renewals, and the relationship must be justified after 12 months.

Constitutional Court Rules on Compensation for Unfair Dismissal

Precedential Decision by Judiciary or Regulatory Agency

Author: Carlo Majer, Partner — Littler, Italy

Employees hired after March 7, 2018, are entitled, in the event of unfair dismissal, to receive compensation that is equal to 2 months for each year of seniority within the company, with a minimum of 6 months and a maximum of 36 months. On September 26, 2018, the Constitutional Court stated that the calculation provided for by the law, which determines a fixed amount only based on the seniority, cannot be considered fair under the Constitution based on principles of "reasonableness" and "equality."

Vulgar Language During Private Chat Cannot Form Basis for Fair Dismissal

Precedential Decision by Judiciary or Regulatory Agency

Author: Carlo Majer, Partner — Littler, Italy

On September 10, 2018, the Supreme Court held as unfair the dismissal of an employee who used vulgar language against the company administrator in a private chat with a trade union organization. The Court reasoned that, since only members of the trade unions participated in the chat, the chat was completely private and protected under the principle of freedom of criticism. Also, the language, even if vulgar, is part of a common way of speaking. The employer was ordered to reinstate the employee and pay 12 months of salary as damages.

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Japan

Government Clarifies Work Style Reform Legislation

New Regulation or Official Guidance

Author: Aki Tanaka, Special Counsel — Littler Mendelson, P.C.

On September 7, 2018, the government clarified that the cap on the "maximum overtime hours" (i.e., up to 45 hours/month and 360 hours/year) can be further extended up to 100 hours/month and 720 hours/year under special circumstances. For employees to work overtime, employers must file an updated form of labor-management agreement with the local labor standards inspection office, providing information on the employee's job description; the duration of the agreement; reasons for the overtime work; maximum hours of overtime per day, month, and year, and start date of calculation of such overtime; among other information.

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Mexico

Mexican Senate Approves Ratification of ILO's Convention 98

New Legislation Enacted

Authors: Mónica Schiaffino, Partner & Rogelio Alanis, Associate — Littler Mexico, S.C.

On September 20, 2018, the High Chamber of the Mexican Congress approved a bill to ratify the International Labour Organization's Convention 98 on the right to organize and to bargain collectively. With this approval, the bill now moves to the federal executive branch, which is expected to ratify the Convention. Although the guarantees contained in Convention 98 are consistent with Mexico's last constitutional reform, the legislature has signaled that they will be incorporated into the Federal Labor Law in a subsequent reform.

New Method to Calculate Overtime

Precedential Decision by Judiciary or Regulatory Agency

Author: Mónica Schiaffino, Partner — Littler Mexico, S.C.

Mexico's Second Chamber of the Supreme Court recently decided that, to calculate the weekly overtime pay, minutes worked exceeding the regular work day must be counted cumulatively for the entire workweek and paid in full hour units. "Surplus" minutes do not constitute time worked beyond the regular work shift and may be considered as the time employees use to start the work day or to leave the workplace. Under this new method, any time period exceeding the legal

work day must be considered as overtime and added to complete hours.

New Digital System to Verify Disability Certifications and Other Related Transactions

New Regulation or Official Guidance

Authors: David Leal, Associate & Verónica López, Associate — Littler Mexico, S.C.

The Mexican Institute for Social Security (IMSS) recently announced new digital tools for both employers and insured employees to review records concerning the employees' disabilities certified by the IMSS, as well as the amount of disability benefits and payment status. Additionally, the new digital tools allow for disability payments to be made via electronic transfers directly to the insured's bank account, as long as the insured is registered in the system. With this digital system, employers can verify whether the disability status of their employees has been registered with the IMSS.

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Norway

New Legislation on Permanent and Temporary Employment

New Legislation Enacted

Author: Ole Kristian Olsby, Partner — Homble Olsby advokatfirma

Recent amendments in the Norwegian Working Environment Act, which become effective on January 1, 2019, prohibit employers from employing workers permanently without guaranteeing their salary. These employment contracts have been common in the temp agency businesses and must meet the conditions of temporary employment, which are very strict in Norway.

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Philippines

The Mental Health Act of 2018

New Legislation Enacted

Author: Emerico O. de Guzman, Managing Partner — Angara Abello Concepcion Regala & Cruz Law Office

Republic Act No. 11036, signed into law on June 20, 2018, requires employers to develop

appropriate policies and programs on mental health in the workplace designed to (1) raise awareness on mental health issues, (2) correct the stigma and discrimination associated with mental health conditions, (3) identify and provide support for individuals at risk, and (4) facilitate access of individuals with mental health conditions to treatment and psychosocial support.

Amendment to Allowable Wage Deductions

New Regulation or Official Guidance

Author: Emerico O. de Guzman, Managing Partner — Angara Abello Concepcion Regala & Cruz Law Office

Generally, wage deductions by an employer are prohibited except in some cases, one of which is when deductions are made with employee's written authorization for payment to a third party and the employer agrees thereto and does not receive any pecuniary benefit. Department Order No. 195 of the Department of Labor and Employment, promulgated on July 27, 2018, amended the regulations to include deductions with written authorization for payment to the employer himself, as allowable deductions.

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Portugal

New Legal Measures Promote Equal Pay for Men and Women

New Legislation Enacted

Authors: Ricardo Grilo, Senior Associate & Gonçalo Machado dos Santos, Junior Associate — Garrigues Portugal SLP Sucursal

Law no. 60/2018 of August 21 creates new measures to promote equal pay for women and men for equal work or work of equal value. Under this Law, companies must ensure the existence of a transparent Remuneration Policy applicable to their employees to prevent the occurrence or perpetuation of cases of discrimination between men and women. Said Remuneration Policy should be based on the evaluation of the components of the functions performed by the employees and solely based on objective criteria (such as merit, productivity, assiduity or seniority) common to men and women. The Law has an implementation deadline of August 21, 2019.

Extension of Scope of Special Regime for Early Access to Retirement Pension

New Legislation Enacted

Authors: Ricardo Grilo, Senior Associate & Gonçalo Machado dos Santos, Junior Associate — Garrigues Portugal SLP Sucursal

Under Law no. 73/2018, effective as of October 1, 2018, the sustainability and the pension reduction factors are no longer applicable to retirement pensions granted to beneficiaries of the

general social security regime with the age of 60 years old or more and with at least 46 calendar years of remuneration records. Beneficiaries of the convergent social protection regime that have been enrolled in the *Caixa Geral de Aposentações* or in the general Social Security regime at the age of 16 or less may request the retirement pension, without applying the sustainability factor or any reduction in its amount, provided that they have at least 46 years of service.

New European Rules on Posting of Employees in the EU

New Regulation or Official Guidance

Authors: Ricardo Grilo, Senior Associate & Gonçalo Machado dos Santos, Junior Associate — Garrigues Portugal SLP Sucursal

Directive (EU) 2018/957 of the European Parliament and of the Council, of June 28, 2018, entered into force on June 29, 2018 and amends the scheme on the posting of employees within the EU to enhance the legal protection of posted employees, including employees posted under a temporary employment contract. The Directive covers *inter alia* the posting of employees by temporary employment agencies or placement agencies; an increased protection of posted workers; the development of the concept of remuneration; and the strengthening of the monitoring and control of postings. Member States must transpose the directive into national legislation by July 30, 2020.

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Puerto Rico

Authorized Deductions to Non-Exempt Employees' Wages

New Legislation Enacted

Authors: Elizabeth Pérez-Lleras, Capital Member & Ana Beatriz Rivera-Beltrán, Associate — Schuster Aguiló, Littler Global Puerto Rico

On June 20, 2018, Act No. 115 was enacted, extending the list of authorized payroll deductions. Specifically, Act No. 115 provides that, upon the employee's written authorization, an employer may prospectively deduct or withhold a fixed amount of money from the employee's wages in the employee's regular pay cycle to fully repay (without interest) the sum corresponding to a loan, salary advance, or any equipment, material, or goods the employer provided that is directly related to an emergency situation (as defined in the Act). For this deduction to apply, certain conditions must be met.

Extension of Deadline to Make Hurricane-Related Retirement Plan Distributions

New Regulation or Official Guidance

Author: Ana María Bigas-Kennerley, Senior Counsel — Schuster Aguiló, Littler Global Puerto Rico

Last year, the Puerto Rico Department of the Treasury issued guidance for temporarily allowing

distributions from an IRA or a Puerto Rico qualified retirement savings plan post Hurricane Maria, subject to a favorable tax treatment (eligible distributions) during the eligible period (i.e., from September 20, 2017, through June 30, 2018). The Puerto Rico Department of the Treasury recently extended the eligible period until November 30, 2018. For distributions received between July 1 and July 31, 2018, to be considered eligible distributions, they must comply with the guidance issued last year, in addition to satisfying various additional conditions.

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Russia

Employees Can Participate in Meeting of Board of Directors

New Legislation Enacted

Author: Anna Ivanova, Employment Practice Director — Egorov Puginsky Afanasiev & Partners Law Offices

On August 3, 2018, the President of the Russian Federation signed the amendments to the Labor Code of the Russian Federation, which empower employee representatives to participate in companies' meetings of the Board of Directors in a consultative capacity. This right may be provided by federal laws, company documents or collective bargaining agreements. The law became effective on August 14, 2018.

Bill to Create Electronic System for Employment Records

Proposed Bill or Initiative

Author: Anna Ivanova, Employment Practice Director — Egorov Puginsky Afanasiev & Partners Law Offices

On July 28, 2018, the Russian Trilateral Commission for the Regulation of Social and Labor Relations supported a bill that, if enacted, will create a system for employers to electronically submit employment-related records, including information on each employee's position, work experience, etc., to the Pension Fund of the Russian Federation. The Fund will maintain a specialized electronic database and employers will be exempted from maintaining paper records. The bill will be voted on in February 2019.

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Singapore

High Court Clarifies Meaning of “Executive” in the Employment Act

Precedential Decision by Judiciary or Regulatory Agency

Authors: Benjamin Gaw, Director & Elizabeth Tong, Director — Drew & Napier LLC

The High Court of Singapore recently clarified the definition of “executive” as applied under the Employment Act (EA), holding that the mere fact that the employee had a supervisory role was not sufficient to make him an “executive”. Whether an employee is employed in a managerial or executive position is a factor in determining the applicability and scope of coverage of the EA, and the nature of the work and all circumstances, including the level of supervisory powers, should be taken into account.

Employment Act to Cover PMEs Earning More Than S$4,500

Proposed Bill or Initiative

Authors: Benjamin Gaw, Director & Elizabeth Tong, Director — Drew & Napier LLC

The Ministry of Manpower (MOM) is seeking parliamentary approval of proposed amendments to the Employment Act (EA) to take effect on April 1, 2019. If enacted, the EA will extend its coverage to managers and executives earning more than S$4,500 per month, thus expanding its coverage by around 430,000. Additionally, the current salary cap and overtime salary cap for non-workmen will be increased. Further, Employment Claims Tribunals will hear both salary-related disputes and wrongful dismissal claims, instead of the latter being heard by the MOM.

Adjudications Before the Employment Claims Tribunal

Trend

Author: Benjamin Gaw, Director — Drew & Napier LLC

The State Court recently announced that since the launch of the Employment Claims Tribunal (ECT), a total of 1,190 employment claims were filed with the ECT from April 1, 2017, through March 31, 2018. The ECT hears employees' salary-related and "salary in lieu of notice of termination" claims. The ECT is intended to provide a cost-effective and expeditious way to resolve certain employment claims and an alternative to civil ligation. To provide a one-stop service, it is contemplated that the ECT will adjudicate wrongful dismissal claims beginning in 2019.

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Spain

Urgent Data Protection Measures for GDPR Enforceability

New Order or Decree

Author: Juan Bonilla, Partner — Cuatrecasas

The Spanish government has fast-tracked the approval of measures aimed at adjusting Spanish legislation to the new General Data Protection Regulation (GDPR) by passing Royal Decree-Law 5/2018, of July 27, in force from July 31. The Royal Decree-Law seeks to compensate partially for the absence of a Spanish data protection act adapted to the GDPR, regulating aspects considered outside the exclusive scope of organic law. It issues rules on sanctioning proceedings for infringements, so they can be applied under the European regulation, and establishes limitation periods for sanctions already imposed.

Supplementary Pension Schemes: Modifications Relative to Employment Terminations

New Order or Decree

Author: Juan Bonilla, Partner — Cuatrecasas

Royal Decree 11/2018, of August 31, in force from September 5, transposes into Spanish law Directive 2014/50/EU, which aims to reduce the obstacles to the mobility of workers between Member States created by regulations relating to supplementary pension schemes linked to an employment relationship. The regulation amends the legal regime of supplementary pension commitment with a rights-acquisition provision, limiting the vesting and waiting periods to 3 years, and setting a minimum age for the vesting of pension rights (21 years).

New Directive Equates the Working Conditions of Workers Posted in the EU

New Order or Decree

Author: Juan Bonilla, Partner — Cuatrecasas

New Directive 2018/957 of the European Parliament and of the Council of June 28, 2018 (published July 9) seeks to equate the working conditions of workers posted in the EU to those applicable to workers in the host Member State. The Directive provides *inter alia* that when a posting exceeds 12 months (on an exceptional basis, 18), all working conditions that apply in the host Member State, by law or under a collective bargaining agreement, will apply, except for the laws on entering into and terminating contracts and supplementary retirement pension schemes. Member States have until July 30, 2020, to transpose it into their national legislation.

CJEU Ruling Will Change Current Spanish Doctrine on Conventional Subrogations

Precedential Decision by Judiciary or Regulatory Agency

Author: Juan Bonilla, Partner — Cuatrecasas

To date, the Spanish Supreme Court (SC) has placed conventional subrogation in labor-intensive sectors outside the scope of TUPE regulations. In a July 11, 2018 decision, the Court of Justice of the European Union (CJEU) ruled that, although an agreement establishes subrogation, when the transfer of all or an essential part of the workforce alone comprises an “economic unit” subject to the transfer to which the Directive 2001/23 refers, the assumption of fact falls within the scope of application. The CJEU decision lays the groundwork for the SC to amend its case law on the subject.

Riders of On-Demand Economy Company Are Not Employees, Judge Rules

Precedential Decision by Judiciary or Regulatory Agency
Author: Juan Bonilla, Partner — Cuatrecasas

In September 2018, a labor judge in Madrid ruled that the nature of the relationship between a company that provides services through a digital platform and its delivery persons ("riders") is not an employment relationship, but a commercial one, because riders are considered independent contractors based on a number of factors. This ruling is significant for on-demand economy platforms operating in Spain, especially since it is contrary to other rulings finding riders have an employment relationship with the digital platform for which they provide their services.

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Sweden

Policy Requiring All Employees to Shake Hands Discriminated Based on Religious Belief

Precedential Decision by Judiciary or Regulatory Agency
Author: Anna Jerndorf, Partner — Advokatfirman Törngren Magnell KB

During a job interview, a job seeker refused to shake the company representative's hand because her interpretation of Islam does not allow such greeting with a person of the opposite sex. The company then cancelled the interview and the recruitment process based on its policy that all employees should be able to greet with a handshake. On August 15, 2018, the Labor Court ruled that the company was liable for damages because the policy was not appropriate, necessary, and proportionate to achieve legitimate objectives, and unlawfully discriminated against women who, based on their religious belief, do not shake hands with men.

New Ruling on Non-Competition Clauses in Employment Contracts

Precedential Decision by Judiciary or Regulatory Agency
Author: Anna Jerndorf, Partner — Advokatfirman Törngren Magnell KB

In a new ruling, the Labor Court has considered, *inter alia*, the reasonableness of non-competition clauses in employment contracts and the limits of the duty of loyalty. The ruling confirms previous case law that non-competition clauses are generally unreasonable if the employee does not receive any financial compensation for the undertaking. The Labor Court further found that the employee had breached the duty of loyalty during the employment, but that the company could not prove that it had suffered any financial damages due to the breach.

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Switzerland

New Whistleblower Law Proposed

Proposed Bill or Initiative

Author: Ueli Sommer, Partner — Walder Wyss AG

A new bill proposing a statutory framework for whistleblowers was presented to Parliament. If adopted, employees will have the duty to inform employers about irregularities coming to their knowledge (whereby anonymous reporting should be feasible). Second, companies will need to appoint an internal or external person to act within a maximum of 90 days upon any report and implement measures to remedy any irregularity. Finally, employees may only inform the public if the company does not remedy the situation in line with the statutory framework.

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The Netherlands

Supreme Court Clarifies Right to Continued Payment of Wages Pending Trials

Precedential Decision by Judiciary or Regulatory Agency

Author: Eric van Dam, Partner — CLINT, Littler Global The Netherlands

On July 13, 2018, the Supreme Court of the Netherlands ruled that an employer has no obligation to pay wages between the period after a dismissal for urgent cause is voided and the moment the appellate court overrules that decision. After a dismissal for urgent cause is declared void, the employment contract can be reinstated upon the employee's request, and the obligation to pay wages revivifies until the legal end of the employment contract. With this ruling in hand, the employer can deny the employee his right to payment of wages if the employment contract ended only after appeal.

Supreme Court Rules Partial Termination Equals Partial Transition Payment

Precedential Decision by Judiciary or Regulatory Agency

Author: Wouter Engelsman, Partner — CLINT, Littler Global The Netherlands

On September 14, 2018, the Supreme Court of the Netherlands held that employers who convert an employee's full-time position into a part-time position must pay a transition fee for the hours the employee will no longer work since employment contracts can be terminated only as a whole. However, if special circumstances lead to a substantial and structural decrease in working hours, partial dismissal coupled with partial transition payment should be possible so the employee will not miss out on part of the transition payment if the employment contract eventually is terminated (in full) at a later date.

The Data Protection Authority Has Started Control and Enforcement of GDPR

Upcoming Deadline for Legal Compliance

Author: Eric van Dam, Partner — CLINT, Littler Global The Netherlands

On July 17, 2018, the Data Protection Authority (DPA) announced the immediate start of an exploratory study on compliance of the General Data Protection Regulation (GDPR) in the private sector, based on a random sample of 30 large organizations from 10 private sectors, focusing on the implementation of the data-processing register. Because a large part of the Dutch government bodies have not yet fully complied with the GDPR, the DPA has given them time to fix any shortcomings. While the same goes for the private sector, the DPA indicated that after given time, non-compliance will result in an incremental penalty or high fines.

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United Arab Emirates

Part-Time Working Arrangements Now Possible in the UAE

New Order or Decree

Authors: Rebecca Ford, Partner & Sara Khoja, Partner — Clyde & Co

The UAE Ministry of Human Resources and Emiratisation (MHRE) has recently issued a Ministerial Resolution No. 31 of 2018 Introducing Part-Time Employment Contract System. The Part-Time Resolution allows an employee employed under an existing part-time employment contract to be employed by several other MHRE-registered employers without the consent of their primary employer. Employers likely will be concerned about the potential disclosure of their confidential information or trade secrets by part-time employees who work for a competitor.

New Code of Ethics and Professional Conduct for Health Professionals

New Order or Decree

Authors: Sara Khoja, Partner & Wayne Jones, Partner — Clyde & Co

The UAE's Minister of Health and Prevention issued a federal resolution approving a Code of Ethics and Professional Conduct for Health Professionals designed to boost confidence in the healthcare industry and to change the culture of the profession in the UAE. This new Code expands upon the conduct expectations of health practitioners outlined in earlier Emirate-specific codes, with specific focus on patients' well-being and the responsibilities that health professional have towards themselves, their colleagues and society. The conduct expectations, if breached, could seriously impact the health professional's license.

Continuing the Drive for Emiratisation

New Order or Decree

Authors: Rebecca Ford, Partner & Sara Khoja, Partner — Clyde & Co

To increase workforce nationalization, the Ministry of Human Resources and Emiratisation has introduced a number of measures, including Ministerial Decree Number 212 of 2018. Among the significant changes, the decree provides for UAE national employees to be employed on a two-year employment contract, which may be renewed by mutual agreement. It also sets out various rules and procedures pertaining to termination of UAE nationals, including legal grounds for termination, employers' and employees' respective obligations, and the potential consequences and penalties for breaching such obligations.

Dubai's New Regulation to Support Individuals with Disabilities in the Workplace

New Order or Decree

Author: Shabnam Karin, Legal Director & Ben Brown, Legal Director — Clyde & Co

Resolution No. 43 of 2018 in support of people with special needs expands upon previous laws by providing guidance on how individuals with a physical or mental disability shall be treated in the workplace, and helps them to get access to equal opportunities in the labor market. In particular, it is aimed at ensuring that their right to work is exercised on an equal basis with others, including: equal employment opportunities; non-discrimination against them in any work stage or benefit; and salaries equal to their peers.

Major Immigration Changes in the UAE

New Regulation or Official Guidance

Authors: Shabnam Karin, Legal Director & Ben Brown, Legal Director — Clyde & Co

To enhance the UAE's economic competitiveness, the UAE has introduced several new types of visas: (i) a job seekers visa for 6 months for those eligible for the on-going immigration amnesty; (ii) a retirement visa for expats; and (iii) a free transit visa for the first 48 hours. The immigration process is becoming increasingly complex, particularly regarding new requirements, additional documentation required, and the home country recruitment centers set up in third countries. Timeframes for recruitment and new employee on boarding also have increased.

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United Kingdom

New Parental Bereavement (Leave and Pay) Act

New Legislation Enacted

Author: Kate Potts, Associate — GQ Employment Law LLP, Littler Global United Kingdom

The new Parental Bereavement (Leave and Pay) Act 2018, which was enacted on September 13 and will come into effect in 2020, grants parents who experience the loss of a child under 18 or a stillbirth after 24 weeks of pregnancy 2 weeks' leave (if they have 26 weeks' continuous service

with their employer). These employees will be entitled to statutory pay, currently set at £145.18 per week for other types of family leave. Some employers may choose to offer enhanced pay in line with their compassionate leave policy. Employers should update their compassionate leave policy and practices ahead of the expected implementation.

Sleep-In Workers Not Entitled to National Minimum Wage Whilst Asleep

Precedential Decision by Judiciary or Regulatory Agency

Author: Lisa Rix, Associate — GQ Employment Law LLP, Littler Global United Kingdom

The Court of Appeal on July 13, 2018, clarified that workers on sleep-in shifts (i.e., shifts where workers are expected to sleep but are on call to be awoken to work if needed) are only entitled to have their hours counted for National Minimum Wage (NMW) purposes when they are (and are required to be) awake for the purpose of performing some specific activity. They are not entitled to receive the NMW for the entirety of the shift, including the hours in which they are asleep.

Decision on When an Employee's Notice Is Not a Valid Resignation

Precedential Decision by Judiciary or Regulatory Agency

Author: Deborah Margolis, Associate — GQ Employment Law LLP, Littler Global United Kingdom

On June 5, 2018, the Employment Appeal Tribunal upheld an Employment Tribunal decision that an employee's letter giving her employer "*one month's notice*" was not a letter of resignation from employment because wording of the resignation was not clear and unambiguous, and the letter had to be understood in light of the relevant context.

Disclosure of Rape Acquittal in Criminal Record Check Did Not Breach Privacy

Precedential Decision by Judiciary or Regulatory Agency

Author: Ben Smith, Trainee Solicitor — GQ Employment Law LLP, Littler Global United Kingdom

On July 30, 2018, the UK Supreme Court ruled that disclosure of a rape acquittal by police in an enhanced criminal record check did not breach the right to privacy under the European Convention of Human Rights. AR, who had been charged with rape, but later acquitted by a jury, alleged that police's disclosure of this acquittal prevented him from obtaining employment. Enhanced criminal record checks are required to work with vulnerable populations and may include unproven allegations if police are satisfied they are "relevant" and "ought to be included". The Supreme Court found this did not breach AR's right to privacy.

Court of Appeal Clarifies Law on Privilege and Internal Investigations

Precedential Decision by Judiciary or Regulatory Agency

Author: Sophie Vanhegan, Partner — GQ Employment Law LLP, Littler Global United Kingdom

On September 5, 2018, the Court of Appeal found that internal investigation documents prepared by both lawyers and forensic accountants were protected from disclosure by litigation privilege. Litigation privilege arises where litigation is reasonably contemplated and documents are created for that purpose. This decision will give comfort to employers who carry out internal investigations into potential wrongdoing as they are now more likely to be able to claim privilege.

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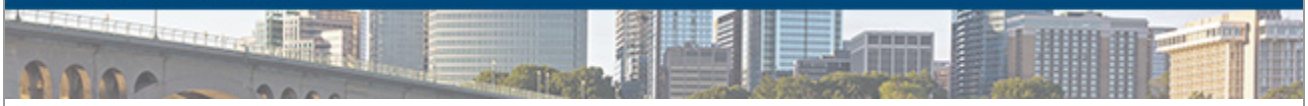
United States



Hawaii Joins Salary History Ban Trend

New Legislation Enacted

Authors: William J. Simmons, Shareholder; Martha J. Keon, Shareholder; & Judy M. Iriye, Shareholder — Littler Mendelson, P.C.

On July 5, 2018, Hawaii's Senate Bill 2351 was signed into law, adding Hawaii to the list of jurisdictions generally prohibiting employers from asking applicants about their prior compensation history. As long as employers have at least one employee in the state, they are covered. Under the new law, which becomes effective on January 1, 2019, employers may not inquire about an applicant's "current or prior wage, benefits, or other compensation" and are specifically prohibited from searching publicly available records or reports to ascertain an applicant's salary history.

California Enacts a Privileged Communication Law Regarding Sexual Harassment Claims

New Legislation Enacted

Author: Bruce Sarchet, Shareholder — Littler Mendelson, P.C.

In the wake of the #MeToo movement, many states have been making concerted efforts to address and prevent sexual harassment through proposed legislation. On July 9, California's government signed one of those proposals, Assembly Bill 2770, into law. This measure targets defamation claims stemming from sexual harassment allegations. Under the law, certain employee and employer statements regarding sexual harassment allegations are deemed privileged and therefore cannot be used to support a defamation claim. This law will take effect on January 1, 2019.

Sixth Circuit Rejects Argument that Full-Time Job Requires Full-Time Hours in ADA Case

Precedential Decision by Judiciary or Regulatory Agency

Authors: Michael Chichester, Shareholder & Jaclyn Giffen, Associate — Littler Mendelson, P.C.

On July 17, 2018, in a failure to accommodate case, the U.S. Court of Appeals for the Sixth Circuit held that full-time presence at the workplace is not always an essential job function. The decision in *Hostettler v. College of Wooster* undermines the deference often afforded to employers in determining whether a particular function is an "essential" job function. Moreover, it appears to eliminate—at least within the Sixth Circuit—the argument that an accommodation permitting an

employee to work less than full-time hours in a full-time position is per se unreasonable.

DOL Issues First Substantive Guidance on Independent Contractors

New Regulation or Official Guidance

Authors: Tammy McCutchen, Principal & Angelo Spinola, Shareholder — Littler Mendelson, P.C.

On July 13, 2018, the Department of Labor issued guidance on independent contractor classification for the caregiver registry industry, stating that it will consider the "totality of the circumstances to evaluate whether an employment relationship exists." The DOL will focus on historically important factors, including control of the work performed by the independent contractor. For example, registries may avoid a determination that they are the caregivers' employer if they avoid controlling and/or becoming involved in the client-caregiver relationship.

New Policy to Expand NTAs to Cover Wider Class of Foreign Nationals for Removal

New Regulation or Official Guidance

Author: Shireen Karcutskie, Associate — Littler Mendelson, P.C.

As of October 1, 2018, the United States Citizenship and Immigration Services (USCIS) will begin implementing its June 28, 2018, policy memorandum to prioritize the removal of foreign nationals from the U.S. on the basis of public safety, in compliance with Executive Order 13768.2 Under this policy memorandum, the USCIS will issue "Notices to Appear" to a wider class of foreign nationals who are removable when there is evidence of fraud, criminal activity, or when the foreign national is denied an immigration benefit and is unlawfully present in the United States.

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