Littler The Global Guide Quarterly

Labor and employment law updates from around the globe

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Australia

Work Hours, Overtime, and Penalty Rates for Professional Employees Award

New Order or Decree

Authors: Naomi Seddon, Shareholder, and Xi (Grace) Yang, Of Counsel – Littler

On March 16, 2023, the Fair Work Commission (FWC) amended the Professional Employees Award 2020 (Award) to (1) clarify the categories of employees covered by the law, (2) impose additional obligations on employers to track hours worked and provide overtime compensation, and (3) update penalty rates for noncompliance. The Award covers employers mainly engaged in the information technology, medical research, quality auditing or telecommunications services industries as well as employers of professional engineers and scientists.

The employer must pay a full-time employee the appropriate minimum hourly rate for all hours worked in excess of 38 hours per week, or an average of 38 hours per week over an agreed period (subject to exemptions). This includes call-backs and work performed on electronic devices or otherwise remotely. The payment is in addition to the minimum annual wage prescribed for working ordinary hours. An employee and employer may agree, in writing, to the employee taking time off within six months after the overtime is worked. Employers must adjust their contractual arrangements, work arrangements, record-keeping and pay systems to comply with the new provisions regarding hours of work, overtime and penalty rates by September 16, 2023.

Workplace Gender Equality: Bill to Close Gender Pay Gap

Proposed Bill or Initiative

Authors: Naomi Seddon, Shareholder, and Xi (Grace) Yang, Of Counsel – Littler

On February 8, 2023, the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023 was introduced into Parliament. The Bill seeks to amend the Workplace Gender Equality Act 2012 by imposing further requirements on employers with over 100 employees to report their gender pay gap to the Workplace Gender Equality Agency (Agency).

Since the Bill also requires the Agency to publish the gender pay gap data, employers' gender pay gap information will be public. Moreover, to promote transparency and accountability, employers will be required to provide executive summary and industry benchmark reports to all members of their governing body.

Bill to Add the Right to Disconnect

Proposed Bill or Initiative

Authors: Naomi Seddon, Shareholder, and Xi (Grace) Yang, Of Counsel – Littler

On March 20, 2023, the Fair Work Amendment (Right to Disconnect) Bill 2023 was introduced to the Parliament. The Bill seeks to amend the Fair Work Act 2009 by including an employee's right to disconnect in the National Employment Standards. The Bill states that an employer cannot contact an employee outside of the employee's work hours unless it is an emergency or genuine welfare matter or the employee received an availability allowance for the period during which the contact is made.

Brazil

New Social Security Cap for 2023

New Legislation Enacted

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

On January 11, 2023, Interministerial Ordinance MPS/MF #26/2023 was published, establishing the new cap for Social Security Institute's benefits in the amount of BRL 7,507.49. As a result, the minimum salary amount for hyper-sufficient employees will increase to BRL 15,014.98. The Ordinance also covers other changes, including changes to the family allowance amount for eligible employees.

Integration of Overtime in Weekly Rest Impacts Other Salary Installments

Precedential Decision by Judiciary or Regulatory Agency

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

On March 20, 2023, the Superior Labor Court ruled that the increase in paid weekly rest (day off) due to the integration of any overtime worked must be reflected on other salary payments, such as vacation, Christmas bonus, prior notice and FGTS (the unemployment fund account). This is a departure from previous jurisprudence. Under this new ruling, the usual overtime and the increases to the paid weekly rest are portions upon which the salary is based. Therefore, both should be considered in the calculations of installments that are based on salary.

The new understanding – enunciated in this judgment (known as an Incident of Repetitive Appeal) – must be applied to overtime effective March 20, 2023, and will impact the requirements under Jurisprudential Orientation #394.

ANPD to Apply Penalties for Violations of Data Protection Law

New Regulation or Official Guidance

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

New Resolution CD/ANPD 4/2023, enacted February 24, 2023, regulates the application of penalties for noncompliance with the Brazilian Data Protection Law (LGPD). As of the effective date, the Brazilian National Data Protection Agency (ANPD) will be able to apply administrative sanctions based on clear and established requirements.

Punitive measures under the resolution include but are not limited to warnings, fines, and a total or partial ban on carrying out data processing activities. Penalties can only be applied in accordance with the administrative procedure outlined within the resolution, thus ensuring the right to full defense. When determining an employer's penalties, the ANPD must consider criteria such as the offender's cooperation, the extent of the damage, the adoption of good practices and governance, among others.

Deadline to Report Taxes and Labor Lawsuits on eSocial Extended

Upcoming Deadline for Legal Compliance

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

On March 30, 2023, the Federal Government announced that it is extending the deadline for employers to report information related to taxes due to labor lawsuits, on eSocial. eSocial is the system of digital bookkeeping used by the federal government for employers to report employment and work-related data to various federal government institutions.

The deadline was originally set for April 1, 2023, but no new date has been announced, thus far.

Canada

British Columbia: New Statutory Holiday for National Day for Truth and Reconciliation

New Legislation Enacted

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

On March 9, 2023, British Columbia's Bill 2, National Day for Truth and Reconciliation Act, received Royal Assent and came into force. Bill 2 amends British Columbia's Employment Standards Act to provide eligible workers in British Columbia a new statutory holiday, the National Day for Truth and Reconciliation, to be observed annually on September 30. This holiday commemorates the history and legacy of Canada's residential school system.

Statutory Tort of Human Trafficking May Be Available in Labor Context

Precedential Decision by Judiciary or Regulatory Agency

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

In *Osmani v. Universal Structural Restorations Ltd.*, 2022 ONSC 6979, an Ontario court was the first to consider a claim for damages for the statutory tort of human trafficking under the Prevention of and Remedies for Human Trafficking Act in the labor context. Although the court denied the claim in this case, it explained that such a claim can be made in the labor context if it can be proved that the employer's purpose in directing, controlling or influencing the employee's movements was to exploit them, knowing that its actions would cause a reasonable person in the employee's position to believe that their safety would be threatened if they failed to provide the labor or service.

ABCA Decides CERB Paid to Workers Affected by COVID-19 Should Not Be Deducted from Damages for Wrongful Dismissal

Precedential Decision by Judiciary or Regulatory Agency

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

In *Oostlander v Cervus Equipment Corporation,* 2023 ABCA 13, the Alberta Court of Appeal held that financial support provided under the Canadian Emergency Response Benefit (CERB) program to workers directly affected by COVID-19 should not be factored into wrongful dismissal damages awards. Following a period of inconsistency in the approach taken on this issue by Canadian trial courts, two appellate courts—the BCCA in *Yates v. Langley Motor Sport Centre Ltd.*, 2022 BCCA 398, and now the ABCA in *Oostlander* - have both decided that a reduction should not occur.

Ontario Court: Employee's Refusal to Comply with COVID-19 Vaccination Policy Frustrated Employment Relationship

Precedential Decision by Judiciary or Regulatory Agency

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

In *Croke v. VuPoint Systems Ltd.*, 2023 ONSC 1234, Ontario's Superior Court of Justice decided that an employee's refusal to comply with mandatory COVID-19 vaccination requirements resulted in the frustration of the parties' employment relationship. The employer, therefore, was entitled to terminate the employee's employment without providing notice of termination or damages in lieu of common law reasonable notice.

Looming Deadline for Certain Federally Regulated Employers

Upcoming Deadline for Legal Compliance

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

By June 1, 2023, federally regulated employers that had 100 or more employees in 2021 must comply with the first deadline for compliance with the Accessible Canada Act (ACA). An employer that is subject to the ACA is required to prepare and publish an initial accessibility plan and update it at least every three years. Federally regulated employers that had between 10 and 99 employees in 2021, or who were established or became federally regulated in 2022, must comply by June 1, 2024. Federally regulated employers that are established or become federally regulated in 2023 must comply by June 1, 2025.

Colombia

New Tax Reform Impacts Employment-Related Taxation

New Legislation Enacted

Authors: Juliana Ramos, Associate, and Juliana Visbal, Associate – Godoy Córdoba | Littler

Colombia adopted a major tax reform in Law 2277 of 2022 (the Law), which aims to strengthen the State's revenues and to reinforce the fight against tax evasion. Among other provisions, the law introduces various important employment-related taxation modifications.

Article 2 of the Law modifies the exempt employment income. Specifically, the Law establishes that 25% of employment payments will be tax-free, limited to 790 UVT (or tax unit value). (It had been limited to 240 UVT prior to this law.) Further, Article 206 of the Tax Statute establishes that disability, old age, survivors' and occupational risk pensions are taxed only on the portion of the monthly payment that exceeds 1,000 UVT. With Law 2277, this benefit is extended to income derived from savings for old age and pensions obtained abroad or in multilateral organizations.

New Ministry of Equality and Equity

New Legislation Enacted

Authors: Juliana Visbal, Associate, and Juliana Ramos, Associate – Godoy Córdoba | Littler

Law 2281 of 2023 establishes the Ministry of Equality and Equity in Colombia, whose main objective is to design, lead, implement, and execute the necessary measures to eliminate economic, political, and social inequalities in Colombia.

Increase to the Minimum Wage

New Order or Decree

Authors: Juliana Visbal, Associate, and Juliana Ramos, Associate – Godoy Córdoba | Littler

By order of Decree 2613 of 2022, the Government established that the minimum wage will be COP 1,160,000 (approximately USD 240), effective January 1, 2023. Because the minimum wage was increased by 16%, the integral minimum wage will be COP 15,080,000 (approximately USD 3,114), effective January 1, 2023.

Increase to Transportation Aid

New Order or Decree

Author: Juliana Ramos, Associate – Godoy Córdoba | Littler

By order of Decree 2614 of 2022, the Government established that the transportation aid is COP 140,606 (approximately USD 29), as of January 1, 2023. The transportation aid was increased by 20%.

Costa Rica

Bylaw to Law for Public Employment Framework Law

New Legislation Enacted

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

The bylaw to the Public Employment Framework Law was published on March 10, 2023, in the official newspaper La Gaceta No. 45 and became effective as of its publication. With the Public Employment Framework Law and its regulations now in force, the institutions and companies subject to its scope of application have a new regulatory framework that will have important effects on labor relations, affecting issues such as hiring policies and practices, remuneration, division of jobs in families, vacations and dismissal, among others.

New Tax Adjustments for 2023, Based on Income Thresholds

New Order or Decree

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

The Ministry of Treasury updated the income tax thresholds for salaried, retired and pensioned persons, as well as independent employees and companies (legal persons), through Executive Decree No. 43852-H, published in Scope 282 of the official newspaper La Gaceta No. 245. For 2023, the adjustment amount is 8.99%, effective January 1, 2023.

The tax adjustment based on income thresholds is as follows:

- Income of up to CRC 941,000.00 per month: No taxation.
- Income between CRC 941,000.01 and CRC 1,381,000.00 per month: 10%.
- Income between CRC 1,381,000.01 and CRC 2,423,000.00 per month: 15%.
- Income between CRC 2,423,000.01 and CRC 4,845,000.00 per month: 20%.
- Income exceeding CRC 4,845,000.00 per month: 25%.

Increase to Minimum Wage for Private Sector

New Order or Decree

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

Decree No. 43849-MTSS updates minimum wage requirements for 2023. The National Wage Council, in ordinary session No. 5727 of October 24, 2022, agreed to increase the minimum wage for all salary categories by 6.62%, effective January 1, 2023.

Once the 6.62% has been applied, the following additional increases will also be applied to the minimum wages: Monthly Domestic Service 2.33962%, Semi-Skilled Worker Monthly 0.3986390%, Skilled Worker per Day 0.3955514% and Specialized Worker Monthly 0.5562880%. This regulation does not modify the salaries that, by virtue of individual contracts, collective agreements or specific laws, are higher than those indicated in this decree.

Denmark

Bill to Transpose EU Directive on Transparent and Predicable Working Conditions

Proposed Bill or Initiative

Author: Bo Enevold Uhrenfeldt, Partner – Littler | enevold

In March 2023, the Danish Government proposed a bill known as the "Act on Employment Certificates and Certain Working Conditions," to replace current law (the latter is known as the Act on Employment Certificates). The proposed bill, which was introduced to transpose Directive (EU) 2019/1152, will expand the scope of the employer's obligation to inform the employee of the employee's employment conditions. Among the provisions, whereas the current law covers all employees working more than eight hours per week, the new law will cover employees working three hours per week. The bill also introduces minimum standards for employment conditions.

The bill has not yet been adopted by the Danish Parliament. However, according to government announcements, it is expected to be effective on July 1, 2023.

Bill to Abolish "General Prayer Day" as a Public Holiday

Proposed Bill or Initiative

Author: Bo Enevold Uhrenfeldt, Partner – Littler | enevold

On February 28, 2023, the Danish Government adopted a bill that abolishes the General Prayer Day (in Danish *Store Bededag*) as a public holiday. Effective January 2024, the General Prayer Day will be a workday.

Action to Annul EU Directive on Minimum Wages

Proposed Bill or Initiative

Author: Bo Enevold Uhrenfeldt, Partner – Littler | enevold

On January 18, 2023, the Danish Government brought an action against the European Parliament and the Council seeking annulment of the Directive on Minimum Wages in the European Union. After the service of the Danish summons, the European Parliament and the Council have two months to submit their answers. The Commission and the other member states of the European Union will have the opportunity to intervene in support of either Denmark or the European Parliament and the Council.

The Danish Ministry of Employment expects a duration of up two years. Denmark must transpose the Directive into national law no later than November 15, 2024, irrespective of the ongoing process for annulment.

Dominican Republic

Minimum Wage Increase in Two Stages

New Order or Decree

Author: Javier Suárez, Partner – BDS, Member of Littler Global

On March 8, 2023, the National Wage Committee raised the minimum wage by 19% for nonsectorized private employees. The increase will take effect in two stages: 15%, effective April 1, 2023, followed by 4% in February 2024.

Adjustments to Payroll Contributions

New Order or Decree

Author: Javier Suárez, Partner – BDS, Member of Littler Global

The Social Security Treasury has increased the payroll contributions based on the increase to the minimum wage. The new maximum contributions, which are rolled out in two stages, *i.e.*, on April 1, 2023, and February 1, 2024, are as follows:

- Labor Risks Insurance: DOP 74,808.00 (April 2023); DOP 77,799.00 (February 2024)
- Family Health Insurance: DOP 187,020.00 (April 2023); DOP 194,497.50 (February 2024)
- Retirement, Disability and Survivorship (Pensions) Insurance: DOP 374,040.00 (April 2023); DOP 388,995.00 (February 2024)

Changes to the Subsidies for Common Illness, Maternity and Breastfeeding

New Regulation or Official Guidance

Author: Javier Suárez, Partner – BDS, Member of Littler Global

The National Council of Social Security issued regulation 560-01, which applies changes to the subsidies for common illness, maternity, and breastfeeding. The regulation changes the form and deadlines to apply for them, a change that will come into effect once the Superintendence of Health and Labor Risks updates its computer system.

El Salvador

Protection of Pregnant Workers or Workers in Postnatal Period

New Legislation Enacted

Author: Noé Martínez, Partner – BDS, Member of Littler Global

The Legislative Assembly amended the Labor Code by adding Article 113-A, which provides that when an employer dismisses a worker who is pregnant or in her postnatal period, the judge must rule *ex officio* or, at the request of a party, on the precautionary measure of immediate reinstatement, under adequate working conditions. Likewise, the judge may order reinstatement as part of the ruling.

The new provision establishes that a pregnant worker may not be fired from her job six months after giving birth. Failure to comply with this provision is subject to penalties, in addition to civil and criminal liabilities that may arise.

New Threshold Amounts to Determine Whether Abbreviated or Ordinary Proceedings Apply

New Legislation Enacted

Author: Noé Martínez, Partner – BDS, Member of Littler Global

The Legislative Branch amended Articles 378 and 425 of the Labor Code to increase the threshold that determines whether a labor claim is adjudicated in an abbreviated or ordinary proceeding. Under the new amendments, labor claims of less than $1,095 will be adjudicated in abbreviated proceedings. All others will be in ordinary proceedings. Prior to this amendment, the minimum amount for regular proceedings was $22.86.

18-Month Compliance Period Has Begun to Provide Care Centers

New Regulation or Official Guidance

Author: Noé Martínez, Partner – BDS, Member of Littler Global

The "Growing Together for the Comprehensive Protection of Early Childhood, Childhood and Adolescence" law was enacted in 2022 and entered into effect in January 2023. This law makes it mandatory for companies that employ more than 100 employees to install a crib room that will be called CAPIS in the workplace, outsource this service, or join neighboring companies to install crib rooms together.

Regulations to enforce this new law have been published, setting an 18-month implementation period. The new regulation, *i.e.*, "Regulations for the Installation, Operation and Supervision of Early Childhood Care Centers" and the "Technical Standard for the Installation and Operation of Early Childhood Care Centers," provide specific guidelines for employers to install, provide or facilitate the CAPIS care centers.

Finland

Implementation of the Changes in the EU Directive Regarding Cross-border Conversions, Mergers, and Divisions

New Legislation Enacted

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

The Finnish Parliament has approved new legislation to protect employees in cross-border conversions, mergers, and divisions. The new legislation became effective on January 31, 2023.

The changes in legislation are based on the amendment to EU Directive (EU) 2017/1132 by EU Directive (EU) 2019/2121, which safeguards the position of employees when an employer plans or carries out cross-border conversions, mergers and divisions. The provisions mainly aim to protect the continuation of the employment rights of the employees, the existing right of the employees to administrative representation, and the informing and consulting of the employees in the preparation of company restructuring by the employer.

Employer Has the Right to Choose Which of the Employees under the Same Threat of Dismissal They Will Dismiss

Precedential Decision by Judiciary or Regulatory Agency

Authors: Noora Ollitervo, Associate, and Samuel Kääriäinen, Partner and Head of Employment – Dottir Attorneys Ltd

On January 10, 2023, the Supreme Court examined a case where the employer had dismissed an employee on economic, production and reorganization grounds under the Employment Contracts Act. Shortly afterwards, the employer had invited another employee to take up a similar post in the same field of research for a three-year period.

In its ruling, the Supreme Court confirmed the principle that the employer can choose which of the employees under the same threat of dismissal they want to dismiss as long as the person to be dismissed is not selected on the basis of inappropriate or discriminatory grounds. In addition, the Supreme Court highlighted the fact that the employer cannot replace an employee with another employee who is not under the same threat of dismissal.

France

Pension Reform

New Legislation Enacted

Author: Guillaume Desmoulin, Partner – Littler France

On March 20, 2023, a pension reform bill was adopted by the French National Assembly. This reform, strongly criticized by the unions, increases the retirement age from 62 years old to 64 years old for employees born after January 1, 1968. Employees who started working early will be entitled to an early retirement under two conditions: (1) Employees must justify the required insurance period by working either 43 years or 142 quarters; and (2) Employees must have reached one of the four age limits (defined by the decree). Employees who have not reached their age limit therefore must contribute longer, even if they have reached 43 years of insurance.

The bill also provides for the possibility to continue contributing to the pension insurance while working and getting the pension at the same time, as well as sponsored employment agreements with employees 60 years old and more.

Protection of Whistleblowers Who Fail to Comply with the Graduated Alert Procedure

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Littler France

In a decision rendered on February 15, 2023, the French Court of Cassation ruled that an employee who reports or testifies to facts constituting a misdemeanor or a crime of which the employee may have become aware in the performance of duties is not obliged to comply with the graduated alert provided for in the French Labor Code.

The Court of Cassation approved the Court of Appeal's ruling that the protection of the employee dismissed for having denounced facts likely to constitute sexual assaults was only conditional on the employee's good faith. The court clarified that bad faith can only result from the knowledge of the falsity of the facts denounced and not from the mere fact that the facts denounced were not established.

An Employee May Request the Disclosure of Pay Slips to Demonstrate Inequality

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Littler France

On March 8, 2023, the Court of Cassation ruled that an employee may request the disclosure of salary slips of other employees before any trial in order to demonstrate the existence of a salary inequality in relation to certain male colleagues having occupied similar functions. The Court of Cassation ruled that it is the responsibility of the judge to investigate relevant facts, and that the judge may limit the scope of the production of the requested documents.

Ruled as relevant facts were: (1) Whether the communication is necessary to provide proof of the alleged inequality of treatment and the disclosure requested is proportionate to the aim for which the disclosure is requested; (2) Whether there is a legitimate reason to preserve or establish, before any trial, the proof of facts on which the solution of a dispute could depend; and (3) If the information requested is likely to affect the personal lives of other employees.

An Intragroup Mobility Clause is Null and Void

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Littler France

A sales representative's employment contract included a mobility clause stating that "the employee undertakes to accept any transfer to another establishment or subsidiary located in France." The employer informed the employee about transferring to another subsidiary, which the employee refused. The employee was dismissed because of this

refusal. The employee challenged this dismissal saying that the clause was actually null and void. The tribunal rejected the employee's claims.

The Court of Cassation overruled the decision and recalls that the employee cannot accept a change of employer in advance. It noted that the mobility clause provides that the employee accepts, in advance, to be transferred to another company of the group and thus to change legal employer. Therefore, the Court found that the mobility clause was null and void. The dismissal was, therefore, without cause.

Germany

New Obligations for Companies under the Supply Chain Due Diligence Act

New Legislation Enacted

Author: Dr. Sabine Vianden, Associate – vangard | Littler

On January 1, 2023, the Supply Chain Due Diligence Act (LkSG) has come into force in Germany. It initially applies only to companies with at least 3,000 employees. From 2024, the scope of application will expand to companies with 1,000 or more employees. The law obligates companies to establish mechanisms to identify human rights and environmental violations.

Comprehensive risk analyses must be conducted and risk management systems must be introduced or supplemented to discover potential violations. Furthermore, the law requires companies to create a policy statement on the company's strategy, which specifies in more detail the steps the company is taking to comply with its obligations under this law. If the risk systems give cause for concern, the companies must take preventive measures as well as remedial action. Complaint procedures must also be established for those affected by violations. Moreover, as part of a comprehensive documentation and reporting obligation, annual business reports on the fulfillment of obligations must be published and sent to the relevant authorities.

German Federal Labor Court on Equal Pay: Negotiating Skills are No Justification for Unequal Pay

Precedential Decision by Judiciary or Regulatory Agency

Author: Dr. Sabine Vianden, Associate – vangard | Littler

On February 16, 2023 (8 AZR 450/21), the German Federal Labor Court (*Bundesarbeitsgericht* – BAG) decided that employers may not justify unequal remuneration of male and female employees on the basis that their male employees had better negotiation skills. The court found that unequal remuneration of equal work or work of equal value gives rise to a presumption of gender discrimination. The female plaintiff was granted an "upward adjustment" resulting in a claim to receive the same remuneration as her male co-worker as well as for damages.

While indirect pay discrimination is generally prohibited under German law, pay discrimination may be justified if the employer has a legitimate purpose and the means of achieving this objective are appropriate and necessary. In particular, criteria related to the labor market, performance and work results can justify a difference in pay, provided the principle of proportionality is observed.

Surcharges for Night Work May Vary in Amount

Precedential Decision by Judiciary or Regulatory Agency

Author: Kim Kleinert, Associate – vangard | Littler

In the dispute over surcharges for night work in the German food industry, which has been raging for years, a first leading ruling has been made. On February 22, 2023 (10 AZR 332/20), the Federal Labor Court ruled irregular night work may be paid at a higher wage than regular night work.

Collective agreements may provide for higher surcharges for irregular night work than for regular night work. This provision does not necessarily violate the principle of equality under Article 3 (1) of the German Constitution. However, there must be an objective reason for the unequal treatment and the reason must be made evident in the collective agreement. The Federal Labor Court has ruled in this regard, stating that objective reasons may include the additional burdens of night work or the fact that it is more difficult to plan such work assignments.

Guatemala

New Requirements for Employers to Register with the Social Security System

New Legislation Enacted

Author: Randolf Castellanos, Partner – BDS, Member of Littler Global

On January 17, 2023, Guatamala enacted a new regulation addressing employer registration with the Social Security System. The new agreement, *i.e.*, Agreement No. 1529 of the Guatemalan Social Security Institute (*Instituto Guatemalteco de Seguridad Social* or IGSS), imposes new obligations on all employers to register and enroll their employees in accordance with the Social Security Regime within 30 business days of the obligation being created.

Minimum Salary for Guatemala 2023

New Order or Decree

Author: Randolf Castellanos, Partner – BDS, Member of Littler Global

The minimum salary in Guatemala has a new modality. In addition to being classified by economic activity (*i.e.*, agricultural, nonagricultural and exporting and maquila), it is now classified by economic circumscriptions. Economic circumscription one (CE1) is limited to the department of Guatemala, and economic circumscription two (CE2) is limited to the rest of the departments.

Further, the minimum salary for 2023 was increased by 7% for the CE1 circumscription and 4% for the CE2 circumscription.

New Court Will Rule Over Noncompliance with Labor Judgments

New Order or Decree

Author: Randolf Castellanos, Partner – BDS, Member of Littler Global

Agreement 33-2022 of the Supreme Court of Justice creates a new court (*Juzgado Pluripersonal de Paz Penal*) with competence over "crimes of disobedience" (regulated in articles 414 and 420 of the Criminal Law). The new court was created because the parties to labor resolutions are not complying with the reinstatements and judicial resolutions ordered by the labor courts.

Hungary

New Obligations for Employers to Justify Termination

New Legislation Enacted

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

In cases where the employee's termination needs no justification (*e.g.*, during the probation period, or when the employee qualifies as a retired person or being in a leading position), but the employee alleges that the employment was terminated by the employer due to the fact that the employee asked for caretaking absence, paternal leave, parental leave, maternal unpaid leave or change of working conditions due to the employee's child younger than eight years, the employer has to justify, in writing, the reasons termination. The justification must be clear, real and include the real cause of the termination. In the case of a dispute, the burden of proof is on the employer.

New Type of Leave

New Legislation Enacted

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

An employee must be released from working obligation for a maximum of five working days annually for the purpose of taking care of a relative who is seriously ill. The illness has to be supported with medical certifications, and the caretaking employee is not entitled to any payment from the employer for the period of the leave.

India

Haryana: New Conditions of Engagement of Female Employees in Night Shifts

New Regulation or Official Guidance

Authors: Nipasha Mahanta, Associate, and Sayantani Saha, Associate – Nishith Desai Associates

The Haryana state government (Gurgaon) previously permitted certain commercial establishments such as IT/ ITeS establishments, hotels, logistics, warehousing and 100% export-based establishments to obtain exemption under the Punjab Shops and Commercial Establishments Act, 1958 to engage women employees in "night shifts" subject to certain conditions. On February 21, 2023, the Haryana state government issued a new notification, superseding its previous directions on the topic. This notice specifies the requirements for obtaining an exemption as a commercial establishment seeking to engage women employees at night between 8 p.m. and 6 a.m.

Besides health and safety related compliance requirements and compliance with all other applicable laws, the notification provides for special conditions of engaging women employees in night shift. This includes requiring employers to apply for an exemption at least a month in advance of exemption period, obtain prior written consent of women employees for their engagement in night shifts, comply with Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH Act) and amend company policies to accommodate the requirements under the PoSH Act, provide transportation equipped with CCTV cameras to female employees engaged in night shifts to and from their residences, ensure canteen and employee strength related compliances applicable to certain establishments, and provide of adequate medical facilities. The notification further requires employers to ensure female employees working in night shifts have regular meetings with the employer through their representatives. Employers are required to include details of employees engaged in night shifts in their annual report to be submitted to Haryana labour authorities.

Employees' State Insurance Corporation (ESIC) to Conduct *Suo-Moto* Aadhar Authentication

New Regulation or Official Guidance

Authors: Nipasha Mahanta, Associate, and Sayantani Saha, Associate – Nishith Desai Associates

The Indian Ministry of Labor and Employment issued a notification dated January 13, 2023, which permits Employees' State Insurance Corporation (ESIC) to perform Aadhar (Indian social security details) authentication on its own. The ESIC administers medical and certain other cash benefits to qualifying insured persons (employees in establishments having employed at least ten employees, earning monthly salaries up to INR 21000 *i.e.* approx. USD 260) under the Employees' State Insurance Act, 1948.

The ESIC has, in the past, required employers to verify the Aadhar details of their employees in order to provide applicable benefits. With the recent notification, the ESIC will be able to verify the details on its own with inputs from the beneficiary directly. ESIC must comply with the applicable laws of the Unique Identification Authority of India (UIDAI) when verifying an individual's information.

Karnataka: Bill Proposes to Amend the Working Hours of State Factory Workers

Proposed Bill or Initiative

Authors: Nipasha Mahanta, Associate, and Sayantani Saha, Associate – Nishith Desai Associates

The Karnataka State legislature has passed the Factories (Karnataka Amendment) Bill 2023 (Bill). The bill proposes to amend the Factories Act 1948 as it applies to the state of Karnataka to enable longer daily working periods in factories. The bill proposes an increase in daily working hour limit for Karnataka factory workers from nine hours to 12 hours.

Further, the bill proposes a revised requirement to provide all factory workers rest interval after six hours of continuous work as opposed to the current requirement to provide rest interval after five hours of continuous work. The bill also proposes to amend the overtime pay requirements, allowing employers to require employees to work more hours daily, without triggering overtime payments. The bill is currently pending the assent of the Governor of Karnataka for its enactment.

EPFO Allows Eligible Employees to Apply for Higher Contribution to Pension Fund Until May 3, 2023

New Regulation or Official Guidance

Authors: Nipasha Mahanta, Associate, and Sayantani Saha, Associate – Nishith Desai Associates

The Employees' Provident Fund Organization issued circulars, dated January 25, 2023, and February 20, 2023, to its regional offices with instructions on how to comply with the the Indian Supreme Court judgment on higher pension. The judgment permitted employees to opt for higher pension fund contributions in accordance with the Employees' Pension Scheme, 1995 (EPS) on wages exceeding the wage ceiling of INR 5000/ 6500/ 15000, as applicable.

The circulars provide guidance on conditions for employees to opt for higher contributions or opt out. Eligible employees will need to exercise their option to make higher contributions to the EPS before May 3, 2023, in a manner prescribed on EPFO portal.

Mumbai Municipal Bodies to Enforce Requirement to Display Name Board in Marathi Language

New Regulation or Official Guidance

Authors: Nipasha Mahanta, Associate, and Sayantani Saha, Associate – Nishith Desai Associates

The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 (MSEA) requires all commercial establishments in Maharashtra to display their name board in Marathi language in a prescribed manner. While the requirement was introduced through an amendment to MSEA, the Maharashtra state government

has issued a notification dated February 24, 2023, empowering relevant municipal and local authorities in Maharashtra to enforce this requirement with respect to commercial establishments in their jurisdictions.

The relevant local authorities are able to exercise their powers of enforcement effective February 22, 2023.

Ireland

Increase in the National Minimum Wage

New Legislation Enacted

Authors: Niall Pelly, Partner, and Philip Gray, Associate – GQ | Littler

Ireland's national minimum rates of pay increased from January 1, 2023. Workers aged 20 and over, are entitled to a minimum wage of EUR 11.30 per hour. Workers who are under 20 are entitled to a minimum wage per hour, as follows: 19 years old, EUR 10.17; 18 years old, EUR 9.04, and under 18 years of age, EUR 7.91.

Amendment to Law Enhances Protections for Whistleblowers

New Legislation Enacted

Authors: Niall Pelly, Partner, and Philip Gray, Associate – GQ | Littler

The Protected Disclosures (Amendment) Act 2022 (the PDAA), which transposes the EU Whistleblowing Directive into Irish law, became effective on January 1, 2023. The PDAA amends current Irish whistleblowing legislation to strengthen the protections for whistleblowers in Ireland. The PDAA makes a number of changes to the procedures that apply when a protected disclosure is submitted, where an employer employs 50 or more employees. Significantly, the legislation extends the power of an employee to seek an injunction to restrain acts of retaliation (*i.e.*, negative acts that are prompted by the employee having made a protected disclosure).

Further, the legislation aims to reverse the burden of proof where an employee is claiming retaliation for raising a protected disclosure by setting out that in any such proceedings, there will be a presumption that the retaliation was a a result of the worker having made a protected disclosure. The burden of proof will be on the employer to show that the act or omission was based on some other justifiable ground and not a result of the protected disclosure.

Employers with more than 250 employees who do not have a local whistleblowing procedure in place are required to put one in place, and employers who have between 50-250 employees will be required to do so by December 2023.

New Statutory Sick Pay

New Legislation Enacted

Authors: Niall Pelly, Partner, and Philip Gray, Associate – GQ | Littler

Statutory sick pay (SSP) was introduced with an effective date of January 1, 2023. As a result, employees with 13 weeks of service are now entitled to three days SSP in 2023 for certified sick leave, with this entitlement expected to rise gradually to 10 days by 2026. SSP is payable at the rate of 70% of an employee's wage, subject to a daily maximum of EUR 110.

Central Bank (Individual Accountability Framework) Act 2023

New Legislation Enacted

Authors: Niall Pelly, Partner, and Philip Gray, Associate – GQ | Littler

On March 9, 2023, the Central Bank (Individual Accountability Framework) Bill 2023 was signed into law. This was soon followed by the publication of a consultation paper by the Central Bank of Ireland on March 13.

The Central Bank (Individual Accountability Framework) Act 2023 (the Act) will introduce an accountability regime (the Senior Executive Accountability Regime or SEAR) for senior executives working in the financial services industry. SEAR, which is similar to the regime that is already in place in the UK, places obligations on certain customer-facing firms and senior individuals within them to set out clearly where responsibility and decision-making lies. It will also introduce individual accountability and conduct standards, as well as strengthen existing fitness and probity standards.

A three-month public consultation process has commenced on the final form that the implementing regulations will take, with an expected implementation date of December 31, 2023, for the conduct standards and fitness and probity aspects of the Act.

Italy

Extensions of Laws

New Legislation Enacted

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

Law No. 14 of February 24, 2023, extended various provisions that have employment-related implications. Concerning staff leasing services (*somministrazione di lavoro*), if the contract between the client itself and the staff leasing agency is fixed-term, a client company may use the same leased employees for assignments until June 30, 2025. The "smart working" modality has been extended until June 30, 2023, with certain conditions. Additionally, retirement support (*isopensione*) has been extended until 2026.

New Whistleblower Law

New Legislation Enacted

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

Legislative Decree No. 24/2023 has finally transposed the E.U. Whistleblower Directive (2019/1937) into Italian law. The new law ensures protections for individuals who report a violation to a specific national or EU provision that harms the public interest or the integrity of public and private subjects. Whistleblowers are protected from any form of retaliation (such as dismissal, change of job, disciplinary measures and others). Administrative fines (from a minimum of EUR 10,000 to a maximum of EUR 50,000) may be imposed in cases of violations under this law.

Private employers must set up an internal channel that guarantees the confidentiality of the whistleblower. Private employers covered under this law include, but are not limited to those who within the last year have employed an average of at least 50 employees with permanent or fixed-term employment contracts, as well as those in various special categories even if they did not reach the 50-employee threshold (such as in the financial services industry, employers covered under Legislative Decree No. 231/2001, among others).

The decree becomes effective on July 15, 2023, but for private employers (described above) who within the last year have employed an average of 249 employees, with open-ended or fixed-term contracts, the obligation to establish the internal channel takes effect on December 17, 2023.

Civil Trial Reform Law: Employment Implications

New Legislation Enacted

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

Italy adopted a civil trial reform, known as *Riforma Cartabia*, parts of which came into effect on February 28, 2023. Within the employment law context, the reform replaced the so-called "*Rito Fornero*," which was a particular trial that applied to claims on dismissal of employees hired before March 2015.

As of February 28, all claims related to dismissal will be subject to the same judicial procedure, regardless of the underlying claims (*e.g.*, remuneration owed, challenge to contractual classification, damages, etc.). Additionally, courts are now able to modify the deadlines for parties to file their defense against complaints. Moreover, the parties can now access dispute resolution mechanisms outside of court, known as "*negoziazione assistita*" in employment-related claims, where both parties are assisted by a lawyer or a payroll consultant. The agreement reached in this context will be enforceable as though it had been formalized before a trade unionist or the other "protected venues" provided by Italian law.

Malaysia

Court of Appeal Held that Employee's Resignation Upon Suggestion by Employee Does Not Amount to Forced Resignation

Precedential Decision by Judiciary or Regulatory Agency

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

The Court of Appeal, on December 9, 2022, held in the case of *Matrix Global Education Sdn Bhd v Felix Lee Eng Boon* [2023] 2 CLJ 34, that the conduct of the employee, in entertaining and entering into negotiations for settlement on terms, could not support the employee's subsequent claim for constructive dismissal. The court held that the employee needed to be seen to have dissociated and distanced himself from actions of the company, and to forthwith walk out of his employment and treat himself as being constructively dismissed. The fact that the employee had negotiated for a better severance package showed that the advice to him to resign was no longer the proximate cause of his alleged forced resignation. The moment the employee tendered his letter of resignation on terms agreed, that was a concluded contract and no longer a case of constructive dismissal.

The court further held that in a case where the company considers the employee to have committed a misconduct, not of the criminal kind but of, poor performance, parties may enter into a negotiation for a severance of the employment contract on terms mutually agreed and this may even have been commenced after the company had suggested that the employee should consider or even should resign.

High Court Held Employer Must Honestly Believe on Reasonable Grounds that the Employee is Incapable and Incompetent

Precedential Decision by Judiciary or Regulatory Agency

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

The standard used to gauge the performance of an employee is left to the employer who does not have to prove that the employee is incapable or incompetent. However, before the employee can be dismissed for poor performance the employee must be given the opportunity to improve and if the employee continues to perform unsatisfactorily, the dismissal is justified after an explanation has been sought and considered by the employer. Secondly, dismissal is not justified or is without just cause and excuse where the employer does not honestly believe on reasonable grounds that the employee is a poor performer or on *mala fide* intentions. *Mala fide* intentions include procedural unfairness, victimization, discrimination, and unfair labor practice.

Social Security Incentives for Hiring Special Groups

Proposed Bill or Initiative

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

Malaysia's Social Security Organization (PERKESO, also known as SOCSO) will provide an incentive of MYR 600 monthly for three months in addition to the salary offered to employers who hire Technical and Vocational Education and Training (TVET) graduates.

SOCSO will also provide incentives for employers to employ vulnerable groups such as persons with disabilities, ex-convicts, the homeless, and chronically unemployed for up to MYR600 monthly for up to three months.

The Government will cover up to MYR4,000 in training fees for gig workers to undergo micro-credentials upskilling programs. SOCSO also provides an allowance of MYR300 for three months as a replacement income for active gig workers undergoing training programs. Overall, MYR40 million is allocated to benefit 30,000 gig workers.

Netherlands

Whistleblower Protection Act Has Entered into Force

New Legislation Enacted

Authors: Dennis Veldhuizen, Partner, and Eric van Dam, Partner – Clint | Littler

The Whistleblower Protection Act went into effect on February 18, 2023. Employers with 250 or more employees must comply with this law upon the effective date. Employers with a total of between 50 and 249 employees have until December 17, 2023, under the transitional law regulated in Article 21c of the Whistleblower Protection Act, to adjust their policies accordingly.

As discussed in the update of Q1 2022, the bill adds breaches of EU law to the scope of the internal reporting procedures and introduces more procedural rules for internal reporting procedures. Furthermore, reporters no longer have to report internally first to fall within the scope of the protection measures for whistleblowers.

Minimum Wage Raised as of January 1, 2023

New Legislation Enacted

Authors: Dennis Veldhuizen, Partner, and Eric van Dam, Partner – Clint | Littler

In January and July of every year the statutory minimum wage gets updated. As of January 1, 2023, the statutory minimum wage is EUR 1,934,40 gross per month for fulltime working employees of 21 years or older. Whether fulltime is 36, 38 or 40 hours per week depends on the employment sector.

Higher Travel and Home Office Allowance as of January 1, 2023

New Legislation Enacted

Authors: Dennis Veldhuizen, Partner, and Eric van Dam, Partner – Clint | Littler

The untaxed travel allowance will increase from EUR 0.19 to EUR 0.21 per kilometer effective January 1, 2023.

Since 2022, in the Netherlands, you may give employees a tax-free allowance for the expenses they incur when working from home. The untaxed home office allowance that employers may provide to their employees will increase from EUR 2.00 per day to EUR 2.15 per day as of January 1, 2023.

Supreme Court: Termination of (Collective) Agency Employment Contract in Case of Illness

Precedential Decision by Judiciary or Regulatory Agency

Authors: Dennis Veldhuizen, Partner, and Eric van Dam, Partner – Clint | Littler

In the Netherlands, specific rules apply with respect to the posting of employees. One of those provisions concerns the so-called agency employment clause. Under the clause, an agency employment contract may provide that the contract ends because the posting of the agency worker to the recipient ends at the request of the recipient (Section 7:691(2) of the Dutch Civil Code). Many collective labor agreements (CLA) contain a provision that, in case of illness of the agency worker, the agency employment contract is deemed to be terminated at the request of the recipient. So therefore, the contract immediately ends in case of illness.

On March 17, 2023, the Supreme Court ruled that the agency employment clause can lead to termination of the contract in case of illness of the agency worker (this does not violate the Dutch statutory prohibition on dismissal in case of illness). However, the recipient must actually make a request to terminate the posting of the agency worker. According to the Supreme Court, the part of the CLA provision that provides that the posting is deemed to be terminated at the request of the recipient in the event of sickness is not valid. This linking of the end of the agency employment contract to a fictitious request by the hirer to terminate the posting is detrimental to the legal position of the temporary worker and is therefore inadmissible.

Large Companies Must Report on Women and Diversity Quota

Legal Compliance

Authors: Dennis Veldhuizen, Partner, and Eric van Dam, Partner – Clint | Littler

Large companies in the Netherlands (companies with 250 employees or more and a turnover of more than 40 million euros), have been subject to the Inclusion Quota and Targets Act (*Wet Ingroeiquotum en Streefcijfers*) since January 1, 2022. The law is known for the "women's quota" or "diversity quota," but also contains other regulations. The law affects about 100 listed companies in the Netherlands and has a target regulation and transparency obligation for the 5,000 "large" companies in our country.

In listed companies, starting January 1, 2023, at least one-third of the supervisory board must consist of women and at least one-third of men. This quota will apply from the moment they have to make a new appointment. Companies are further required to draw up a plan of action with target figures and report on this to the Social and Economic Council (SER). Annually, the SER provides an overview of all goals, targets, results and measures of the reporting companies.

Nicaragua

New Minimum Wages

New Order or Decree

Author: Francisco Cerda, Partner – BDS, Member of Littler Global

In February 2023, the National Minimum Wage Commission agreed to increase the minimum wage for various sectors, including agriculture, fishing, manufacturing, commerce, construction (mostly administrative employees), financial and insurance establishments, among others. The new minimum wage will be in effect from March 1, 2023, to February 28, 2024.

Additionally, effective January 1, 2023, industries subject to the special regime of free zones must apply an increase of 8% to the minimum wage received by employees. Therefore, the new minimum wage for free trade zones is NIO 8,098.46.

Norway

Definition of an Employee Likely Will Cover More Workers

New Legislation Enacted

Authors: Ole Kristian Olsby, Partner, and Lise Gran, Attorney-at-Law – Homble Olsby | Littler

Effective January 1, 2024, a definition of the term "employee" will be implemented in law. The main elements in the assessment of whether a person is an employee, working for and subordinate to someone else, is, among other things, whether that person has a personal duty to work and whether the person is considered subordinate and subject to being directed, managed, and controlled.

From the same date, a presumption rule is also introduced into law. It states that if there is reasonable doubt about whether a person is an employee or not, the relationship will be deemed an employment relationship unless the client can document that it is highly probable that the person is, in fact, an independent contractor. The new implementations may lead to more workers being given employee status.

Information and Consultation Obligations for Employers

New Legislation Enacted

Authors: Ole Kristian Olsby, Partner, and Lise Gran, Attorney-at-Law – Homble Olsby | Littler

From January 1, 2024, further information and consultation duties are introduced for a corporation. Groups with more than 50 employees will have an obligation to establish a framework for cooperation, information, and discussion between the group companies and the employees in the group. The type of cooperation to be established is subject to consultation with a majority of the employees in the group, or one or more local trade unions representing a majority of the employees in the group.

In addition, any plans for expansions, reductions, or changes that could have a significant impact on employment in several businesses in the group, must be informed and discussed as early as possible.

Obligations for Group Companies in Redundancy Processes

New Legislation Enacted

Authors: Ole Kristian Olsby, Partner, and Lise Gran, Attorney-at-Law – Homble Olsby | Littler

Currently, a termination in a redundancy process will not be lawful if the company has other suitable work to offer the employee. Also, most employees who are made redundant have a preferential right to new employment in the same company if a position opens which they are qualified for in the year following the termination.

Effective January 1, 2024, this will not only apply to the legal entity where the redundancy happens, but also in the other group companies within the group. This means that when a group company carries out a redundancy process, the other group companies must be involved to see whether there are any open positions that should be offered to the employees in the process or following the first year of the termination.

Lower Thresholds for Safety Representatives and Working Environment Committees

New Legislation Enacted

Authors: Ole Kristian Olsby, Partner, and Lise Gran, Attorney-at-Law – Homble Olsby | Littler

Currently, companies with more than 50 employees are obligated to establish a working environment committee. Effective January 1, 2024, the threshold is lowered from 50 to 30 employees.

All companies are obligated to have safety representatives. Currently, companies with less than ten employees may agree on a different arrangement. Effective January 1, 2024, this threshold is lowered from ten to five employees. From the same date, the safety representatives' work must not only include the employees of the company but also contracted employees and independent contractors who carry out work in close connection with the company.

Panama

Repeal of Work Permit Regulations

New Order or Decree

Author: Yeris Nielsen, Partner – BDS, Member of Littler Global

On March 9, 2023, the Official Gazette of Panama published Executive Decree No. 4 of March 2, which regulates Articles 17 to 19 of the Labor Code of the Republic of Panama. The new decree repeals the work permit regulations.

The Ministry of Labor will subsequently issue the Procedures Manual, which will describe the steps and requirements of each of the Work Permit categories.

Supreme Court: Exemptions for SEM Visa Holders Not Unconstitutional

Precedential Decision by Judiciary or Regulatory Agency

Author: Yeris Nielsen, Partner – BDS, Member of Littler Global

The Plenary of the Supreme Court of Justice ruled that the article of the Law that allows exemption from income tax, social security quota and educational insurance for employees with a Multinational Company Headquarters visa (SEM Visa) is not unconstitutional.

Peru

Extension of the Sanitary Emergency

New Order or Decree

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

The Supreme Decree 003-2023-SA, published on February 24, extended the Sanitary Emergency from February 25 until May 26, 2023, for a total of 90 days. This extension also signifies the extension of other measures linked to the Sanitary Emergency such as the modification of work hours, the suspension of medical examinations, the extension of the mandate from the employees' representatives before the Safety and Health Committee, the suspension of audits to the Safety and Health at Work Management System, and facilities for family members of people from the risk group.

New Directive for the Verification of Arbitrary Dismissal

New Regulation or Official Guidance

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

On February 10, the Superintendency Resolution 074-2023-SUNAFIL was published. This Resolution approved the second version of the Directive for the verification of arbitrary dismissal for impediment of entrance to the workplace. This document is to be followed by Labor Inspectors for purposes of verifying an arbitrary dismissal in the situation described.

Regulation of the Teleworking Law

Upcoming Deadline for Legal Compliance

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

Supreme Decree 002-2023-TR, which approves the new Regulation for the Teleworking Law 31572, was published on February 26, 2023. This new regulation sets forth a number of obligations for the implementation of telework, namely regarding the parties' rights and obligations, the agreement for the change of modality from in-person to telework, work equipment supplies and compensations, occupational health and safety, among others.

All of the obligations mentioned must be adopted by employers who wish to use this modality and the deadline for compliance with these provisions is April 28, 2023.

Philippines

Supreme Court: Employment Status of Delivery Riders of E-commerce Platform

Precedential Decision by Judiciary or Regulatory Agency

Authors: Emerico O. de Guzman, Of Counsel, and Franchesca Abigail C. Gesmundo, Senior Associate – Angara Abello Concepcion Regala and Cruz Law Office

In January 2023, the Philippine Supreme Court released a Decision dated September 21, 2022, regarding an illegal dismissal and misclassification suit filed by delivery riders of an e-commerce platform. The delivery riders were engaged by the platform as independent contractors, but they claim that they are regular employees due to the extent of control exercised by the platform over how they perform their work.

The Supreme Court ruled in favor of the delivery riders after a review of their agreements and an application of the four-fold test which showed that it was the e-commerce platform who directly hired them, paid their wages, had the power to discipline them, and had control over the performance of their work. Thus, the court declared them as employees of the ecommerce platform.

Poland

Remote Work and Sobriety Test Now in Labor Code

New Legislation Enacted

Authors: Miłosz Awedyk, Partner, and Michał Fijak, Associate – PCS | Littler

On February 21, 2023, a major amendment to the Labor Code was published. In addition to a number of minor adjustments, the amendment focuses on two issues. First, effective February 21, 2023, it allows employers to control the sobriety of employees in the workplace. This has been long-awaited and, until now, carrying out such an inspection was considerably more difficult and required the presence of a police officer.

Secondly, effective April 7, 2023, the amendment permanently incorporates remote work to the Labor Code. Previously, remote work was only addressed by temporary regulations adopted in connection with the COVID-19 pandemic.

Amendments to Labor Code Transpose EU Directives

New Legislation Enacted

Authors: Miłosz Awedyk, Partner, and Michał Fijak, Associate – PCS | Littler

Works on amending the Labor Code and several other acts, related to implementation of EU Directives, are finally near completion. On March 24, 2023, the act was signed by the President. The main purpose of the work-life-balance amendment is to implement the provisions of two EU directives into the Polish legal system.

The first implemented directive is Directive of the European Parliament and of the Council (EU) 2019/1152, which focuses on improving working conditions by promoting more transparent and predictable employment while ensuring the adaptability of the labor market. The second directive implemented by the amendment is Directive of the European Parliament and of the Council (EU) 2019/1158, which establishes minimum requirements to achieve equality between women and men in terms of labor market opportunities and treatment in the workplace by making it easier for employees who are parents or caretakers to balance work and family life. Still, works on the draft are pending and the deadline for implementation has already lapsed.

Law on Foreigners and Certain Other Acts

New Legislation Enacted

Authors: Miłosz Awedyk, Partner, and Michał Fijak, Associate – PCS | Littler

On March 21, 2023, the President signed an amendment to the Law on Foreigners and Certain Other Laws, which has been under development since late 2022. With the exception of a few provisions, the Act will enter into force on April 7, 2023.

The amendment is primarily aimed at a more effective application of the EU Parliament and Council regulations and Directive 2008/115/EC to eliminate deficiencies in the functioning of the common visa policy. The objectives set out in the amendment are to be achieved by introducing into national law provisions, mainly of a competence nature, indicating the authorities competent for the performance of particular tasks.

Ordinance on Employee Recordkeeping Requirements

New Order or Decree

Authors: Miłosz Awedyk, Partner, and Michał Fijak, Associate – PCS | Littler

Following the aforementioned amendment to the Labor Code introducing, among other things, control of employee sobriety, an ordinance introducing changes to the employee recordkeeping requirements will become effective on April 7, 2023.

In order to adapt the employee documentation to the changes in the law, a new part of the personal files covering documents related to sobriety control must be added, in accordance with the regulation. In addition, the previously known telework files will be replaced by remote work files.

Portugal

Minimum Wage and Social Support Protection

New Legislation Enacted

Authors: David Carvalho Martins, Partner and Head of Employment, and Maria Beatriz Silva – DCM | Littler

The minimum wage for 2023 was increased, pursuant to Decree-Law 85-A/2022 of December 22. Accordingly, in the continental territory of Portugal, the minimum wage is EUR 760 (increased from EUR 705). In the Madeira Autonomous Region, the minimum wage is EUR 785 (increased from EUR 723). In the Azores Autonomous Region, it is EUR 798 (increased from EUR 740).

This increase follows the Portuguese Government's objective of achieving the EUR 900 monthly wage by 2026. Additionally, despite the minor 1% increase in the value of the Index of Social Supports (social protection) between 2021 and 2022, this value has also been recently updated with a considerable 8.4% hike, "skyrocketing" from EUR 443.20 to EUR 480.43.

Additional Expenses in Teleworking

New Regulation or Official Guidance

Authors: David Carvalho Martins, Partner and Head of Employment, and Maria Beatriz Silva – DCM | Littler

On January 18, 2023, the Portuguese Tax Office (AT) published a legal understanding of how to set the practical solutions regarding the compensation of additional expenses borne by the employee while teleworking, from a tax point of view. According to the general framework, employers are required to fully compensate employees for any additional expenses incurred by reason of teleworking, provided the employee successfully proves that the employee now bears these expenses. These expenses include increased energy costs, network installation at the (home) workplace with sufficient speed for service communication needs, and maintenance costs for equipment and systems. This method requires a permanent system of monthly comparisons between current and one-year-old invoices.

The general framework also established that the compensation of the additional expenses is considered a cost to the employer and does not constitute an income to the employee. In many Collective Bargaining Agreements (CBA), for greater ease, a lump sum for compensation has been established to be paid monthly by the employer with express reference to this ground (*e.g.*, CBA of *Casa da Moeda*).

However, the Tax Office takes away from the lump sum the nature of compensation on expenses to give them the physiognomy of labor income, subjecting teleworkers to greater taxation. The new legislation to be enacted is a result of the Decent Work Agenda. This legislation will establish, for tax purposes, a maximum amount to consider the teleworking additional expenses as a cost to the employer.

New Decent Work Agenda Law, Effective May 1, 2023

New Legislation Enacted

Authors: David Carvalho Martins, Partner and Head of Employment, and João Villaça – DCM | Littler

The Decent Work Agenda was approved and enacted on March 22, 2023, and the new legislation is set to take effect on May 1, 2023.

The new legislation will modify the Labor Code in significant areas of the labor and employment framework. The new law will cover, among others, (i) the labor presumption regarding providers on digital platforms (for re-classification purposes), (ii) Collective Bargaining Agreements for specific service providers (providers that are dependent of the beneficiary, (iii) greater variety of the paid parental leave, (iv) greater variety of paid days for bereavement, (v) a new leave of absence for gestational mourning, (vi) the prohibition of outsourcing after a redundancy, and (vii) the increase

of compensation within the context of redundancies and after termination of a employment contracts for fixed-term or uncertain term.

Mandatory Quotas to Employ Persons with Disabilities

New Legislation Enacted

Authors: David Carvalho Martins, Partner and Head of Employment, and João Villaça, – DCM | Littler

The Law 4/2019 of January 10 established the system of employment quotas for persons with disabilities with an incapacity equal to or exceeding 60%. The primary objective of this law is to facilitate the integration of individuals with disabilities who possess the capability to perform job functions without experiencing significant functional limitations. Even in cases where such limitations are verified, reasonable adjustments to the job or work environment should be made to overcome these barriers and to enable their full participation in the organization. To allow companies to adapt and reorganize themselves, this law established a five-year transition period.

Effective February 1, 2023, medium-sized companies with 100 to 249 employees are required to ensure that at least 1% of their workforce (quota) consists of employees with disabilities or incapacity of 60% or more. Large companies, consisting of 250 or more employees, must implement a quota of no less than 2% of the staff at their service. Failure to comply with these quotas may subject the employer to serious administrative offenses. Exemptions may be made for several reasons, including if the company can establish that it is impossible to fill the job position or there are not sufficient number of disabled or incapacitated candidates registered at the Portuguese National Employment Center.

Puerto Rico

Court: Labor Reform Nullified Ab Initio

Precedential Decision by Judiciary or Regulatory Agency

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

The District Court for the District of Puerto Rico has nullified Act No. 41-2022, enacted in June 2022, which had instituted significant changes to labor and employment laws in Puerto Rico. Employers in Puerto Rico are once again subject to the law as it was prior to the summer of 2022, when the Puerto Rico Labor Transformation and Flexibility Act, Act No. 4 of January 26, 2017, was in effect.

2023 Limits on Qualified Retirement Plans

New Regulation or Official Guidance

Authors: Lourdes C. Hernández-Venegas, Capital Member, and Alberto Tabales Maldonado, Associate – Schuster LLC | Littler

The Puerto Rico Department of the Treasury recently issued Internal Revenue Circular Letter No. 23-01 announcing the applicable 2023 limits for Puerto Rico qualified retirement plans. Pursuant to Section 1081.01(h) of the Puerto Rico Internal Revenue Code of 2011, as amended, the Secretary of the Treasury is required to publish the applicable limits under Section 401(a) of the Internal Revenue Code of 1986, as amended, which are incorporated by reference into the PR Code limits (*e.g.*, annual compensation, annual benefit/contribution limits), once the IRS publishes its retirement plan limits under the U.S. Code.

Spain

Menstrual Leave

New Legislation Enacted

Authors: Sonia Cortés, Partner, and Isabel Herrero, Attorney-at-Law – Abdón Pedrajas | Littler

Starting on June 1, 2023, women with secondary incapacitating menstruation or secondary dysmenorrhea associated with pathologies will be entitled to sick leave. The pathologies include endometriosis, myomas, pelvic inflammatory disease, adenomyosis, endometrial polyps, polycystic ovaries or difficulty in the outflow of menstrual blood of any kind, which may involve symptoms such as dyspareunia, dysuria, infertility, or heavier than normal bleeding, among others.

Under Act 1/2013, February 28, the social security will pay the sickness benefit from the day of the sick leave during the menstrual leave. No minimum contribution period is required to be entitled to menstrual leave.

Miscarriage and Maternity Leave

New Legislation Enacted

Authors: Sonia Cortés, Partner, and Isabel Herrero, Attorney-at-Law – Abdón Pedrajas | Littler

Starting on June 1, 2023, the interruption of pregnancy, whether voluntary or not, will be considered a special situation qualifying for sick leave while a woman is receiving medical care from the Public Health Service and unable to work.

In addition to the 16 weeks of maternity leave, Act 1/2023 provides a special sick leave for pregnant women from the first day of the 39th week of pregnancy. In both cases, the Social Security will pay the sickness benefit from the day following the day of sick leave, and the employer must pay the full salary corresponding to the day of sick leave.

Minimum Interprofessional Wage

New Order or Decree

Authors: Sonia Cortés, Partner, and Isabel Herrero, Attorney-at-Law – Abdón Pedrajas | Littler

Royal Decree 99/2023 has increased the minimum interprofessional wage to EUR 1,080.00 per month (*i.e.*, EUR 15,120 per year). This salary increase has a retroactive effect from January 1, 2023.

Increase in Social Security Contributions

New Order or Decree

Authors: Sonia Cortés, Partner, and Isabel Herrero, Attorney-at-Law – Abdón Pedrajas | Littler

Royal Decree-Law 2/2023 establishes a progressive increase in Social Security contributions. As an example, from October 1, 2023, companies will have to register and pay Social Security contributions for those students who are carrying out unpaid external training or academic internships.

Time Recording: Unilateral Declaration by the Employee

Precedential Decision by Judiciary or Regulatory Agency

Authors: Sonia Cortés, Partner, and Isabel Herrero, Partner – Abdón Pedrajas | Littler

The Supreme Court ruled that the agreement that established a system of time recording, where the employee unilaterally includes its actual working hours, is respectful of the system of time recording provided for by law. Specifically, in that case, the employee was required to enter the start and end time of the working day on a daily basis, establishing the actual number of hours worked and deducting any interruptions that would not be considered effective working time.

Sweden

Income from Another Employer Deducted from Salary that Employer Must Pay for Wrongful Dismissal

Precedential Decision by Judiciary or Regulatory Agency

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

The Swedish Labor Court recently ruled in a case (AD 2023 no. 2) where an employee was dismissed based on allegations of serious misconduct. After the Labor Court invalidated the dismissal, the question arose whether an employer may deduct salary that the employee has received from another employer after the dismissal from the salary that the employer is obliged to pay due to the wrongful dismissal. The Labor Court held that the principle for an invalidation of a dismissal is that the employment relationship will continue in the same way as prior the dismissal. This means that the employer is obligated to pay salary for the period after the wrongful dismissal.

The Labor Court pointed out that an employee who has been wrongfully dismissed and only claims financial damages receives financial damages corresponding to the actual loss, *i.e.* compensation for lost salary with a deduction for any salary from other employment. According to the Labor Court, there are significant systematic reasons and reasons of principle why the compensation in question should be calculated in the same way. The Labor Court held that it is not acceptable that an employee who has sought annulment of a wrongful dismissal receives higher compensation than the actual loss. The Labor Court also referred to the fact that it appears unreasonable and unfair that an employer would have to pay full salary for time when an employee performed work for someone else and received salary for this. Thus, the Labor Court found that the salary from the other employer should be deducted from the employee's salary claim.

Switzerland

Pay During Company Closure

Precedential Decision by Judiciary or Regulatory Agency

Author: Ueli Sommer, Shareholder – Littler | LEL

The higher Cantonal Court of Basle ruled that the closure of the company, as a result of governmental orders, is not a *force majeure* event but a risk to be borne by the employer. Hence, even if employees cannot work, they have the right to be paid. This is not confirmed by the Federal Court yet and remains disputed in the doctrine. The case has been appealed to the Federal Court.

United Arab Emirates

End of Transition Period for Limited-term Employment Contracts

New Legislation Enacted

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

The new UAE Labor Law came into force in February 2022 and brought significant changes for employment in the UAE. One of those significant changes was the limitation of employment relationships to limited-term employment contracts only.

To ensure a smooth transition from the former employment law regulations towards the new UAE Labor Law, employers were granted a one year period to prepare for those requirements and to transition all employees onto limited-term employment contracts. This transition period ended February 2, 2023.

Responsibility of Fee Payment for Change in Employee Profession

New Regulation or Official Guidance

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

The Ministry of Human Resources and Social development (MHRSD) has confirmed that the employer is responsible for the following: (1) Fees for changing profession of non-Saudi workers; (2) Fees for residency (*Iqama*), work license including their renewal, and the fines resulting from delay; (3) Exit and return fees; (4) Non-Saudi workers' tickets to their home country after the end of the contract between the two parties; and (5) To provide the employee with an experience certificate after the end of the work contract without any charges and must contain the date of joining and last wage.

DMCC Freezone Implements Wage Protection System (WPS)

New Regulation or Official Guidance

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

The Wage Protection System (WPS) was developed by the Central Bank of the United Arab Emirates to provide a safe and secure mechanism to ensure the consecutive payment of the employees' remuneration in a timely manner. The system is tried and tested and was used in the UAE mainland and selected Freezones for many years.

In February 2023, the Dubai Multi Commodities Centre (DMCC), UAE's biggest Freezone, also implemented WPS for all registered companies. During the year 2023, the respective authorities will refrain from any fines in case of non-compliance or failures in processes.

Employee Transfers

Important Action by Regulatory Agency

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

The Ministry of Human Resources and Social Development (MHRSD) has confirmed that employee transfers will be done automatically in the event of establishment ownership transfer under the same commercial registry.

Skills Verification Program

Important Action by Regulatory Agency

Author: Sara Khoja, Partner, and Sarit Thomas, Knowledge Management Counsel – Clyde & Co.

The Ministry of Human Resources and Social Development (MHRSD), in cooperation with the Ministry of Foreign Affairs (MOFA) and the Technical and Vocational Training Corporation, launched the Professional Verification initiative to evaluate the skills of foreign workers in Saudi Arabia's private sector and limit the participation of unskilled workers in the labor market. The program was initially launched in July 2021 and is being implemented in phases with the latest phase applying to select nationals of Bangladesh, who will now be required to have their skills verified in their home country prior to being given a Saudi entry visa.

United Kingdom

Court of Appeal: Dismissal of Employee Who Stayed Away from Working During COVID-19 Was Not Unfair

Precedential Decision by Judiciary or Regulatory Agency

Authors: Stephanie Compson, Professional Support Lawyer, and Darren Isaacs, Partner – GQ | Littler

In the first COVID-19 related employment case heard by the Court of Appeal, the court considered whether the dismissal of an employee who refused to attend work during the COVID-19 pandemic on the grounds that it presented a health and safety risk was automatically an "unfair dismissal." Under section 100(1)(d) of the Employment Rights Act 1996 (ERA 1996), dismissals are automatically unfair if the employee is dismissed in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert and such employee left (or proposed to leave) or (while the danger persisted) refused to return to the place of work or any dangerous part of the place of work.

The Court of Appeal upheld that an employee had not been automatically unfairly dismissed for leaving the workplace and refusing to return at the start of the first COVID-19 lockdown. Although decided on its facts, the Court of Appeal set out some useful guidance on s. 100(1)(d) ERA 1996, including that the employee must believe that there were circumstances of serious and imminent danger at the workplace and that such belief must be reasonable.

The decision and the guidance will be welcome to employers who put in place adequate safety measures to reduce the risk of COVID-19 infection in their workplace.

Proposed Strikes (Minimum Service Levels) Bill

Proposed Bill or Initiative

Authors: Stephanie Compson, Professional Support Lawyer, and Darren Isaacs, Partner – GQ | Littler

In the previous Global Guide Quarterly update, we reported on the Transport Strikes (Minimum Service Levels) Bill. That Bill now appears to have been superseded by the Strikes (Minimum Service Levels) Bill and will, if enacted, target a broader range of public services (relevant services), including a) health; (b) fire and rescue; (c) education; (d) transport; (e) decommissioning of nuclear installations and management of radioactive waste and spent fuel; and (f) border security. The Bill, which is currently working its way through the UK Parliamentary process, proposes to give the UK government new powers to make regulations setting minimum service levels for the relevant services. Consultations in respect of regulations to set minimum service levels for ambulance, fire and rescue and passenger rail services have been launched.

The Bill, if enacted, will also: (1) Enable employers to issue "work notices" to require minimum service levels to be delivered for particular strikes in those relevant services; (2) Restrict the current legislative protections afforded to trade unions for immunity from tort liability (when certain conditions have been met) if the union fails to take reasonable steps to ensure all union members identified in the work notice comply with such work notice; and (3) Amend the current automatic unfair dismissal protection given to employees who take part in protected industrial action, to exclude employees who are "identified workers" in the work notice and nevertheless take part in a strike in breach of the relevant work notice.

Proposed Statutory Leave and Pay Entitlements for Parents of Babies Requiring Neonatal Care

Proposed Bill or Initiative

Authors: Emily Partridge, Associate, and Darren Isaacs, Partner – GQ | Littler

The Neonatal Care (Leave and Pay) Bill (the Neonatal Bill), which has gained UK government support, proposes that parents of babies who require specialist neonatal care following birth will be entitled to statutory Neonatal Care Leave and Neonatal Care Pay in addition to other statutory leave entitlements such as maternity and paternity leave. If approved as proposed, employees will be able to take Neonatal Care Leave from one to 12 weeks, either when their child is receiving neonatal care or after that period but within a prescribed period.

Statutory Neonatal Care Pay will be provided for qualifying employees with at least 26 weeks' continuous service and who have earnings not less than the lower earnings limit. Parents taking Neonatal Care Leave will have the similar employment protections as those associated with other forms of family related leave. This includes protection from dismissal or detriment as a result of having taken Neonatal Care Leave. Additionally, employees will therefore be able to add Neonatal Care Leave to the end of other forms of statutory parental leave to which they may be entitled.

Workers (Predictable Terms and Conditions) Bill

Proposed Bill or Initiative

Authors: Hannah Drury, Trainee Solicitor, and Darren Isaacs, Partner – GQ | Littler

Under current law, there is no statutory right for workers to request a predictable working pattern. The Workers (Predictable Terms and Conditions) Bill (the Bill), which is expected to be passed without opposition, proposes to create this right for workers and agency workers. The framework is largely based on the existing statutory flexible working framework and so the application of the rules will not be unfamiliar to employers.

As currently proposed, the right will be available to workers who have a lack of predictability in their working pattern, where such request is to change their working pattern and the purpose of such change is to get a more predictable working pattern. The right will be available to workers after they have completed a qualifying period of service (expected to be 26 weeks), and a worker is restricted from making two statutory applications in any 12-month period. The Bill also proposes to introduce certain remedies to workers where an employer has failed to deal with their request reasonably, including the right to request reconsideration of their request and/or an award of compensation. Further, a worker will have the right not to be subjected to a detriment and it would be automatically unfair to dismiss an employee because they have made a request for a predictable working pattern (or brought proceedings) under the proposed legislation.

Scottish Reforms to Gender Recognition Process Blocked by UK Government

Proposed Bill or Initiative

Authors: Ben Smith, Associate, and Darren Isaacs, Partner – GQ | Littler

By way of background, the United Kingdom is made up of different jurisdictions: Scotland, Northern Ireland, England and Wales. Although the UK Parliament makes laws for the whole of the UK, law-making powers have also been given to other legislatures (*e.g.*, the Scottish Parliament) on certain matters within their jurisdictions.

Accordingly, the Scottish Parliament passed the Gender Recognition Reform (Scotland) Bill in December 2022 (the Bill). The Bill would have made changes to apply in Scotland to the system of gender recognition certificates (GRCs) - the system in the UK by which a person is able to get legal recognition of a change in their gender identity from that assigned at birth. The Bill would have removed the current requirement for a medical diagnosis of gender dysphoria and extended the GRC application rights to 1) apply to 16- and 17-year-olds, albeit with slightly different requirements; and 2) to reduce the self-certification time required for an applicant to live in their "acquired gender" from two years to three months.

However, in January 2023, the UK's central government used its legislative powers under s.35 of the Scotland Act 1998 to block the Bill from becoming law, on the grounds that the legislation would have an adverse impact on an area of law that applies across the whole of the UK (in this case, equality law). The unprecedented use of this power is expected to be legally challenged by the Scottish government and it may be some time before the status of the Bill is resolved. If the challenge is successful and the Bill is enacted, it would apply only in Scotland but there may be wider implications for all UK employers (such as whether Scottish GRCs would be recognized in England, Wales or Northern Ireland).

United States

Court of Appeals Rejects Claim of Employee Fired for Refusing to Attend Training Session on LGBTQ Bias

Precedential Decision by Judiciary or Regulatory Agency

Author: Lindsay M. Rinehart, Associate – Littler

The U.S. Court of Appeals for the Second Circuit has rejected an employee's claim that he was unlawfully discriminated against based on religion after he refused to attend mandatory LGBTQ anti-discrimination trainings. In *Zdunski v. Erie 2-Chautauqua-Cattaraugus BOCES*, No. 22-547 (2d Cir. Mar. 13, 2023), the plaintiff sued his former employer, a public organization that provides educational programs and services to school districts, after he was terminated from employment. The district court dismissed his case, finding that the termination was not because of religion but for repeatedly refusing to attend mandatory employee training.

The court opined that the plaintiff's requested accommodation to forego anti-discrimination trainings would have put the employer in the position of violating the training requirements set for public schools. The employer was, therefore, not required to accommodate him, and lawfully terminated him for his repeated refusal to attend the training.

DOL Issues Guidance on Tracking Hours Worked by Teleworkers Who Take Breaks

New Regulation or Official Guidance

Authors: Robert W. Pritchard, Shareholder, and Dimitrios Markos, Associate – Littler

On February 9, 2023, the U.S. Department of Labor Wage and Hour Division issued Field Assistance Bulletin No. 2023-1 (FAB) to provide guidance on tracking hours worked by employees who telework. While the FAB largely repeats longstanding principles regarding what constitutes hours worked under the Fair Labor Standards Act (FLSA), it provides a useful reminder that an employer's obligation to maintain an accurate record of hours worked applies even when its employees are working remotely. The FAB considered four scenarios in which breaks from active work may challenge this general rule: Meal periods, short breaks, off-duty periods and break time for pumping breast milk.

The FAB reminds employers that "hours worked" generally includes all time spent by an employee between their first principal activity of the day and their last principal activity of the day. The key takeaway from the FAB is that the rules governing when breaks must be treated as hours worked do not change just because an employee is working from home. When managing a remote workforce, an employer should set clear expectations about when nonexempt employees are expected to work and how they should manage and track their breaks. There is no one-size-fits-all approach to these complex issues.

USCIS Clarifies Guidance on O-1B Extraordinary Ability Visa Eligibility and Updates USCIS Policy Manual

New Regulation or Official Guidance

Authors: Jorge R. Lopez, Shareholder, and Elizabeth A. Whiting, Associate – Littler

On March 3, 2023, the U.S. Citizenship and Immigration Services (USCIS) issued new policy guidance, Evaluating Eligibility for O-1B Visa Category, which describes new updates made to the USCIS Policy Manual. The new USCIS guidance aims to clarify the adjudication of O-1B visas for nonimmigrant workers of extraordinary ability in the arts and nonimmigrant workers of extraordinary achievement in the motion picture or television industry. The new guidance is effective immediately and aims to improve predictable and transparent application of O-1B evidentiary requirements, as well as improve consistency and efficiency in USCIS decision-making. These updates were based on stakeholder comments in response to a request for public input made by USCIS on May 19, 2021.

In an effort to help alleviate inconsistencies in adjudication of petitions involving these criteria, USCIS has also introduced a new appendix, Satisfying the O-1B Evidentiary Requirements, into the Policy Manual, which provides concrete examples of evidence that "may, in some circumstances, satisfy the O-1B evidentiary requirements, as well as considerations that are relevant to evaluating the evidence." The appendix provides new detail on how employers and employees can ensure that they meet the provided O-1B criteria, for example, by instructing officers to consider factors such as "favorable critical reception, high attendance levels, commercial success, or another indicator" when evaluating whether the beneficiary has performed, and will perform, "as a lead or starring participant in productions or events which have a distinguished reputation." The more specific evidence standards should have the effect of reducing barriers for employers associated with applying for the O-1B visa, as well as improving timeliness of approvals, ensuring employees can be onboarded more quickly and have better transparency about adjudication of their visas without lengthy requests for evidence.

FTC Proposes Rule Banning Noncompetes

Proposed Bill or Initiative

Authors: Colton D. Long, Shareholder, and Melissa L. McDonagh, Shareholder – Littler

On January 5, 2023, the Federal Trade Commission published a proposed rule that, if it became final, would ban all noncompete agreements with limited exceptions. The rule would go into effect 60 days after it becomes final, but employers would have 180 days after publication of the final rule in the Federal Register to comply. The rule defines a "noncompete clause" as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." Notably, the proposed rule goes beyond traditional noncompetes and would sweep under its coverage any provision that the FTC determines functions as a noncompete. The FTC advises that while nondisclosure agreements and customer nonsolicit agreements generally do not prevent a worker from seeking or accepting employment, if they are too broad, they would be covered within its definition of a noncompete clause.

Existing noncompetes are impacted under the proposed rule. Section 910.2(b) of the proposed rule provides that "an employer that entered into a noncompete clause with a worker prior to the compliance date must rescind the noncompete clause no later than" the "compliance date," which the proposed rule sets for 180 days after publication of the final rule. To rescind in compliance with the proposed rule, businesses/employers must provide formal written notice of rescission to both existing employees bound by a noncompete clause and former employees (except those whose contact information is not "readily available") bound by noncompete clauses. The proposed rule provides a template notice of rescission language that can be used to comply with this requirement.

NLRB's Guidance on Nondisparagement and Confidentiality Provisions in Severance Agreements

Important Action by Regulatory Agency

Authors: Jonathan O. Levine, Shareholder, and Maura A. Mastrony, Shareholder – Littler

The National Labor Relations Board (NLRB or the Board) recently issued a decision in McLaren Macomb, 372 NLRB No. 58 (2023), holding that severance agreements containing overly broad nondisparagement or confidentiality/nondisclosure clauses violate the rights of employees under Section 7 of the National Labor Relations Act (NLRA). In the weeks since the Board's February 21 decision in McLaren, employers have been struggling to understand the breadth of the decision and how it affects the agreements they have entered into, or plan to enter into, with employees.

On March 22, 2023, the NLRB General Counsel (GC) issued Memorandum GC 23-05 (the Memorandum), in which she provides guidance on the decision's scope in answering a number of inquiries related to the decision. Briefly, the GC explained that severance agreements are not prohibited, limited confidentiality and nondisparagement clauses may still be lawful, McLaren applies retroactively, and disclaimer language is not necessarily a cure-all, among other key issues. The Memorandum is helpful in understanding the Board's enforcement efforts related to severance agreements. It bears emphasis, though, that McLaren has not worked through the appeal process and, thus, there may be further direction from the courts on this issue, which might not necessarily dovetail with the GC's interpretation.

Venezuela

Venezuela Law, and Not Foreign Law, Applied to Employment Contract Signed in Embassy in Venezuela

Precedential Decision by Judiciary or Regulatory Agency

Author: Daniel Jaime, Associate – Littler

On March 10, 2023, the Supreme Court ruled that the Venezuela Labor Law applies to employment agreements signed by a foreign employee in an embassy located within Venezuelan territory. In this case, the foreign employee, who was a secretary providing services as part of the diplomatic mission of an embassy in Venezuela, was a foreigner and signed the employment agreement in a foreign territory and under international private law. However, the Supreme Court ruled that local law applied, and not foreign law, because the jurisdiction of Venezuelan courts was already set by the Supreme Court before the procedure began.

Supreme Court Ratifies Foreign Currency Payment to Employees

Precedential Decision by Judiciary or Regulatory Agency

Author: Gabriela Arevalo, Associate – Littler

The Social Chamber of the Supreme Court issued Decision No. 63, dated March 10, 2023, ratifying a previous ruling, holding that payment of the salary in foreign currency is valid. The Court also ratified that indexation to convert the foreign currency into Bolivars does not apply since foreign currency is an adjustment mechanism or stabilization of the pecuniary obligation against possible variations in the internal value of local currency.

Additionally, this decision ratified that the interest rates set by Central Bank of Venezuela (CBV) cannot be applied to calculate interest to the amounts in foreign currency. Therefore, foreign currency should be converted to Bolivars at the official exchange rate to calculate interests for payment delay at the active rate of CBV.

Proposed Law for Workers with Disabilities

Proposed Bill or Initiative

Author: Daniela Arevalo, Associate – Littler

The National Assembly of Venezuela approved a new Law for Workers with Disabilities on January 24, 2023, and submitted it to the President of the Republic for signature. The National Assembly commented that the new law aims to regulate the means and mechanisms that guarantee the inclusion, protection, defense, attention and integral development of workers with disabilities, in a full and autonomous manner according to their capacities and abilities, in equal conditions and equality of opportunities, ensuring the full, dignified, and fair integration to the social process of work without discrimination or prejudice of any kind.