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Employment Law

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Employment Law

THEODORE GOLOFF*

I. Canada

A. CANADA'S SUPREME COURT SETS NEW SUBSTANTIVE LABOUR, EMPLOYMENT, AND HUMAN RIGHTS PRINCIPLES

In 2015, at least two decisions rendered by the Supreme Court of Canada impact transnational labour relations and employment law. These decisions impacted the law both in terms of the legal principles established and the effect that foreign law and jurisprudence, international conventions, and perceived Canadian treaty obligations might have in determining fundamental rights.

In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc.*,¹ the Supreme Court held that an employer cannot rely on its own action taken in furtherance of a United States regulatory agency's decision, which it was obliged to respect to maintain United States accreditation or licencing, as an affirmative defense to a charge of adverse impact discrimination or violation of rights guaranteed under the *Quebec Charter of Human Rights and Freedoms*.² The Court found that the evidence, including expert evidence tendered to the effect that there was post 9/11 anti-Arab or anti-Muslim sentiment or bias involving racial profiling, was insufficiently specific to the United States regulations involved to taint the Alien Flight Students Program ("AFSP") as being discriminatory.³ The Court found that absent proof of the United States authorities' decision to refuse security clearance for training/recurrent training under a United States issued pilot's license pursuant to the Alien Flight Students Program ("AFSP")⁴ of a

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1. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc.*, [2015] 2 S.C.R. 789.

2. *Quebec Charter of Human Rights and Freedoms*, CQLR, ch. C-12, http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_12/C12_A.html.

3. *Bombardier*, [2015] 2 S.C.R. ¶¶ 88-89 ("It cannot be presumed solely on the basis of a social context of discrimination . . . that a specific decision is necessarily based on a prohibited ground under the Charter. In practice, this would amount to reversing the burden of proof . . . Evidence of discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct.") (finding at para. 89 that the expert evidence of racial profiling was not "sufficiently related to the facts of the case to establish a connection between the decision of the U.S. authorities on which Bombardier relied and Mr. Latif's ethnic or national origin.")

4. *Flight Training for Aliens and Other Designated Individuals*, 49 C.F.R. § 1552 (2004).

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Canadian citizen of Pakistani origin was itself “discriminatory” on the basis of his religion and/or ethnic origin⁵ because it refused pilot training in Canada on the basis of the United States refusal, it did not unlawfully discriminate.⁶ But the Court stated that its conclusion “does not mean that a company can blindly comply with a discriminatory decision of a foreign authority without exposing itself to liability under the Charter.”⁷ The Court also, inferentially, rejected any suggestion that economic hardship to the employer of failing to follow a foreign discriminatory directive might legitimate such conduct.⁸ In short, commercial consequences, however grave that result from direct or indirect “long arm” application of foreign law or judgments beyond the foreign entity’s borders, do not diminish the exigencies of Canadian domestic human rights laws one iota.

In *Saskatchewan Federation of Labour v. Saskatchewan*,⁹ the right to strike in support of collective bargaining was recognized as an “indispensable component”¹⁰ of Canada’s system of labour relations that deserved “constitutional benediction,”¹¹ now viewed as integral to the fundamental “freedom of association” guaranteed by section 2(d) of the *Canada Charter of Rights and Freedoms*.¹² As a right that is not simply a statutory creation but a constituent of a fundamental freedom, substantive restriction or abrogation thereof by legislation could only pass constitutional muster if its purpose was consonant with the values of a free and democratic society *and* the vehicle chosen represented minimal impairment necessary to achieve the goal.¹³ The judgment is important not only because it reverses precedent to the effect that neither collective bargaining nor withdrawal of services in support thereof—i.e., a strike—are *Charter* protected rights,¹⁴ but also because the Court arrived at such reversal through what the majority viewed as the persuasive authority of foreign judgments, consensus interpretation of ILO Conventions (whether binding in strict law or not), and the effect of Canada’s adherence to the *Charter of the Organisation of American States*.¹⁵ In essence, Canada’s *Charter* protected rights should be viewed and interpreted as being no less robust than those set out in such international instruments.¹⁶

5. *Bombardier*, [2015] 2 S.C.R. ¶ 98. .

6. *Id.* ¶ 106.

7. *Id.* ¶ 99.

8. *Id.* ¶ 24.

9. *Saskatchewan Fed’n of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245.

10. *Id.* ¶ 3.

11. *Id.*

12. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 2(d).

13. *Id.* § 1; *Saskatchewan Fed’n of Labour*, [2015] 1 S.C.R. ¶¶ 25, 54, 61, 78-96.

14. Reference re: Public Sector Employee Relations Act (Alta.), [1987] 1 S.C.R. 313 (holding that neither collective bargaining nor the right to strike were *Charter* protected fundamental freedoms), *overruled by Saskatchewan Fed’ n of Labour*, [2015] 1 S.C.R. 245.

15. *Saskatchewan Fed’ n of Labour*, [2015] 1 S.C.R. at para. 62-75. Canada acceded to the O.A.S. in 1990 and ratified the *Charter of the Organisation of American States*. See 1990 Can. T.S. No. 23.

16. *Saskatchewan Fed’ n of Labour*, [2015] 1 S.C.R. at para. 64; see also *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, para. 23 (providing that “the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada ratified.”)

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EMPLOYMENT LAW 361

II. France***A. NEW MEASURES IN FRANCE ON EMPLOYMENT LAW**

In France, two key laws were voted on in 2015: (I) the law for growth, activity, and equal economic opportunities, dated August 6, 2015, (the “Macron law”)¹⁷ and (II) the law on social dialogue and employment, dated August 17, 2015, (the “Rebsamen law”).¹⁸ In addition, various changes now improve dispute resolution in France (III).

The Macron law contains over 200 articles touching an extremely wide range of issues.¹⁹ All of its provisions will have an impact on companies doing business in France, including posting of workers.²⁰

The Rebsamen law contains provisions aimed at encouraging foreign investment and creating employment in France.²¹ The law also lightens the requirements related to employee representatives in French companies, thus helping foreign companies with legal entities in France.²²

B. EMPLOYMENT-RELATED PROVISIONS OF THE MACRON L—EMPLOYEES POSTED TO FRANCE

Some of the most important provisions for foreign companies doing business in France are those regarding posted employees in France, which has been an important political and economic subject over the past year. The Macron law provides a variety of new obligations and liabilities for posting of foreign employees in France.

In 2014, to further reinforce the EU directive related to “social dumping,”²³ the French legislature passed legislation making it mandatory for the filing of certain documents with the French Labor administration when posting employees to France.²⁴ The Macron law goes several steps further.

First, users of posted workers must now file documents, in French, with the French Labor Inspector in order to ensure that all the mandatory legal requirements for a posting

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17. Loi 2015-990 du 6 août 2015 pour la croissance, l’activité et l’égalité des chances économiques [Law 2015-990 of August 6, 2015 for Growth, Activity, and Equal Economic Opportunities], Journal Officiel De La République Française [J.O.] [Official Gazette of France], Aug., 8, 2015, p. 13776 [hereinafter Macron law].

18. Loi 2015-994 du 17 août 2015 relative au dialogue social et à l’emploi [Law 2015-994 of August 17, 2015 on Social Dialogue and Employment], Journal Officiel De La République Française [J.O.] [Official Gazette of France], Aug. 18, 2015, p. 14346 [hereinafter Rebsamen law].

19. See Macron law.

20. See *id.*

21. See Rebsamen law.

22. See *id.*

23. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), 2014 O.J. (L 159).

24. See French Legal & Regulatory Update, Hogan Lovells (June 2014), http://www.hoganlovells.com/files/Publication/addbb7a0-d6e5-4d09-ba96a7251e984a46/Presentation/PublicationAttachment/cf16e8c3-3d67-466a-8e6e-a99807faa330/PARLIB01%231387188-v1-French_Legal_and_Regulatory_Update_-_June_2014.pdf.

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have been met.²⁵ Failure to do so is sanctioned by a _ 2,000 fine per employee whose documents were not properly filed, for a maximum total fine that has been increased from _ 10,000 to _ 500,000.²⁶

In addition, the labor administration now has the power to suspend the posting of an employee working in France if the “user” entity has failed to comply with key mandatory rules; such as minimum wage, or working hours, or even for having failed to provide the labor inspector with documents translated in French.²⁷

These changes illustrate France’s focus on ensuring that companies comply with the applicable legislation when posting foreign employees in France. Failure to do so may now expose such companies to considerable financial as well as business risks.

III. The Main Provisions of the Rebsamen Law

A. SIMPLIFIED OBLIGATIONS WITH THE WORKS COUNCIL

Instead of seventeen mandatory meetings with the Works Council required before on a variety of subjects, the employer now must only meet in the information and consultation process three times a year.²⁸ Moreover, only three subjects need be addressed: (1) the strategic orientation of the company; (2) the financial and economic situation of the company; and (3) the company’s human resources policies and the working and employment conditions.²⁹ The employer is required to create a database with all of this information.³⁰

In addition, instead of having to collectively bargain twelve different subjects with the unions, the subjects are now regrouped into only three negotiations.³¹

B. MERGING EMPLOYEE REPRESENTATIVE BODIES

Before the Rebsamen law, companies with less than 200 employees could opt to merge the Works Council and the personal delegates (“délégués du personnel”).³² The Rebsamen law provides greater relief for employers because they may now opt to merge into a single representative body—the personal delegates and the Works Council, as well as the Health and Safety Committee.³³ Employers who employ between 200 and 300 employees can proceed with this merger after having informed and consulted the relevant representative bodies.³⁴ Employers with more than 300 employees may do so, but only if collectively bargained with a representative union.³⁵

25. Macron law at art. 280.

26. *Id.* at art. 279.

27. *Id.* at art. 280.

28. See Rebsamen law at art. 18(I)(4).

29. *Id.*

30. *Id.*

31. *Id.* at art. 19(I)(1).

32. Roselyn Sands, *France- Measures Improving the Relation Between Employers & Employee Representative Bodies*, THE INTERNATIONAL EMPLOYMENT LAWYER (Dec. 14, 2015), <http://intemploy.blogspot.com/2015/12/france-measures-improving-relationship.html>.

33. *Id.*

34. *Id.*

35. *Id.*

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IV. New Measures for Employment Law Dispute Resolution

Early in 2015, the French Government announced a series of measures to favor employment including modifications to employment dispute resolution rules.³⁶ After several months of debate before the National Assembly and Senate, the Law for Growth, Activity, and Equal Economic Opportunities (known as the Macron law, after the Minister of Economy who proposed it) took effect on August 7, 2015.³⁷

The Macron law not only improves employment dispute resolution rules but also adds two new options for alternative dispute resolution.³⁸

A. GENERAL CONTEXT

Labor courts in France are composed of four magistrates who are elected every five years: two chosen by employers and two by employees.³⁹ Decisions are based on a majority vote.⁴⁰ If there is a tie, the case is reheard up to twelve months later, with an additional judge from the court of general jurisdiction.⁴¹

Before a labor court decides a case at the judgment hearing, the parties must attend a conciliation hearing during which they are encouraged to reach an amicable resolution. However, these hearings rarely result in a settlement.⁴²

B. NEW EMPLOYMENT DISPUTE RESOLUTION RULES

1. *A Streamlined Court*

According to the new law, during the conciliation hearing, parties in dismissal cases may agree to have their case heard by a reduced court of only two judges: one chosen by employers and one by employees.⁴³ The reduced court will render decisions within three months.⁴⁴

2. *Faster Justice*

During the conciliation hearing, if the nature of the case requires it or if the parties request it, the matter can be directly heard by a five-judge court, four labor court magistrates, and an additional judge from the court of general jurisdiction.⁴⁵ The purpose of this change is to avoid having the case heard twice if the chance for a tie breaker seems inevitable, thus accelerating the proceedings.⁴⁶

36. Roselyn Sands & Nicolas Etcheparre, *Labor & Employment Law Newsletter* EY 15 (Dec. 2015), [http://www.ey.com/Publication/vwLUAssets/ey-labor-employment-law-newsletter-december-2015/\\$FILE/ey-labor-employment-law-newsletter-december-2015.pdf](http://www.ey.com/Publication/vwLUAssets/ey-labor-employment-law-newsletter-december-2015/$FILE/ey-labor-employment-law-newsletter-december-2015.pdf).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

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3. *Guidelines and Ceilings for Damages*

When a court decides that a termination is wrongful, the employee is awarded damages that may vary depending on factors such as age, salary, and years of service.⁴⁷ There was no statutory ceiling or scale to calculate the damages.⁴⁸

The French Government proposed introducing two new measures in the Macron bill: a ceiling on damages and recommended guidelines to allow courts to award damages based on various criteria.⁴⁹

Labor judges are, therefore, encouraged to rely on the recommended guidelines to help them better assess damages in wrongful dismissals.⁵⁰ The guidelines will likely be based on the employee's years of service, age, and employment situation.⁵¹ The judges may decide not to apply the guidelines; but it can become binding if both parties request its application during litigation.⁵²

The proposed ceilings were based on the employee's years of service and the number of employees in a company.⁵³ The latter point was challenged and deemed unconstitutional.⁵⁴ The French Constitutional Court ruled that a ceiling itself is lawful, but said it cannot be based on the size of the company because that has no bearing on the damage caused to the employee.⁵⁵

The Government has announced that the ceilings will be the subject of a forthcoming law that will likely further modify the labor court system.⁵⁶

C. NEW ALTERNATIVE DISPUTE RESOLUTION OPPORTUNITIES

The Macron law makes two new alternative dispute resolution options available to employers and employees.⁵⁷ First, employers and employees can agree to mediate a potential dispute before any court hearing.⁵⁸ Second, employers and employees can now agree not to litigate before the courts for a set amount of time and will instead seek an amicable resolution to any future dispute.⁵⁹ Such agreements apply only to future litigation and each party must be represented by a lawyer.⁶⁰

Both of these options have been available since the publication of the Macron law on August 7, 2015.⁶¹

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

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EMPLOYMENT LAW 365

V. Germany*

A. CHANGES IN THE GERMAN ACT ON COLLECTIVE BARGAINING AGREEMENTS

Never before has Germany experienced so many strikes as in the past two years.⁶² Railroad workers, medical doctors, postmen, and pilots, as well as nurses in childcare facilities have engaged in strikes lasting for weeks and sometimes months.⁶³ The German Parliament, in reaction, has amended the German Act on Collective Bargaining Agreements, carefully trying to balance the powers between unions and employer associations.⁶⁴

In 2010, the German Federal Labour Court overturned a decade-long jurisprudence that upheld the principle that, within an establishment of a company, only collective bargaining agreements of one particular trade union were supposed to be in force.⁶⁵ Since, as a consequence of that decision various unions with various applicable collective bargaining agreements competed for influence within the same establishment of a company, the German government and parliament were afraid of a division within the workforce and a fragmentation in bargaining structures.⁶⁶

Also, it was considered a disadvantage that small, but very powerful unions could become more active if they were allowed to unrestrictedly represent a specific part of the workforce that can lead very effective strikes and, thereby, exercise huge bargaining power (pilots, train drivers, etc.).⁶⁷ The trade union of train drivers, for example, initiated several strikes in the last years with the effect that thousands of travellers and commuters were affected because rail services in Germany were suspended for weeks.⁶⁸

The new initiative implemented as statutory law (what had previously been previously upheld as a principle by the German labour courts, i.e. that within an establishment only one collective bargaining agreement of a specific trade union) shall be applicable.⁶⁹ If there are various trade unions that compete for the conclusion of collective bargaining agreements, only the collective bargaining agreement of the trade union that has the majority of members employed in that specific establishment shall apply.⁷⁰

This amendment to the German Act on Collective Bargaining Agreement has raised concerns that this new law severely obstructs the right to strike and to form coalitions.⁷¹ As the right to strike is a constitutional right under Article 9 of the German Basic law, several trade unions have initiated proceedings at the German Federal Constitutional Court with the aim to declare the new law unconstitutional and invalid.⁷² Currently, the German Federal Constitutional Court has gathered factual information on how the

* Martin Reufels and Heuking Kuhn Luer Wojtek.

62. Martin Reufels, *European Law Update Shepherd Wedderburn* 11 (2016), <https://www.shepwedd.co.uk/sites/default/files/European%20employment%20law%20update.pdf>.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

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striking actions have actually been influenced by the new law since it has been put into effect.⁷³

It cannot be denied that small trade unions that concentrate on specific professions (like trade unions for pilots, train drivers, doctors, firefighters, etc.) that had a very long history in Germany are severely impeded in their actions and might become irrelevant if bigger trade unions also conclude their collective bargaining agreements for the specific professions that were represented in the past by the small trade unions.⁷⁴ Indeed, it might be the case that the German Federal Constitutional Court will decide that the current statutory changes of the German Act of Collective Bargaining Agreements violate the trade union's constitutional rights.⁷⁵

VI. Ireland*

There have been several important developments in employment law in Ireland in 2015. The two most significant changes were the enactment of the Workplace Relations Act ("WRA"),⁷⁶ which will streamline Ireland's employment-rights and industrial-relations bodies and the Protected Disclosures Act ("PDA"),⁷⁷ which will protect whistle-blowers.

The WRA has introduced unprecedented institutional reform to the resolution of employment disputes and has also made some changes to substantive employment law. In particular, private-sector employees who are absent from work for long periods because of illness will be entitled to accrue annual leave during their sick leave and, subject to certain limitations, be entitled to take that accrued annual leave after their sick leave ends.⁷⁸ Until July, whistle-blower protection applied in certain sectors. The PDA now applies to all types of organisations; regardless of sector or size, public, private, or non-profit. It introduces significant sanctions (including awards of up to five years' gross remuneration) when an employee is dismissed for making a protected disclosure.⁷⁹

VII. Netherlands*

In the Netherlands, a new law allowing employees to request to work from home with a more flexible schedule is expected to come into force on January 1, 2016.⁸⁰

73. *Id.*

74. *Id.*

75. *Id.*

* Deirdre Lynch, Associate Solicitor, and ByrneWallace.

76. Workplace Relations Act 2015 (Act No. 16/2015)(Ir.), *available at* <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf> [hereinafter WRA].

77. Protected Disclosures Act 2014 (Act No. 14/2014), *available at* <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/pdf> [hereinafter PDA].

78. *See* WRA § 86 (amending the Organisation of Working Time Act 1997).

79. *See* PDA § 5(1)(b).

* By Helene Bogaard, Helene.bogaard@dlapiper.com; and Jasper Bok, Jasper.deBok@dlapiper.com.

80. Edith Franssen, New Dutch Flexible Work Legislation, *Lexology* (Dec. 14, 2015), <http://www.lexology.com/library/detail.aspx?g=59e9aaf0-5542-42d5-a2ed-15dd287a8cbd>.

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- All employees who have worked for the employer for over six months can request to work from home or request to work less or more hours or request to shift their working hours.⁸¹
- The request will need to be made two months in advance of the start date of the new working pattern, and the employer must decide at least one month in advance of the start date.⁸²
- The employer will only be entitled to refuse a request for adjustment of working hours if the change is not possible because of compelling interests of the company.⁸³
- For a request to work more flexibly in regard to the work place, the employee has “a right to ask” and the employer has a “duty to consider,” but the employer will not need reasons of compelling company interests to refuse.⁸⁴

In the Netherlands, a new law introducing a clamp down on contractor arrangements is expected to come into force on April 1, 2016.⁸⁵ The Dutch Government is concerned that the majority of contractor arrangements in the country are, in fact, employment arrangements.⁸⁶ When the tax authorities believe that is the case, they will seek to recover income tax from the client/employer as part of a clamp down from April 2016.⁸⁷ But the tax authorities will provide template contracts for various client-contractor relations.⁸⁸ When the client and contractor work on the basis of such a template and the de facto working relationship is in line with the provisions of the contract, the tax authorities will be unable to recover income tax from the client/employer.⁸⁹

Also, the Cantonal severance formula for dismissal cases has been replaced by a transition payment, which is linked to an employee's length of service and is capped at the higher of EUR 75,000 or one year's salary (and EUR 76,000 as per 1 January 2016).⁹⁰

Roughly, the transition payment amounts to one-third of a month's salary per year worked during the first ten years of employment (with the same employer), or one-half of a month's salary per year worked after ten years of employment.

81. Dep't for Emp't & Learning, *ER 36 Flexible Working: the right to request and duty to consider. A guide for employment and employees*, LABOUR RELATIONS AGENCY, https://www.lra.org.uk/images/publications/flexible_workin_the_right_to_request_and_duty_to_consider.pdf

82. *See id.*

83. *See id.*

84. *See id.*

85. Thessa van der Windt, *Netherlands: Clampdown on Contractor Arrangements Delayed to April 2016*, DLA PIPER, (Oct 29, 2016), <https://knowledge.dlapiper.com/dlapiperknowledge/globalemploymentlatestdevelopments/netherlands-clampdown-on-contractor-arrangements-delayed-to-january-2017>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Sarah Hellewell, *Netherlands: New Rules Effective 1 July 2015*, DLA PIPER, (June 30, 2015), <https://knowledge.dlapiper.com/dlapiperknowledge/globalemploymentlatestdevelopments/netherlands-new-rules-effective-1-july-2015>.

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VIII. Qatar*

A. LABOR LAW DEVELOPMENTS

1. Amendment to Labor Law Article 66⁹¹

Article 66 of the Qatar Labor Law No. (14) of 2004 (Qatar Labor Law) was recently amended by Law No. (1) of 2015 (the Amendment).⁹² Article 66 previously required that salaries (Salaries) and any other sums to which an employee is entitled under a contract of employment be paid to the employee's account at a bank agreed upon between the parties, or to an agent appointed by the employee; payment now must be made directly from the employer's local Qatari account into a Qatari account in the name of the employee.⁹³ The new system creates an entirely domestic transaction between the employer and employee.⁹⁴ The Amendment applies to employees whose employment is governed by the Qatar Labor Law.⁹⁵

Article 66 remains the same notwithstanding the Amendment, insofar as Salaries must continue to be paid in Qatari currency. Further, Salaries of employees employed on an annual or monthly basis must be paid at least once a month; salaries of all other employees must be paid at least every two weeks.⁹⁶ The material change is that once the Amendment takes effect, an employer will be obliged to transfer the Salaries directly into the employees' Qatari accounts within designated time periods.⁹⁷

B. MINISTRY OF LABOR DECISION ON WAGES PROTECTION SYSTEM

The Minister of Labor and Social Affairs (Minister) recently issued Decision No. (4) of 2015 (Decision) setting out both the controls and procedures required to apply the Amendment that it refers to as the Wages Protection System (WPS).⁹⁸ The Decision was published in the Official Gazette on July 7, 2015, and took effect the following day.⁹⁹

The WPS's stated aim is to ensure an employer's payment of Salaries on specified dates and in accordance with employment contracts and applicable Qatari laws.¹⁰⁰ The Decision requires employers to transfer Salaries via the WPS to the appropriate Qatari banks and financial institutions the week prior to the date on which the Salaries are due to

* This contribution is in collaboration with the Middle East Committee. The authors are Emma Higham, Legal Director, Clyde & Co, Doha, Qatar and [Yasser Shabbir, Associate, Clyde & Co. [Doha].

91. Note: Qatari laws (saved for those issued by the Qatar Financial Centre to regulate internal business) are issued in Arabic and there are no official translations, therefore for the purposes of drafting this article we have used our own translations and interpreted the same in the context of Qatari regulations and current market practice.

92. Emma Higham, Qatar Labour Law: Amendment to Article 66, Lexology (Oct. 6, 2015), <http://www.lexology.com/library/detail.aspx?g=f56bb62e-b4e6-4771-8a4f-7e41cbfb4681>.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

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be paid.¹⁰¹ An employer will only be relieved of its payment obligations after the transfer has occurred and the monies have been received by the Qatari banks and financial institutions.¹⁰²

The Labor Department may also request that a detailed report from an employer, in the form prepared by that department and approved by the Minister, showing the employer's approval of the payment of all of its employees' Salaries for a specified period of time.¹⁰³

C. PENALTIES FOR NON-COMPLIANCE

If an employer believes that it does not have sufficient time to put the necessary measures in place to accommodate the Amendment and implement the WPS, an employer is entitled to request an extension.¹⁰⁴ The decision to grant an extension is dependent on the facts and circumstances of each case and is ultimately at the discretion of the Minister.¹⁰⁵

The Amendment has introduced a penalty for every employer who fails to comply with Article 66.¹⁰⁶ The penalty may constitute either (1) imprisonment of up to one month, or (2) a fine of a sum between QAR 2,000 and QAR 6,000 per employee.¹⁰⁷ In order for an imprisonment penalty to be issued to a corporate employer, an individual would need to be joined as a party to the claim.¹⁰⁸ The individual would usually be the general manager or an authorized signatory of the employer.¹⁰⁹ An unpaid employee will also remain entitled to submit a claim to the Labor Court.¹¹⁰

Further, if an employer fails to transfer its employees' Salaries via WPS within seven days of the salary due date, the Minister may either suspend the issuance of any new work permits to the employer and/or suspend all of the employer's transactions with the Ministry, provided that the suspension shall not include the authentication of any employment contracts.¹¹¹ Suspension may only be removed by the Minister, or his designee, once the employer submits proof that all unpaid Salaries have been transferred and received.¹¹²

We understand that the Ministry has established a separate inspection unit in order to monitor compliance with the WPS.¹¹³

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

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IX. United Kingdom*

The UK passed the Modern Slavery Act 2015.¹¹⁴ This law requires companies with a global turnover of GBP 36 million or more and that have a commercial organisation in the UK to publish an annual slavery and human trafficking statement on its website, which is signed by a director, setting out the steps the companies have taken to ensure there is no slavery and human trafficking in their supply chains.¹¹⁵ Businesses with a fiscal year ending March 31, 2016, or after will be the first to report and will be required to publish a statement covering their activities for the 2015–2016 fiscal year.¹¹⁶ Businesses with a year-end date of October 29, 2015–March 30, 2016, will not be required to publish a statement for the 2015–2016 fiscal year.¹¹⁷ The statement is expected to be published on the website within six months of the fiscal year end.¹¹⁸

The UK Government is pushing ahead with plans to make it compulsory for companies with 250 or more employees to publish gender pay gap information to redress a 19.1% gender pay gap between men and women in the UK.¹¹⁹ An announcement on the proposals is expected imminently. Following the case of *Bear Scotland v. Fulton*, employees in the UK are entitled to receive holiday pay that equates to their normal remuneration—this will include non-guaranteed overtime and commission from now on.¹²⁰ Claims for unpaid holiday pay are limited to two years arrears, rather than six years, in order to limit the financial impact of including non-guaranteed overtime pay in the holiday pay calculation.¹²¹

X. United States 1*

In *Martinez v. Bloomberg LP*, 740 F.3d 211 (2d Cir. 2014), the panel dismissed discrimination claims brought in federal district court in New York by an American employee working in the UK.¹²² The American employee had entered into an employment agreement with forum-selection and choice-of-law clauses providing for the application of English law in an English forum.¹²³ The employee alleged that he had reported to his employer that he had been a victim of physical abuse by his same-sex partner and was subsequently terminated.¹²⁴ He alleged that his termination was because

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114. Modern Slavery Act, 2015, c. 30 (U.K.).

115. *Id.* §54(2), (7).

116. SECRETARY OF STATE, TRANSPARENCY IN SUPPLY CHAINS ETC. A PRACTICAL GUIDE, GUIDANCE ISSUED UNDER SECTION 54(9) OF THE MODERN SLAVERY ACT, 2015, at 12, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc_A_practical_guide_final_.pdf.

117. *Id.*

118. *Id.*

119. Robert Forsyth et al., Employment Law Briefing 2016, DLA Piper 5 (Jan. 2016), <https://www.dlapiper.com/-/media/Files/Insights/Events/2016/01/ELB2016Internationalemployment.pdf>

120. *Bear Scotland Ltd. v. Fulton*, [2014] UKEAT, available at <https://www.judiciary.gov.uk/wp-content/uploads/2014/11/bear-scotland.pdf>.

121. Terms and Conditions of Employment, 2014, S.I. 2014/3322 (U.K.).

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122. *Martinez v. Bloomberg LP*, 740 F.3d 211, 214 (2d Cir. 2014).

123. *Id.* at 215.

124. *Id.*

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of a perceived disability and his sexual orientation.¹²⁵ He sued in the Southern District of New York under the Americans with Disabilities Act, as well as the New York State and City Human Rights laws.¹²⁶ The district court dismissed the case on the ground that the forum-selection clause governed, stating that any claim ought to have been pursued under English law in an English forum.¹²⁷

The employee appealed to the Second Circuit, and the court affirmed, holding that the forum-selection clause was presumptively enforceable and that the interpretation of its scope and nature was to be determined by English law as the choice-of-law clause governed.¹²⁸ Judge Newman, in a concurrence, suggested that there was earlier Second Circuit law holding that the law of the forum, the Southern District of New York, would govern interpretation of the scope and nature of the forum-selection clause.¹²⁹ Judge Droney, writing for the panel, went on to hold that the law of the forum, the Southern District of New York, governed the procedural question as to whether the forum-selection clause was enforceable, and that the clause was enforceable.¹³⁰

In doing so, the panel unanimously set forth standards for the courts to apply in determining whether a forum-selection clause is unreasonable or unjust.¹³¹ Here, for a variety of reasons, including the existence of remedies in the UK, the panel found the forum-selection clause to pass muster.¹³²

XI. United States 2*

The United States has seen an increase in what some legal scholars have dubbed “bag check” class actions. These actions focus on whether employees should be paid for time spent in security screenings before they leave their employers’ premises, but after they have already clocked out for the day. In 2014, the United States Supreme Court held that the time an employee spends in a security screening is not compensable under the Federal Labor Standards Act (“FLSA”).¹³³ Even though the United States Supreme Court held in favor of the employers, this did not put an end to these types of claims.

The continued relevance of these “bag check” actions is significant because some states, such as California, define compensable time differently than the FLSA. The critical distinction between California and the FLSA is that the California Labor Code mandates that employees be paid for all time that they are “subject to the control of the employer” or “suffered or permitted to work.”¹³⁴

Under this interpretation, employees who participate in these class actions claim that they are subject to the control of their employer when they have to participate in a security screening before they clock off. In fact, in November 2015, Bath and Body

125. *Id.*

126. *Id.*

127. *Id.* at 216.

128. *Id.* at 214.

129. *Id.* at 231.

130. *Id.* at 223-24.

131. *Id.* at 227-28.

132. *Id.* at 229.

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133. *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014).

134. Cal. Lab. Code § 1174 (West 2012).

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Works Inc. agreed to pay \$2.25 million to settle a putative class action based on claims alleged under the California Labor Code for unpaid work hours that employees alleged were for time spent in security screenings.¹³⁵ While Bath and Body Works, Inc. was busy settling these type of claims, Judge William Alsup in the District Court of the Ninth Circuit dismissed a class action lawsuit brought by Apple Store employees seeking compensation for time spent waiting for their bags to be checked as a screening tool prior to them leaving the stores where they worked.¹³⁶

In granting the defendant's motion for summary judgment in *Frlekin v. Apple Inc.*, Judge Alsup determined that waiting time was not "hours worked" under the definition of the California Labor Code because the bag searches were incidental to the employees' job duties.¹³⁷ Moreover, the bag checks could be avoided if the employee did not bring a bag to work.¹³⁸ This ruling signaled another win for employers in the United States.

135. *Jones v. Bath & Body Works*, 588 Fed. App'x. 744 (9th Cir. 2014).

136. *Frlekin v. Apple, Inc.*, No. C 13-03451 WHA, 2014 WL 2451598 (Dist. Ct. App. N.D. Cal. May 30, 2014).

137. *Id.* at *4.

138. *Id.*

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