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This Article summarizes important developments in 2016 in labor and employment law in Canada, France, Ireland, the Netherlands, Saudi Arabia, and the United Kingdom.

I. Canada

In *Wilson v. Atomic Energy of Canada Limited*,¹ the Supreme Court of Canada determined that the Canada Labor Code does not permit federally regulated employers to dismiss employees without just cause (with the legislated exceptions of employees with less than one year's service, managerial employees, and dismissals due to lack of work or elimination of a position). In light of this decision, federally-regulated employers must ensure that appropriate internal procedures and performance management programs are in place to properly document employee performance issues, as employers will not be able to simply proceed "without cause" to dismiss poorly performing employees. Similarly, when employees are being dismissed as a result of an internal reorganization or reduction in force, employers should now properly document such terminations as resulting from "lack of work" or "elimination of a position," in the past employers may have proceeded with such terminations as being "without cause."

In *Paquette v. TeraGo Networks Inc.*,² the Court of Appeal for Ontario found that a bonus plan which required an employee to be "actively" employed at the time of payment was insufficiently clear to deprive an employee who was dismissed without cause and without "reasonable" notice of termination of a claim for the bonus as part of his or her claim for wrongful dismissal damages. This determination is a significant decision for employers whose Canadian employees participate in bonus, incentive compensation, and/or equity plans which stipulate that participation ceases

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1. *Wilson v. Atomic Energy of Canada Limited*, [2016] S.C.C. 29 (Can.).

2. *Paquette v. TeraGo Networks, Inc.*, [2016] O.N.C.A. 618 (Can.).

upon termination of employment or which require “active” employment as a condition of continued participation. Language of this kind, without more, is likely to be found insufficiently clear. Concise language that explicitly limits an employee’s entitlements during any period following the actual termination date that does not constitute “deemed employment” under provincial employment standards legislation will be required in order to mitigate the risk of such damage awards.

In *Omarali v. Just Energy*,³ the Ontario Superior Court of Justice certified a class action filed by commissioned “sales agents” who alleged that Just Energy had misclassified them as independent contractors (rather than employees) and had thereby breached the Employment Standards Act 2000, by failing to provide them with minimum wage, overtime, and other benefits provided for employees. Although certification does not mean that Just Energy will not be able to successfully defend this claim on its merits, this certification is itself significant to employers because the courts have previously refused to deal with worker misclassification cases by way of class action on the basis that individualized assessments of fact were required with respect to each individual worker.

II. France⁴

One of the most significant changes in French legislation in 2016 is the final adoption of the draft law (the “El Khomri” law) relating to “labor, improvement of social dialogue and safeguard of professional careers.”⁵

The law contains provisions that aim at clarifying the general principles of French employment law, strengthening collective bargaining in France, increasing flexibility by modifying rules on working time and leave, and clarifying rules on economic redundancies.

A. REWRITING THE FRENCH LABOR CODE AND ITS GENERAL PRINCIPLES

The new law profoundly reworks the general principles of the French Labor Code and modifies its general architecture. Indeed, under the new law, company-level collective bargaining may result in greater flexibility for employers regarding working time and for other matters in the future. This is a considerable philosophical change in French labor and employment law where the historical hierarchy of norms principle ensured that company-

3. *Omarali v. Just Energy*, [2016] O.N.S.C. 4094 (Can.).

4. This section builds on a post by co-editor Roselyn Sands posted on The International Employment Lawyer, which is a quarterly newsletter published by the International Employment Law Committee under the American Bar Association, Section of International Law. Roselyn Sands, *France – Recent Legal Developments*, THE INTERNATIONAL EMPLOYMENT LAWYER (Sept. 27, 2016), http://intemploy.blogspot.com/2016_09_01_archive.html.

5. Loi 2016-1088 du 8 août 2016 [Law 2016-1088 of August 8, 2016], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 9, 2016.

level CBAs could further enhance employee rights but could not provide less protection.

B. FLEXIBILITY THROUGH COLLECTIVE BARGAINING

The law strengthens the legally binding effect of company-level CBAs, and enables companies to achieve flexibility through collective bargaining.

Whereas the detailed application of this architecture will take a couple of years to fine tune, this architecture is immediately applicable for issues relating to working time and employee leave. Under the new law, the validity of company-level CBAs on other matters will depend on a “two-tier” system, starting September 1, 2019. Company-level CBAs will be valid if the majority unions, *i.e.* those that have gathered more than 50% of the employee votes during the most recent election, sign or if the signatories have gathered more than 30% of the employee votes during the most recent election, and the agreement has been approved by the employees through referendum.

C. WORKING TIME

The new law includes a series of measures impacting working time and aiming to increase employer flexibility and freedom in organizing the company.⁶ Working time related issues such as the number of hours to be worked to trigger night work compensation, the maximum weekly time duration, or the weekly and daily minimum rest period can now be set through collective bargaining. As mentioned above, the ability for the employer to provide for rules through collective bargaining that are less favorable to employees is a considerable change.

The new law also reinforces certain employee rights, in particular rights related to health and safety issues. Employees are now afforded a right “to be disconnected, in particular from electronic devices, after working hours.”⁷ This measure aims to ensure a proper balance between workload and private life with the regulation of the use of digital tools. The specific modalities of this right new right will be discussed, on a company by company basis, with union representatives on a yearly basis.

6. Loi 2016-1088 du 8 août 2016 [Law 2016-1088 of August 8, 2016], art. 8, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 9, 2016.

7. CODE DU TRAVAIL (LABOR CODE) [C. TRAV.] art. L. 2242-8 (Fr.).

D. GREATER FLEXIBILITY IN THE JUSTIFICATION FOR COLLECTIVE REDUNDANCIES

The law provides for new rules regarding collective redundancies.⁸ These rules clarify some of the reasons that can be used to justify a collective redundancies caused by economic difficulties. Indeed, the law provides that in addition to the already existing reasons (i.e., the company's closure, or the safeguard of the company's competitiveness, or considerable technological changes) two new reasons could be used: a drop in the company's turnover for a period of time depending on the size of the company (e.g. four consecutive quarters for companies with more than 300 employees). Together with the procedural changes from 2013, the combination of these modifications facilitates and creates certainty as to the time required to complete the collective redundancy process in France.

E. CONCLUSION

France labor and employment law continues its path to creating a more employer-friendly environment in order to fuel foreign investment into France.

III. IRELAND

Several significant changes to Ireland's employment law landscape were introduced in 2016. Legislation protecting workers who whistle-blow on wrongdoing in the workplace was introduced in 2014.⁹ A code of practice published in 2015 sets out guidance for employers, workers, and their representatives in regard to the disclosure of information regarding wrongdoing in the workplace and how to deal with the disclosure of such information. It also provides for potential compensation of up to five years' gross remuneration as "compensation for unfair dismissal on grounds of making a protected disclosure."¹⁰ The protection afforded to those who make a disclosure in the workplace will continue to be a very relevant consideration for employers for the foreseeable future.

Equality legislation continues to allow employers to set compulsory retirement ages but only if such retirement ages are "objectively and reasonably justified by a legitimate aim, and [] the means of achieving that

8. Loi 2016-1088 du 8 août 2016 [Law 2016-1088 of August 8, 2016], art. 22, *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 9, 2016.

9. Protected Disclosures Act of 2014 (Act No. 14/2014) (Ir.), <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html>.

10. Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, (SI 464/2015) (Ir.), <http://www.irishstatutebook.ie/eli/2015/si/464/made/en/print>.

aim are appropriate and necessary.”¹¹ This brings the law in Ireland into line with European case law. There is also a legislative right to two weeks’ paternity leave.¹² An employer is not required to pay an employee during this period; however, the employee may be eligible for social welfare payments.

Individuals who work with children and vulnerable adults must be vetted by the Irish Police’s National Vetting Bureau before commencing employment.¹³

Certain criminal convictions may now be regarded as spent. Where a conviction is regarded as a spent conviction, an individual is not required to disclose the conviction itself or the circumstances ancillary to it when seeking employment or entering employment, except in limited cases specified in the legislation.

IV. The Netherlands¹⁴

A. DBA ACT

On 1 May 2016 the Act on Deregulation Assessment Labor Relationships (in Dutch the “Wet dereguleren beoordeling arbeidsrelaties,” the “DBA Act”) came into force.¹⁵ This also meant the end of the VAR declaration. The VAR declaration (which was issued by the Dutch Tax Authorities) indemnified companies that hired self-employed freelancers from any potential claims by the Dutch Tax Authorities for wages and social security premiums, should it (later) appear the relationship factually qualified as employment agreement.¹⁶

11. Equality (Miscellaneous Provisions Act) 2015 (Act No. 43/2015) (Ir.), <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html>.

12. Paternity Leave and Benefit Act 2016 (Act No. 11/2016) (Ir.), <http://www.irishstatutebook.ie/eli/2016/act/11/enacted/en/print.html>.

13. National Vetting Bureau (Children and Vulnerable Persons) Act 2012 Revised (Act No. 47/2012) (Ir.), <http://revisedacts.lawreform.ie/eli/2012/act/47/revised/en/html>.

14. This section builds on a post by author Dennis G. Veldhuizen posted on The International Employment Lawyer, which is a quarterly newsletter published by the International Employment Law Committee under the American Bar Association, Section of International Law. Dennis G. Veldhuizen, *Netherlands – Independent Contractor Status*, THE INTERNATIONAL EMPLOYMENT LAWYER (Feb. 10, 2017), <http://intemploy.blogspot.com/2017/02/netherlands-independent-contractor.html>.

15. Eerste Kamer, *Wet dereguleren beoordeling arbeidsrelaties* [Review of deregulation of labor relationships law], Eerste Kamer der Staten-Generaal, www.eerstekamer.nl/wetsvoorstel/34036_wet_dereguleren_beoordeling; *Wet dereguleren beoordeling arbeidsrelaties* [Act on Deregulation Assessment Labor Relationships] 3 februari 2016, Stb. 2016, 45 (Neth.).

16. *Wet inkomstenbelasting* [Income Tax Act] 30 mei 2000, Stb. 2001 (Neth.); *Wet expansion VAR legal* [Law Extending Legal VAR] 29 december 2004, 2005 (Neth.).

B. INDEPENDENT CONTRACTOR?

Whether the relationship between the company and the freelancer qualifies as employment agreement depends mainly on whether the following three factors are present: (1) labor, (2) wages, and, (3) authority:

- An employee should personally perform activities and substitution is only possible with the permission of the employer, whereas the freelancer does not have to personally perform labor;
- Employees receives wages for the activities performed, whereas the freelancer receives a (management) fee;
- The contact with a freelancer is aimed at bringing about a result and the contractor bears the responsibility in this respect;
- A relationship of authority exists between the employee and employer, whereas a client has a limited right to give instructions to the freelancer, only to the extent it regards the execution of the freelancer's assignment.¹⁷

C. DBA ACT IN PRACTICE

The purpose of the DBA Act is to minimize the chances of a 'pseudo' independent contractor and as such to provide a better protection to the self-employed. The DBA Act would also increase the legal security, as the differences between employees and independent contractors are now much more defined.

Clients and freelancers have to make use of three types of so-called "model contracts" prior to engagement. These have been drawn up and issued by the Dutch Tax Authorities:

- A general model contract: this model contract covers most business relationship where employment is not involved;
- A sector or profession specific model contract: meant for everyone working according to certain sectoral or professional standards or conditions;
- An individual model contract: a specific model contract that can be used by everyone working in the same sector or profession for which that model contract was drawn up specifically.¹⁸

Once the model contract is approved by the Dutch Tax Authorities, both parties are assured that there is no requirement to withhold taxes by the client. However, if a Dutch Tax Authorities judge at a later stage that the relation is one of employment rather than independent contracting, both client and contractor will be held liable to withhold payroll taxes and social security contributions with retroactive effect.

17. Wet deregulerend beoordeling arbeidsrelaties [Act on Deregulation Assessment Labor Relationships] 3 februari 2016, Stb. 2016, 45 (Neth.).

18. Dutch Tax Authorities, *The DBA Law: How Does it Work?*, BELASTINGDIENST.NL, <https://www.belastingdienst.nl/wps/wcm/connect/nl/modelovereenkomsten/modelovereenkomsten> (last visited Apr. 15, 2017 5:22 PM).

The Dutch senate introduced a transitional period of one year, until 1 May 2017. During the transitional period, the Dutch Tax Authorities will not actively enforce the DBA Act, but will mainly focus on providing information.¹⁹

D. INSECURITY

Already before its entry date, the DBA Act led to insecurity to both self-employed contractors and their clients. Many self-employers became reluctant to take on new engagements and some of them are even considering to cease their activities because of the insecurity with which the DBA Act has provided them. The same applies to clients: they are also reluctant to hire a self-employer because of the risk of corrective tax assessments.

E. WILL THE DBA ACT SURVIVE?

On the recommendation of a special committee (the Boot Committee), which performed a study the consequences of the DBA Act, the Dutch State Secretary of Finance, Mr. Wiebes, decided on 18 November 2016 to postpone the implementation of the DBA Act until 1 January 2018.²⁰

This means that in principle, the Dutch Tax Authorities will not enforce the DBA Act during the extended implementation period, provided that the client or its principal in question is deemed to be 'well-intentioned'. A party is deemed to be well-intentioned if it is familiar with the DBA Act and in any event attempts to operate in accordance with the model contracts issued by the Dutch Tax Authorities.

The situation is different for 'ill-intentioned parties'. As from 1 May 2017, the original end date of the implementation period of the DBA Act, the Dutch Tax Authorities will take enforcement measures against such parties.

The Dutch government itself obviously still has a great deal of work to do in the coming period. It is expected that the system of model contracts will be simplified or even cancelled.

F. PRACTICE

So while the pressure is off the self-employment sector to some extent, it remains unclear how the DBA Act will ultimately be applied as of 2018. For principals, it is important to continue to use (approved) model contracts in

19. Dutch Tax Authorities, *Letter to former VAR holders postponing DBA law enforcement*, BELASTINGDIENST.NL (Jan. 31, 2017), <https://www.belastingdienst.nl/wps/wcm/connect/nl/modelovereenkomsten/content/brief-voor-oud-var-houders-over-uitstel-handhaving-wet-dba>.

20. Anneke Meulenveld, *Enforcement DBA Act postponed: what does that mean?*, BOONTJE: ADVOCATEN ARBEIDSRECHT BLOG (Jan. 12, 2016), <http://www.boontjeadvocaten.nl/enforcement-dba-act-postponed-what-does-that-mean-2/>.

practice. A wait-and-see approach is definitely not an option. The VAR declaration has been abolished and will not be reintroduced.

V. Saudi Arabia

A. LABOR LAW 2016 IMPLEMENTING REGULATIONS

The Saudi Arabian Labor and Workmen's Law (the Labor Law)²¹ and its Implementing Regulations (IRs) comprehensively govern Saudi Arabia's labor and employment law regime. IRs are issued from time to time and have the effect of both explaining existing provisions of the Labor Law, as well as creating new statutory rights and duties.²² On 22 April 2016, a new set of Labor Law IRs came into effect (the 2016 IRs), which superseded and abrogated all previous Labor Law IRs, as well as any other inconsistent law or regulation.²³

Following is a brief overview of significant changes to the Saudi Arabian labor and employment law regime effected by the 2016 IRs:

B. STANDARD FORM OF WORK RULES

The 2016 IRs adopted a new standard form of internal work rules, which are not significantly different than the previous standard form. However, the new form lays out "a much more specific and detailed scheme for employee discipline specifying the type of penalty that may be applied for 49 specific acts depending on whether the act was committed for the first, second, third, or fourth time."²⁴ Additionally, whereas the previous guidelines provided that an employee was "entitled to a bonus in the event that his yearly performance is classified as "Good" on a scale of 1) Excellent; 2) Very Good; 3) Good; 4) Satisfactory; and 5) Poor," the new Guidelines require that an employee with merely "Satisfactory" performance must also receive a bonus.²⁵

All companies in Saudi Arabia are required to have internal work rules, which do not have to follow verbatim the new form, but may not be inconsistent with it.

21. See Labor and Workmen's Law, enacted by Royal Decree No. M/51, 23/8/1426H (Sept. 27, 2005).

22. See Labor and Workmen's Law Amendment, enacted by Royal Decree No. M/46, 05/06/1436H (Apr. 24, 2015).

23. See Ministerial Resolution No. 693/1 of 29/2/1428H; Ministerial Decision No 1/1/1998; Amgad T. Husein & Jonathan Burns, *Saudi Arabia: Assessing the Impact of the 2016 Implementing Regulations to the Labour Law*, DENTONS.COM (Aug. 24, 2016), <http://www.dentons.com/en/insights/alerts/2016/august/24/saudi-arabia-assessing-the-impact-of-the-2016-implementing-regulations-to-the-labour-law>.

24. Husein & Burns, *supra* note 23.

25. *Id.*

C. STANDARD FORM OF EMPLOYMENT CONTRACT

The 2016 IRs also adopted, for the first time, a standard employment contract form with obligatory terms must be incorporated (in substance only—i.e., such terms need not be copied verbatim) and optional terms depending on individual circumstances. Any additional terms included in an employment contract are enforceable only to the extent that they are not inconsistent with the Labor Law and its IRs.

The provisions of the standard form contract are not significantly noteworthy, and it appears it was adopted and formatted in a way in order to simplify the contracting process so as to encourage employers and employees to reduce the terms of their employment relationship to writing—likely as a remedial measure to reduce the burden on the labor courts, since many labor claims arise out of a basic misunderstanding between the parties due to lack of a clear written agreement.

However, one noteworthy provision is an obligatory term that all fixed term contracts shall automatically renew for similar periods at the expiration of the contract unless either party notifies the other party in writing otherwise at least thirty days prior. This requirement has not existed previously in Saudi Arabian labor and employment law. Thus, employers who plan to let go an employee on a fixed term contract at the end of the term by simply not renewing the contract should be mindful of the new thirty days' notice requirement.

D. MISCELLANEOUS UPDATES

Saudi Arabian employers are notorious for holding the passports of their expatriate employees, which has drawn criticism from advocacy groups and the international community. Some employers claim that they hold their employees' passports voluntarily and for safekeeping. However, critics claim that employers only do so as a means of maintaining control and leverage over their employees because an employee cannot escape the country without his or her passport. Historically, the Ministry of Labor (MOL) and its labor regulations have not been very forceful as to the impermissibility of this practice. However, the 2016 IRs expressly state that an employer may not retain the passport of his non-Saudi Arabian employee without execution of an acknowledgment form by the employee in both Arabic and the employee's language.

The 2016 IRs listed eighteen jobs that may not be filled by non-Saudi Arabians, including, among others, titles as Human Resources Director, Hotel Reception Clerk, Treasurer, or Private Security Guard. In addition, non-Saudi Arabians who are less than eighteen years of age or more than sixty years of age may not be employed—unless the employee is an expert, doctor, or another exempt profession as determined by the MOL. Presumably, existing employment visas will not be renewed, and new employment visas will not be issued, for expatriates falling into these restricted categories.

Finally, the 2016 IRs expressly limit an employee's yearly overtime to no more than 720 hours, unless otherwise permitted by the MOL.

VI. The United Kingdom

In the United Kingdom (UK), the main development across the legal world has been the vote on 23 June 2016 to leave the European Union (EU). For employment law, Brexit's impact is still far from clear and the UK government has ruled out major changes. However, several commentators anticipate at least some modifications once Brexit occurs, most likely in the following areas: introducing a financial cap on damages in discrimination claims; increasing the ability for employers to harmonize terms and conditions after a Transfer of Undertaking (Protection of Employment) (TUPE) transfer or Acquired Rights Directive (ARD) transfer; the EU bankers' bonus cap; and limiting holiday pay claims. Many international employers will be closely watching the outcome of UK/EU negotiations on the freedom of workers, and particularly on whether the rights of EU citizens currently in the UK will be curtailed. As of yet, there is little clarity on these points as the UK government continues to keep its cards close to its chest.

A recent Employment Tribunal decision granting "worker" status to Uber drivers has also gained a lot of attention.²⁶ Although falling short of full "employee" status, the decision grants the drivers the right to minimum wage, paid holiday, rest breaks, and other rights. An appeal is possible, and claims from other similar groups of atypical workers (e.g. couriers) are following. More litigation in this area is expected in 2017.

Other developments that should be on international employers' radars include a new obligation for larger companies to report on their efforts to ensure their supply chains are free of modern slavery (already in force);²⁷ an obligation to report on differentials in pay also for larger employers (expected to come into force in 2017);²⁸ and continuing developments in the long-running holiday pay cases regarding how employers should calculate pay while employees are away from the workplace.²⁹

26. *Mr. Y Aslam, Mr. J Farrar & Others v. Uber B.V., Uber London Ltd., Uber Britannia Ltd.*, Case Nos: 2202550/2015 & Others, Employment Tribunals (Oct. 28, 2016), 2016 WL 06397421 (Eng.).

27. *Modern Slavery Act 2015*, § 54 (UK).

28. *Equality Act 2010*, § 78 (UK).

29. *Case C-539/12, Z.J.R. Lock v. British Gas Trading Ltd.*, CELEX 612CJ0539 (May 22, 2014); *UKEAT/0189/15/BA, British Gas Trading Ltd. v. Lock and another*, 2 C.M.L.R. 40.