

# Developments in Employment Law Around the World 2007

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## I. Denmark

### A. THE DANISH SMOKE-FREE ENVIRONMENT ACT

On August 15, 2007, the Danish Smoke-Free Environments Act<sup>1</sup> (the “Act”) became effective. The purpose of the Act is to promote a smoke-free work environment in order to minimize employee exposure to second-hand smoke.<sup>2</sup>

The Act prohibits all smoking in indoor workplaces, public as well as private.<sup>3</sup> There are, however, three general exceptions. First, smoking may be permitted in a workplace where only a single employee is working, such as individual offices and the cab of a truck, provided that other employees are not generally exposed to the second-hand smoke.<sup>4</sup> Second, the Act permits employers to create separate smoking rooms where their employees may smoke, provided the rooms meet certain ventilation requirements.<sup>5</sup> These rooms, however, may not serve other purposes, such as a storage closet, that would expose non-

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1. See Smoke-Free Environments Act no. 512 of 6 June 2007, available at [http://www.ensp.org/files/denmark\\_smoke-free\\_environments\\_act\\_20070606.pdf](http://www.ensp.org/files/denmark_smoke-free_environments_act_20070606.pdf)

2. *Id.* § 1.

3. *Id.* § 6.

4. See *id.* § 6(2).

5. *Id.* § 3, 6.

smoking employees to second-hand smoke.<sup>6</sup> And third, the Act exempts hotel rooms and small restaurants under certain conditions.<sup>7</sup>

In addition, the Act requires employers to prepare and disseminate to all employees a written smoking policy.<sup>8</sup> At a minimum, the policy must state whether smoking is allowed and, if so, where. The policy must also state the consequences to an employee should he or she violate it.<sup>9</sup>

Under the Act, the employer must ensure that all employees comply with its terms.<sup>10</sup> The Act is governed by the Danish Working Environment Service and any violation is punishable by a fine.<sup>11</sup>

## B. NO-HIRE CLAUSES

On September 7, 2007, the Danish Industrial Court established that a no-hire clause, of which the employees were unaware, violated Section 9(2) of the Main Agreement between the Danish Confederation of Trade Unions (LO) and the Confederation of Danish Employers (DA).<sup>12</sup> The case concerned a temporary employment agency that was a party to a contract with its customer in which the customer agreed not to employ the temporary workers who were lent to them by the agency. For workplaces and industries covered by collective agreements, the Court's ruling prohibits companies from agreeing not to hire certain employees through the use of restrictive covenants. This ruling could jeopardize numerous agreements that frequently contain no-hire clauses, such as contracts for temporary workers and outsourcing arrangements. For workplaces and industries not covered by collective agreements, the impact of the Court's ruling is less certain. The permissibility of no-hire clauses in this area will likely be determined on a case-by-case basis.

## II. European Union

### A. AGE DISCRIMINATION

The provisions of the EC Employment Equality Directive (2000/78)<sup>13</sup> (the "Equality Directive") relating to age were the subject of continued debate during 2007. In *Palacios de la Villa v. Cortefiel Servicios SA*,<sup>14</sup> the Advocate General rendered its opinion that Spanish law permitting compulsory retirement is lawful, despite the Equality Directive, because the Equality Directive does not apply to laws regulating retirement ages. In its opinion, the Advocate General relied heavily on the fourteenth recital of the Equality Directive, which states that it is to be without prejudice to national provisions establishing

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6. *Id.* § 6.

7. *Id.* § 21-22

8. *Id.* § 5.

9. *Id.*

10. *Id.* § 23.

11. *Id.* § 26.

12. See Labor Court case A2005.721, The Confederation of Unions (LO) on behalf of the union for tree-industry-construction work in Denmark (TIB) against the Confederation of Employer Associations (DA) on behalf of Danish Construction and Bach & Søndergaard I/S.

13. Council Directive 2000/78/EC OJ (L 303/16).

14. Case C-411/05 (Oct. 16, 2007).

mandatory retirement ages. Although the Advocate General's opinion is not binding on the European Court of Justice (ECJ), it is persuasive authority and therefore is likely to have significant influence in the ECJ's determination of a case from the United Kingdom currently pending before it.

In *R (on the application of the Incorporated Trustees of the National Council for Ageing (Age Concern England)) v. Secretary of State for Business, Enterprise and Regulatory Reform*, the U.K. High Court referred a number of questions to the ECJ regarding the U.K.'s interpretation of the Equality Directive's age provisions.<sup>15</sup> The issues referred to the ECJ include the assertion that: (i) provisions dealing with mandatory retirement ages under the U.K. Employment Equality (Age) Regulations 2006 ("Age Regulations") are incompatible with the Equality Directive; (ii) the U.K.'s standard for justification for direct discrimination (also known as disparate treatment) fails to meet the standards set forth in the Equality Directive; (iii) the retirement provisions in the Age Regulations are not objectively justified as required by Article 6 of the Equality Directive; and (iv) under the Equality Directive, it is impermissible for an employer to refuse to allow an employee to work beyond the age of sixty-five without a justifiable reason.<sup>16</sup> The U.K. maintains that it has fully and properly implemented the Equality Directive. It is unlikely that the ECJ will rule on the questions before 2009.

### III. France

#### A. MAJOR LEGISLATIVE REFORMS

##### 1. *No smoking in the workplace*

As of February 1, 2007, smoking in collective workspaces and individual offices is prohibited.<sup>17</sup> An employer may, however, establish smoking areas upon consultation with the Health, Safety and Working Conditions Committee (*Comité d'Hygiène de Sécurité et des Conditions de travail - CHSCT*).

##### 2. *Tax Favorable Treatment of Overtime*

The Law of August 21, 2007, which went into effect October 1, 2007, has introduced favorable social security and tax treatment for overtime work.<sup>18</sup> Companies must still comply with legal and collective bargaining agreement rules and regulations under the "thirty five hour" work-week regime, but the new law reduces social security contributions for both the employer and the employee and provides employees income tax exemptions on payment for overtime hours.<sup>19</sup>

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15. *The Inc. Trustees of the Nat'l Council for Ageing (Age Concern England) v. Sec'y of State for Bus., Enter. And Regulatory Reform*, [2007] EWHC (Admin) 3090 (Eng.).

16. *See id.*

17. Ordinance no. 2006-596 of May 23, 2006.

18. Law no. 2007-1223 of August 21, 2007.

19. *Id.*

#### IV. Germany

##### A. EMPLOYEE STOCK PURCHASE PROGRAMS

The Securities Prospectus Act of 2005 (the "Securities Act"),<sup>20</sup> which implemented the EC Prospective Directive of 2003,<sup>21</sup> continues to be a source of confusion for foreign companies. Specifically, under the Securities Act, it is unclear whether foreign companies or their German subsidiaries need to produce a prospectus when they provide stock purchase programs to their German employees.

Currently, where an entity offers its stock to its employees, whether a part of an employee stock purchase program or otherwise, the offer constitutes a "public offer" within the meaning of Section 2 (4) of the Securities Act.<sup>22</sup> In such cases, a prospectus must be issued.<sup>23</sup> But there are four significant exceptions to the prospectus requirement. First, if the stock offered to the employees is already publicly traded on an exchange in the European Economic Area (EEA), a prospectus would not be required.<sup>24</sup>

Second, under Section 3 (2) of the Securities Act, if the offer is made to less than 100 unqualified investors, the issuer does not have to produce a prospectus.<sup>25</sup> Therefore, if the employer offers stock to less than 100 investors, including employees who may be offered the stock through a stock purchase program, there is no need to issue a prospectus.

Third, if the sale price for all the securities offered to employees and other investors is less than EUR 100,000 in a twelve month period, the company does not have to issue a prospectus.<sup>26</sup>

Fourth, the German Federal Financial Supervisory Authority may approve the prospectus of a foreign company prepared for a securities issuance in a non-EEA jurisdiction if the company prepared the prospectus in accordance with international standards established by the International Organisation of Securities Commission.<sup>27</sup> Unfortunately, to date, no prospectus from an American company that was created for an issuance in the United States has been approved.

Generally, the exceptions are narrowly construed and therefore will only apply to those companies with a small number of German employees. The vast majority of foreign companies that offer stock purchase programs to their German employees will have to issue a prospectus.

20. See *Prospektrichtlinie-Umsetzungsgesetz* [Securities Prospectus Act], June 27, 2005, BGBl. I 2005, at 1698 [hereinafter "Securities Prospectus Act"].

21. See Council Directive 2003/71, O.J. (L345/64)(EC).

22. See *Kollmorgen/Feldhaus*, BB 2007, 225 ff.; *Pfeiffer/Buchinger*, NZG 2006, 449 ff.; *Giedinghagen*, BKR 2007, 233 ff.

23. Previously, there was no obligation to issue prospectuses for securities offered to employees by their employers.

24. See *Securities Prospectus Act*, *supra* note 20, § 2(16).

25. See *id.* § 3(16).

26. See *id.*

27. See *id.* § 20(1).

## V. Japan

### A. REVISED EQUAL OPPORTUNITY LAW IN EFFECT

The long-awaited revised Equal Employment Opportunity Law (the “Revised Law”)<sup>28</sup> came into effect on April 1, 2007.<sup>29</sup> Prior to the revision, Japan’s gender discrimination law lacked important protections adopted by other jurisdictions, namely the United States and European countries, including: (i) no protection from discrimination for male employees; (ii) a limited definition of discriminatory treatment; and (iii) no protection from “indirect discrimination.”<sup>30</sup>

The Revised Law expands the scope of legal protection to include discrimination against male employees and allows them to utilize mediation and other dispute resolution methods provided under the law.<sup>31</sup> In addition to prohibiting discrimination in recruitment, hiring, personnel assignment,<sup>32</sup> promotion, educational training, welfare, retirement, and dismissal (all covered by the prior law), the Revised Law also prohibits gender-based discriminatory treatment for demotion, job title change, employment status shift (including shift to part-time employment), encouragement of retirement, and non-renewal of fixed-term employment contracts.<sup>33</sup>

The most significant change is that the Revised Law prohibits “indirect discrimination,” which has been considered a major source of social inequality in Japan.<sup>34</sup> “Indirect discrimination” is considered by the Ministry of Health, Labour and Welfare as a measure: (i) neutral on its face with respect to gender, (ii) that causes significant disadvantage(s) to one gender group than to the other, and (iii) is not supported by reasonable cause.<sup>35</sup> Based on a designation by the Ministerial Order of the Ministry of Health, Labour and Welfare, the Revised Law specifically prohibits three types of measures unless there is reasonable cause:

- (1) Using the height, weight or physical strength of an individual as a requirement for recruiting or hiring an employee;
- (2) Using an employee’s willingness to transfer to any other location as a requirement for recruiting or hiring an employee for career track jobs; and
- (3) Using an employee’s prior transfer as a requirement for promotion.<sup>36</sup>

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28. The Law No. 82 (June 21, 2006) [hereinafter “The Law”].

29. See Health, Labour and Welfare Ministry, <http://www.mhlw.go.jp/general/seido/koyou/kaiseidanjo/dl/02b.pdf> (last visited March 9, 2008).

30. See KAZUO SUGENO, *THE LABOR LAW* at 150 (Kobundo Publishers, Inc. 7th ed. 2006, Supplemented Version).

31. The Law, *supra* note 28, art. 2, 5, & 11.

32. The Revised Law clarifies that this includes allocating tasks and granting authority. The Law, *supra* note 28, art. 6.

33. The Law, *supra* note 28, art. 6.

34. The Law, *supra* note 28, art. 7.

35. See Website of the Ministry of Health, Labour and Welfare.

36. *Id.* Any measure other than those designated in said Ministerial Order that shall not be subject to the Revised Law, in principle, could be determined by Court as indirect discrimination. Please refer to the Website of the Ministry of Health, Labour and Welfare for more details.

The Revised Law also provides dismissal protection for pregnant or postpartum employees.<sup>37</sup> Any dismissal of a pregnant employee or an employee who gave birth one year prior to the dismissal shall be void, unless the employer verifies that “the pregnancy, childbirth [or] other maternity leaves . . . are not the reasons for discharging such female employees.”<sup>38</sup>

## VI. South Africa

### A. FORUM SHOPPING

In *Boxer Superstores Mthatha v. Mbenya*, the Supreme Court of Appeal (SCA) ruled that an employee could bring a claim in the High Court (general civil court), as opposed to the Labour Court, to declare a dismissal unlawful for procedural or substantive unfairness under common law contract theory.<sup>39</sup> As the SCA acknowledged, the decision further erodes the Labor Court’s exclusive jurisdiction over unfair labor practices under the Labour Relations Act 66 of 1995 (LRA).<sup>40</sup> Early decisions under the LRA indicated that the High Court would not interfere in employment related matters if employees sought relief based on equity; however, recent decisions of the SCA have held that the common law contract of employment has now developed to include the right to a pre-dismissal hearing.<sup>41</sup>

### B. REASONABLE EMPLOYER TEST

In *Z Sidumo v. Rustenburg Platinum Mines Ltd.*, the Constitutional Court, South Africa’s highest court, overturned a ruling by the Supreme Court of Appeal that the Commissioners of the Commission for Conciliation Mediation and Arbitration (CCMA), who arbitrate employment law disputes, must defer to the employer in respect of the sanction imposed and may not interfere with the sanction imposed.<sup>42</sup> The SCA ruled that the Commissioner may only interfere with an employer sanction where the sanction is unreasonable and not because the Commissioner would have imposed a different sanction. The reversal of this decision creates greater uncertainty with respect to the outcome of dispute brought to the CCMA.

### C. RETRENCHMENTS

In *Perumal v. Tiger Brands*, the Labor Court in Durban rejected an employer’s objection to the Court’s evaluation of procedural fairness in the same trial that adjudicated the substantive fairness of a retrenchment decision where the procedural fairness directly im-

37. The Law, *supra* note 28, art. 9.

38. *Id.*

39. *Boxer Superstores Mthatha v. Mbenya* Case no. 2006 (97) SA 206 (SCA) at 6 (S. Afr.), available at [http://www.supremecourtsofappeal.gov.za/judgments/sca\\_2007/sca07-079.pdf](http://www.supremecourtsofappeal.gov.za/judgments/sca_2007/sca07-079.pdf).

40. *Id.* at 5-7.

41. *See Old Mutual Life Assurance Co. SA Ltd. v. Gumbi* 2007 SCA 52 (RSA) at 5-8 (S. Afr.).

42. *Z Sidumo v. Rustenburg Platinum Mines, Ltd.*, 2007 (85) SA (CC) at 6 (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/11037.PDF>.

pacted the substantive fairness of the dismissal decision.<sup>43</sup> Under the LRA, the procedural fairness of large scale retrenchments must be dealt with separately from any substantive challenge. Over time the Labour Court has determined that the separation of the adjudication of procedural and substantive fairness applies not only to large scale retrenchments but to all retrenchments. In *Perumal*, the Court declined to hear the issue of consultation with the union prior to the retrenchment, maintaining the LRA's separation of procedural fairness and substantive fairness issues at trial.<sup>44</sup> Nevertheless, the Court did hear the issue of failure to consult with the employee, as it related to the substantive issue of her selection for dismissal.<sup>45</sup> No doubt the issue of whether procedural and substantive fairness should properly be separated as envisaged by the LRA will give rise to challenges in the Labour Appeals Court, the Supreme Court of Appeal, and ultimately the Constitutional Court.

## VII. United Kingdom

### A. LEGISLATIVE DEVELOPMENTS

#### 1. *Family Friendly Legislation*

On April 1, 2007, the Work and Families Act 2006 (the "Work and Families Act") along with its accompanying regulations became effective. The Work and Families Act modifies maternity and adoption leave and pay laws by: (1) granting employees an automatic right to additional maternity leave regardless of the employee's length of service, (2) increasing from twenty-six to thirty-nine weeks statutory maternity and adoption pay, (3) giving employers an express statutory right to have "reasonable" contact with employees on maternity leave, and (4) permitting employees to work up to ten days ("keeping in touch days") during maternity and adoption leave without losing statutory maternity or adoption pay.

#### 2. *Statutory Vacation*

On October 1, 2007, the Working Time (Amendment) Regulations 2007 (the "Amendment Regulations")<sup>46</sup> went into effect. The Amendment Regulations amend the Working Time Regulations 1998 (the "WTR") and modify an employee's right to vacation providing an additional eight days to workers.<sup>47</sup> The purpose of the Amendment Regulation is to ensure that workers receive paid time off for U.K. public holidays in addition to the twenty days of vacation under the WTR.

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43. *Perumal v. Tiger Brands*, 2007 (987) (ZALC) at 41, available at <http://www.saflii.org/za/cases/ZALC/2007/41.html>.

44. *Id.* at 18.

45. *Id.* at 22.

46. The Working Time (Amendment) Regulations, 2007 No. 2079 (Eng.), available at [http://www.opsi.gov.uk/si/si2007/pdf/uksi\\_20072079\\_en.pdf](http://www.opsi.gov.uk/si/si2007/pdf/uksi_20072079_en.pdf).

47. *Id.* ¶ 2.

## B. CASE LAW DEVELOPMENTS

1. *Restrictive Covenants*

In the U.K., clauses restricting post-termination competitive activity are void unless the employer can show that it has a legitimate proprietary interest to protect, and the clause is narrowly drafted to provide reasonable protection of such an interest. In *Thomas v. Farr Plc*, the United Kingdom Court of Appeal (CA) enforced a twelve-month non-competition clause.<sup>48</sup>

Following the termination of Thomas's employment, Farr Plc, an insurance broker, sought to enforce a twelve-month restrictive covenant that Thomas, its former Managing Director, had signed. Thomas argued that the restriction was unreasonably long. The CA held that the restriction was enforceable because Thomas had knowledge of sensitive confidential information, which would be helpful to Farr's competitors, and twelve months was a realistic estimate of the time for which the confidential information would remain valuable.<sup>49</sup>

## VIII. United States

## A. THE SUPREME COURT REJECTS THE "PAYCHECK ACCRUAL RULE"

In *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>50</sup> the U.S. Supreme Court clarified the filing period for a pay discrimination complaint under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits an employer from discriminating against "any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin[.]"<sup>51</sup> Generally, if an individual believes that his or her employer has discriminated against him or her in violation of Title VII, the individual has 180 days to file a complaint with the Equal Employment Opportunity Commission.<sup>52</sup>

Previously, there was a split among lower courts concerning when Title VII's limitations period began with respect to discriminatory pay issues. Some courts held that the statute of limitations period started when the individual learned of the decision that resulted in discrimination with respect to an individual's pay. Other courts followed the "paycheck accrual rule," which states that each time an individual receives a paycheck reflecting past discriminatory decisions the 180-day limitations period started anew.

In a 5-4 decision, the Supreme Court resolved the disagreement among the lower courts by rejecting the paycheck accrual rule and holding that pay decisions are "discrete acts" and therefore Title VII's limitations period begins to run when the aggrieved individual learns of the decision resulting in discrimination with respect to his or her pay.<sup>53</sup>

48. *Thomas v. Farr PLC & Hanover Park Comm. Ltd.*, [2007] EWCA (Civ) 118.

49. *Id.* ¶ 44.

50. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. \_\_\_, 127 S. Ct. 2162, 2165 (2007).

51. 42 U.S.C. § 2000e-2(a)(1) (2008).

52. *See* 42 U.S.C. § 2000e-5(e)(1). The statute of limitation may be increased to 300 days if the complaint arises in a jurisdiction with its own fair employment practices agency that has the authority to challenge the alleged discriminatory practice. *See id.*

53. *Ledbetter*, 127 S. Ct. at 2169-70.

The Court acknowledged that the “180-day EEOC charging deadline, 42 U.S.C. § 2000e-5(e)(1), is short by any measure, but ‘[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.’”<sup>54</sup>

The Court further explained that a Title VII disparate-treatment claim<sup>55</sup> has “two elements: an employment practice, and discriminatory intent.”<sup>56</sup> Under the paycheck accrual rule, courts “would shift intent from one act (the act that consummates the discriminatory employment practice) to a later act that was not performed with bias or discriminatory motive. The effect of this shift would be to impose liability in the absence of the requisite intent.”<sup>57</sup> Accordingly, the paycheck accrual rule was inconsistent with the language of Title VII and case law precedent.

The dissent argued that because “pay disparities often occur . . . in small increments over time,” they are “significantly different from adverse actions ‘such as termination, failure to promote, or . . . refusal to hire,’ all involving fully communicated discrete acts, ‘easy to identify’ as discriminatory.”<sup>58</sup> Therefore, according to the dissent, pay disparity claims are more akin to hostile work environment claims than to termination, promotion or refusal to hire claims. As such, pay disparity claims should follow the paycheck accrual rule in which a series of separate acts (each paycheck) constitutes one unlawful employment practice.

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54. *Id.* at 2170 (quoting *Mohasco Corp. v. Silver*, 442 U.S. 807, 825 (1980)).

55. 42 U.S.C. § 2000(e)-2(h). Under Title VII, there are two types of claims: disparate-treatment claims and disparate-impact claims. A disparate-treatment claim occurs when an employer intentionally treats individuals less favorably than others because of their protected characteristics (i.e. race, color, religion, sex or national origin). A disparate-impact claim, also called an adverse-impact claim, occurs when an employer has a facially neutral policy or practice that has a significant adverse effect on an individual in a protected group.

56. *Ledbetter*, 127 S.Ct. at 2171.

57. *Id.* at 2170.

58. *Id.* at 2179 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)).

