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Employment Law

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I. Europe¹

A. AGENCY WORKERS

In November 2008, the European Parliament adopted the Temporary Agency Workers Directive (Directive).² The key provision states that from the first day of their assignment, the basic working and employment conditions of temporary agency workers must be at least the same as those that would apply if the worker had been recruited directly to occupy the same job.³ Member states must implement the Directive within three years,⁴ but the Directive will enable the United Kingdom to implement the agreement reached in May 2008 between the U.K. Government, Trade Union Commission, and Confederation of British Industry, under which agency workers need twelve weeks employment before they are entitled to equal treatment.⁵

Because the U.K. Government removed a significant stumbling block to reaching an agreement over the Directive, Ministers at the EU Employment, Social Policy, Health and Consumer Affairs Council agreed in exchange that the United Kingdom might preserve its opt-out of the forty-eight hour weekly working time limit under the Working

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1. This first section examines relevant directives from the European Parliament and case law from the European Court of Justice. The following sections examine country-specific developments from various nations around the world and are organized in alphabetical order by state.

2. Council Directive 2008/104, 2008 O.J. (L 327) 9 (EC).

3. *Id.* art. 5(1).

4. *Id.* art. 11.

5. *See id.* ¶¶ 17, 19.

Time Directive. This opt-out will be subject to a new overall cap of sixty hours per week,⁶ and in the future, no opt-out will be allowed until the employee has been employed for one month or more.⁷

B. AGE DISCRIMINATION

The European Court of Justice (ECJ) delivered its opinion on the Heyday Challenge on March 5, 2009.⁸ Heyday, an offshoot of the U.K. charity Age Concern, filed an application at the U.K. High Court in July 2006 seeking judicial review of whether the Employment Equality (Age) Regulations 2006 (Age Regulations) give effect to the United Kingdom's obligations under the EU Framework Directive 2000/78.⁹ The main focus of the Heyday Challenge is the effect of Regulation 30 of the Age Regulations, which provides for the lawful mandatory retirement of employees at age sixty-five.

The U.K. High Court stayed the judicial review proceedings and referred three questions to the European Court of Justice (ECJ) for a preliminary ruling. On March 5, 2009, the ECJ delivered its judgment in *Incorporated Trustees of National Council on Ageing v. Secretary of State for Business, Enterprise, and Regulatory Reform*.¹⁰ The ECJ held that:

- National rules on retirement are subject to age discrimination law;
- There is no requirement for national law to list the types of treatment that may amount to justification; and
- There is no significant difference between the test for justification with regard to direct and indirect discrimination.¹¹

Therefore, a national rule permitting employers to dismiss employees aged sixty-five or over for retirement can, in principle, be justified. It is for national courts to determine whether that rule is objectively and reasonably justified by a legitimate aim, such as employment policy or labor market or vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

The U.K. High Court must now apply the ECJ principles and determine whether the U.K. Government correctly implemented the Framework Directive. The outcome of this case will likely not be known until the middle of 2009 at the earliest.

II. Denmark

A. NON-SOLICITATION AND NO-HIRE CLAUSES

The Danish Parliament adopted the Act on Employers' Use of Non-solicitation and No-hire Clauses¹² (Act) in June 2008.

6. Council Common Position (EC) No. 23/2008 of 15 Sept. 2008, art. 1(6), 2008 O.J. (C 254) 26, 28.

7. *Id.*

8. Case C-388/07, *Inc. Trs. Of Nat'l Council on Ageing v. Sec'y of State for Bus., Enter. and Regulatory Reform*, (March 5, 2009).

9. Council Directive 2000/78, 2008 O.J. (L 303) 16 (EC).

10. Case C-388/07.

11. *Id.* ¶¶ 58-89.

12. Law No. 460 of June 17, 2008, Lovtidende A [Danish Gazette] [D.G.], available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=120323>. The Act was adopted following rulings concerning cases that did not establish absolute certainty with regard to the legal positions of the employees. See Danish Maritime

The main purpose of the Act is to limit the employers' use of non-solicitation and no-hire clauses by prohibiting involuntary non-solicitation or no-hire clauses, and by reducing limitations on the mobility of the labor market in Denmark. Further, the Act establishes the rules that must be complied with when non-solicitation and no-hire clauses are entered into voluntarily.¹³

The Act is applicable to any no-hire clauses entered into by an employer with other companies in order to prevent or limit an employee's possibilities of employment with another company.¹⁴ In addition, the Act is applicable to non-solicitation clauses entered into by an employer with an employee in order to prevent or limit other employees' possibilities of employment with another company.¹⁵

Pursuant to the Act, non-solicitation and no-hire clauses will only be enforceable against employees if each of the affected employees has agreed upon the clause in question in writing.¹⁶ The agreement must contain information regarding how the employees' job opportunities will be specifically affected by the clause.¹⁷ Furthermore, the agreement must contain information regarding the employees' right to compensation upon leaving the company at which the clause was agreed upon.¹⁸ Employees are entitled to compensation of at least fifty percent of their salary at the effective date of termination.¹⁹

There are a few specific exceptions to the Act. These exceptions include temp agencies²⁰ and agreements concerning non-solicitation and no-hire clauses entered into in connection with business transfers.²¹

The Act came into force on July 1, 2008 and applies to non-solicitation and no-hire clauses agreed to from that date forward. But beginning July 1, 2009, the law will apply to all non-solicitation and no-hire clauses, including clauses agreed to before July 1, 2008. Finally, if the non-solicitation or no-hire clause is not in accordance with the Act, the clause will not be enforceable against the affected employee.

B. THE DANISH ACT ON POSTING OF WORKERS

On May 1, 2008, an amendment to the Danish Act on Posting of Workers (Posting Act)²² came into force.

According to the amended Posting Act, all foreign entities posting employees in Denmark must file the following information with the Danish Commerce and Companies Agency when posting employees in Denmark:

& Commercial Court case H-0066-05 28 July 2006; see also Marjorie R. Culver et. al., *Developments in Employment Law Around the World 2007*, 42 INT'L LAW. 669, 670 (2008) (discussing Labor Court case A2005.721 regarding no-hire clauses).

13. Law No. 460 § 1.

14. *Id.* § 2.

15. *Id.*

16. *Id.* § 3.

17. *Id.*

18. *Id.* § 4.

19. *Id.*

20. *Id.* § 2(2).

21. *Id.* § 8.

22. See Law No. 849 of July 21, 2006, Lovtidende A [Danish Gazette] [D.G.], available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=30784>, as amended by Law No. 263 of April 23, 2008, Lovtidende A [Danish Gazette] [D.G.], available at, <https://www.retsinformation.dk/Forms/R0710.aspx?id=116585>.

1. The name and business address of the foreign entity;
2. The date of commencement and finalization of the service rendered;
3. The place of delivery of the service;
4. A contact person of the foreign entity;
5. The industrial classification code of the foreign entity; and
6. The identities of the posted employees and the duration of the posting.²³

The information must be filed with the Danish Commerce and Companies Agency at the time the work commences.²⁴

The register created on the basis of the amended Posting Act will allow Danish authorities to supervise whether foreign entities abide by the relevant Danish laws and regulations. The relevant laws and regulations include those relating to working environment, non-discrimination, and equal pay provisions, among others. Further, the purpose of the register is to enable the parties of the labor market to outline the number and identity of foreign entities posting workers in Denmark and the employees posted by those entities.

Furthermore, a bill concerning the amendment of the Posting Act has been introduced.²⁵ This bill was introduced by the Danish Minister for Employment in October 2008, and the amendment seeks to secure Danish workforce action rights, e.g., the right to strike, as against foreign employers. This amendment will ensure that the workers posted in Denmark receive minimum wages according to the collective agreements in force in Denmark. The proposal was a result of the *Laval* judgment²⁶ and the following government investigation concerning the matter.

III. France

A. MAJOR LEGISLATIVE REFORMS

1. *Law on Modernization of the Labor Market—Common-Consent Termination*

The implementation of the *loi de modernisation du marché du travail*²⁷ has formalized a new type of termination agreement: the common-consent termination agreement (*rupture conventionnelle*). This agreement is meant to be used in situations where the employee and

23. Law No. 263, ¶ 1 (amending Section 5 of the 2006 Posting Act).

24. *Id.* (According to Section 5 of the Posting Act, there is a specific exception with regard to the obligation to file information under the Posting Act if the posting of employee relates to delivery or installation of a technical system, and the posting does not last for more than eight days).

25. Proposal no. L 36 of 22 October 2008 concerning amendment of the Danish Act on Posting of Workers.

26. Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767. This judgment from the European Court of Justice concerns Swedish trade unions taking collective action against a Latvian construction company. The dispute was initiated to cause the Latvian enterprise to sign a collective agreement about pay and working conditions for work performed in Sweden. The decision, which sets up certain conditions in connection with industrial action against foreign service providers, has been interpreted as an attack against the right to take industrial action and, consequently, against the Nordic labor market model.

27. Law No. 2008-596 of June 25, 2008, *Journal Officiel de la République Française [J.O.]* [Official Gazette of France], available at <http://textes.droit.org/JORF/2008/06/26/0148/0002/>. The law implements the January 11, 2008 agreement between the Unions and Government.

the employer wish to end their relationship amicably, thereby guaranteeing the free consent of both parties, particularly that of the employee. The agreement requires:

- At least one meeting between the employer and employee to inform the employee of his or her rights relating to the minimum amount of the termination indemnity and the legal consequences of common-consent termination before the parties sign the agreement;²⁸
- A signed common-consent termination agreement, which must specify the amount of the termination indemnity, all other mandatory payments that will be made to the employee as part of the final statement of accounts, and the termination date. Both parties have fifteen calendar days to withdraw from the agreement;²⁹
- Homologation of the agreement by the Departmental Director of Employment and Vocational Training, who ensures that consent was not given under duress or by mistake.³⁰ The Director has fifteen working days to provide a decision, and failure to do so within the required time frame is deemed an approval of the homologation request.³¹ Subsequently, the parties to the agreement have one year to challenge it.³²

2. *Law on Social Democracy and Working Time Reform*

As a result of the measures for reform found in the law on trade union representation and working time, *loi portant rénovation de la démocratie sociale et réforme du temps de travail*,³³ companies may renegotiate agreements individually with regard to the amount of allowable overtime hours and working time.³⁴ But the legal working time in France remains set at thirty-five hours a week with a maximum of forty-eight working hours a week, so this reform merely provides some exceptions to the general rule. Notably, companies may set the maximum number of overtime hours to be performed annually by the employees without having to obtain the Labor Inspector's authorization if the overtime quota (220 hours per year) is exceeded.³⁵ The 218-day legal limit for days that can be worked in a year may also be exceeded, subject to certain requirements.³⁶

B. CASE LAW DEVELOPMENTS

1. *Mobility Clauses: Decisions dated October 14, 2008*

In several decisions dated October 14, 2008, the French Supreme Court specified the terms and conditions of mobility clauses in employment contracts. In the first case, which has been confirmed by other decisions, the Court asserted that clauses providing that an

28. C. TRAV. art. L1237-12 (2008) (created by Law No. 2008-596); see also Circular Letter DGT No. 2008-11 of July 22, 2008, available at <http://www.travail.gouv.fr>.

29. C. TRAV. art. L1237-13.

30. *Id.* art. L1237-14.

31. *Id.*

32. *Id.*

33. Law No.2008-789 of Aug. 20, 2008, Journal Officiel de la République Française [J.O.] [Official Gazette of France], available at <http://textes.droit.org/JORF/2008/08/21/0194/0001/>.

34. C. TRAV. art. L3121-11.

35. See *Id.*

36. C. TRAV. art. L3121-45.

employee should change workplace when requested “have to make clear [the relevant] geographical area and cannot allow the employer to unilaterally extend its range.”³⁷ That is to say, the clause has to specify the precise boundaries of the area within which the employee can be requested to move. Without this specification, the clause will be inoperative.

The novelty of this case is that at least one of the decisions dated October 14, 2008, refers to the right of the employee to have respect for his or her private and family life. Likewise, based on new Article L.1121-1 of the French Labor Code, the Court stated that it is possible to interfere in an employee’s private and family life only if the interference is allowed by the task to be accomplished and commensurate with the goal pursued.³⁸ Essentially, this judgment reveals a tougher stance towards the construction of mobility clauses in employment contracts.

2. *Determination of the Size of Workforce for Redundancy Benefit Purposes Does Not Require the Inclusion of Headcount Outside of France*

The Employment Division of the French Supreme Court ruled that only employees of a foreign company’s French branch are to be taken into account when assessing whether or not the threshold size of fifty workers has been reached, thereby requiring the implementation of a collective redundancy plan.³⁹ In that case, an Italian bank decided to close its Paris branch due to economic difficulties that made its twenty-eight Paris employees redundant.⁴⁰ But because the French branch had fewer than fifty employees (the legal threshold for the requirement to implement such a plan), it had not implemented a collective redundancy plan.⁴¹ After many appeals in the Paris jurisdiction, the French Supreme Court held that, based on the French Labor Code and the principle of territoriality, only the employees assigned to the employer’s activity in France could benefit from French employment and labor laws.⁴²

IV. Japan

A. LABOR CONTRACT LAW OF 2007

The newly enacted Labor Contract Law (LCL),⁴³ implemented on March 1, 2008, prescribes the principle rules applicable to a labor contract between employees and em-

37. Courdecassation, chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, labor chamber], Oct. 14, 2008, Bull. civ. 2008, no. 07-46400 (Fr.); Courdecassation, chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, labor chamber], Oct. 14, 2008, Bull. civ. 2008, no. 07-43071 (Fr.); Courdecassation, chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, labor chamber], Oct. 14, 2008, Bull. civ. 2008, no. 07-40523 (Fr.); Courdecassation, chambre societale [Cass. soc.] [highest court of ordinary jurisdiction], Oct. 14, 2008, Bull. civ. 2008, no. 07-40092 (Fr.).

38. Cass. soc. no. 07-40523.

39. See *Courde cassation, chambre sociale [highest court of ordinary jurisdiction, labor chamber]*, Sept. 23, 2008, no. 07-42862 (Fr.) [BNL v. Syndicat national de la banque et du crédit].

40. *Id.*

41. See C. TRAV. art. L1233-61.

42. Cour d’appel [CA] [regional court of appeal] Paris, 18th ch., Jan. 25, 2007, J.C.P. 2007, No. S 04/03770.

43. Rōdō Keiyakuhō [Labor Contract Law], Law No. 128 of 2007 (Japan).

ployers.⁴⁴ The LCL, consisting of nineteen articles, confirms the rules established by court precedents, including the abuse of employers' rights doctrine in secondments, disciplinary actions, and dismissal cases.⁴⁵ In addition, the LCL clarifies the requirement of reasonableness when an employer modifies the work rules, thereby unfavorably changing the working conditions of its employees. Essentially, employers may unfavorably modify the work rules that apply to employees if: (1) the employer notifies the employees of the modified work rules, and (2) the modification is reasonable. In determining reasonableness, the following factors must be taken into consideration: (1) the adverse impact on employees, (2) the necessity of the changes in working conditions, (3) the reasonableness of the work rules after modification, and (4) the circumstances of discussions with labor unions or employees.⁴⁶

Because the LCL basically codified already established rules, the impact of this new law has not been significant to date.

B. ACT ON IMPROVEMENT, ETC. OF EMPLOYMENT MANAGEMENT FOR PART-TIME WORKERS

The Amended Act on Improvement, etc. of Employment Management for Part-Time Workers (Amended Act) became effective on April 1, 2008, and strengthened the status of part-time workers.⁴⁷ Under the Amended Act, employers are prohibited from discriminating against part-time workers, as these workers now are considered equivalent to regular employees.⁴⁸ In addition, the Amended Act imposes several obligations on employers, including the obligation to calculate wages for part-time workers with wages of regular employees in mind and to consider factors like job descriptions, performance, motivation, capability, and experience.⁴⁹ But most of these obligations remain at the level of "obligation to exert effort," and are not legally required obligations.⁵⁰ Thus, the impact of this Amended Act should be carefully watched for further amendment.

C. *McDonald's* Case

On January 28, 2008, the Tokyo District Court ruled that a *tencho* employee of a McDonald's franchise should not have been classified as an employee in a managerial and supervisory position—a manager, *Kanri Kantokusha* in Japanese—and therefore should not have been exempted from overtime pay⁵¹ for the purposes of Japanese labor law. The

44. *Id.* art. 19. The LCL is not applicable to governmental officials or labor contracts between an employer and an employee when the employee is a relative living with the employer.

45. Article 18-2 of the Labor Standards Law that regulates this principle was deleted and moved to Article 16 of the LCL.

46. Labor Contract Law, art. 10. These factors are recognized by several court decisions. *See, e.g.*, *Murose v. Michinoku Ginko*, 54-7 Minshu 2075 (Sup. Ct., Sept. 7, 2000); *Sato v. Dai shi Ginko*, 51-2 Minshu 705 (Sup. Ct., Feb. 28, 1997).

47. Law Concerning the Improvement of Employment Management, Etc. of Part-Time Workers, Law No. 76 1993 (Japan), translated at http://www.jiwe.or.jp/english/law/law3_1_1.html.

48. *Id.* art. 8.

49. *Id.* art. 9. Article 9 also regulates the obligation to exert effort.

50. *Id.* arts. 3, 7, 9.

51. Overtime includes work on holidays.

court awarded the manager a total of seven million yen⁵² in compensation.⁵³ This decision was widely publicized in the media as a red flag for employers.

Generally, to be classified as a manager, the employee: (1) should be involved in control or decision-making of important business operations of the company, including personnel management; (2) should have the discretion to decide his or her own working schedule; and (3) should receive a reasonable and suitable salary and other compensation.⁵⁴ But it is reported that in many companies, employees without such power and authority are classified as “managers” and are exempted from overtime pay. To improve this situation, the Ministry of Health, Labor, and Welfare of Japan (MHLW) issued directives and questions and answers concerning the proper classification of *tencho* employees as managers.⁵⁵

V. People’s Republic of China

A. THE IMPLEMENTING REGULATIONS TO THE RULES ON EMPLOYEES’ ANNUAL LEAVE

On September 18, 2008, the Implementing Regulations to the Rules on Employees’ Annual Leave (Annual Leave Regulations) were issued. They clarify some of the issues left open in the Rules on Employees’ Annual Leave (Rules).⁵⁶ According to the Rules, an employee is entitled to five days of annual leave if his or her total years in the workforce, or working years, is greater than one and less than ten years; ten days for ten to twenty years; and fifteen days for twenty years or more.⁵⁷ The Annual Leave Regulations clarify that working years means the employee’s service years with all employers, including military service.⁵⁸

The Rules state that if an employer cannot provide the statutorily required annual leave to the employee, and the employee consents, the employer must pay the employee compensation at the rate of 300 percent of the employee’s regular salary in lieu of the unused leave.⁵⁹ The Annual Leave Regulations explain that the 300% includes the regular daily salary, and as such, the employer must only pay an additional 200% for unused annual leave. But if an employer allows the employee to take annual leave, and the employee requests in writing not to take annual leave, the employer does not need to compensate the employee for the unused annual leave.⁶⁰

52. This amount consists of five million yen in unpaid overtime pay and an additional statutory payment of two million yen.

53. Charles Weathers, *Overtime Activists Take on Corporate Titans: Toyota, McDonald’s, and Japan’s Work Hour Controversy*, LABOR NET, Mar. 20, 2009, <http://labornet.org/cgi-bin/ib/cgi-bin/ib.cgi?action=read&id=298>

54. KAZUO SUGENO, *JAPANESE EMPLOYMENT AND LABOR LAW* 262 (Leo Kanowitz trans., Carolina Academic Press 8th ed. 2008) (1992).

55. Ki-Hatsu 0401001, April 1, 2008; Ki-Hatsu 0909001, September 9, 2008.

56. Implementation Measures for Paid Annual Leave for Employees of Enterprises (promulgated by the Ministry of Human Res. and Soc. Sec., Sept. 18, 2008, effective Sept. 18, 2008) (P.R.C.) [hereinafter Annual Leave Regulations].

57. Regulation on Paid Annual Leave for Employees (promulgated by State Council, Dec. 14, 2007, effective Jan. 1, 2008), § 3 (P.R.C.) [hereinafter Rules].

58. See Annual Leave Regulations, *supra* note 56, § 4.

59. See Rules, *supra* note 57, § 5.

60. See Annual Leave Regulations, *supra* note 56, § 10.

The Annual Leave Regulations also entitle a new hire to annual leave on a pro-rata basis.⁶¹ Moreover, an employer must pay an employee for any unused annual leave upon termination or the non-renewal of an employment contract. But if an employee has exceeded his or her allotment of statutory annual leave, the employer may not recoup the excess amount from the employee.⁶²

B. LABOR DISPUTE MEDIATION AND ARBITRATION LAW

On May 1, 2008, the Labor Dispute Mediation and Arbitration Law of the PRC⁶³ (Arbitration Law) was promulgated. It sets forth new guidelines concerning mediation, arbitration, and adjudication of labor disputes. The Arbitration Law provides rules that apply to most employment-related claims, including claims regarding wages, severance, social insurance, termination, leave, training, safety, and performance or modification of an employment contract. It does not cover claims concerning sexual harassment or discrimination.

The Arbitration Law places stricter requirements on the hiring of arbitrators, stating that arbitrators must have “a reputation of impartiality and integrity” and possess some experience in law, legal research, or labor and employment.⁶⁴ The Arbitration Law also requires that the hearings be recorded in writing, allows for the use of expert witnesses, and provides the right to conduct examination and submit closing arguments.⁶⁵ The parties also may engage counsel or a person to represent them.⁶⁶

Further, the Arbitration Law extends the statute of limitations for filing a claim from sixty days to one year from the time the party knew or should have known of the injury or infringement of rights,⁶⁷ while the arbitrator will generally only have forty-five days from the receipt of the arbitration application to issue an award.⁶⁸ In addition, the Arbitration Law states that the government will pay for the costs of the arbitration, allowing parties to file for arbitration free of charge.⁶⁹

The Arbitration Law limits an employer’s right to appeal an arbitration award and provides that awards are final and binding unless: (1) the dispute involves a claim for wages, medical expenses for a workplace injury, severance, or compensation, which amounts to less than or equal to twelve times the local monthly minimum wage; or (2) the dispute involves the implementation of the state’s labor standards concerning working hours, rest and leaves, or social insurance.⁷⁰ In contrast, employees have the right to appeal the award within fifteen days of receipt of the award.⁷¹

61. *Id.* § 11.

62. *Id.* § 12.

63. Law of People’s Republic of China on Labor Dispute Mediation and Arbitration (promulgated by Standing Comm. of Tenth Nat’l People’s Cong., Dec. 29, 2007, effective May 1, 2008) (P.R.C.), *translated in* CHINA LAW & PRAC. 2430, Dec. 29, 2007.

64. *Id.* § 20.

65. *Id.* §§ 37-38, 40.

66. *Id.* § 24.

67. *Id.* § 27.

68. *Id.* § 43.

69. *Id.* § 53.

70. *Id.* § 47.

71. *Id.* § 48.

C. THE IMPLEMENTING REGULATIONS OF THE EMPLOYMENT CONTRACTS LAW

On September 18, 2008, the Implementing Regulations of the Employment Contracts Law of the PRC (Implementing Regulations) took effect.⁷² The Implementing Regulations aim to clarify some of the more vague or ambiguous sections of the Employment Contracts Law (ECL), which was implemented on January 1, 2008.⁷³

The ECL aims to impose written employment contracts on the majority of employment relationships. The Implementing Regulations clarify the penalties for an employer's failure to execute a written contract with an employee. The ECL provides that if an employer fails to execute a written employment contract with an employee within thirty days of the commencement of employment, the employer must pay the employee double wages for the length of time the employee worked without a contract.⁷⁴ The Implementing Regulations clarify that the first month of employment is a grace period and that the double wages penalty does not apply until the first day of the employee's second month of employment.⁷⁵

Moreover, the ECL states that an employer must enter into an open-ended employment contract with an employee once the employee completes ten continuous years of service with the employer.⁷⁶ The Implementing Regulations clarify that an employer must consider the employee's service years served before the implementation of the ECL when determining continuous service.⁷⁷

According to the ECL, an employer may enter into a training agreement with an employee, thereby binding the employee to a set amount of service years, in exchange for the employer paying for the costs of the professional and technical training.⁷⁸ The Implementing Regulations explain that any expenses directly arising from the training, such as travel to and from the training, are considered part of the training costs.⁷⁹ Thus, an employer should be entitled to recoup these additional costs if an employee resigns before he or she completes the agreed upon service years. The Implementing Regulations also clarify that an employment contract automatically renews if the contract is set to expire before completion of the agreed upon service period.⁸⁰

PRC law requires employers to pay severance when an employment contract expires and is not renewed or when an employment contract terminates prematurely.⁸¹ The ECL requires severance to be calculated based on the employee's tenure and the employee's average monthly salary for the preceding twelve months, capping the average monthly salary at three times the average monthly salary of employees in the city where the em-

72. Regulation on Implementation of Employment Contract Law of People's Republic of China (promulgated by State Council, Sept. 13, 2008, effective Sept. 18, 2008), *translated in CHINA LAW & PRACTICE* 2200 (Sept. 19, 2008) [hereinafter *Implementing Regulations*].

73. Labor Contract Law of People's Republic of China (promulgated by Standing Comm. of Tenth Nat'l People's Cong., Jun. 29, 2007, effective Jan. 1, 2008), *translated in CHINA LAW & PRACTICE* 2200 (June 29, 2007) [hereinafter *ECL*].

74. *Id.* § 82.

75. *See* *Implementing Regulations*, *supra* note 72, § 6.

76. *See* *ECL*, *supra* note 73, § 14.

77. *See* *Implementing Regulations*, *supra* note 72, § 9.

78. *See* *ECL*, *supra* note 73, § 22.

79. *See* *Implementing Regulations*, *supra* note 72, § 16.

80. *Id.* § 17.

81. *See* *ECL*, *supra* note 73, §§ 44, 46.

ployer is located who have completed twelve years of service.⁸² The Implementing Regulations explain that in calculating the average monthly salary, employers must include all cash income payable to the employee during the past twelve months, including bonuses, commissions, allowances, and subsidies.⁸³

In sum, employment laws in China continue to change and evolve, and employers need to remain abreast of the myriad and frequent changes in this area of the law.

VI. Spain

A. NEW LEGISLATION ON INFORMATION AND CONSULTATION RIGHTS OF EMPLOYEES' REPRESENTATIVES

The new legislation on information and consultation rights of the legal representatives of employees has been changed since law 38/2007 entered into force on November 16, 2007.⁸⁴ The new law implemented Directive 2002/14/EC,⁸⁵ and the main changes have been included in clauses 64 and 65 of the Workers' Statute. The changes extend the scope of information and consultation rights of legal representatives and set forth new information and consultation obligations for the employer. The legislation also includes a new right for the employer potentially to exclude highly confidential company information, that cannot be disclosed at a preliminary stage, from the scope of the information and consultation rights of the employee's representatives. Information and consultation rights are defined below.

- Right to information: legal representatives have the right to be informed of the company's economic information as well as non-discrimination policies and procedures that have been implemented to provide equal treatment for employees. The information must be sufficient enough for legal representatives to draft a report when employment law requires it, especially in cases where decisions taken by the employer lead to changes in work organization or in contractual relations.⁸⁶
- Consultation obligations: requires a minimum consultation period with legal representatives during which the employer's final implemented decision must be justified after examining (if relevant) the report drafted by legal representatives, which expresses the representatives' opinion regarding the specified measure.⁸⁷ This consulting system should be followed, particularly in cases where the employer's actions might entail changes in work organization or in contractual relations.⁸⁸
- Potential exception to information and consultation obligations: the employer may exclude the obligation to give information to legal representatives when such information is industrial, financial, or commercial in nature and when disclosure of such

82. *Id.* § 47.

83. See Implementing Regulations, *supra* note 72, § 27.

84. Amending Law of the State Statute of Workers (B.O.E. 2007, 38/2007).

85. Council Directive 2002/14, 2002 O.J. (L 80) 29, 29-34 (EC).

86. See Worker's Statute (B.O.E. 2002, 1/1995), *amended by* Amending Law of the State Statute of Workers (B.O.E. 2007, 38/2007).

87. *Id.* art. 64(6).

88. *Id.* art. 64(5).

information might compromise the proper working system of the company or might produce economic damage.⁸⁹

B. NEW CASE LAW ON COMPULSORY RETIREMENT ESTABLISHED IN COLLECTIVE BARGAINING AGREEMENTS

The European Court of Justice has upheld a Spanish preliminary ruling regarding the validity of compulsory retirement clauses in collective agreements. In its first case dealing with age discrimination, the ECJ agreed that compulsory retirement clauses might be enforced if there is a legitimate justification, e.g., reduction of unemployment levels, and if the person to retire is entitled to obtain public retirement benefits immediately after the compulsory retirement.⁹⁰ Therefore, compulsory retirement is valid in Spain if the collective agreement provides for a compulsory retirement age and if the person reaching that retirement age has access to public retirement benefits.

C. CASE LAW ON PAYMENT OF BONUSES WHEN METRICS ARE NOT SPECIFIED IN THE EMPLOYMENT CONTRACT

The Spanish Supreme Court has established, in recent case law, the principles that apply to the payment of bonuses when the contract of employment only provides for the possibility to receive a bonus without specifying the exact metrics, elements, or targets and instead states that such metrics, elements, or targets will be determined in the future.⁹¹

According to this case law, the fact that the employer has not set out the metrics, elements, or targets for the payment of a bonus cannot prevent the employee from receiving a bonus because the payment of the bonus would be left at the complete discretion of the employer, but the employer cannot simply decide not to apply any metrics, elements, or targets at all. In the case reviewed by the Spanish Supreme Court, the employee was awarded a bonus by the Court in line with the amount of bonuses paid in previous years.

D. NEW CASE LAW ON CALCULATION OF SEVERANCE PAYMENTS IN THE EVENT OF EXERCISE OF STOCK OPTIONS

The Spanish Supreme Court has again considered the nature of stock options and their impact on the calculation of severance payments upon termination of employment.⁹² In this sense, the court stated that stock options are deemed to be salary on the exercise date, with the salary amount constituting the difference between the fair market value of the shares on the exercise date and the exercise price.

The court also ruled that for the calculation of severance payments due upon unfair termination or termination without cause, the profit obtained by the employee as a result of exercising stock options is applied in the year prior to the termination.⁹³ But the full

89. *Id.* art. 65(4).

90. See Case C-411-05, *Palacios de la Villa v. Cortefiel Servicios SA*, 2008 E.C.J. CELEX LEXIS 411 (Oct. 16, 2007).

91. See STS, Nov. 14, 2007 (R.G.D. 616/2007).

92. See STS, June 3, 2008 (R.G.D. 2532/2006).

93. *Id.*

profit obtained within that one-year period is not to be considered for the calculation base. Only a pro-rata portion of such profit, depending on the entire period the stock options actually rewarded, is to be considered for that purpose.⁹⁴

VII. United Kingdom

A. LEGISLATIVE CHANGES

1. *Family Friendly Legislation*

Changes to statutory maternity and adoption leave took effect on October 5, 2008, under the Maternity and Parental Leave and the Paternity and Adoption Leave (Amendment) Regulations of 2008.⁹⁵ Employees who are due to give birth or adopt on or after October 5, 2008, now have the right to the same terms and conditions during additional maternity leave (AML) and additional adoption leave (AAL) as employees currently enjoy during ordinary maternity leave (OML).⁹⁶ Employees will have the right to receive all non-cash benefits under their contract and will continue to accrue annual leave throughout the whole maternity and adoption leave.⁹⁷

2. *Sex Discrimination*

The U.K. Government has amended the Sex Discrimination Act 1975 following a successful U.K. High Court challenge by the Equal Opportunities Commission (now known as the Equality and Human Rights Commission).⁹⁸ The Sex Discrimination Act 1975 (Amendment) Regulations 2008 (2008 Regulations),⁹⁹ which came into effect on April 6, 2008, widens the definition of sex harassment and makes employers liable in certain circumstances for the harassment of an employee by a third party.¹⁰⁰ The 2008 Regulations also amend the definition of discrimination based on pregnancy or maternity to remove the need for a formal comparator of any kind.¹⁰¹

Protection from sex discrimination during maternity leave has been expanded by the 2008 Regulations, thereby eliminating a distinction between an employee on OML and AML for the purposes of a claim for pregnancy or maternity discrimination.¹⁰² This change will apply to women whose expected week of childbirth starts on or after October 5, 2008.¹⁰³

3. *Immigration*

The U.K. Government has implemented the first phases of a full reform of the U.K. immigration system. Over eighty different routes to work and study in the United King-

94. *Id.*

95. Maternity and Parental Leave etc. and Paternity and Adoption Leave (Amendment) Regulations, 2008, 1966 (U.K.).

96. *Id.* § 4.

97. *Id.*

98. Sex Discrimination Act, 1975, 65.

99. Sex Discrimination Act 1975 (Amendment) Regulations, 2008, 656 (U.K.).

100. *Id.* § 4.

101. *Id.* § 2.

102. *Id.* § 5.

103. *Id.* § 1.

dom have been replaced with a single, objective, and transparent points-based system (PBS).¹⁰⁴ The PBS distinguishes between five tiers of migrant workers: (1) highly skilled workers, (2) skilled workers, (3) low-skilled workers, (4) students, and (5) temporary or exchange workers.¹⁰⁵ Tiers one and two were introduced in 2008, while tiers three to five will take effect in 2009. A major difference between the old and new schemes is the requirement that most migrant workers must be sponsored by a U.K.-based employer in order for their application to be successful.¹⁰⁶ The PBS therefore places a greater burden on employers to monitor immigration compliance.

B. CASES

1. *Restrictive Covenants*

Two recent cases in the U.K. High Court have demonstrated a robust approach in situations where employees have colluded to compete with their employer or have attempted a mass poaching of staff. In *UBS Wealth Management (U.K.) Ltd. v. Vestra Wealth LLP*, the High Court granted a springboard injunction against Mr. Vestra following a mass poaching of staff from UBS.¹⁰⁷ The judge held that it was extremely likely that UBS would be able to establish at trial that the poaching had involved both a breach of the implied duty of fidelity by defecting staff and possibly an unlawful conspiracy.¹⁰⁸ The decision is significant, as springboard injunctions have traditionally been used only in cases involving an abuse of confidential information.

The case of *Kynixa Ltd. v. Hynes* concerned three employees who deliberately misled their employer about their intent to join a competitor.¹⁰⁹ The High Court found that two of the employees, by virtue of their senior positions, were in breach of their fiduciary duties and restrictive covenants contained in a shareholders agreement.¹¹⁰ Most significantly, the High Court also found that the third employee, who was more junior and owed no fiduciary duty to Kynixa, was in breach of her duty of fidelity for failing to disclose her decision to defect to a competitor and for being evasive when asked questions about her future plans.¹¹¹

The High Court's decision suggests that an employee who fails to disclose a possible move to a competitor may be in breach of their implied duty of fidelity, even if they have no fiduciary duty to their employer, are not part of senior management, and are not bound by any post-termination restrictive covenants.

2. *Disability Discrimination*

The recent decision by the House of Lords in *Mayor and Burgesses of London Borough of Lewisham v. Malcolm* abrogated the Court of Appeal's decision in *Clark v. TDG Ltd.*, possi-

104. HOUSE OF COMMONS, STATEMENT OF CHANGES IN IMMIGRATION RULES, 2008, H.C. 321, pt. 6A; HOUSE OF COMMONS, STATEMENT OF CHANGES IN IMMIGRATION RULES, 2008, H.C. 607; HOUSE OF COMMONS, STATEMENT OF CHANGES IN IMMIGRATION RULES, 2008, H.C. 1113.

105. See STATEMENT OF CHANGES IN IMMIGRATION RULES, H.C. 1113, Explanatory Memorandum § 6.2.

106. *Id.* § 6.5

107. *UBS Wealth Mgmt. (UK) Ltd. v. Vestra Wealth LLP* [2008] EWHC 1974, ¶ 46 (Q.B.).

108. *Id.* ¶¶ 35, 44.

109. *Kynixa Ltd. v. Hynes* [2008] EWHC 1495, ¶ 284 (Q.B.).

110. *Id.* ¶¶ 256-76, 365-97.

111. *Id.* ¶¶ 277-86

bly changing the law on disability-related discrimination.¹¹² Although the case, decided under Part III of the Disability Discrimination Act 1995 (DDA), concerned a housing authority's decision to evict a schizophrenic tenant who had unlawfully sublet his flat, the decision may likely have far-reaching implications for employment cases under Part II of the DDA and will make it more difficult for employees to bring claims.

Clark v. TDG Ltd. established the principle that the correct comparator in a case of disability-related discrimination is someone, whether or not disabled, who was not subject to the less favorable treatment applied to the disabled employee.¹¹³ For example, in a case where a disabled employee who has been absent for ill health is dismissed, the comparator would be an employee, whether or not disabled, who has not been absent for ill health. In *Malcolm*, the House of Lords departed from this test and held that the correct comparator was a non-disabled person who had unlawfully sublet his property, the same action taken by the disabled person.¹¹⁴ The effect has been to redefine the appropriate comparator for establishing less favorable treatment, so as to make it much more difficult for a claimant to succeed in proving disability-related discrimination.

The U.K. Government has now implemented a consultation process in order to determine how the forthcoming Equality Bill should address disability discrimination in light of the House of Lords' decision in *Malcolm*.

VIII. United States

A. AMENDMENTS TO THE AMERICANS WITH DISABILITIES ACT

In 2008, Congress passed and President Bush signed into law amendments to the Americans with Disabilities Act (ADA). The ADA prohibits employers from discriminating against qualified individuals who are disabled and requires employers to provide reasonable accommodations to individuals with disabilities. Effective January 1, 2009, the amendments radically expand the ADA and overturn numerous Supreme Court decisions.

The amendments contain three significant features. First, they broadly define the term "disability." The ADA only covers those individuals with a physical or mental impairment that substantially limits one or more major life activities. The Supreme Court had interpreted this definition very narrowly by, among other things, requiring the physical or mental impairment to have permanence. The amendments alter this interpretation and provide that the term "disability" "shall be construed broadly" and extends its meaning to encompass impairments that are "episodic or in remission," including those that are temporary.¹¹⁵

Second, the amendments also expand the definition of "major life activity" to include a non-exhaustive list of activities such as "performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, con-

112. *Mayor and Burgesses of London Borough of Lewisham v. Malcolm* [2008] UKHL 43 (H.L.); *Clark v. TDG Ltd.* [1999] IRLR 318 (A.C.).

113. *Clark* [1999] IRLR 318, ¶ 91.

114. *Malcolm* [2008] UKHL 43, ¶¶ 12-16, 30-33, 40, 112-116, 139, 140, 151, 154.

115. 42 U.S.C. § 12102(4) (2009) (effective Jan. 1, 2009).

centrating, thinking, communicating, and working.”¹¹⁶ The definition also includes “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”¹¹⁷

Third, the amendments overturn Supreme Court precedent that permitted employers and courts to take into account mitigating measures (such as medication) when determining whether an individual is “disabled” and entitled to protection under the ADA. Now, the substantial limitation inquiry of the ADA’s disability definition must be undertaken without regard to any mitigating measures, such as medications or assistive devices.¹¹⁸ Thus, an individual who, because of the medication she takes, exhibits no limitations to any major life activity can nonetheless be “disabled” under the ADA. The only exception is ordinary eyeglasses and contact lenses.

Because of these changes to the ADA, employers can expect many more employees to fall under the definition of “disabled.” This increase will force employers to incur greater accommodation costs as many more employees will be covered by the ADA and entitled to reasonable accommodations. Employers can also expect greater litigation over whether employment decisions that adversely affect employees were the product of disability discrimination.

B. THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008

In 2008, the United States enacted the sprawling, complex, and highly technical Genetic Information Nondiscrimination Act (GINA). This law prohibits employers and health insurers from discriminating against individuals based on their genetic predisposition toward a disease.

Borrowing language from Title VII of the Civil Rights Act of 1964, 29 U.S.C. § 2000e *et seq.* (Title VII), GINA makes it an unlawful employment practice for an employer, employment agency, or labor organization to hire, discharge, or otherwise discriminate against an employee, prospective employee, or in the case of a labor organization, a member, because of the individual’s genetic information.¹¹⁹ As with Title VII and similar anti-discrimination statutes, GINA prohibits discrimination with respect to promotions, compensation, training programs, and other terms and conditions of employment.¹²⁰

Further, GINA generally prohibits employers from requesting, requiring, or buying information about employees, prospective employees, or their family members, except in limited circumstances (such as when necessary to comply with Family and Medical Leave Act).¹²¹ Employers who legitimately possess such information must maintain the confidentiality of the information and keep the information in separate files, and they cannot disclose the information except in limited circumstances.¹²²

116. *Id.* § 12102(2)(A).

117. *Id.* § 12102(2)(B).

118. *Id.* § 12102(4)(E).

119. *See* 42 U.S.C. § 2000ff-2 (effective Nov. 21, 2009).

120. *See id.*

121. *See* 42 U.S.C. § 2000ff-5 (effective Nov. 21, 2009).

122. *See id.*

Employers, employment agencies, labor organizations, and group health plans that violate GINA are subject to all of the administrative and remedial schemes set forth in Title VII.¹²³ Thus, violators of GINA could be liable for compensatory and punitive damages.

GINA also prohibits any group health plan from adjusting premium or contribution amounts for the group covered under such plan on the basis of genetic information.¹²⁴ Group health plans, however, are allowed to adjust rates and premiums based on the manifestation of a disease of an individual enrolled in its plan.¹²⁵

C. CHANGES TO THE FAMILY AND MEDICAL LEAVE ACT

In 2008, there were two fundamental changes to the Family and Medical Leave Act (FMLA): (1) expanded coverage to protect family members of soldiers and sailors and (2) revised regulations.

1. *Expanded FMLA Coverage*

Early in 2008, President Bush signed into law amendments to the FMLA. The amendments create two new forms of FMLA leave. First, the law provides employees with active duty FMLA leave for up to twelve weeks in a twelve-month period of unpaid leave due to a “qualifying exigency” resulting from active duty (or notice of impending call to active duty) in the Armed Forces of an employee’s spouse, child, or parent.¹²⁶

Second, the amendments provide employees with serious injury or illness FMLA leave.¹²⁷ Under this provision, employees may take up to twenty-six weeks (rather than the usual FMLA leave of twelve weeks) during a single twelve-month period of unpaid leave to care for the “serious injury or illness” of a service member who is the employee’s spouse, child, parent, or next of kin.¹²⁸

2. *Revised Regulations*

On November 17, 2008, the U.S. Department of Labor (DOL) issued final revised regulations for the FMLA. These revisions are the first changes to the FMLA’s regulations in thirteen years. The revised regulations, among other things, clarify who is eligible for FMLA leave, revise FMLA notice requirements, require employees to cooperate with employer requests for health care certifications (and fitness for duty certifications) and put time limits on employee submission of such forms, prohibit employers from requiring employees to perform light duty in lieu of FMLA leave, and provide guidance on when employees are eligible for active duty FMLA leave and serious injury or illness FMLA leave. The revised regulations also allow employees voluntarily to waive their FMLA rights retrospectively (but not prospectively) without seeking DOL or court approval.

123. See 42 U.S.C. § 2000ff-6 (effective Nov. 21, 2009).

124. 42 U.S.C. § 300gg-53 (effective May 21, 2009).

125. See *id.*

126. See 29 U.S.C. § 2612(a)(1)(E) (2009).

127. See *id.* § 2612(a)(3).

128. See *id.*

