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Employment Law

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I. Argentina

A. SEVERANCE CALCULATION

The House of Representatives approved several bills proposed by the government aimed at disregarding severance caps, increasing the severance thresholds and including non-monthly payments in the severance calculation (annual bonuses being the most common example).[1] The Senate's approval on this legislation is pending.

This initiative from the government is consistent with the pro-employee positions adopted by Argentine labor courts that disregard statutory severance caps and take different (and to some extent contradictory) positions concerning the items needed to be included in severance, such as annual bonuses, stock option plans, company cars, cellular phones and other benefits granted to employees.[2]

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1. Replacement of Section 245 of Seniority Law 20.744, Bill of Law No. 318-D-2008 (Arg. 2009); Reviewing Chamber Senate No. 44-CD-2009 (Arg. 2009).

2. *See* Corte Supreme de Justicia, [CJSN], 16/11/82, "Heimann, Raúl v. Rigolleau SA," DJBA, 124-349 (Arg.); *see* Corte Supreme de Justicia, [CJSN], 3/6/86, "Borsani, Jorge A. v. Gillette de Argentina," LL 1987-C, 423 (Arg.); Camara Nacional de Apeclaciones del Trabajo de la Capital Federal (CNTrab.), Room II, 26/7/05, "La Giglia, Horacio Ramón v. Xerox Argentina ICSA On Dismissal," Errepar OnLine, BD-T05260 (Arg.); Camara Nacional de Apeclaciones del Trabajo de la Capital Federal (CNTrab.), Room II, 20/6/07, "Petruzzi, Alfredo v. IBM Argentina S.A.," IMP 2007-17 (Arg.); Camara Nacional de Apeclaciones del

These contradictory decisions have created uncertainty for employers in determining the lawful amount of severance. In reaction, the National Labor Court of Appeals has issued a full bench decision in which it decided that performance bonuses paid to employees on other than a monthly frequency should not be included in the monthly salary for severance purposes.[3] This decision provides employers with a higher degree of certainty regarding their amount of severance exposure.

Full bench decisions are an exception in the Argentine court system and unlike other decisions, do have precedential effect.

B. Definition of Remuneration

The Argentine Supreme Court of Justice has declared unconstitutional section 103(c) of the Labor Contract Law No. 20,744 (LCL), which provided that meal and food vouchers were permissible non-remuneration.[4] Consequently, certain food vouchers formerly granted by employers pursuant to Section 103(c) can be considered unregistered remuneration. Although these food vouchers are no longer granted because section 103 (c) has been abolished, vouchers granted prior to such abolishment may now be claimed as remuneration pursuant to this case law, which may have consequences in determining severance.

In addition, the National Labor Court of Appeals has recently held that certain non-remunerative payments negotiated in collective agreements duly approved by the Labor Ministry are unregistered payments, and can now be considered remuneration.[5]

The most relevant consequence of these decisions, as opposed to the full bench decision regarding annual bonuses, is that they create a high degree of uncertainty and increase the likelihood of additional litigation over the inclusion of these payments in severance calculations.

C. Pension System

Another recent change is the amendment to the Argentine pension system.[6] Until 2009, there was a split system under which employees could choose to have their pension funds deposited in accounts administered by private companies, or directly paid to the government. The amendment eliminated the availability of private administrators and

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Trabajo de la Capital Federal (CNTrab.), Room IV, 11/3/05, "Pérez, Patricia M. v. Máxima AFJP," DT, 2006 (May) 743 (Arg.); Camara Nacional de Apeclaciones del Trabajo de la Capital Federal (CNTrab.), 27/3/00, Room X, "Fernández v. Telefónica," DT 2000-B, 1997 (Arg.); Camara Nacional de Apeclaciones del Trabajo de la Capital Federal (CNTrab.), Room III, 30/11/07, "Saint Jean Alejandro Roberto v. Disco S.A. on dismissal," "La Ley Online" (Arg.).

3. Camara Nacional de Apeclaciones del Trabajo de la Capital Federal (CNTrab.), full-bench regarding "Tulosai, Alberto Pascual v. Central Bank of the Republic of Argentina on Law 25,561 (File No. 8448/06), original from Room VII (CNTrab.), full-bench regarding "Tulosai, Alberto Pascual v. Central Bank of the Republic of Argentina on Law 25,561 (File No. 8448/06), original from Room VII.

4. Corta Suprema de Justicia de la Nacion (CSJN), 1/9/09, "Pérez, Aníbal v. Disco S.A., Scp No. 1911, L. XLII (Arg.).

5. Camara Nacional de Apeclaciones del Trabajo de la Capital Federal (CNTrab.), 26/6/09, "Gimenez Patricia v. Blockbuster Argentina S.A." (Arg.).

6. Law 26,425, Official Gazette 31548 (Dec. 9, 2008) (Arg.).

now requires the transfer of all funds (formerly included in nominal accounts identified on an employee-by-employee basis) to global government-administered accounts.[7]

II. Denmark

A. Record-breaking Compensation of DIKE 100,000 for Deficient Employment Contract

A dismissed Danish employee filed a claim against his former employer pursuant to the Danish Employment Contracts Act[8] arguing that the employment contract incorrectly stated that the employee was not a salaried employee as defined in the Danish Salaried Employees Act.[9] The Copenhagen City Court awarded the employee a record-breaking compensation of DIKE 100,000, corresponding to fifteen weeks' salary, for the deficient employment contract.[10]

The employee, who was trained in retail, was employed by the company in January 2000. The employee mainly performed work related to the daily purchase of goods for the wine and spirits department, engaged in customer service, and negotiated with suppliers.

During his employment with the company, the employee had three employment contracts, each stating different employment terms.[11] One stated that the employee was salaried.[12] The other two stated that the employee was a non-salaried employee and was covered by a collective agreement with a shorter notice period.[13] The tasks of the employee were the same during the entire employment period.[14] When the employee was dismissed in May 2007 on grounds of restructuring, he commenced proceedings against the company claiming, among other things, that he was entitled to compensation according to The Employment Contracts Act because the employment contract incorrectly stated that the employee was a non-salaried employee employed under a collective agreement and not a salaried employee.[15]

The Court concluded that the alternating designations under the employment contract, notwithstanding the fact that the employee performed the same tasks, was an aggravating factor, justifying additional compensation for a deficient contract under Section 6, Subsection 1, of The Employment Contracts Act.[16] Under this section, compensation may

7. *Id.*

8. *See* [Danish Employment Contract Act], (Consolidation Act no. 1011, of Aug. 15 2007), Lovtidende A [Danish Gazette] [D.G], *available at* https://www.retsinformation.dk/Forms/R0710.aspx?id=31353 (amended by Law no. 482 of June 12, 2009, Lovtidende A [Danish Gazette] [D.G], *available at* https://www.retsinformation.dk/Forms/R0710.aspx?id=125440).

9. *See* Copenhagen City Court case BS 31C-4404/2008, at 10 (July 17, 2009).

10. *Id.* at 13.

11. *See* Claus Molbech Bendtsen, *Unexpected Compensation in Case Regarding Employment Contract*, Moalem Wettemeyer Bendtsen, Sept. 28, 2009, at 1, *available at* http://www.mwblaw.dk/en/Nyheder/28092009Ansaettelsesbevis.aspx.

12. *Id.*

13. *Id.*

14. *Id.* at 2.

15. *Id.* at 1.

16. *Id.* at 2.

amount to up to twenty weeks of salary. The Court therefore assessed compensation at fifteen weeks of salary, corresponding to approximately DIKE 100,000.[17]

III. France

A. Reform on Employment of Seniors

The Social Security Finance Act for 2009 (the Act) was enacted to address the challenges to the social security system of an aging population and promote the employment of older workers.[18]

By the end of 2009, the Act requires companies and group companies with at least fifty employees to conclude an agreement with social partners or, failing that, unilaterally establish an action plan subject to the validation of the Departmental Labor Directorate, aimed at maintaining employees aged fifty-five and over in employment and/or hiring individuals who are aged fifty and over.[19] The Act provides that failure to have an agreement or action plan by January 1, 2010, could result in companies or groups paying a penalty of one percent of their total payroll to the old-age pension fund.[20]

This reform also seeks to push back the retirement age to seventy.[21] Until now, employers were entitled to pension off their employees after they reached sixty-five years of age, provided they were entitled to full pension under Social Security regulations.[22] Since January 1, 2009, employers can no longer pension-off employees under the age of seventy without the concerned employee's prior consent.[23]

B. Redeployment Search Cannot be Limited by Questionnaire

In 2009, the French Supreme Court clarified an employer's obligation to provide redeployment opportunities abroad to employees who will be made redundant, ruling that "[t]he employer cannot limit its search for redeployment opportunities and offers based on its employees' wishes, expressed at its request and in advance, outside any concrete offer."[24] A previous decision by the French Supreme Court for administrative matters confirmed the practice by employers to first determine an employee's interest in relocating abroad prior to searching for vacant positions. Based on this new case, however, employers cannot limit the redeployment offers made to an employee on the assumed basis that the latter will refuse them. The employer must offer a concrete mobility opportunity.

17. *Id.*

18. Law No. 2008-1330 of Dec. 16, 2008, Journal Officiel de la République of Française [J.O.] [Official Gazette of France], Dec. 17, 2008; Law No. 0294 of Dec. 18, 2008, art. 87 Journal Officiel de la République of Française [J.O.] [Official Gazette of France], Dec. 19, 2008, (referencing articles L. 138-24 to L. 138-28, R. 138-25 to R.138-31, & D.138-25).

19. Law No. 2008-1330; Law No. 0294.

20. Law No. 2008-1330; Law No. 0294.

21. Law No. 2008-1330, art. 90 (referencing Articles L.1237-5 & D.1237-2-1 of the Labor Code).

22. Philippe Desprès, *Seniors to Work Longer to Help Preserve Social Security System Under New Government Policy*, ABA Int'l Lab. & Emp. L. Committee Newsl., Dec. 2009, at 1, *available at* http://www.abanet.org/labor/intlcomm/newsletter/2009/12/france.shtml.

23. *Id.*

24. Cour de cassation, Employment Div., No. 07-42.381 FS-PBR (Mar. 4, 2009), *available at* http://lesrapports.ladocumentationfrancaise.fr/BRP/094000262/0000.pdf.

Otherwise, the company will be deemed to have circumvented its redeployment obligation, exposing itself to a claim for unfair dismissal.

IV. Germany

A. The German Accounting Law Modernization Act

In many companies, pension obligations to employees are an important component of total remuneration. Particularly in medium-sized companies, accounting for these obligations is reflected in the company balance sheet based on Tax Code valuations requirements.

The German Accounting Law Modernization Act (BilMoG), in force since May 28, 2009,[25] has changed commercial accounting practices significantly, and affects the accounting for pensions and similar obligations (*i.e.*, benefits, death benefits, or retirement liabilities). The Accounting Law Modernization Act resembles the international accounting standards (IFRS), but it retains the principles of German commercial law.[26]

1. *Discounting*

Until the Accounting Law Modernization Act came into force, the valuation of pension obligations followed the tax provisions of the (German) Income Tax Act in Section 6a.[27] The requirements of Section 6a of the Income Tax Act were as follows:

- the application of the actuarial partial value method;
- a discount rate of six percent p.a. for discount future payments; and
- no consideration of expected changes of ratings, such as expected payment increases and indexation of pensions.[28]

From an economic point of view, provisions under Section 6a of the Income Tax Act led to underrated valuations and were also significantly lower than those made in accordance with the IFRS. Therefore, these provisions did not paint a realistic picture of actual obligations.

The Accounting Modernization Act is oriented towards the economic realities. Instead of taking only the conditions at the contribution date into account, valuations are determined by the expected settlement amount of the obligation. Therefore, Section 253 of the Commercial Code includes the following requirements for the valuation of pension obligations:

- Partial value method or the required procedure for benefits prescribed for the IFRS financial statements;

25. Bilanzrechtmodernisierungsgesetz [BilMoG] [German Accounting Law Modernization Act, No. 27], May 25, 2009, *available at* http://www.bmj.bund.de/files/-/3691/bilmog_gesetz_bundesgesetzblatt.pdf.

26. *See* Press Release, German Federal Ministry of Justice, Modernisation of Accounting Law (Mar. 26, 2009), *available at* http://www.bmj.bund.de/enid/0,5cecef6e657565737563686509 2d0931/Commercial-Economic-Law/Modernisation_of_accounting_law_1gs.html; Entwurf eines Gesetzes zur Modernisierung des Bilanzrechts (Bilanzrechtsmodernisierungsgesetz–BilMoG) [Modernisation of Accounting Law], July 30, 2008, *available at* http://dip21.bundestag.de/dip21/btd/16/100/1610067.pdf.

27. Einkommensteuergesetz [EStG] [Income Tax Act], Oct. 16, 1934, at § 6a, *available at* http://www.gesetze-im-internet.de/bundesrecht/estg/gesamt.pdf.

28. *Id.*

- Interest rate based on the average market rate of the last seven years and published monthly by the German Central Bank;
- Provisions for the expected settlement amount of the obligations (future changes of relevant ratings are to be taken into account).[29]

2. *Period of Application and Transitional Arrangements*

The accounting rules are prescribed for the financial years starting from January 1, 2010. Transitional arrangements under Article 67 of the Introductory Act to the German Code of Commercial Law (EGHGB)[30] enable the distribution for obligations as the result of the changed evaluation method for a period up to December 31, 2024.

V. Japan

A. Amendments to the Child Care and Family Care Leave Law

Amendments to the Child Care and Family Care Leave Law (CCFCLL)[31] went into effect on September 30, 2009. The amendments attempt to ensure the effectiveness of CCFCLL and to promote the taking of childcare leave. Pursuant to the amendments, when the Director-General of the Prefectural Labor Bureau is asked to provide assistance in a conflict regarding the taking of childcare leave, it shall provide necessary assistance, advice, and admonition.[32] The amendments provide that employers shall not dismiss or otherwise treat an employee disadvantageously for requesting such assistance. Also, the Minister of Health, Labor, and Welfare (MHLW) shall publicly disclose the name of any employer who does not comply with an admonition it receives for violating the law. Further, an employer who provides a false report to the MHLW in response to a request under the CCFCLL shall be punished by a civil fine not to exceed 200,000 yen.[33] In addition, certain other childcare leave enhancements will go into effect by June 1, 2010.[34]

B. Employment of Foreign Workers

Under the Employment Measures Law, which went into effect on October 1, 2009, when a foreign worker resigns from an employer, the employer must submit a notification to the public employment stabilization office. Also, an employer who employs foreign

29. Handelsgesetzbuch [HGB] [Commercial Code], May 10, 1897, § 253, *available at* http://www.gesetze-im-internet.de/bundesrecht/hgb/gesamt.pdf.

30. Einführungsgesetz zum Handelsgesetzbuch [EGHGB], May 5, 1897, art. 67, *available at* http://www.gesetze-im-internet.de/bundesrecht/hgbeg/gesamt.pdf.

31. Ikuji-Kyugyo Kaigo-kyugyo-tou Ikuji mataha Kazoku Kaigo wo Okonau Rodo-sha no Fukushi ni kansuru Horitsu, [Child Care and Family Care Leave Law], Law No. 76 of 1991, *translation available at* http://www.jiwe.or.jp/english/law/law4_1_3.html (amended 2009) (Japan).

32. *Id.* art. 52(4).

33. *Id.* art. 68.

34. The main amendments are: (1) the employer must adopt the shortened working hour system (six hours per day) if an employee taking care of a child under three years old so requests; (2) if an employee has two or more children under elementary school age, the employee may obtain leave to care for the sick or injured child for up to ten days per year; (3) both father and mother may take child care leave, which can be extended until the child reaches fourteen months of age; and (4) the employee may take leave of up to five days to care for one family member and up to ten days to care for two or more family members per year.

workers as of October 1, 2009 must submit the relevant notification concerning the employment of foreign workers by September 30, 2010.

C. Other Developments

Due to difficult economic conditions in Japan after the fall of 2008, many manufacturing companies terminated dispatched (temporary agency workers) employment contracts and have not renewed fixed-term employment contracts.[35] Many workers filed lawsuits seeking to invalidate the termination, though no final judgments have yet been rendered. Judicial precedents regarding the validity of these types of dismissals will likely accumulate in the near future. The government has begun to discuss proposals to revise the Worker Dispatch Law of 1985 to protect dispatched employees in light of these employment losses.

VI. Spain

A. Extension of Coverage of Unemployment Benefits During Temporary Lay-offs

The Spanish Government passed Royal Decree 2/2009, dated March 6, 2009,[36] for urgent measures to maintain employment and to protect unemployed people by extending the coverage period of unemployment benefits for employees on a temporary lay-off who, after the temporary lay-off, are made redundant. Essentially, when a company decides to make employees redundant who have previously been on a temporary lay-off, the employees will still be entitled to the maximum unemployment benefits as if the unemployment benefits received during the temporary lay-off had not been received, with a maximum period of unemployment benefits for 120 days.

B. Extension of Paternity Leave in the Event of Child Birth or Adoption

Act 9/2009, dated October 6, 2009,[37] extended the paternity leave benefit from thirteen to fourteen uninterrupted weeks, beginning from the date of the birth of the child or the court ruling confirming an adoption.[38] This extension of paternity leave enters into force on January 1, 2011, and is an unpaid leave with certain benefits paid by the Social Security authorities.

35. Scott North, *Japan Temps May Get New Deal, of Sorts*, Asia Times, Jan. 27, 2010, *available at* http://www.atimes.com/atimes/Japan/LA27Dh01.html.

36. Spanish Government Royal Decree 2/2009, Mar. 6, 2009 (BOE, 2009, 30843-59).

37. Spanish Government Royal Decree 9/2009, Oct. 6, 2009 (BOE, 2009, 84692-94).

38. *Id.*

C. Implementation of the Services Directive

On November 23, 2009, Spanish Act 17/2009[39] was enacted transposing services according to the EC Directive.[40] In accordance with the Directive, the new Spanish legislation regulates the rendering of services of already established companies and services providers within the European Union, with simplified administrative requirements.[41] Even though there are no specific employment related provisions in the new Act–save that temporary work agencies are excluded from the applicable scope of the Act–it is expected that the new Act will facilitate the launching of new businesses in Spain.

D. New Case Law on Temporary Sick-Leave and Paid Annual Leave

The Spanish Supreme Court of Justice[42] recently created a new legal doctrine concerning temporary sick-leave. The Court ruled that an employee on a temporary sick-leave shall still be entitled to the holiday accrued during that period upon returning to work, even if the period to carry out the holidays has expired.

The Supreme Court asserted that the concept of annual paid leave can only be fully accomplished when an employee has full physical and mental capability.[43] This new Supreme Court doctrine is based on the recent case law of the European Court of Justice,[44] which analyzed the scope of Section 7.1 of the EC Directive 2003/88,[45] which determined the right to a paid annual leave when the employee is on sick-leave.

VII. Sweden

A. Offers of Alternative Employment in a Redundancy Situation

In a recent judgment, the Swedish Labor Court concluded that an employer, in a redundancy situation, does not have to offer vacant positions according to employees' length of service.[46] The Court also stated that transfer offers are reasonable even if the new positions are placed at another location (from Stockholm to Uppsala) and represent a decrease in the employment benefits for the employees.[47] In the instant case, an employer with operations in several cities in Sweden had a production stop at its location in Uppsala.[48] As a result, the number of employees had to be reduced by half.[49] The company had vacant positions in its Stockholm location and offered its employees these positions.[50] Two of the employees had longer lengths of employment than several of the other em-

39. Spanish Parliament Act 17/2009, Oct. 7, 2009 (BOE, 2009, 99570-92).
40. Council Directive 2006/123/EC 2006 O.J. (L 376) at 9-18 (EC).
41. *Id.*
42. *See* Tribunal Supremo (TS), (Employment Court, General Section), 24 June 2009 (Appeal 1542/2008).
43. *Id.*
44. *See* G Schultz-Hoff et al., 2009 ECJ EUR-Lex LEXIS 82, ¶ 63.
45. Council Directive 2003/88/EC 2003 O.J. (L 299) at 9-18 (EC).
46. Arbetsdomstolen [AD] [Labor Court] 2009-17-06 ref 50 (Swed.).
47. *Id.*
48. *Id.* at 3.
49. *Id.*
50. *Id.*

ployees, and did not accept the company's transfer offers.[51] As a result, their employment was terminated due to redundancy.[52] These two employees argued that the transfer offers were not reasonable because of the commute time and because of personal reasons.[53]

The question before the Swedish Labor Court was whether the company had an obligation to transfer its employees in a priority order based on the employees' length of employment and whether the transfer offers were reasonable.[54]

The Court concluded that, when facing a first-phase redundancy situation, an employer has an obligation to offer its employees vacant employment positions as stated in Section 7 of the Swedish Employment Protection Act.[55] Nevertheless, the Court found that the employer did not need to offer vacant positions in accordance with the order of priority.[56]

Subsequently, if there is still a need to terminate employees, an employer is obligated to terminate them in turn, based on the employees' lengths of employment, as stated in Section 22 of the Swedish Employment Protection Act.[57] Furthermore, the court found the offer of alternative employment was reasonable, as it was possible for both the employees to commute on a daily basis, despite the subjective personal reasons put forward by the employees.

As a result, an employer within its management rights can offer vacant positions to the employees that are most suitable for them, as long as this procedure does not interfere with good conduct in the labor market or legislation prohibiting discrimination. In addition, a transfer offer to a work location with a daily commute is considered reasonable.

VIII. United Arab Emirates

A. Limits on Termination of Services of UAE Nationals

Ministerial Resolution No. 176, which restrains the right of private sector entities to terminate the employment of UAE nationals, came into effect on February 17, 2009.[58] The Ministerial Resolution advanced the Emiratasion policies (policies to promote the qualification and growth of the employment of UAE nationals) and confirmed the special protection granted to UAE nationals by Federal Law No. 8 of 1980 (as amended) (Labor Law).[59] These protections are twofold: a termination is considered unlawful and arbitrary if material requirements or procedural requirements are not met by the employer.[60] For material grounds, the termination is arbitrary if it is based on grounds other than those

51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 7.
55. *Id.*; *see also* 7 § Employment Protection Act (SFS 1982:80) (Swed.), *available at* http://www.sweden.gov.se/sb/d/5807/a/76536.
56. Arbetsdomstolen [AD] [Labor Court] 2009-17-06 ref 50, at 10-11.
57. 22 § Employment Protection Act (Swed.).
58. *See* Ministerial Res. No. 176 of 2009 on Regulations of Termination of Service of Private Sector National Employee (U.A.E.).
59. *See* Fed. Law No. 8 of 1980 on Regulation of Labour Relations (U.A.E.). Article 9 of the Labor Law provides that work is an inherent right of nationals of the UAE, and that preferences in employment relationships shall be given to them. According to Article 10 of the Labor Law, when a UAE national is not available, a preference shall be given to Arab nationals and, afterwards, to other nationals.
60. *See* Ministerial Res. No. 176 of 2009 art. 1(i)-(ii) (U.A.E.).

provided for in Article 120 of the Labor Law,[61] if an employer employs a non-UAE national employee who is assigned the same duties as the terminated UAE national employee, or if a UAE national employee is not paid all his entitlements due at the time of termination.[62] For procedural grounds, the termination is considered arbitrary if the employer fails to notify the Ministry of Labor thirty days prior to terminating the employee or fails to implement the Ministry of Labor instructions following such notification.[63]

If the Ministry of Labor determines that a termination of a UAE national is unlawful and arbitrary, it will send a notice to the employer requesting amicable settlement of the dispute. If settlement cannot be reached, the matter is referred to the competent court to hear the matter. One consequence stipulated in the Ministerial Resolution is that, until a final judgment is issued in relation to the dispute between the employer and the UAE national employee, no new work permit and employment visa will be issued for employees working for the employer.[64] The Ministerial Resolution does not specify whether this provision applies only to new employees applying for an employment visa, or whether it also applies to current employees applying for an employment visa renewal. The Ministerial Resolution does not provide for other consequences to an employer if an arbitrary termination of an UAE national employee occurs. Potentially, Article 123 of the Labor Law will apply. Article 123 of the Labor Law provides that, in the case of an arbitrary dismissal, the employee shall be entitled to compensation for damages, which cannot exceed the equivalent of an employee's remuneration for three months.[65] There are as yet no reported UAE court decisions applying Article 123.

B. Wage Protection System

Ministerial Decree No. 788 provides for the protection of wages and came into effect on September 1, 2009.[66] The Decree was a response to the growing number of claims brought in relation to payment of salaries, particularly in the construction sector and other sectors, where a large number of unskilled workers are employed. The Decree requires employers to pay all salaries through bank transfers, or transfers from other UAE financial institutions, and retain supporting documentation evidencing the transfer.[67] Further, the Ministry of Labor may request the employer to submit such supporting documentation at any time.

The Decree provides a grace period for employers to implement the new bank or financial institution salary payment requirement; the grace period varies according to the number of employees.[68] Entities employing fifty or more employees must submit a monthly declaration to the Ministry of Labor showing that payment of salaries has been made until they implement the salary payment via transfer to banks and financial institutions.[69] The authorized signatory of the employer may face civil and criminal liability for any false

61. *See* Fed. Law No. 8 of 1980 art. 120 (U.A.E.).
62. *See* Ministerial Res. No. 176 of 2009 art. 1(iv).
63. *Id.* art. 1(iii).
64. *Id.* art. 3.
65. *See* Fed. Law No. 8 of 1980 art. 123.
66. Ministerial Decree No. 788 of 2009 on Protection of Wages (U.A.E.).
67. *Id.* arts. 1-2.
68. *Id.* art. 3.
69. *Id.* art. 5.

information contained in the monthly declaration.[70] Employers who fail to pay any salaries (or to submit the monthly declaration for the interim period) will be prevented from obtaining any new work permits and employment visas for a period of time that will depend on the number of repeating violations.[71]

In addition to the Decree, a Wages Protection Office was established within the Ministry of Labor to oversee the implementation of the Decree, and guarantee that salaries in the private sector are timely paid.[72] The Ministry of Labor has also created a mechanism whereby employees may file a salary complaint through the Ministry of Labor's website without having to disclose their identity.[73]

IX. United Kingdom

A. Major Legislative Reforms

1. *Employment Act 2008*

The Employment Act 2008[74] (the Act) came into force on April 6, 2009. The Act repealed the statutory dismissal, disciplinary and grievance procedures contained in the Employment Act 2002,[75] and brought in a new regime affecting most Employment Tribunal (ET) claims. Under the previous law, a dismissal made without following the relevant statutory procedures was automatically unfair. Instead, an ET will examine whether an employer's conduct was within the range of reasonable responses, with reference to the procedures and advice set out in the new Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice on Disciplinary and Grievance Procedures[76] (the Code).

The Code encourages employers who are considering dismissing an employee to investigate all issues, hold a hearing, provide a decision in writing, and inform the employee of the right of appeal.[77] The Code applies to most disciplinary matters and grievances, but not to redundancy situations, the non-renewal of fixed-term contracts, or grievances raised by an employee representative on behalf of two or more employees.[78] ETs can increase or reduce compensatory awards by up to twenty-five percent, according to whether and why the employer (or employee) failed to comply with the Code.[79]

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70. *Id.* arts. 4, 7.

71. *Id.*

72. *UAE-Wage Protection Office Set Up to Protect the Rights of Workers*, Khaleej Times, Oct. 22, 2008, *available at* http://www.menafn.com/qn_print.asp?StoryID=1093217011&subl]true.

73. *Id.*

74. Employment Act, 2008, c. 24 (Eng.).

75. Employment Act, 2002, c. 22 (Eng.).

76. *See* Advisory, Conciliation and Arbitration Service Code of Practice, Disciplinary and Grievances at Work–The ACAS Guide (2009), *available at* http://www.acas.org.uk/ChttpHandler.ashx?id=1043.

77. *See id.* at 17-18, 23.

78. *See id.* at 2-4, 41.

79. *See id.* at 4.

B. Case Law Developments

1. *R (on the Application of Age UK) v. Secretary of State for Business, Innovation and Skills*[80]

Following the publication of the Employment Equality (Age) Regulations 2006,[81] the charity Age UK sought a judicial review of the national default retirement age (DRA) of sixty-five. Age UK argued that because the Age Regulations included a DRA of sixty-five applicable to all UK workers, the United Kingdom had improperly implemented European Union Directive 2000/78/EC.[82] The case was referred to the European Court of Justice (ECJ), which published its judgment in March 2009, stating that the United Kingdom has to meet a high standard of proof in demonstrating that the current DRA is justifiable on grounds of social or employment policy.[83] In September 2009, the High Court (HC) held that the DRA of 65 was lawful when it was introduced in 2006. Nonetheless, the HC gave a strong indication that the position will likely change after the forthcoming review by the UK Government in 2010 as there is now a compelling case for setting the DRA higher than sixty-five.[84]

2. *Her Majesty's Revenue and Customs v. Stringer (sub nom Ainsworth v. IRC)*[85]

A worker claimed unpaid holiday during a period of long-term sick leave. The case was referred to the ECJ prior to being decided by the House of Lords (HL).[86] The ECJ held that under Directive 2003/88/EC,[87] workers must be allowed to accrue holiday during periods of sickness absence.[88] It is for EU member states to decide whether workers may actually take their statutory holiday during a period of sick leave.[89] If workers are prevented from taking their holiday because of sickness, they must be allowed to take it on their return to work, even if this means carrying it over to the next leave year.[90]

Following the ECJ's decision, Her Majesty's Revenue & Customs conceded, and the HL implicitly agreed,[91] that even though the Working Time Regulations promulgated in 1998[92] (WTR) expressly rule out carryover of statutory holiday to the next leave year, the

80. R (on the application of Age UK) v. Secretary of State for Business, Innovation & Skills [2009] EWHC 2336, [2009] All ER 141 [hereinafter Age UK v. Secretary of State for BIS].

81. The Employment Equality (Age) Regulations, (2006) S.I. 2006/1031 (U.K.).

82. Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L303).

83. Case C-388/07, The Queen v. Sec'y of State for Business, Enterprise and Regulatory Reform, 2009 ECJ EUR-Lex LEXIS 151 (Mar. 5, 2009).

84. Age UK v. Secretary of State for BIS, [2009] EWHC 2336, ¶ 126.

85. Her Majesty's Revenue and Customs v. Stringer [2009] UKHL 31, [2009] ICR 985 [hereinafter Stinger].

86. Joined Cases 350 & 520/06, Gerhard Schultz-Hoff v. Deutsche Rentenversicherung, 2009 ECJ EUR-Lex LEXIS 82 (Mar. 21, 2009) [hereinafter Schultz-Hoff and Others].

87. Council Directive 2003/88/EC, Concerning Certain Aspects of the Organization of Working Time, 2003 O.J. (L299/9).

88. Schultz-Hoff et al., 2009 ECJ EUR-Lex LEXIS 82, ¶¶ 3-5.

89. *Id.* ¶¶ 20-32.

90. *Id.* ¶¶ 33-52.

91. Stringer, [2009] UKHL 31, ¶¶ 1, 33, 63, 90.

92. The Working Time Regulations, 1998, S.I. 1998/1833 (U.K.).

WTR must be interpreted as allowing workers on sick leave to take or be paid in respect of, their statutory holiday entitlement.[93] The HL also held that claims for non-payment of statutory holiday pay could be brought as "unauthorized deductions from wages" claims under the Employment Rights Act 1996, as well as directly under the WTR.[94] This significantly extends the time limit for an employee to bring an action for an employer's failure to pay holiday pay, as an employee could claim for all such deductions, no matter how far back these extend.

X. United States

A. Executive Compensation

In an effort to stem the current recession, in February 2009 Congress passed and President Obama signed into law an economic stimulus package known as the American Recovery & Reinvestment Act of 2009 (ARRA).[95] ARRA imposes dramatic restrictions on executive compensation for those entities that received money under the Treasury Department's Troubled Asset Relief Program (TARP), which was established in 2008 to rescue or bail out financial services companies.[96] The restrictions ease significantly once a TARP recipient repays the United States the monies it received under the program.[97]

ARRA places three significant restrictions on executive compensation. First, TARP recipients are prohibited from providing anyone with any bonus, retention award, or incentive compensation (other than long-term restricted stock that does not vest until all TARP funds are repaid) that has a value greater than one-third of the individual's total annual compensation.[98] This restriction does not apply to any bonus or other incentive compensation payment that is required to be paid pursuant to any employment contract executed prior to February 12, 2009.[99]

Second, ARRA prohibits TARP recipients from giving Senior Executive Officers (SEE) and other highly compensated employees any golden parachute payments (which are defined broadly to include any payment for departure from the company for any reason) except for payments for services performed or benefits accrued.[100]

Third, ARRA requires each TARP recipient to have the right to recover or claw-back any bonus, retention award, or incentive compensation payment that is (i) paid to a SEE

93. Case C-277/08, Pereda v. Madrid Movilidad S.A., 2008 O.J. C 247. The ECJ held that where a worker is unable to take pre-arranged holiday due to illness, the employer must allow him to take that leave at a later date–even if this means carrying over holiday into the next leave year. *Id.* ¶¶ 25-26. Following Stringer and Pereda, it is possible that the United Kingdom Government will amend the WTR in order to make them compatible with EU law.

94. Stringer, [2009] UKHL 31, ¶¶ 50-90.

95. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 3, 123 Stat. 115 (2009) [hereinafter ARRA].

96. *See* ARRA § 7001 (amending Emergency Economic Stabilization Act of 2008 § 111, 12 U.S.C. § 5221 (2009)) [hereinafter § 5221].

97. *See id.*

98. *See* § 5221(b)(3)(D).

99. *See id.*

100. *See* §§ 5221(a)(2), (b)(3)(C).

or highly compensated employee, (ii) "based on statements of earnings, revenues, gains, or other criteria found to be materially inaccurate."[101]

B. Changes in Employment Discrimination Law

In 2009, at the federal level, there were two fundamental developments in U.S. employment discrimination law: (i) passage of the Lilly Ledbetter Fair Pay Act; and (ii) narrowing the burden of proof for claims under the Age Discrimination in Employment Act of 1967 (IDEA).

1. *The Lilly Ledbetter Fair Pay Act*

In 2007, in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), the United States Supreme Court held that the statute of limitation period of 180 days[102] for pay discrimination claims under Title VII of the Civil Rights Act of 1964 (Title VII)[103] commences when the aggrieved individual learns of the decision resulting in discrimination with respect to his or her pay.[104] In reaching this conclusion, the Supreme Court rejected the paycheck accrual rule used by some lower courts, which states that each time an individual receives a paycheck reflecting past discriminatory decisions, the 180-day limitations period starts anew.[105]

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act, which overturns the *Ledbetter* decision, and amends Title VII, IDEA, the Americans with Disabilities Act, and the Rehabilitation Act of 1973.[106] The Ledbetter Fair Pay Act codifies the paycheck accrual rule and incorporates that rule into the aforementioned statutes.[107] The operative language of the Ledbetter Fair Pay Act declares that an unlawful compensation-related employment practice occurs "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to [it], or when an individual is affected by [its] application . . ., including each time wages, benefits, or other compensation is paid resulting in whole or in part from such a decision or other practice."[108] This Act applies to all forms of compensation including wages, salaries, bo-

101. *See* § 5221(b)(3)(B).

102. *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.*

103. Title VII 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[.]" § 2000e-2(a)(1).

104. *See Ledbetter*, 550 U.S. at 621.

105. *See id.* at 628.

106. The Americans with Disabilities Act prohibits an employer from discriminating against a qualified individual with a disability "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a) (2009). The Rehabilitation Act of 1973 prohibits federal agencies, federal contractors and recipients of federal assistance from discriminating against qualified individuals with a disability with respect to the terms, privileges, and conditions of employment. *See* 29 U.S.C. § 791 (2009).

107. *See* 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d) (2009); 42 U.S.C. § 12117(a) (2009); 29 U.S.C. § 794a(a) (2009).

108. 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d).

nuses, commissions and incentive pay.[109] It is retroactive to May 28, 2007, and applies to all compensation discrimination claims pending on or after that date.[110]

C. Changes to the Family and Medical Leave Act

In 2009, Congress expanded the Family and Medical Leave Act (FMLA) in two significant ways. First, the FMLA expanded the definition of Caregiver Leave. Previously, the FMLA provided up to twenty-six weeks of unpaid Caregiver Leave for employees to care for active service members (individuals in the U.S. Armed Forces, National Guard, or U.S. Reserves) who had suffered a serious injury or illness.[111] In order to qualify for Caregiver Leave, the individual requesting the leave had to be the spouse, parent, child, or next of kin of the service member who had suffered a serious illness or injury.[112] In October 2009, Congress extended Caregiver Leave to cover employees who are family members caring for an active service member or a veteran of the Armed Forces, National Guard or U.S. Reserves, who within the past five years undergoes medical treatment, recuperation, or therapy for a serious injury or illness related to their military service.[113]

Second, Congress expanded the definition of Exigency Leave. Prior to the 2009 FMLA amendments, employees could take up to twelve weeks of unpaid leave if their spouse, child, or parent was in the National Guard or U.S. Reserves and was on active duty or was notified of an impending call to active duty.[114] The purpose of the leave was so that the employee could attend to personal matters resulting from the family member's active duty or call to active duty. Exigency Leave did not apply, however, to employees whose family member was on active duty in the U.S. Armed Forces.[115] In 2009, Congress changed this anomaly by extending Exigency Leave to employees whose family members are on active duty in the Armed Forces and who are deployed (or are notified of their impending deployment) to a foreign country.[116]

109. *See* Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, §6, 123 Stat. 5 (2009).
110. *Id.*
111. *See* 29 U.S.C. § 2612(a)(3) (2009).
112. *See* § 2612(a)(1).
113. *See* § 2611(15)(B).
114. *See* § 2612(a)(1)(E).
115. *Id.*
116. *See id.*