# International Employment

CHARLES BAESLER, DONALD C. DOWLING, JR., AND DAVID A. LARSON

There were significant developments in international employment law in 1996, both in the United States and overseas. Especially significant were new U.S. case law on discovery of overseas employment practices, the rise of "codes of conduct" among U.S.-based multinational employers, the *United Kingdom v. Council* decision in the European Union Court of Justice, and the June 1996 package of amendments to Poland's labor code.

## I. U.S. Developments on International Employment Law Issues

In a case which may have broad implications for lawyers advising U.S. operations of employers based outside the United States, the U.S. District Court for the Southern District of New York ruled that age-discrimination plaintiffs may possibly seek discovery of employment practices at a foreign-based employer's non-U.S. facilities. In *Pisacane v. Enichem America, Inc.*,[1] an age discrimination case brought by a former employee against an Italian company which operates in the United States, the plaintiff sought discovery relating to the employer's restructuring on a *worldwide* basis. The plaintiff alleged that as a part of a corporate restructuring effort the employer had discharged older workers at its forty subsidiaries worldwide. The employer objected, arguing that its practices in other countries were irrelevant to whether it discriminated in its U.S. operations: legal systems outside the United States tend *not* to prohibit age discrimination.

In overruling the magistrate's ruling in favor of the employer, the district court recognized that the issue was one of first impression. Courts in previous "pattern and practice" cases had ruled that an employer's practices outside a relevant *time period* were irrelevant to whether the employer currently pursued a pattern of discriminatory practices, and thus were not subject to discovery. But in *Pisacane*, of course, the question was whether plaintiffs may discover an employer's practices *outside the United States* which presumably did not violate the other jurisdictions' law. The court remanded to the magistrate the question of whether, as a matter of law,

Parts I and IV were written by Charles Baesler of Stoll, Keenan & Park in Louisville, Kentucky. Part II was written by Donald C. Dowling, Jr., of Graydon, Head & Ritchey in Cincinnati, Ohio, and he is chair of the International Employment Law Committee. Part III was written by David A. Larson of Creighton University in Omaha, Nebraska, and he is vice-chair of the International Employment Law Committee.

1. Pisacane v. Enichem America, Inc., No. 94 Civ. 7843, 1996 U.S. Dist. LEXIS 9755 (S.D.N.Y. July 12, 1996).

a jury could infer from the information discovered at foreign subsidiaries that the entity also discriminated stateside.

*Pisacane* is significant for two reasons. First, it demonstrates that discovery of worldwide personnel practices could prove onerous to any employer operating internationally. Second, it raises the issue of how U.S. anti-discrimination laws apply to foreign employers operating outside the United States. Title VII's prohibitions against discrimination do not extend to "the foreign operations of an employer that is a foreign person not controlled by an American employer."[2] But this provision might be little comfort to a foreign employer whose non-U.S. operations are held to be relevant evidence in a case regarding an employer's stateside facilities.

In another development, the U.S. Department of Labor recently published a report lauding an apparent decrease in the use of child labor by exporters to the U.S. market. In "The Apparel Industry and Codes of Conduct: A Solution to the International Labor Problem?" published by the U.S. Department of Labor Bureau of International Labor Affairs in 1996, the Department reviewed various codes of conduct which U.S. manufacturers and retailers have voluntarily adopted in recent years, largely in response both to a highly publicized case of child labor in Bangladesh which was broadcast on the television show *NBC Dateline* in 1993 and to U.S. television hostess Kathy Lee Gifford's highly publicized child labor problems involving a line of clothing which bore her name. According to the report, major U.S. apparel manufacturers and retailers now have adopted codes of conduct restricting imports of items produced through use of child labor. The report says that smaller U.S. importers have so far been less willing to adopt such codes. They continue to import without regard to working conditions in the plants of countries from which they import.

## II. European Union: New Court of Justice Decision Brings United Kingdom Back into "Social Europe"

A significant development occurred in 1996 which calls into question the European Union (EU) system for legislating employment issues, which carves out Britain from the rest of the Member States.

In the early 1990s, European employment law developed so fast that the United Kingdom tried to opt out of Social Europe. At the 1993 Maastricht conference (which rewrote vast sections of the European Union treaty), the United Kingdom did opt out of some future employment legislation via the so-called Social Protocol. Under this unique Protocol, the Member States besides the United Kingdom can implement employment laws which the United Kingdom would otherwise have a right to veto. These laws then apply across the EU, *except in Britain*. The recent Works Council Directive (which imposes mandatory collective bargaining on large companies) is an example: It does not apply in the United Kingdom.

Britain has trumpeted—in paid advertising—the competitive advantage of being "friendly to business" which the Maastricht Social Protocol creates for the United Kingdom. Those ads and this attitude infuriate the rest of Europe (Brussels, the fourteen Member States besides Britain, and Europe's labor movement).

Yet notwithstanding the Maastricht Protocol, Britain still has to follow all those EU employment laws passed the old fashioned way, under the EU treaty proper (that is, passed under the treaty's pre-Maastricht employment law provisions). These original treaty sections usually

2. 42 U.S.C. § 2000e-1(c)(2).

require a *unanimous* vote on employment legislation, allowing the United Kingdom to veto whatever employment laws it does not like. The other Member States want employment laws to apply in Britain, so they invoke the Maastricht Social Protocol only as a fall-back, after a U.K. veto of a proposed employment law under the original treaty provisions.

But the original (pre-Maastricht) treaty has for years allowed the Member States to pass, by a "qualified majority" vote, any employment law that deals with worker "health and safety."[3] This is the "health and safety" *exception* to the general pre-Maastricht rule that employment law in Europe must pass unanimously.

A new EU Court of Justice decision from November 12, 1996, holds—to the United Kingdom's real displeasure—that the "health and safety" exception almost swallows the unanimity rule. In *United Kingdom v. Council*,[4] the Court upheld an EU directive on work time which had passed under the "health and safety" exception, and which therefore applied in Britain.[5] This work time directive, which the Member States had to incorporate into their national laws by November 1996, puts a flat forty-eight hour cap on hours worked in a week (beyond which overtime is illegal), it requires rest periods both on the job and between shifts, and it requires employers to grant four weeks' *paid* vacation per year. While Continental Member States' laws have long been largely consistent with the terms of this directive, U.K. law was not.

The United Kingdom sued in the Court of Justice to annul the work time directive on the ground that the "health and safety" justification (which had gotten the law passed over Britain's opposition) was a sham. The United Kingdom argued that the directive is not really about "health" at all; rather, the United Kingdom claimed, the law is a socialistic bid to alleviate unemployment by forcing employers to hire more people.

But in a potentially wide-ranging decision, the Court of Justice rejected the United Kingdom's theory and supported the directive's "health and safety" rationale. In the eyes of the Court, forcing people to work too long and denying people four weeks' paid vacation can be, quite literally, hazardous to the health.

In a post-decision press conference,[6] the EU's Social Affairs Commissioner Padraig Flynn (an Irish socialist) applauded the Court's broad reading of the EU treaty's "health and safety" exception. Flynn promised the *United Kingdom v. Council* decision would "guide" him in drafting future EU employment laws: The clear inference is that *United Kingdom v. Council* will allow Brussels to characterize more and more employment laws as "health and safety" regulations, so they can pass over Britain's objection and apply in Britain—notwithstanding the Maastricht Social Protocol.

*United Kingdom v. Council* is, for the United Kingdom, the latest in a string of recent Court of Justice defeats on employment issues. Brussels, the other Member States, and the Court of Justice have succeeded in drastically weakening the edge which the United Kingdom gained when it negotiated the Maastricht Social Protocol.

The United Kingdom has implied it will put its opt-out of Social Europe back on the table at the late-1996 "Intergovernmental Conference" (the new summit meeting rewriting the treaty). However, if England's Labor party comes to power soon, the United Kingdom's position might actually fall in line with the rest of Europe.

---

3. EC Treaty art. 118a, 1987 O.J. (L 169).

4. Case C-84/94, United Kingdom v. EU Council, 1996 E.C.R. ___, [1996] 3 C.M.L.R. 671 (1996).

5. Council Directive 93/104/EC of 23 November 1993 Concerning Certain Aspects of the Organization of Working Time, 1993 O.J. (L307) 18.

6. Transcribed at E.U. ref: Bio/96/526 (Nov. 14, 1996).

## III. Poland: New Labor Code Amendments

Russia passed its first reading of a new labor code in October 1996, but that code is still being developed. Otherwise, the most significant development in 1996 to Eastern European employment law was the package of amendments to Poland's labor code.

On June 2, 1996, over 200 amendments went into effect which, among other things, limit the state's regulatory role and allow employers and employees more freedom to shape their employment agreements.[7] Poland has applied for full membership in the EU (it currently is an associate member), and these amendments bring Poland's labor code up to EU standards. Also the amendments are more consistent with a market economy.[8] Yet even though it just enacted significant revisions, Poland has declared that it will soon draft and enact an entirely new labor code.[9]

The recent amendments to Poland's code represent a departure from a fundamental principle of socialist labor law: the right to work. Through its amendments, Poland acknowledges it can no longer ensure permanent employment for all its citizens.[10]

The amendments require that employment contracts be in writing. They set out six criteria for determining whether an employment relationship has been established: whether the worker is (1) performing work of a specific type, (2) personally performing the work, (3) using best efforts to do the work, (4) working during the agreed-upon hours, (5) working under the employer's supervision, and (6) being compensated for the work performed.[11]

Although not guaranteeing a right to work, the amendments do provide a degree of employment security by requiring that a third consecutive fixed-term employment contract (with less than one month between renewal) automatically results in an indefinite term employment contract. Based upon length of employment, definite-term employees are entitled to pre-termination notice of two weeks, one month, or three months. In the event of a merger or takeover by a new employer, all employees automatically get transferred to the employer without signing a new employment contract.[12]

The amendments also specifically address employee noncompetition agreements, which must be in writing and separate from all other agreements. Noncompetes can restrict an employee either during the term of an employment contract or after. An employer which wants to restrict an employee's activities *after* an employment contract is terminated must pay the ex-employee at least twenty-five percent of annual earnings (paid in one sum at the end of the noncompetition period).

Additional changes effective January 1, 1997, concern work hours, vacation, and overtime pay. According to the amendments, employees will accumulate vacation time after working for six months (instead of the previously required twelve months). The statutory minimum vacation period for an employee who has worked one year has increased from fourteen to

7. *Changes to the Labor Code*, CENT. EUR. BUS. GUIDE, Aug. 1, 1996, available in WESTLAW, 1996 WL 8665228.

8. *President Kwasniewski Signs New Labour Code*, Polish Press Agency, Feb. 21, 1996, *available in* LEXIS, Europe Library, Poland File. *See also* E. Eur. Rep. (BNA) Mar. 11, 1996, Vol. 6 at 155.

9. *Minister Sees Draft of New Labor Code Ready by Mid-1997*, Polish Press Agency, June 1, 1996, *available in* LEXIS, Europe Library, Poland File.

10. CENT. EUR. BUS. GUIDE, *supra* note 7.

11. Lejb Fogelman, *The New Labor Code: Sweeping Changes in Workplace Contracts*, WARSAW BUS. J., Apr. 1, 1996, *available in* LEXIS, Europe Library, Poland File.

12. Lejb Fogelman, *The New Labor Code: Changes in Vacations, Work Hours, Overtime*, WARSAW BUS. J., Apr. 15, 1996, *available in* LEXIS, Europe Library, Poland File.

eighteen working days.[13] Importantly, every employee is now vested with vacation rights beginning January 1, 1997—regardless of when work began. Further, the amendments protect vacation time when an employee changes jobs.

Employers must give employees who work a minimum of six hours one fifteen-minute break per work day. The maximum number of overtime hours per year, however, has increased from 120 to 130. Although the overtime pay rate has not changed, overtime now will be calculated differently: employers must now determine overtime based on an employee's monthly or hourly remuneration for the most recent pay period.

Poland's late labor minister Andrzej Baczkowski said on June 1, 1996, that he hoped to have a new labor code completed by mid-1997. But on November 7, 1996, the labor minister died of a heart attack. Baczkowski's death obviously could affect the proposed timetable. The amendments to the existing labor code represent an attempt to facilitate Poland's participation in Eastern Europe's growing market economy while simultaneously protecting workers.

## IV. Malaysia: Sex Harrassment

A former hotel executive who accused her supervisor of sexual harassment has won the first-ever suit of its kind in Malaysia. As reported,[14] the ruling (from Malaysia's Industrial Court) is significant, given that Malaysia is a conservative, predominantly Muslim country which has no law prohibiting sexual harassment. The plaintiff's argument and the Industrial Court's ruling were based on the decisional law of U.S. courts.

13. *New Vacation Rules in Effect*, POLISH NEWS BULLETIN, Jan. 2, 1997, *available in* LEXIS, Europe Library, Poland File.

14. *Ruling in Malaysia on Sex Harassment Is First of Its Kind*, ASIAN W.S.J., Jan. 9, 1997, *available in* WESTLAW, 1997 WL-WSJA 3794416.