

2002

International Employment

John W. Simmons

R. Bradley Mokros

Erika C. Collins

Recommended Citation

John W. Simmons et al., *International Employment*, 36 INT'L L. 329 (2002)
<https://scholar.smu.edu/til/vol36/iss2/6>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Employment

JOHN W. SIMMONS, R. BRADLEY MOKROS, AND ERIKA C. COLLINS*

The trend towards the internationalization of labor and employment law accelerated in 2001. In the United States, the Alien Tort Claims Act (ATCA)¹ continued to be an avenue for non-Americans to sue for violations of international law for human rights abuses. Around the world, the European Union expanded its influence in the labor and employment arenas of the EU Member Countries, the International Labour Organization (ILO) continued its fight to end the exploitation of children, and other countries addressed labor issues ranging from employee medical leave to leveling the playing field for women and minorities in the workplace. This article summarizes some key labor and employment legislation, court decisions, conventions, and other initiatives for the year 2001. Space does not permit, however, for an exhaustive review of labor and employment laws passed in 2001.

I. Labor and Employment Developments in the United States

A. THE ALIEN TORT CLAIMS ACT²

In *Mendonca v. Tidewater, Inc.*,³ the plaintiff, a foreign employee, alleged that he was discharged by Tidewater, Inc. because of his race in violation of the Alien Torts Claims

*John W. Simmons is a founding member of the law firm of Kiesewetter Wise Kaplan Schwimmer & Prather, PLC, a law firm that practices labor and employment law. R. Bradley Mokros is a research specialist with Kiesewetter Wise Kaplan Schwimmer & Prather, PLC. Erika Collins is a senior associate in the Labor and Employment Group with Cooley Godward LLP and practices international employment law. We wish to thank the following contributors: Bruno Blanpain with Price & Partners; Phillis R. Morgan with Kiesewetter Wise Kaplan Schwimmer & Prather, PLC; Renata Neeser and Gabriela Brant de Carvalho with Demarest & Almeida; Ravi Singhania and Neelakshi Nayak with Singhania & Partners; Dr. Melda Sur, Professor of Law at the Nine September Law School; Noyan Turunc with Turnuc & Savascin; Jose Victor Torres with Gonzalez Calvillo, S.C.; and Kazuki Okada with Freshfields Foreign Law Office.

1. Alien Tort Claims Act, 28 U.S.C. § 1350 (2001).

2. The Alien Tort Claims Act provides: "The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the Law of Nations or Treaty of the United States." *Id.* The Act was originally passed some 200 years ago to permit prosecution of international pirates. Recently, it has been resuscitated by U.S. courts, opening America's courthouses to foreigners who are suing for violations of international law.

3. *Mendonca v. Tidewater, Inc.*, 159 F. Supp. 2d 299 (E.D. La. 2001).

Act.⁴ To state a claim under the ATCA, a plaintiff has to establish that (1) he is an alien (2) suing for a tort (3) that was committed in violation of a treaty of the United States or the law of nations.⁵ Ultimately, it was the third requirement that the plaintiff could not satisfy. Indeed, the plaintiff failed to cite any solid support for his claim that his discharge rose to a level recognized by the law of nations.⁶ According to the court, the ATCA applies only to shockingly egregious violations of universally recognized principles of international law. In this case, the court held, the plaintiff presented no evidence that the treaties cited in his complaint enjoyed universal acceptance in the international community or that they referred to anything more than a general sense of responsibility, devoid of any articulable or discernable standards or regulations that identify practices, which the world's governments would agree constitute international abuses or torts.⁷

B. ARAMCO⁸ AND ITS PROGENY

In *Reyes-Gaona v. North Carolina Growers Ass. Inc.*,⁹ the Fourth Circuit was asked to decide whether the Age Discrimination in Employment Act (ADEA)¹⁰ applied in an extra-territorial manner to support a Mexican national's claim that he was discriminated against in Mexico by the agent of an American company, which recruited seasonal agricultural workers for jobs in the United States. The crux of the plaintiff's argument was that when determining whether a claim requires the extra-territorial application of the ADEA, courts must look to the place of employment rather than the place where the employment decision was made. Since he applied for a job in the United States, the plaintiff argued, the fact that he submitted the application in Mexico is not dispositive. The Fourth Circuit rejected this argument. The court began by observing that nothing in the ADEA states that it applies anytime the workplace is in the United States—regardless of the nationality of the applicant or the country in which the application was submitted. The simple submission of a resume

4. 28 U.S.C. § 1350 (2001). Plaintiff's complaint included allegations of two statements by the defendant indicating work-related discrimination of Indians: an allegation that the defendant withheld the plaintiff and his family's passport for two months and an allegation that he was compelled to submit false submissions and/or bribes regarding Indian taxes. In response to the defendant's motion to dismiss, the plaintiff listed four treaties as providing the basis for his ATCA claim: the International Convention on the Elimination of All Forms of Racial Discrimination; the International Convention on Civil and Political Rights; the Indo-U.S. Convention Treaty for the Avoidance of Double Taxation and Prevention of Fiscal Evasion; and the Convention on Combating Bribery of Foreign Public Officials on International Business Transactions. The court did not address the viability of any theory arising under these individual treaties, however, but instead addressed whether the plaintiff had claimed a violation of the "law of nations." Mendonca, 159 F. Supp. 2d at 301.

5. 28 U.S.C. § 1350; *see also* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 164–65 (5th Cir. 1999).

6. The standards by which nations regulate their dealings with one another *inter se* constitute the "law of nations." These standards include the rules of conduct, which govern the affairs of the United States, acting in its national capacity, and in its relationships with any other nation. It also may involve a violation by individuals of standards, rules, or customs affecting the relationship between states, or between an individual and a foreign state, where those standards, rules, or customs are used by those states for their common good. *See* Mendonca, 159 F. Supp. 2d at 302 (citing *Cohen v. Hartman*, 634 F.2d 318, 319 (5th Cir. 1981)).

7. *Id.*

8. In *EEOC*, the United States Supreme Court held that federal and state laws may be applied extraterritorially only when a clearly expressed intention to do so is expressed in the statute. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (*Aramco*).

9. *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 463 (2001).

10. 29 U.S.C. § 621 (2001).

abroad for a position located in the United States does not confer a right on the applicant to file an ADEA claim, the court ruled.¹¹

In *Mithani v. Lehman Brothers, Inc.*,¹² the plaintiff, a foreign national, claimed that he was denied a position in the London office of Lehman Brothers in violation of Title VII of the Civil Rights Act of 1964 (Title VII).¹³ Plaintiff conceded that the Supreme Court had confirmed in *Aramco* that Title VII does not apply to the employment of aliens outside the United States. He argued, however, that if he had been hired, he would have been sent to the United States for at least two months of training. This contact with the United States, plaintiff claimed, was sufficient to confer jurisdiction under Title VII. The court rejected this argument. Even assuming that the plaintiff would have been in the United States for two months of training, Lehman Brothers was considering him only for a position in England; and this was the only position for which he applied.

C. FOREIGN SOVEREIGN IMMUNITIES ACT¹⁴

In *Hansen v. Danish Tourist Board*,¹⁵ the plaintiff sued the Danish Tourist Board alleging, in part, violations of Title VII and the ADEA. The Tourist Board argued that it was not subject to the provisions of the ADEA and Title VII because it was a foreign person not controlled by an American employer.¹⁶ Referring to the Second Circuit's recent decision in *Morelli v. Cedel*,¹⁷ the district court rejected the Tourist Board's argument and held that the ADEA and Title VII do not exempt the United States branch of a foreign employer. Therefore, the Tourist Board was subject to suit under Title VII and the ADEA. The Tourist Board next argued that even if it was subject to suit under the ADEA and Title VII, it was immune from suit under the Foreign Sovereign Immunities Act (FSIA).¹⁸ In response, the plaintiff asserted that the Tourist Board was not protected by the FSIA because one of the statutorily defined exceptions to FSIA immunity applied to the activities of the Tourist Board.¹⁹ The commercial activity exception precludes FSIA immunity in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state.²⁰ This activity may either constitute a regular course of commercial activity or a

11. Of course, had the plaintiff been hired, once he began working in the United States the ADEA would have protected him from unlawful employment discrimination. See *Reyes-Gaona*, 250 F.3d at 867 (Motz, concurring); see also *Mota v. Univ. of Tex. Houston Health Science Ctr.*, 261 F.3d 512, 524-25 (5th Cir. 2001) (rejecting argument that trial court lacked jurisdiction under Title VII because plaintiff was not a U.S. citizen and several, but not all, of the acts of harassment occurred outside the United States).

12. *Mithani v. Lehman Brothers, Inc.*, 2002 WL 14359 (S.D. N.Y. 2002).

13. 42 U.S.C. § 2000e (2001).

14. 28 U.S.C. § 1602 (2001). The Foreign Sovereign Immunities Act provides that sovereign states are immune from the jurisdiction of the courts of the United States and the individual states. 28 U.S.C. § 1604. The term "foreign states" includes an agency or instrumentality of a foreign state. 28 U.S.C. § 1603(a).

15. *Hansen v. Danish Tourist Board*, 147 F. Supp. 2d 142 (E.D.N.Y. 2001).

16. *Id.* at 147-48. Actually, the foreign employer exclusion provision in Title VII is limited to the "foreign operations of an employer that is a foreign person not controlled by an American employer." 42 U.S.C. § 2000e-1(c)(2) (Emphasis added). Therefore, pursuant to Title VII itself, the Tourist Board was not exempt from the requirements imposed by Title VII. *Danish Tourist Board*, 147 F. Supp. 2d at 148.

17. *Morelli v. Cedel*, 141 F.3d 39 (2d Cir. 1998). In *Morelli*, the Second Circuit concluded that the ADEA "generally applies to foreign firms operating on U.S. soil." *Id.* at 43-44.

18. 28 U.S.C. § 1602. The parties did not dispute that the Tourist Board was covered by the FSIA.

19. The FSIA provides seven general exceptions to the jurisdictional immunity of a foreign state. See 28 U.S.C. § 1605 (2001).

20. *Id.* § 1605(a)(2); see also *Saudi Arabia v. Nelson*, 507 U.S. 349, 356 (1993).

particular commercial transaction or act. The commercial character of an activity, the court noted, is determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.²¹ Thus, a foreign state is immune from the jurisdiction of the United States courts as to its sovereign or public acts, but not as to those that are private or commercial in nature.²² The court ruled that the actions, which formed the basis of the plaintiff's complaint, did not reflect the exercise of *powers peculiar to sovereigns*, but instead involved basic employment decisions akin to those made by many small businesses.²³ Therefore, the court determined, the Tourist Board could not avail itself of FSIA immunity.

D. OTHER DEVELOPMENTS IN THE UNITED STATES

Following the events of September 11, 2001, the Equal Employment Opportunity Commission and the Departments of Justice and Labor issued a joint statement reaffirming the federal government's commitment to upholding the federal anti-discrimination laws. The statement focused on preventing and redressing incidents of harassment, discrimination, and violence in the workplace, including such acts directed toward individuals who are, or are perceived to be, Arab, Muslim, Middle Eastern, South Asian, or Sikh.²⁴

The fiscal year 2001 budget for the Bureau of International Labor Affairs (BILA), a division of the Department of Labor, includes an unprecedented \$82 million to support international efforts to eliminate child labor. The BILA budget includes a new education initiative that will support programs to improve access to quality education in areas with a high incidence of child labor. On November 28, 2001, the International Child Labor Program's Education Initiative published a solicitation for grant applications to implement the education component of the program in El Salvador, Nepal, and Tanzania.

A new study conducted by the ILO shows that U.S. workers are putting in the longest hours in the industrialized world, spending nearly one week more on the job per year than they did a decade ago.²⁵ According to the report, the increase in hours in the United States runs counter to the trend in other industrialized nations where the annual number of hours worked has declined. The report also showed that since 1995, U.S. labor productivity has grown considerably faster than most other industrialized economies.²⁶ Between 1995 and 2000, the average annual labor productivity growth rate in the United States was 2.6 percent, compared to a growth rate of 1.2 percent in the European Union during the same period.²⁷ Another study, released by the ILO in 2001, showed that women in the United

21. 28 U.S.C. § 1603(d).

22. Danish Tourist Board, 147 F. Supp. 2d at 150 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 359–60 (1993)). Put differently, the court wrote, "a foreign state engaging in commercial activities does not exercise powers peculiar to sovereigns; rather, it exercises only those powers that can also be exercised by private citizens." *Id.*

23. Plaintiff alleged that after she rejected the sexual advances of her supervisor, her salary increases were not as large as those of similarly situated employees, her workload increased, and her responsibilities were changed. She also claimed that she was passed over for promotion and that a younger, less qualified person was chosen. *Id.* at 149.

24. Statement, Joint Statement Against Employment Discrimination in the Aftermath of the September 11 Terrorist Attacks (Nov. 19, 2001), available at <http://www.eeoc.gov/press/11-19-01-js.html> (last visited Aug. 2, 2002).

25. International Labour Org., *Key Indicators of the Labor Market 2001–2002* (KILM 2001).

26. *Id.*

27. *Id.*

States have made more progress in attaining executive management positions with large companies than women in other countries.²⁸ In 1999, women in the United States held 5.1 percent of the executive management positions in the 500 largest U.S. companies, compared to 2.4 percent in 1996.²⁹

II. Labor and Employment Developments from Around the World

A. THE INTERNATIONAL LABOR ORGANIZATION

At its November 2001 meeting in Geneva, the governing body of the ILO adopted a *Code of Practice on Managing Disability in the Workplace*.³⁰ The Code of Practice provides guidance to enterprises on how to recruit people with disabilities and maintain employment for workers who become disabled. The Code is written so that it can be applied by employers in both developed and developing countries. According to the ILO, many of the obstacles that disabled persons face in the search for jobs and at work arise as much, if not more, from social barriers, than from a genuine inability to perform work. The ILO cites statistics showing there are approximately 610 million people with disabilities in the world today, of whom 386 million are of working age.³¹ Eighty percent of these people live in developing countries, predominantly in rural areas.³² Studies cited by the ILO further show that unemployment among disabled persons is significantly higher than in the workforce as a whole. A comprehensive disability management strategy, the Code states, should include provisions for recruitment, promotion, and retention of disabled workers, as well as adjustments and accommodations when required. Although adjustments to the workplace or the working arrangements may be necessary in some cases, the costs often are relatively small.

At the United Nations General Assembly Special Session on HIV/AIDS, held in New York on June 25–27, 2001, the ILO launched a new *Code of Practice on HIV/AIDS and the World of Work*.³³ According to the ILO, the Code will provide workers, employers, and governments with global guidelines—based on international standards—for addressing HIV/AIDS and its impact at the enterprise, community, and national levels where most infections occur. It will also help boost efforts to prevent the spread of HIV, manage its impact, provide care and support for those suffering from its effects, and eliminate the stigma and discrimination associated with HIV and AIDS. Of the 36 million people infected with HIV worldwide, the ILO estimates that at least 23 million are working people aged fifteen to forty-nine.³⁴ Of these, it is estimated that 17.5 million are located in just forty-three African states, where the Director of the ILO stresses, the HIV epidemic has created a state of emergency.

28. International Labour Org., *Breaking Through the Glass Ceiling, Women in Management* (2001), available at http://us.ilo.org/news/pkits/glassceiling/glass_Backgrounder.htm (last visited Aug. 2, 2002).

29. *Id.*

30. International Labour Org., *Code of Practice on Managing Disability in the Workplace* (2001), available at <http://www.ilo.org/public/english/employment/skills/disability/download/code.pdf> (last visited Aug. 2, 2002).

31. *Id.*

32. *Id.*

33. International Labour Org., *Code of Practice on HIV/AIDS and the World of Work* (2001), available at <http://www.ilo.org/public/english/protection/trav/aids/pdf/acodeen.pdf> (last visited Aug. 2, 2002).

34. *Id.*

The ILO announced on November 20, 2001, that recent efforts in Myanmar (Burma) to reduce forced labor have had limited impact. The report by a high-level ILO team that was in Myanmar in September 2001 also noted that obstacles to real progress include the military's *de facto* immunity from prosecution and the lack of government funding for unskilled manual labor on public works projects as an alternative to cost-free forced labor. The ILO Governing Body has called on the government of Myanmar to allow a permanent ILO presence in the country to monitor efforts to end forced labor. It also endorsed a proposal to appoint an ombudsman with national and international credibility to whom complaints regarding forced labor could be submitted and who would have a mandate and the necessary means to conduct investigations without fear or favor with the required confidence of all parties concerned.³⁵

The ILO announced on September 26, 2001 that Convention No. 182, which calls on the world's governments to take immediate steps to outlaw the worst forms of child labor, has been ratified at a record pace.³⁶ Convention 182 was unanimously adopted by the ILO in June 1999 and came into force on November 19, 2000. As of October 15, 2001, 104 countries had ratified the Convention. The ILO hopes to achieve near universal ratification by its 175 members by the end of 2003. In October 2001, the International Program on the Elimination of Child Labor (IPEC) released a report detailing the progress and future priorities of the child labor program.³⁷

B. BELGIUM

1. *Industry-Wide Collective Agreement*

Belgium's central trade union and employers' organizations' inter-industry-wide collective agreement became effective in 2001.³⁸ The accord provides for a pay increase of 6.4 percent over two years (or up to 7 percent in well-performing sectors), as well as provisions addressing training, working time, older workers, reductions in employers' social security contributions, and the harmonization of blue-collar and white-collar status. Under the agreement, double holiday-pay was granted for the full four weeks of annual leave. Employers and unions agreed that these changes would become effective retroactively on January 1, 2001. The reimbursement of the costs of commuting between home and work was increased to 60 percent of a public transport season ticket. The Minister of Employment and Labour originally asked the social partners to reduce the maximum working week from the current thirty-nine hours to thirty-eight hours by January 1, 2001.³⁹ The agreement, however, leaves the negotiations on this issue to the sectors and companies, with the requirement that they achieve a reduction in the working week to thirty-eight hours by Jan-

35. International Labour Org., *Developments Concerning the Observance by the Government Myanmar of the Forced Labour Convention, 1930 (No. 29)* (Nov. 2001), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/gb-4.pdf> (last visited Aug. 2, 2002).

36. International Labour Org., *Milestone in Campaign Against Worst Forms of Child Labour* (Sept. 26, 2001), available at <http://www.ilo.org/public/english/bureau/inf/pr/2001/31.htm> (last visited Aug. 2, 2002).

37. International Labour Org., *IPEC Action Against Child Labour 2000-2001: Progress and Future Priorities* (2001), available at <http://www.ilo.org/public/english/standards/ipec/about/implementation/ipecreport.pdf> (last visited Aug. 2, 2002).

38. Int'l Labour Org. Natlex: Belgium Employment, at <http://natlex.ilo.org/scripts/natlexcgi.exe?lang=E> (last visited Aug. 2, 2002) [hereinafter Belgium Employment].

39. *Id.*

uary 2003, at the latest. Workers over the age of fifty are now entitled to reduce their working time to four days per week and receive an allowance, or to half-time with a higher allowance. The recruitment of unemployed workers over the age of forty-five is now encouraged through reductions in employer social security contributions and the “activation” of unemployment benefits to subsidize the recruitment of older workers.⁴⁰ Workers over forty-five will be able to switch from night shift to day shift work and receive an additional sum to compensate for the loss of income.⁴¹ For a maximum total of one year over their entire career, employees may interrupt their work, or reduce it to a half-time job, without breaking the contract of employment and without loss of social security rights. This time-credit may be extended to a maximum of five years by agreement at the sectoral joint committee or at the company level. Further, during their career, for a maximum period of five years, employees have the right to reduce their working hours by one-fifth.⁴² In practice, this generally means working four days a week instead of five.

2. *Monitoring by Camera*

The Belgian Supreme Court held that an employer may install a secret camera to verify its suspicion that a worker is stealing.⁴³ The worker argued that the use of a secret camera deprived him of his privacy.⁴⁴

3. *Paternity and Adoption Leave*

The Act of August 10, 2001 concerning the balance between work and quality of life provides for paternity leave and for adoption leave.⁴⁵ Under the Act, a father may take ten days of leave during the period thirty days after the child’s birth.⁴⁶ The employee receives his normal wages for the first three days; the remaining seven days are paid by the official medical insurance services.⁴⁷ These provisions also apply to the adoption of a child.⁴⁸

4. *Employee Ownership*

The Act on Participation of Employees in Capital and the Profit of Companies⁴⁹ of May 22, 2001, governs participation schemes in the private sector; the non-profit and public sectors are excluded. The Act includes provisions requiring that the participation plan be introduced at the enterprise level, financial participation must be voluntary, the plan should be the result of collective bargaining, participation is collective (this means that it is available to all workers in the enterprise), the financial participation scheme should be based on a predefined formula, and financial participation does not replace the remuneration of the employees—it constitutes additional income.⁵⁰ In addition to these “European” principles, the Belgian Government added two provisions: (1) the advantages, which are awarded in

40. *Id.*

41. *Id.*

42. *Id.*

43. Belgium Employment, *supra* note 38.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Belgium Employment, *supra* note 38.

50. *Id.*

the framework of participation schemes, do not fall under the normal fiscal and social security regimes that normally cover remuneration; and (2) the enterprises will be able to develop two schemes of participation, namely, participation in the capital and participation in the profits of the enterprise.⁵¹

5. *Breastfeeding Pauses*

The inter-industry-wide agreement concluded in the framework of the National Labour Council on November 27, 2001 provides for the right of breastfeeding breaks by July 1, 2002.⁵² The agreement implements Convention No. 183 of the ILO and the European Social Charter. Payment for the pauses is absorbed by medical insurance (social security) at 82 percent of normal remuneration.⁵³

6. *Right to Outplacement*

Workers of forty-eight years of age and more have a right to outplacement.⁵⁴ To that end, a collective agreement will be concluded in the framework of the National Labour Council.⁵⁵ If the social partners cannot agree within a period of two months, the rules will be laid down by a Royal decree.⁵⁶ To be eligible, workers need one year of seniority.⁵⁷ Workers have no right to outplacement if their individual employment contract has been terminated for just cause, or in case of pre-pension.⁵⁸

7. *Intervention by the Civil Courts in Industrial Actions*

In October 2001, the Belgian Government announced a bill designed to restrict the unilateral intervention of civil courts in industrial disputes.⁵⁹ Welcomed by the trade unions, the bill has prompted vehement criticism from employers.⁶⁰

C. BRAZIL

In 2001, Brazil passed labor legislation creating two new social contributions related to the employment security fund (FGTS).⁶¹ The first contribution added 0.5 percent to the existing rate of 8 percent, which employers must contribute monthly to the FGTS account.⁶² The second contribution added 10 percent to the existing penalty of 40 percent of the FGTS balance, which is paid by employers as a penalty for dismissing an employee.⁶³

51. *Id.*

52. *Id.*

53. *Id.*

54. Chapter V, art. 13 of the Act of Sept. 5, 2001.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Int'l Labour Org.: Natlex, at <http://natlex.ilo.org/scripts/natlexcgi.exe?lang=E> (last visited Aug. 2, 2002).

60. *Id.*

61. *Id.*

62. *Id.*

63. Institue Contribuicoes Sociais, Autoriza Creditos De Complementos De Atualizacao Montearia Em Contas Vinculadas Do Fundo De Garania Do Tempo De Servico- FGTS E Da Outras Providencias, SOCIAIS, LCP 000110, of June 29, 2001, available at <http://www.senado.gov.br/legbras> (last visited Aug. 2, 2002) (Brazil).

These contributions will be in effect until October 2006. Other major changes in 2001 include the requirement that employers pay in court the uncontroversial amounts of the severance package.⁶⁴ Otherwise, the employer will have to pay such amounts increased by 50 percent.⁶⁵ The Employees' Unions must also provide free legal services for employees that earn less than five minimum wages or that prove that they cannot afford to litigate.⁶⁶ Part-time employment is now characterized as work for a maximum of twenty-five hours per week.⁶⁷ Currently, there is a bill in Congress that will give more flexibility to the labor laws.⁶⁸ Under this bill, the following labor rights would be negotiable: vacation, overtime payment, weekly rest, reduction of salaries, and additional payment for night workers.⁶⁹

D. CANADA

1. *Ontario Regulation on Posting of Information Concerning Rights and Obligations (Ontario Reg. 290/01)*⁷⁰

Pursuant to the Ontario Employment Act, employers must post the following information at the workplace: dispute settlement options under the Act, information about enforcement and administration of the Act, and how employees can obtain further information about the Act.⁷¹

2. *Ontario Terms and Conditions of Employment in Defined Industries (O. Reg. 291/01)*⁷²

As part of the Employment Standards Act of 2000, this provision sets out the terms and conditions of employment in specific industries.⁷³ The regulations provide for minimum pay for short periods of work, define rules regarding a normal work day and work week, work schedules, special rate work, vacation, vacation pay, year-end vacation payment, industry holiday pay, special rules for Victoria Day and Canada Day, and an industry review committee.⁷⁴ It also revokes Regulations 658, 659, and 660 of the Revised Regulations of Ontario, 1990, as well as Ontario Regulations 282/99 and 283/99.⁷⁵

64. Int'l Labour Org.: Natlex, Brazil Employment, at <http://natlex.ilo.org/scripts/natlexcgi.exe?lang=E> (last visited Aug. 1, 2002).

65. Altera a Redacao Do Artigo 467 Da consolidacao Das Leis Do Trabalho- CLT, Que Dispoes Sobre O Pagamento De Verbas Rescisorias Em Juizo, 010272, of Sept. 5, 2001, available at <http://www.senado.gov.br/legbras> (last visited Aug. 2, 2002) (Brazil).

66. Altera A consolidacao Das Leis Do Trabalho, Dispondo sobre O jus Postulandi, A Assistencia Judiciaria E A Representacao Dos Menores No Foro Trabalhista, LEI 010288, of Sept. 20, 2001, available at <http://www.senado.gov.br/legbras> (last visited Aug. 2, 2002) (Brazil).

67. Provisory Measure 2,076-38 of June 21, 2001.

68. PL 5,483/01.

69. *Id.*

70. *Ontario Regulation Posting of Information Concerning Rights and Obligations* (O.Reg. 290/01), 134-31 ONTARIO GAZETTE, 1556, Aug. 04, 2001, (Can.), available at <http://natlex.ilo.org/leginf/english/01-12.htm> (last visited Aug. 2, 2002).

71. *Id.*

72. *Terms and Conditions of Employment in Defined Industries* (O.Reg. 291/01), 134-31 ONTARIO GAZETTE, 1556-1560, Aug. 04, 2001 (Can.), available at <http://natlex.ilo.org/leginf/english/01-12.htm> (last visited Aug. 2, 2002).

73. *Id.*

74. *Id.*

75. *Id.*

3. *Regulations Amending the Pension Benefits Standards Regulations, 1985 (SOR/2001-222)*⁷⁶

These regulations provide a procedure for employers who sponsor pension plans with a surplus to establish claims to that surplus.⁷⁷

4. *Benefit Plans (Ontario Reg. 286/01)*⁷⁸

Enacted under the Ontario Employment Standards Act, 2000, the regulations set out the permitted differentiation regarding pension, life insurance, disability benefits, and health benefit plans based on an employee's sex, marital status, and age.⁷⁹ Moreover, it provides for participation in benefit plans during a leave of absence, exclusion from certain former benefit plans, and several related matters.⁸⁰

5. *Exemptions, Special Rules and Establishment of a Minimum Wage (Ontario Reg. 285/01)*⁸¹

Enacted under the Ontario Employments Standards Act 2000, these regulations provide for exemptions from Parts VII and XI of the Act for certain practitioners, for a special rule regarding emergency leave under Section 50 of the Act, and for exemptions concerning hours of work and eating periods.⁸² The regulations also make provisions for a minimum wage and for exemptions regarding the minimum wage under Part IX of the Act, exemptions respecting overtime pay under Part VIII of the Act, exemptions regarding public holidays under Part X of the Act, and exemptions regarding retail business establishments under Section 73 of the Act.⁸³ Finally, the regulations set forth special rules for homemakers, homeworkers, overtime pay, domestic workers, residential care workers, harvest workers, and commission automobile salespersons.⁸⁴

6. *Alberta Employment Standards Amendment Act, 2001*⁸⁵

This provision amends the Alberta Employment Standards Code to provide an entitlement to maternity leave to a pregnant employee for a period of fifteen weeks starting at any time during the twelve weeks immediately before the estimated date of delivery.⁸⁶ The pregnant employee must have been employed by the employer for at least fifty-two consecutive weeks.⁸⁷ An employee who takes maternity leave must take a period of leave of at least six weeks immediately following the date of delivery unless the employee and her

76. *Regulations amending the Pension Benefits Standards Regulations 1985 (SOR/2001-222)*, 135-14 OFFICIAL GAZETTE, Statutory Instruments, 1303-1306, July 4, 2001 (Can.), available at <http://natlex.ilo.org/leginf/english/01-09.htm> (last visited Aug. 2, 2002).

77. *Id.*

78. *Benefit Plans (O.Reg. 286/01)*, 134-31 ONTARIO GAZETTE, 1549-1552, Aug. 04, 2001 (Can.), available at <http://natlex.ilo.org/leginf/english/01-12.htm> (last visited Aug. 2, 2002).

79. *Id.*

80. *Id.*

81. *Exemptions, Special Rules and Establishment of Minimum Wage (Ontario Regulations 285/01)*, 134-31 ONTARIO GAZETTE, 1543-1549, Aug. 04, 2001 (Can.) available at <http://natlex.ilo.org/leginf/english/01-12.htm> (last visited Aug. 2, 2002).

82. *Id.*

83. *Id.*

84. *Id.*

85. Employment Standards Act, R.S.B.C., c. 113 (1996), amended by § 1(1) (2002) (Can.), available at http://www.legis.gov.bc.ca/37th3rd/3rd_read/gov48-3.htm (last visited Aug. 2, 2002).

86. *Id.*

87. *Id.*

employer agree to shorten the period and the employee gives her employer a medical certificate indicating that the resumption of work will not endanger her health.⁸⁸ This amendment also deals with the notice of maternity leave, notice of employer to start maternity leave, and parental leave.⁸⁹

E. THE EUROPEAN UNION

The European Union Member States approved a number of significant labor initiatives in 2001. Under the *Fixed Term Workers Directive*,⁹⁰ discrimination against workers engaged on fixed-term contracts is unlawful. Member States are left free to define (1) what amounts to justification for the renewal of a fixed term contract, (2) a fixed-term contract's maximum duration, and (3) the limits on how many times a contract can be renewed. The *Revised Acquired Rights Directive*⁹¹ provides a new definition of "transfer," which specifically includes first and second generation contracting out situations when there is a transfer of a fully functioning business and provides an option to include all occupational pension rights within the terms and conditions that pass from the transferor to the transferee. Under the *Burden of Proof in Sex Discrimination Claims Directive*,⁹² an employer is required to show that there has been no breach of the principle of equal treatment where an employee demonstrates a prima facie case of discrimination; the Directive also includes a new EC definition of indirect discrimination. The change in the *Extended Working Time Directive*⁹³ extends the Directive to workers in the previously excluded sectors: air, rail, road, sea, inland waterway and lake transport, sea fishing and trainee doctors. The *Framework Agreement on Employment Rights for Teleworkers*⁹⁴ provides that teleworkers are to be employed on a similar basis to other employees and enjoy comparable rights, remuneration structures, and career opportunities. The *Directive on Employee Involvement Within a Future European Company*⁹⁵ allows companies operating in more than one Member State to incorporate as a European Company and thereby avoid being required to operate under conflicting sets of national company law regulations. The *National Information and Employee Consultation Directive*,⁹⁶ mandates that covered employers consult with their employees about (1) the firm's recent activities and economic condition, (2) the prospect for continued employment with the firm and any particular threats to employment, and (3) information on decisions likely to lead to substantial changes in the organization of the firm, including business transfers or mergers.

The European Court of Justice (ECJ) issued a number of rulings in 2001 that impact labor and employment relations with the Member States. For example, in *Lange v. Georg Schunemann GmbH*, the Court ruled that an employee's obligation to work overtime whenever requested by his employer is an essential element of the contract or employment relationship.⁹⁷ Therefore, it must be brought to the employee's notice in writ-

88. *Id.*

89. *Id.*

90. The date for implementation is July 10, 2001.

91. The date for implementation is July 17, 2001.

92. The date for implementation is July 22, 2001.

93. The date for implementation is August 1, 2003.

94. A non-binding sectoral agreement signed by the Social Partners, observed by the Commission, to apply to salaried employees working either off site or at home in the commerce sector.

95. Formally adopted by the Council of Ministers on October 8, 2001. It will come into force during 2004.

96. The directive was approved by the Council of Ministers on June 11, 2001.

97. *Lange v. George Schunemann GmbH*, Case C-350/99 (2001).

ing.⁹⁸ In *Abrahamsson v. Fogelqvist*, the Court held that Swedish legislation, which automatically favors access for women to public posts, even where their qualifications are not equal to those of the male candidates, is contrary to Community law.⁹⁹ The Court pointed out, however, that priority for women where their qualifications are equal—as a way of restoring balance—is not contrary to Community law provided that an objective assessment of each candidate is guaranteed.¹⁰⁰ In two pregnancy discrimination cases decided together, *Melgar v. de Los Barrios* and *Tele Danmark A/S/ v. Handels-og Kontorfunktionaerernes Forbund i Danmark (HK)*, the Court of Justice held that the dismissal of a worker on account of her pregnancy constitutes direct discrimination on grounds of sex, whether her contract of employment was concluded for a fixed or an indefinite period.¹⁰¹ The Court accepted that non-renewal of a fixed-term employment contract that has reached its normal date of termination cannot be equated with dismissal, and is not contrary as such to Community law.¹⁰² Nevertheless, in certain circumstances, such as when the employee is considered qualified for the position, the non-renewal of a fixed-term contract may be regarded as a refusal of employment.¹⁰³ At that point, the Court held, it is for the national court to ascertain whether the reason for non-renewal was the employee's pregnancy.¹⁰⁴ In a case from the United Kingdom, *The Queen v. Secretary of State for Trade and Industry, ex parte: Broadcasting, Entertainment, Cinematographic and Theatre Union*, the Court ruled that the right to paid annual leave is a social right conferred directly on all workers by Community law.¹⁰⁵ Consequently, the United Kingdom's regulations, which make the very existence of that right subject to completion of a minimum period of thirteen weeks uninterrupted employment with the same employer, are contrary to Community law.¹⁰⁶

F. INDIA

1. *Proposed Amendments (Second Labor Commission)*

The Labour Ministry recently proposed a set of amendments to the Industrial Disputes Act allowing employers to fire up to 1,000 employees without prior permission from the Government.¹⁰⁷ Also, it proposed that there should be a social security net for employees through an insurance scheme wherein retrenchment compensation should be increased from the current half-month pay per year of service to one-month pay per year of service or higher.¹⁰⁸

Labor reforms should also encompass provisions for a system of short-term employment under which workers hired on a contract basis can be easily discharged at the end of the

98. *Id.*

99. *Abrahamsson v. Fogelqvist*, Case C-407/98 (2001).

100. *Id.*

101. *Melgar v. de Los Barrios*, Cases C-438/99 (2001); *Tele Danmark A/S/ v. Handels-og Kontorfunktionaerernes Forbund i Danmark*, C-109/00 (HK) (2001).

102. *Id.*

103. *Id.*

104. *Id.*

105. Case C-173/99, *The Queen v. Secretary of State for Trade and Industry, ex parte: Broadcasting, Entertainment, Cinematographic and Theatre Union* (2001).

106. *Id.*

107. Int'l Labour Org.: Natlex, at <http://natlex.ilo.org/scripts/natlexcgi.exe?land=E> (last visited Aug. 1, 2002).

108. *Id.*

contract. These short-term workers should be paid a premium over the normal wage to avoid legal challenge to the arrangement. Other areas where amendments have been proposed include increased flexibility for employers to shift labor, a three-year limit within which a dispute can be referred to adjudication, compulsory notice to be given by all the workers unions in case of strike, and the introduction of a system of strike balloting wherein a strike can be called only if it is supported by a majority of qualifying workers.¹⁰⁹

G. ITALY

On July 2, 2001, the Italian government ratified the International Labour Organization's Maternity Protection Convention, 2000 (No. 183).¹¹⁰

H. JAPAN

In 2001, the Japanese government amended the Commercial Code to establish a "spin off" procedure pursuant to which employers may transfer employees to a newly created company (for example, a subsidiary) without having first to obtain the consent of those employees.¹¹¹ Prior to the amendment, an employer was prohibited from transferring employment contracts without first obtaining employee consent to the transfer. Employers now have more flexibility in determining the manner and number of employees to be transferred—for example, in a sale of its business to a third party. This amendment is expected to facilitate much needed structural reform in Japan.

Until recently, the Japanese pension system was relatively complicated. Most major companies were required by law to provide their employees a company-funded pension upon retirement. Under these defined benefit plans, companies bore the burden of the risk of low interest rates.¹¹² As of October 2001, however, Japanese law provides for a defined-contribution pension (*Kakutei Kyoshutsu Nenkin*), which closely resembles a U.S.-style 401(k) plan.¹¹³ Under such pension schemes, employees are responsible for selecting and managing their retirement investments, and the benefits payable upon retirement vary according to the performance of such investments.¹¹⁴

With regard to termination of employment, recent court rulings have relaxed what, until recently, have been very strict dismissal criteria. Japan does not have a single statute governing dismissal, and regulation of dismissal from employment is almost wholly derived from court decisions, with the exception of a small number of specific statutory provisions regulating dismissal during sick or accident leave. Japan's stringent dismissal criteria have rendered companies restructuring or downsizing their workforces, even during a recession, susceptible to union action or employee litigation. The recent rulings indicate that courts have acknowledged the need for increased workforce flexibility in Japan.¹¹⁵

109. *Id.*

110. *Id.*

111. Commercial Code (Law No. 48 of 1899 as amended) and Law Concerning Succession of Labour Contracts following Company Reorganization (Law No. 103 of 2000 as amended).

112. Tax Qualified Pension Plan provided in the Corporation Tax Law (Law No. 34 of 1965 as amended) and Employment Pension Fund provided in the Welfare Pension Insurance Law (Law No. 115 of 1954 as amended).

113. Defined-Contribution Pension Law (Law No. 88 of 2001 as amended).

114. *Id.*

115. For example, Tokyo District Court decision dated 21 January 2000, Tokyo District Court decision dated 12 January 2000, and Osaka District Court decision dated 23 June 2000.

I. MEXICO

Pursuant to the provisions of the Federal Constitution, the Federal Labor Law, and the Social Security Law, employers in Mexico are obligated to make (and withhold from the workers' wages) contributions to the Mexican Institute of Social Security (Institute).¹¹⁶ These contributions are subsequently used by the Institute to provide medical assistance to enrolled workers and their families, as well as for payment of monthly retirement, disability, and old-age benefits to retired employees.¹¹⁷

On December 20, 2001, a new Social Security Law was enacted by the Mexican President and published in the Official Gazette of the Federation.¹¹⁸ The new statute converts the Institute into an autonomous fiscal agency and grants the Institute broader authority to collect, administer, and apply the contributions of employers, as well as to impose sanctions on defaulting employers.¹¹⁹ The statute also grants the Institute authority to treat an employer's intentional failure to pay the Social Security contributions as a criminal offense, in a manner substantially similar to tax evasion. While the new Social Security Law became effective in December of 2001, the provisions described above dealing with criminal liability took effect on June 20, 2002.¹²⁰

J. TURKEY

Turkey amended its Constitution in 2001 to grant public employees the right to form and join a union.¹²¹ In addition, a new law was enacted that allows civil servants to form and join a union without prior approval from the government.¹²² Unions may not, however, conclude collective labor agreements, nor are they allowed to call a strike or other collective action. Despite these limitations, unions have the right to participate in collective negotiations with the government to determine the terms and conditions of employment for workers. Moreover, a union can reach an agreement on the terms of a collective contract, and it has the right to monitor compliance with the terms of the agreement. Turkey took these actions to conform to several ILO Conventions to which it is a party.¹²³

K. THE UNITED KINGDOM

The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 went into force for Great Britain on October 12, 2001.¹²⁴ The Regulations are intended to bring the United Kingdom into compliance with the European Union's burden of proof

116. Ley del Seguro Social, art. 38.

117. Ley del Seguro Social, art. 2.

118. Ley del Seguro Social.

119. Ley del Seguro Social, art. 270.

120. Ley del Seguro Social.

121. The Constitution of the Republic of Turkey, (1980) art. 51, amended on Oct. 17, 2001.

122. The Law on Unions for Civil Servants, No. 4688 (*Kamu Görevlileri Kanunu*) (2001) (Turkey).

123. ILO Conventions Nos. 87, 98, and particularly Convention No. 151 concerning Labor Relations in Public Service.

124. The Regulations specifically indicate they apply only to Great Britain. Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations, Statutory Instrument 2001/2660, § 1(3) [hereinafter Sex Discrimination Regulations].

directive.¹²⁵ The Regulations provide that for certain complaints presented to an employment tribunal, if the complaining party presents proof from which the tribunal could conclude in the absence of an adequate explanation that the respondent engaged in sex discrimination, the respondent employer has the burden of proving that it did not commit, or is not to be treated as having committed such an act of discrimination.¹²⁶ The Regulations also indicate that an employer discriminates against a woman on the basis of her sex if the employer applies to her a provision, criterion or practice which the employer applies or would apply to a man, but which would be to the detriment of a considerably larger proportion of women than of men, which the employer cannot demonstrate is justifiable irrespective of the sex of the employee, and which is detrimental to the woman employee. As the explanatory comment indicates, the Regulation considers such an apparently neutral practice that disadvantages a substantially larger proportion of women than men to be indirect discrimination on the basis of sex unless the employer can demonstrate the practice is justified for objective reasons unrelated to sex.¹²⁷

125. Council Directive No. 97/80/EC 1998 O.J. L14/6.

126. Sex Discrimination Regulations, *supra* note 124, § 5.

127. *Id.* at Explanatory Note.

